

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

HEALTHBRIDGE MANAGEMENT, 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 HEALTHCARE 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,

Applicants,

v.

JONATHAN B. KREISBERG, REGIONAL DIRECTOR OF REGION 34 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

**EMERGENCY APPLICATION FOR PARTIAL STAY OF INJUNCTION
PENDING APPEAL IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, OR IN THE ALTERNATIVE,
PETITION FOR WRIT OF CERTIORARI AND PARTIAL STAY OF
INJUNCTION PENDING RESOLUTION OF THE PETITION**

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TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

This is an extraordinary request prompted by extraordinary circumstances. This case arises out of an ongoing strike at Applicants' nursing home centers in Connecticut. It is undisputed that as the strikes began, some as-yet-unidentified Union members engaged in unconscionable acts of medical sabotage, such as switching medical charts and removing identification bracelets from Alzheimer patients. Nonetheless, the District Court has ordered the immediate reinstatement of all the striking workers pursuant to section 10(j) of the National Labor Relations Act (NLRA), which authorizes the National Labor Relations Board (Board or NLRB) to seek preliminary injunctive relief to protect the Board's jurisdiction while the Board deliberates before taking final action. But the Board's ability to take final action has been called into question by the D.C. Circuit's recent decision invalidating the President's recess appointments and recognizing that the Board therefore lacks a quorum to take action. That decision is of particular consequence because any final action by the Board in disputes arising throughout the Nation may be appealed to the D.C. Circuit. Moreover, the Board has made clear it will not acquiesce in the D.C. Circuit's decision, and companies subject to final Board orders have made clear they will not comply because of the D.C. Circuit's decision. Under these circumstances, the validity of the President's recess appointments to the Board is a question that will inevitably and quickly find itself before this Court, whether in this case, *Noel Canning v. NLRB*, or another. It makes little sense for

the courts to order immediate action at the behest of the Board here when the Board's ability to act is in profound doubt and will be addressed by this Court. Accordingly, Applicants respectfully request a partial stay of the District Court's section 10(j) order while the Second Circuit and ultimately this Court consider the propriety of that relief on the merits.

In the alternative, the Court could also grant a stay pending this Court's own consideration of this Application as a petition for certiorari before judgment. This case presents three related questions in need of this Court's resolution. First and most obviously, this case, like many other pending cases, presents the question concerning the validity of the President's recess appointments to the Board. Although the brief order below does not address the question, it was pressed and properly preserved for this Court's review. Second, this case presents the question whether the Board can seek relief under section 10(j) in the absence of a quorum by delegating authority to the Board's general counsel, a question on which the Courts of Appeals are divided. If this Court ultimately determines that the President's recess appointments are invalid, the question whether the Board may nonetheless seek section 10(j) relief will have the utmost importance, and so resolving that question contemporaneously with the recess appointment issue would be prudent. Finally, this case presents an opportunity to clarify the confusion in the Circuits in the wake of this Court's decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), as to whether the traditional four-factor test for preliminary injunctive relief applies in the section 10(j) context.

OPINIONS BELOW

The District Court's order granting injunctive relief is available at 2012 WL 6553103 and attached as Appendix A. The District Court's order denying Applicants' motion for a partial stay pending appeal is attached as Appendix B. The Second Circuit's order denying Applicants' emergency motion for a partial stay pending appeal is attached as Appendix C.

JURISDICTIONAL STATEMENT

The Court of Appeals denied Applicants' emergency motion for a partial stay on January 30, 2013. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a).

STATEMENT OF THE CASE

This Application is brought on behalf of HealthBridge Management, LLC ("HealthBridge"), which manages sub-acute and long-term nursing care facilities for the elderly, and five of those facilities operating in Connecticut and managed by HealthBridge (the "Centers").¹ The New England Health Care Employees Union, District 1199 (the "Union"), represents units of employees at the Centers. After negotiating with the Union for 38 bargaining sessions over the course of more than 16 months, HealthBridge came to the conclusion that the parties were at a good faith and lawful impasse and, on June 17, 2012, implemented last, best, and final bargaining proposals. The Union responded by commencing strikes at each of the

¹ Except where necessary to describe a particular facility or group of facilities, this Application refers to HealthBridge and the Centers collectively as "HealthBridge."

Centers in short order. With the Union's encouragement, approximately 700 members of the bargaining unit walked off their jobs on July 3, 2012.

Critically, however, the workers did not simply go on strike. Instead, on their way out the doors, Union members, apparently at the direction of the Union, committed a series of unconscionable acts of medical sabotage that put their frail, elderly, and memory-impaired patients at immediate and significant risk. Utterly abandoning their responsibilities as caregivers, Union members endangered their patients by, among other things:

- mixing up names on patients' doors and photographs on patients' medical records for patients in the Alzheimer's ward of one of the Centers, making it nearly impossible to identify and care for those patients;
- removing dietary stickers affixed to door name tags indicating how patients could safely be fed;
- removing patients' identification wristbands and patient identifiers from room doors and wheelchairs at another Center;
- removing stethoscopes and blood pressure cuffs from various units within one of the Centers;
- removing patient medical records such as patient-care flow books and activities-of-daily-living flow sheets;
- removing handles from patient lifts in an effort to make them inoperable; and
- soiling patients' clean linens, while damaging and tampering with washing machines.

As the responsible Union members surely anticipated, these acts of sabotage delayed and disrupted medical treatment for patients, thus placing those vulnerable persons in grave danger. Only prompt action by others at the Centers and good

fortune prevented serious harm to patients. The Centers reported these incidents to local police, who in their reports noted that “the persons involved are presumed to be employees who are part of a protest taking place outside against [the Center].” *See App. D.*

Although the identities of the specific perpetrators remain unknown (an investigation by the Connecticut Chief State’s Attorney’s Office is ongoing), what is known is that the acts of sabotage were coordinated across three Centers in the hours before the strikes, and the Centers’ employees were the only ones with access to the patients when these acts occurred. What is also known is that members of the same Union engaged in similar acts of medical sabotage at other Connecticut health care facilities on the eve of a 2001 strike. At that time, among many other things, members of the Union also removed patient wristbands, damaged medical equipment, deliberately contaminated urethral catheter kits and formula feeding bottles, disorganized patients’ narcotics cards, removed patient lifts, loosened bolts on a patient lift so that it collapsed while being used with a patient, and injected glue into the locks on various doors, including the door to the oxygen room. In documenting those 2001 incidents, the Connecticut Chief State’s Attorney’s Office noted that some of these acts “could have had an effect resulting in seriously jeopardizing the resident’s health and safety” and that “these types of incidents are common during work actions at facilities of this nature.” *See App. E.*

Notwithstanding that remarkable series of events and the undeniable fact that at least some as-yet-unidentified Union members were responsible, the NLRB

authorized its general counsel, who in turn authorized his regional director, Jonathan B. Kreisberg, to file a petition in the District of Connecticut seeking injunctive relief under section 10(j) of the NLRA. The NLRB sought to obtain an injunction that would compel HealthBridge to reinstate *all* of the striking workers, even though at least some plainly were responsible for or complicit in unconscionable acts of medical sabotage fundamentally incompatible with the Centers' care-giving function. The regional director brought a petition seeking that relief "for and on behalf of the Board" on September 7, 2012, maintaining that it was necessary to preserve the Board's ability to adjudicate an unfair labor practices complaint brought against HealthBridge on August 14, 2012. Dist. Ct. Doc. 1.²

The Board immediately moved to try the matter on the basis of affidavits and exhibits, and thus deny HealthBridge any ability to seek discovery, provide live testimony, or test the credibility of the Board's evidence and witnesses. Dist. Ct. Doc. 2. HealthBridge opposed the motion and sought discovery and an evidentiary hearing to determine, among other things, whether Union leaders had endorsed the actions and which strikers had endangered patients by committing the reprehensible acts described. Dist. Ct. Doc. 10. Such discovery and evidentiary hearings have been granted in numerous section 10(j) proceedings.³ HealthBridge

² The Board itself did not act as if this matter required the urgent intervention of the courts. The regional director first submitted the matter to its general counsel for consideration of section 10(j) relief many months earlier, but the general counsel did not approve the filing of a petition until August 16, 2012. Even then, the regional director waited nearly a month before filing his petition.

³ See, e.g., *Eisenberg v. Holland Rantos Co.*, 583 F.2d 100, 104 (3d Cir. 1978) ("[I]n many Section 10(j) cases ..., an evidentiary hearing may be essential to informed decision whether an injunction would be in the public interest."); *Lightner v. 1621 Route 22 W. Operating Co., LLC*, 2012 WL 1344731, at *32 (D.N.J. Apr. 16, 2012) (supplemental evidentiary hearing held on eight non-consecutive days following conclusion of 19-day evidentiary hearing before ALJ); *Hoffman v. Pennant Foods Co.*, 2008

also moved to dismiss the petition for lack of subject-matter jurisdiction, arguing that three of the President's appointments to the Board were unconstitutional, thus depriving the Board of the requisite three-member quorum and the general counsel and regional director of authority to file a complaint or a section 10(j) petition on the Board's behalf. Dist. Ct. Doc. 36.

At the Board's urging, the District Court denied HealthBridge's discovery requests, and also denied its request to present live testimony and to cross-examine the Board's witnesses. The Board argued that the court should defer to its factual findings and legal conclusions, maintaining that "[w]e've done the hard work, we've done the heavy lifting, if you will." Oct. 22, 2012 Tr. 42. The District Court agreed. In denying one such request, the court offered the following explanation:

I don't want to preclude you from having your day in court, so to speak, but from my perspective, your day in court does not give you an opportunity to treat the NLRB like any other litigant and treat this as a start-from-scratch evidentiary hearing with me as the finder of fact. I think that tends to diminish the role of the NLRB and its authority in a way that Congress does not intend.

Oct. 22, 2012 Tr. 78. Accordingly, the only evidence on which the District Court ultimately based its decision consisted of affidavits, correspondence, contract proposals, and the parties' bargaining notes. App. A at 13.

WL 1777382, at *5 (D. Conn. Apr. 14, 2008) (granting Board's request to try petition based on administrative record before ALJ, but allowing employer to supplement record with additional testimony at a supplemental hearing); *McLeod v. Gen. Elec. Co.*, 257 F. Supp. 690, 692 (S.D.N.Y. 1966), *rev'd on other grounds*, 366 F.2d 847 (2d Cir. 1966) (week-long evidentiary hearing held in section 10(j) case); *Lineback v. Coupled Prods., LLC*, 2012 WL 1867615, at *2 (N.D. Ind. May 22, 2012) ("[A] respondent in a section 10(j) proceeding is entitled to discovery limited to the issues raised by the petition for an injunction."); *Kobell ex rel. NLRB v. Reid Plastics, Inc.*, 136 F.R.D. 575, 579 (W.D. Pa. 1991) (same).

Although it was hamstrung in its efforts to obtain discovery or present live witnesses, HealthBridge nonetheless presented substantial evidence of the very real threat of irreparable injury to its patients that would result were the court to order all striking workers reinstated, without giving any consideration to which of those workers had so callously sabotaged patient care. HealthBridge provided declarations from two experts who opined in the strongest terms that putting the workers who committed such acts in positions to harm the Centers' vulnerable patients again could put the lives and safety of patients in immediate jeopardy and would negatively impact patient care. Lorraine Mulligan, an Advanced Practice Registered Nurse with 25 years of healthcare experience, opined that "a court order requiring the reinstatement of any of [the workers] who engaged in such sabotage, or additionally those who had knowledge of sabotage and failed to act would expose the residents to immediate danger and put them at risk of suffering serious harm or death." *See App. F.* Corrine Schwarz, a registered nurse with more than 18 years of experience in the healthcare industry, concluded that "it would be contrary to the interests of the resident and public interest to require the Centers to reinstate the previous staff." *See App. F.* HealthBridge also presented evidence that the families who have entrusted the Centers with care for their loved ones oppose reinstatement of the strikers and have seen significant improvements in the quality of care since the Centers brought in replacement workers. *See App. G.*

In a December 11, 2012 telephone conference with counsel, the District Court granted the Board its requested injunction, concluding that "[t]he Second Circuit

has instructed that the board is entitled to appropriate deference, and if the board's legal theory is valid and its view of the facts finds adequate support in the record, then the district court is to provide relief." Dec. 11, 2012 Tr. 11. The court further declared that "[i]t is not the place of the district court to adjudicate the case as if it were brought by a private party seeking injunctive relief, nor is the court to substitute itself for the board and purport to play a larger role in this area than the one assigned to it by Congress." Dec. 11, 2012 Tr. 11–12. The court also rejected HealthBridge's jurisdictional argument, concluding that it need not reach the constitutional question because the Board properly delegated authority to its general counsel before losing its quorum, such that even if the Board lacks the authority to take any final action, the general counsel may seek injunctive relief on the Board's behalf. Dec. 11, 2012 Tr. 8–10. Accordingly, without making any effort to determine which workers had recklessly endangered the health and safety of their patients, the District Court ordered HealthBridge to offer reinstatement to *every* striking worker by December 17, 2012. Although the evidence before the District Court was undisputed that the terms of the expired collective bargaining agreements had been and would continue to be financially ruinous to the Centers (leading to \$3.7 million in net operating losses for the Centers in 2011), the District Court ordered HealthBridge to reinstate these striking workers under the terms of the expired collective bargaining agreements. *See* App. H.

At the close of the telephonic conference, HealthBridge requested a one-day stay of issuance of the District Court's extraordinary order to allow it sufficient time

to prepare a motion for a stay of the reinstatement portion of the order pending an expedited appeal to the Second Circuit. Later that day, the District Court denied the request. Accordingly, HealthBridge filed a motion for a partial stay pending appeal the next day, and also simultaneously filed a notice of appeal and emergency motion to the Second Circuit seeking the same relief. The District Court—at the Board’s urging—refused to grant the stay one day later, on December 14, 2012. App. B. Although the court acknowledged HealthBridge’s patient safety concerns and that investigation into the acts of sabotage that undisputedly occurred remains ongoing, it summarily dismissed those acts as mere “allegations” of “isolated occurrences” that should not prevent reinstatement of all 700 workers. App. B at 6.

On the same day it denied the stay motion, the District Court also issued an opinion explaining its reasons for granting the injunction. App. A. The court first rejected HealthBridge’s argument that its determination of whether to grant a section 10(j) injunction must be guided by the four-factor test articulated in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), concluding that it would instead apply the two-part “reasonable cause” and “just and proper” test described in *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980). The court deemed the “more demanding” four-factor standard “inconsistent with the remedial purposes of section 10(j).” App. A at 16. Reasoning that, “unlike applications for injunctions by private parties that reach the judiciary without any prior screening, section 10(j) petitions are investigated by the Board before they are filed in court,” the court reiterated its view that the two-prong test and “the statutory policies

underlying section 10(j)” require deference to the NLRB, “even when facts are disputed.” App. A at 14 n.8.⁴

Elaborating on the “considerable deference” that it decided section 10(j) demands, the court maintained that the Board’s burden to demonstrate “reasonable cause to believe that unfair labor practices have been committed” in fact requires the Board to do nothing more than offer “evidence sufficient to spell out a likelihood of a violation.” App. A at 16–17. The court once again emphasized that, “[e]ven when disputed issues of fact exist, the Regional Director’s version of the facts should be sustained if within the range of rationality,” *id.*, then proceeded to accept all of the Board’s untested evidence and find reasonable cause. App. A at 29. Turning to whether injunctive relief would be “just and proper” to prevent irreparable harm or to preserve the *status quo*, the court yet again reiterated the importance of “deference” to the “[t]he Regional Director’s judgment that injunctive relief is necessary to promote the effectiveness of the Board’s remedial procedures.” App. A at 20. Applying that deference, the court deemed the requested injunction necessary to prevent irreparable injury “because support for the Union is currently eroding and will continue to erode if the Union is perceived as being unable to adequately protect the employees or affect their working conditions.” App. A at 29.

Remarkably, the District Court dismissed entirely HealthBridge’s contention that ordering reinstatement of all 700 workers would *cause* irreparable injury and disserve the public interest by resulting in reinstatement of the same workers who

⁴ The District Court in fact had scant knowledge of the Board’s investigative efforts as it denied HealthBridge’s request to conduct discovery into the NLRB’s investigation.

committed the acts of medical sabotage on the eve of the strike. Even though it is undisputed that those acts occurred, that the only persons with access to patient-care areas at the time were employees, and that Union members were the only employees with any motive to disrupt the Centers' operations, the court again declared HealthBridge's concerns "unsubstantiated." App. A at 31. And even though the court itself denied every single one of HealthBridge's efforts to take discovery regarding the acts of sabotage (or anything else), the court faulted it for failing to identify the perpetrators, thus blaming HealthBridge for failing to provide the very evidence it precluded HealthBridge from obtaining. App. A at 31.

On December 17, 2012, Judge Chin entered a temporary stay of the District Court's order to allow for the orderly consideration of HealthBridge's emergency stay motion by a full panel of the Second Circuit. Approximately a month and a half later, on January 30, 2013, the Second Circuit motions panel denied the motion and lifted the temporary stay. In a one-paragraph order, the panel concluded that HealthBridge had not shown that it would suffer irreparable harm absent a stay. App. C. Accordingly, HealthBridge must now offer immediate reinstatement to approximately 700 strikers, including some who were responsible for medical sabotage.⁵ Doing so will effectively foreclose HealthBridge's ability to be heard on the merits of its appeal.

⁵ The District Court's original order gave HealthBridge five days to offer reinstatement, but the order was written in date-specific terms, such that it required the offer to be extended by December, 17, 2012. Thus, in light of Judge Chin's temporary stay, literal compliance with the District Court's order is impossible. If the same five days is calculated from the lifting of the temporary stay on January 30, 2013, the offer of reinstatement would be due on February 5, 2013. To foreclose any argument that HealthBridge is in non-compliance while this application is considered, a temporary

REASONS FOR GRANTING THE APPLICATION

This Court’s authority to grant an application for a stay pending appeal to a Court of Appeals is clear, as is its authority to treat such an application as a petition for certiorari before judgment. *See* 28 U.S.C. § 1651(a); *Nken v. Mukasey*, 555 U.S. 1042 (2008). When determining whether to grant either form of relief, the Court considers the likelihood that “four Justices would vote to grant certiorari should the Court of Appeals affirm” and that “the Court would then set the order aside,” and also takes into consideration “the so-called ‘stay equities,’” *San Diegans for Mt. Soledad Nat’l War Mem’l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers)—namely, “whether the applicant will be irreparably injured absent a stay”; “whether issuance of the stay will substantially injure the other parties interested in the proceeding”; and “where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). This case not only presents three related but independently cert-worthy questions, such that there is an unusually strong likelihood that this Court would review should the Court of Appeals affirm, but also involves particularly strong equities that make the risk of irreparable injury absent a stay concrete and acute. Those extraordinary circumstances warrant extraordinary relief.

administrative stay along the lines Judge Chin ordered likely would aid the orderly consideration of this Application.

I. Applicants Have A Reasonable Likelihood Of Success On The Merits.

A. There Is a Reasonable Likelihood that this Court Will Grant Certiorari to Resolve a Circuit Split on the Constitutionality of the President's Recess Appointments to the NLRB.

This case involves a substantial constitutional question regarding the scope of the President's power to fill vacancies that "happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. All actions purportedly taken on behalf of the Board leading up to and during this proceeding were undertaken while the Board's authority to act depends entirely on the constitutionality of three appointments purportedly made pursuant the President's recess appointment power. The D.C. Circuit recently concluded that all three appointments were unconstitutional, thus casting serious doubt on the legitimacy of the Board's actions in this case and many others. *See Noel Canning v. NLRB*, No. 12-1153, slip op. (D.C. Cir. Jan. 25, 2013).

Although the Board has not yet petitioned in *Noel Canning*, it has announced that it will not acquiesce in the decision, and thus the need for this Court's involvement is obvious. Indeed, not only has the Board announced its non-acquiescence, but at least one company subject to a final order has announced it will not comply because of the D.C. Circuit decision, which has unusual significance in light of the ability of aggrieved parties nationwide to appeal final Board actions to the D.C. Circuit. Because the constitutionality of those appointments is a question that will very likely warrant this Court's resolution in short order, HealthBridge should not be forced to comply with an extraordinary injunctive order that will endanger the health and safety of its patients when this Court may well conclude

that the relief was granted to a Board with no power to request it, to preserve the powers of a Board with no power to act.

The validity of the President's recess appointments goes to the heart of the Board's ability to act because of this Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). There, the Court held that the NLRB lacks authority to act when its membership falls below the statutorily mandated three-member quorum. *See id.* at 2644; 29 U.S.C. § 153(b) ("three members of the Board shall, at all times, constitute a quorum of the Board"). As relevant here, the Board concededly lost a quorum when member Craig Becker's appointment expired on January 3, 2012 (because two other members' appointments had already expired with no replacement appointed, the expiration of Becker's appointment left the five-member Board with only two members). When that vacancy arose, the Senate viewed itself as in session. Specifically, it was operating pursuant to a unanimous consent agreement, which provided that it would continue its 111th Session from December 20, 2011, through January 3, 2012; and would begin its 112th Session on January 3, as required by Section 2 of the Twentieth Amendment to the United States Constitution, and continue that session at least through January 23, 2012. 157 Cong. Rec. S8,783–84 (daily ed. Dec. 17, 2011). The Senate then met in *pro forma* session on January 3, 2012, a meeting that was necessary to discharge the Senate's obligations under both the Twentieth Amendment and Article I, Section 5, Clause 4 of the Constitution, which prohibits one House of Congress from adjourning for more than three days without the consent of the other.

Just one day after the Senate met in this constitutionally necessary session and began its 112th Session, and only three weeks after having made two nominations to fill the two NLRB vacancies that had been open for months, the President on January 4, 2012, announced his intent to “recess appoint” three individuals to serve as members of the Board. Press Release, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recessappointments-key-administration-posts>. On January 9, 2012, those individuals were sworn in and purported to take office as members of the Board. Press Release, New Board Members Take Office, Announce Chief Counsels (Jan. 10, 2012), <http://nlrb.gov/news/new-boardmembers-take-office-announce-chief-counsels>. Because these individuals were the putative third, fourth, and fifth members of the Board at all times relevant to this case, the Board’s quorum turns entirely on the validity of their “recess” appointments.

Because the President’s attempt to appoint officers of the United States just a day after the Senate began a new session was wholly unprecedented, it quickly produced litigation on the constitutionality of the appointments in jurisdictions throughout the Nation. Two weeks ago, the D.C. Circuit became the first Court of Appeals to resolve such a challenge and held the President’s appointments to the Board unconstitutional. *See Noel Canning*, slip. op. 15. In doing so, the court not only cast serious doubt on every action the Board has taken over the past year, but also opened an acknowledged split with the decisions of three other Courts of

Appeals by concluding that the President may use his recess appointment power only to fill vacancies that arise during the Senate's recess. See *Noel Canning*, slip op. 34–35 (acknowledging split with *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); and *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962)).

That the D.C. Circuit issued this opinion is of particular import because an aggrieved party may seek review of final decisions by the Board in either the D.C. Circuit or the circuit in which the unfair labor practice is alleged to have occurred. See 26 U.S.C. § 160(f). Accordingly, the court's decision effectively deprives the Board in its current form of the power to issue any orders, as any order it purports to issue will be appealed to the D.C. Circuit and summarily vacated based on *Noel Canning*. Nonetheless, the Board has already announced that it will not acquiesce in the D.C. Circuit's decision. Statement by Chairman Pearce on Recess Appointment Ruling (Jan. 25, 2013), <http://www.nlr.gov/news/statement-chairman-pearce-recess-appointment-ruling>. At the same time, because of their ability to seek D.C. Circuit review, companies have already begun making clear that they have no intention of complying with any orders issued by the Board while, in the D.C. Circuit's view, it lacked a quorum. See, e.g., Terry Baynes, *Exclusive; Hospital Chain Defies NLRB Rulings After Court Decision*, Reuters (Jan. 31, 2013), <http://www.reuters.com/article/2013/02/01/us-nlr-b-hospital-idUSBRE91001320130201>. This dynamic makes this Court's review of this issue unusually imperative. It is thus highly likely

that this Court will be called upon to resolve the jurisdictional contention HealthBridge has pressed and preserved in the very near future.

As the D.C. Circuit's opinion makes clear, the contention of Noel Canning, HealthBridge, and other companies is a powerful one. Strong textual arguments support reading the Recess Appointments Clause to apply only to intersession recesses, not to brief adjournments that occur during the course of an ongoing session. *See Noel Canning*, slip. op. 16–20. Moreover, even if the President has some power to make intrasession appointments, the particular kind of intrasession appointment challenged here—made just a day after the Senate met in a constitutionally required session and initiated a new Session—is wholly unprecedented. *Id.* at 20–21. Indeed, because a recess appointee historically serves until the expiration of the next Session of Congress, these appointments—made just a day after the 112th Session commenced—are the most ambitious purported use of the recess appointment power imaginable. The ability of the President to appoint individuals for a full two years, which is only slightly less than the average term of service of a confirmed officer of the United States, *see* Matthew Dull & Patrick S. Roberts, *Continuity, Cooperation, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009*, 39 *Presidential Studies Q.* 432, 436 (2009), poses a unique threat to the separation of powers that clearly merits this Court's review. Indeed, sources contemporaneous to ratification of the Constitution underscore that interpreting the Recess Appointments Clause to permit such intrasession appointments would run contrary to the purpose the clause was understood to

serve. *Id.* at 23–24. Accordingly, there is a substantial likelihood not only that this Court will be called upon to resolve this pressing question in the months ahead, but that upon doing so, the Court will resolve it by adopting HealthBridge’s position.

Given the unusually strong likelihood that this Court will ultimately resolve a jurisdictional question at the core of this case, and likely will do so while HealthBridge’s appeal remains pending, it would be highly anomalous to force HealthBridge to comply with the District Court’s order without even having the chance to present its constitutional challenge to the Court of Appeals or this Court. While employers across the country are openly defying *final* Board adjudications of unfair labor practices, secure in the knowledge that they may challenge those orders in a court that is sure to invalidate them, the coercive power of an Article III court is being used to effectively foreclose HealthBridge’s efforts to pursue the same constitutional challenge, even though no one has ever even made a final determination that HealthBridge engaged in *any* unlawful conduct. And that coercive power is being invoked with sure knowledge that at least some of the workers whose reinstatement has been ordered were responsible for unconscionable acts of medical sabotage and could put the health and safety of the Centers’ patients at risk the next time the workers have a gripe about working conditions. Those extraordinary circumstances render the need for this Court’s intervention acute.

B. There Is a Reasonable Likelihood that this Court Will Grant Certiorari to Resolve a Circuit Split on Whether the Board Can Seek Section 10(j) Relief in the Absence of a Quorum.

To be sure, the Board has a theory that would allow it to seek and obtain a section 10(j) injunction from an Article III court even when the Board lacks a

quorum. But far from undermining the need for this Court’s review, the Board’s theory implicates another circuit split—one that would take on added urgency and importance if this Court held the recess appointments invalid—and therefore strengthens the case for the Court’s intervention.

The District Court accepted the Board’s theory and concluded that it could avoid HealthBridge’s constitutional argument on the logic that the Board validly delegated its authority to seek section 10(j) injunctions before it lost its quorum to act. App. A at 15 n.9. In doing so, the court implicated another open and acknowledged split regarding whether a Board delegation of power remains valid after the loss of a quorum. The D.C. Circuit has concluded that a Board delegation “cannot survive the loss of a quorum on the Board” and that a delegee’s “delegated power to act ... ceases when the Board’s membership dips below the Board quorum of three members.” *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472, 475 (D.C. Cir. 2009). In doing so, the D.C. Circuit relied upon well-established principles of agency law, including that “an agent’s delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended” and that delegated authority “is also deemed to cease upon the resignation or termination of the delegating authority.” *Id.* at 473.

While the D.C. Circuit’s position that delegations do not survive the loss of a quorum was presented to this Court in *New Process Steel* (*Laurel Baye* was part of the circuit split under review), the Court expressly declined to address it when it reached the same result as the *Laurel Baye* court on different grounds. *See New*

Process Steel, 130 S. Ct. at 2642 n.4 (validity of “prior delegations of authority to nongroup members, such as the regional directors or the general counsel implicates a separate question that our decision does not address”). Nonetheless, three Courts of Appeals have mistakenly taken this Court’s explicit caveat that it was not resolving that question as an implicit rejection of the D.C. Circuit’s approach. See *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 853–54 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011).⁶

Here, too, the mechanics of the NLRA make this split highly unlikely to resolve itself without this Court’s intervention. The Board may bring a section 10(j) petition in “any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business.” 26 U.S.C. § 160(j). Given the Board’s wide choice of forums, absent the highly unusual circumstance in which D.C. is the only available venue, the Board is unlikely to seek section 10(j) relief in the D.C. District Court, meaning *Laurel Baye* will undoubtedly remain the law of the circuit. Thus, while other circuits may deepen the already substantial circuit split, there is no getting around the fact that the split will persist until the Court intervenes. But while the question whether an agent of a Board that currently lacks a quorum to act nonetheless can invoke the injunctive powers of an Article III court is already of

⁶ Although it has not considered the issue in the context of section 10(j), the Second Circuit has previously rejected the D.C. Circuit’s reliance on agency principles. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 420 (2d Cir. 2009) *cert. granted, judgment vacated*, 130 S. Ct. 3498 (2010) and *abrogated by New Process Steel*, 130 S. Ct. 2635.

considerable importance, it will take on new urgency should this Court ultimately conclude that the recess appointments are unconstitutional and the Board lacks the power to act.

Indeed, the practical impact of a decision invalidating the recess appointments will turn almost entirely on whether the Board, acting without a quorum but through a general counsel granted a “springing delegation” by the old Board on the eve of losing its quorum, may obtain section 10(j) relief. Since that question would be of profound importance if this Court invalidates the recess appointments, and implicates both a circuit split and a question this Court expressly reserved in *New Process Steel*, it would make particular sense for the Court to resolve both the recess-appointment and the section 10(j)-delegation questions at once, an opportunity that this case (either alone or in conjunction with a final order case like *Noel Canning*) would provide. In all events, whether in this case or another, whether the Board’s delegation survives its loss of a quorum is another question that the Court is substantially likely to resolve in the near future.

The Board’s continued pursuit of section 10(j) injunctions under the specific delegation at issue in this case conflicts not only with the D.C. Circuit’s decision in *Laurel Baye*, but with this Court’s decision in *New Process Steel* as well. As noted, this Court did not reach the question of whether a valid delegation by the Board at the time it *has* a quorum can survive the loss of the quorum consistent with basic principles of agency law. But by its express terms, the “springing delegation” at issue here is completely inoperative unless and until the Board loses its quorum.

See NLRB, *Order Contingently Delegating Authority to the General Counsel*, 76 Fed. Reg. 69,768, 69,769 (Nov. 9, 2011). Thus, the delegation here is not a tail that “would *continue* to wag after the dog died.” *New Process Steel*, 130 S. Ct. at 2645 (emphasis added). It is a tail that *begins* to wag only if the dog dies. Notably, the 2007 delegation at issue in *New Process Steel*—and every delegation of section 10(j) authority to the general counsel since enactment of the Taft-Hartley Act in 1947, other than the 2011 delegation at issue here—took effect while the Board had a quorum. See *id.* at 2638 (delegation effective on December 28, 2007, two days before Board lost a quorum) (citing NLRB, Minute of Board Action (Dec. 20, 2007)).⁷ The 2011 delegation that the general counsel must rely upon in this case is therefore without precedent.

Both that historical practice and the unusual terms of the 2011 delegation underscore the importance of the issue and the weakness of the Board’s position. Seeking the intervention of a coordinate branch of government to issue an order enforceable by contempt is no small matter. For that reason, whenever the Board has had a quorum, it has insisted that the Board itself, acting through a regional director, initiate the section 10(j) process. It has delegated its authority to the general counsel only when the Board is without a quorum. That is what makes the

⁷ See also NLRB, *Statement of Delegation of Certain Powers of National Labor Relations Board to General Counsel of National Labor Relations Board*, 13 Fed. Reg. 654, 654–55 (Feb. 13, 1948); NLRB, *General Counsel Description of Authority and Assignment of Responsibilities*, 15 Fed. Reg. 6,924, 6,924–25 (Oct. 14, 1950); NLRB, *Authority and Assigned Responsibilities of General Counsel*, 20 Fed. Reg. 2,175, 2,175–76 (Apr. 6, 1955); NLRB, *Order Delegating Authority to General Counsel*, 58 Fed. Reg. 64,340, 64,340 (Dec. 6, 1993); NLRB, *Order Delegating Authority to the General Counsel*, 66 Fed. Reg. 65,998, 65,998–99 (Dec. 21, 2001); NLRB, *Order Delegating Authority to the General Counsel*, 67 Fed. Reg. 70,628, 70,628 (Nov. 25, 2002).

2011 delegation so unusual. Since the Board obviously must treat the recess appointments as valid, it believes it has a quorum. The Board thus does not view the springing delegation as effective and instead continues to independently authorize section 10(j) petitions, as it did here. But as a testament to either its own doubts concerning the validity of the recess appointments or the aggressiveness of its section 10(j) theory, the Board also relies on this unprecedented delegation as an alternative basis for seeking section 10(j) relief.⁸

Whether the general counsel may seek section 10(j) relief in the absence of a Board with authority to act is an issue of critical importance. A section 10(j) proceeding may be brought only when the Board has issued a complaint. *See* 29 U.S.C. § 160(b). And only the Board itself may make the ultimate unfair labor practice determination in the complaint that necessarily underlies each section 10(j) proceeding. *See* 29 U.S.C. § 160(c) (“If ... the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue” a cease and desist order). Indeed, even courts that accept the possibility of the Board delegating its section 10(j) authority to the general counsel recognize that the Board cannot delegate core adjudicatory functions like an unfair labor practice

⁸ To be clear, while the Board seems to view the delegation as a belt-and-suspenders approach that prevents courts outside the D.C. Circuit from reaching the recess appointment issue in a section 10(j) proceeding, that is not accurate. The delegation is more accurately understood as a belt-*or*-suspenders approach. There is no delegation at all if the recess appointments are valid. Since the Board’s principal theory is that the recess appointments are in fact valid, that is the logically anterior question. By its own terms, the delegation takes effect only if the appointments are found invalid and the Board is without a quorum. Accordingly, this Court could review both questions in a section 10(j) case secure in the knowledge that it could definitively decide the logically anterior question of the validity of the recess appointments.

determination. *See Frankl*, 650 F.3d at 1348 (“[T]he Board may not authorize others to adjudicate individual unfair labor practice cases on its behalf.”).

The purpose of section 10(j) injunctions is to preserve the Board’s power to adjudicate the underlying complaint. *See Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 539 (4th Cir. 2009) (section 10(j) petitions seek to “preserve the Board’s remedial power during the pendency of administrative proceedings”). Therefore, permitting an agent of the Board to seek section 10(j) relief from the Article III courts while the Board itself lacks the power to act is highly anomalous. While section 10(j) relief is supposed to be temporary, the relief being awarded in proceedings like this one is, if the Board lacks a quorum, anything but temporary. If the Board cannot make an unfair labor practice determination and award final relief, the Board’s delegee is permitted to obtain relief that is in practical effect permanent and untethered to the Board’s own ability to act. Thus, in essence, the question this case and other pending section 10(j) proceedings like it present is whether the equitable power of federal courts may be invoked by the federal government against private parties to aid an adjudicative process that necessarily will end without a valid Board adjudication. Surely in that context, HealthBridge should at least be relieved of the burden of immediate compliance with an extraordinary order that this Court may well conclude neither the President’s appointments nor the Board’s orphaned delegation provided the power to seek.

C. There Is a Reasonable Likelihood that this Court Will Grant Certiorari to Resolve an Acknowledged Circuit Split on the Standard for Granting Injunctive Relief Under Section 10(j).

The District Court’s decision also openly implicates an acknowledged circuit split on the proper standard for reviewing a request for injunctive relief under section 10(j), a question that has long been a source of disagreement among the Courts of Appeals and has taken on added importance in the wake of this Court’s decision in *Winter v. Natural Resources Defense Council*. The statute itself offers very little guidance on the matter, stating only that courts shall have “jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.” 29 U.S.C. § 160(j). Nonetheless, a number of circuits have concluded that the phrase “just and proper” displaces the traditional four-factor standard for equitable relief and permits courts to grant section 10(j) injunctions under a two-prong test that asks only whether there is “reasonable cause” to believe a violation of the Act has occurred and whether the relief requested is “just and proper.” *See, e.g., Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 234 (6th Cir. 2003); *Sharp ex rel. NLRB v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000); *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998); *Arlook ex rel. NLRB v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992); *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188 (5th Cir. 1975). By contrast, other circuits have found nothing in the phrase “just and proper” to suggest courts should employ anything other than the traditional four-factor test. *See, e.g., Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994) (en banc); *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1037 (8th Cir. 1999); *Kinney v. Pioneer Press*, 881 F.2d

485, 490 n.3 (7th Cir. 1989). Two more circuits have employed a “hybrid” approach, imposing the two-prong standard in combination with the four-factor test. *See, e.g., Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 368 (2d Cir. 2001); *Pye ex rel. NLRB v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994).

While the practical impact of that split might have been debatable in the past, it has become much more pronounced in the wake of this Court’s decision in *Winter*. That is so not only because courts have sharply disagreed about whether *Winter* has any impact on which standard should govern. *Compare McDermott v. Ampersand Publ’g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010) (reiterating application of four-factor test in light of *Winter*), *and Muffley*, 570 F.3d at 542 (4th Cir.) (relying on *Winter* to adopt four-factor test), *with Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 94 (3d Cir. 2011) (expressly rejecting argument that *Winter* requires abandonment of two-prong test), *and El Paso Disposal*, 625 F.3d at 850 (5th Cir.) (same). It is also the case because the Third and Fifth Circuits have refused to apply the four-factor standard on the ground that they consider it far more demanding than the two-prong test. *See El Paso Disposal*, 625 F.3d at 851 (requiring Board to “show ‘irreparable harm’ and ‘likelihood of success’ for § 10(j) relief would raise the factual threshold that the NLRB must reach”); *Chester*, 666 F.3d at 97 (same). In other words, courts not only are openly divided as to which standard should apply after *Winter*, but are quite confident that the distinction between the two is material.

The District Court in this case was clearly of the same view. In rejecting HealthBridge’s argument that *Winter* requires application of the four-factor test, the court described the *Winter* test as a “more demanding” and “stricter approach” that it considered “inconsistent with the remedial purposes of section 10(j).” App. A at 16 (citing *Chester*, 666 F.3d at 96). The court then went on to defer almost entirely to “[t]he Regional Director’s judgment that injunctive relief is necessary,” App. A at 20, even denying HealthBridge *any* discovery into which Union members posed a threat to its patients on the ground that “the statutory policies underlying section 10(j) call for expedited proceedings and deference to the Regional Director, even when facts are disputed.” App. A at 14 n.8. Plainly, any correct application of the four-factor standard would preclude a court from short-circuiting the analysis by deeming deference to the plaintiff’s characterization of the facts and equities so absolute as to render the defendant’s evidence irrelevant—especially in a case like this one, where patient safety concerns are paramount. Accordingly, this case not only squarely presents an acknowledged circuit split on the proper standard for granting a section 10(j) injunction, but does so on extraordinary facts likely to make resolution of that split outcome determinative.

It is also reasonably likely that, were the Court to resolve that circuit split, it would reject the District Court’s position. While “Congress may intervene and guide or control the exercise of the courts’ discretion” to grant injunctive relief, this Court will “not lightly assume that Congress has intended to depart from established principles.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982).

Thus, “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.” *Id.* at 313.

There is absolutely nothing in section 10(j) that gives any indication Congress intended courts to apply a more lenient standard when considering whether to grant the Board injunctive relief. The statute does not say anything about the circumstances under which a court should grant relief, and certainly says nothing about deference, but instead says only that a court may grant such relief “as it deems just and proper.” 29 U.S.C. § 160(j). As the Ninth Circuit explained in rejecting the two-prong approach, that is just “another way of saying ‘appropriate’ or ‘equitable’”—in other words, of incorporating the traditional equitable standards. *Miller*, 19 F.3d at 458 (citing *Webster’s Third New International Dictionary* 1228, 1817 (1981) (defining “just” as “equitable” and defining “proper” as “marked by suitability, fitness, accord, compatibility”)). And the “reasonable cause” prong of the test is not found in section 10(j) at all, but rather is imported from a provision that governs *the Board’s* authority to seek interim relief against a limited subset of violations. 26 U.S.C. § 160(l) (regional attorney may seek injunction to halt certain unfair labor practices if he “has reasonable cause to believe that such charge is true and that a complaint should issue”).

Nor is there any merit to the notion that the statutory scheme as a whole compels the extraordinary deference to the Board’s judgment that courts applying the two-prong test routinely give. In the Third Circuit’s view, that deference is necessary

because “the merits of” claims underlying 10(j) request are ultimately “adjudicated through an administrative process that is largely independent of the courts,” and so courts should be loath “to intrude upon the Board’s exclusive authority to decide the merits of the cases.” *Chester*, 666 F.3d at 96. That gets matters exactly backwards. Had Congress intended courts to do nothing more than rubber-stamp the Board’s request every time the Board takes the weighty step of enlisting the aid of an Article III court in securing extraordinary temporary injunctive relief—even though that court would have no ability to review the Board’s ultimate determination on the merits—surely Congress would have made such intent explicit. Instead, section 10(j) gives a court jurisdiction to grant such relief “as *it* deems just and proper,” 29 U.S.C. § 160(j) (emphasis added), not to grant such relief as the Board (or one of its regional directors) considers just and proper.

More fundamentally, the District Court’s extraordinary deference to the Board underscores the deeper problems with this proceeding. There are serious questions as to whether the Board has any power to act and whether the Board can delegate its authority to seek section 10(j) relief. If the Article III court’s role in the section 10(j) proceeding is really little more than a rubber-stamp, then the need for it to be invoked by the Board itself, rather than a dubious delegee, seems all the more critical. Indeed, even the District Court justified deference on the ground that the Board was unlike an ordinary private litigant seeking preliminary injunctive relief. *See, e.g.*, App. A at 14 n.8; Oct. 22, 2012 Tr. 42, 78 (deferring to regional director’s claim that Board had done the “hard work” and “heavy lifting” for the court).

Nonetheless, an Article III court applied wholesale deference in granting coercive and potentially health-endangering injunctive relief that will force HealthBridge to capitulate to demands the Board itself may lack the power to make, all in the name of preserving adjudicatory authority the Board may lack the power to exercise. Rather than viewing this unusual course of events with the suspicion it deserves, the District Court accepted without question or adversarial testing every representation the regional director made, on the premise that his representations are entitled to greater weight because they are those of the Board. Thus, the District Court's remarkable decision to order reinstatement of workers who deliberately put at risk the health and safety of the Centers' elderly and vulnerable patients is not the only indication that something has gone seriously wrong.

II. The Equities Strongly Favor Entry Of A Partial Stay.

There can be little question that the equities of this case strongly favor granting a stay, absent which HealthBridge and the Centers' patients will suffer immediate and irreparable injury. The Second Circuit's apparent conclusion otherwise is difficult to fathom. There is no dispute that the acts of medical sabotage detailed above took place—and took place hours before the Union went on strike. There can also be no serious dispute that those acts were committed by some of the same workers the District Court has ordered reinstated. HealthBridge presented unrefuted and irrefutable evidence that the only people with access to patient-care areas at the time were employees, and that the striking Union members were the only employees with any reason to disrupt the Centers' operations. Indeed, the Board has never really contended otherwise, but instead

has responded only that HealthBridge cannot identify *which* workers committed those reprehensible acts. *See, e.g.*, Ct. App. Doc. 19 at 4–5. But that is precisely why HealthBridge sought discovery into the incidents, so that if the District Court did issue an injunction, it would at least tailor it to prevent the perpetrators from being among those ordered reinstated.

Rather than undertake any effort to ensure that whatever relief it might order would not further endanger the health and safety of the Centers’ vulnerable patients, the District Court not only refused to allow any discovery on the matter, but then blamed HealthBridge for failing to provide the very evidence the court foreclosed it from obtaining. In other words, the court faulted HealthBridge for failing to meet an evidentiary burden the court itself made impossible to satisfy. The Court then deferred entirely to the Board’s contention that the Union’s interest in avoiding being “perceived as being unable to adequately protect the employees or affect their working conditions” is an “irreparable harm” entitled to more weight than the much more concrete risk to the Centers’ patients should the perpetrators of the acts of sabotage be reinstated and resort to the same tactics as contract negotiations continue. App. A at 29.

The ruinous financial consequences to HealthBridge if forced to comply with the District Court’s order further support granting a partial stay. There is no dispute that the Centers sustained devastating financial losses while operating under the terms of the expired collective bargaining agreements. A return to those

unsustainable terms likely would lead to closure of the Centers, displacing hundreds of patients currently in their care.

In discounting all these concerns, the District Court concluded that the sweeping injunctive relief it ordered was necessary to preserve support for the Union. Even accepting the dubious notion that any loss in Union support was attributable to concerns about its effectiveness at the bargaining table rather than disgust at the unconscionable acts of sabotage to which its members again resorted, that is hardly the kind of irreparable injury that warrants the “extraordinary remedy” of a preliminary injunction. *Winter*, 555 U.S. at 24. Nor is it a sufficiently “likely” injury under the four-factor test that should have governed the analysis. *See id.* at 22 (party “seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction,” not just a mere “possibility”).

In truth, neither the Board nor the Union has demonstrated any likelihood that irreparable injury would result from a stay pending appeal. To be clear, HealthBridge requests only that the Court stay the portion of the order requiring immediate reinstatement of the striking workers and return to the unsustainable terms and conditions of employment in place as of June 16, 2012. HealthBridge stands ready to comply with the District Court’s order to return to bargaining. Thus, the interest of the NLRB and the Union in the collective bargaining process would be preserved without resort to the extraordinary step of ordering reinstatement of a group of workers that includes some who engaged in medical sabotage. Were the Second Circuit and/or this Court to affirm the injunction on the

merits after briefing and argument, the Union's members could be made whole with back pay. That the strikers' unconscionable conduct might delay the date on which they obtain any monetary relief to which they are entitled should not outweigh HealthBridge's critical interest in protecting the health and safety of its patients. *See Romero-Barcelo*, 456 U.S. at 312–13 (“where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff”).

For the same reasons, the public interests underlying the NLRA are overcome here by the public interest in protecting the Centers' patients, who are innocent bystanders to this labor dispute. This is not a typical section 10(j) case, in which the only consequence of an incorrect decision is loss of money or interference with the efficient operation of the employer's business. As skilled nursing facilities, the Centers are required by federal law to “care for [their] residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.” 42 U.S.C. § 1395i-3(b)(1)(A). They must “provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.” *Id.* § 1395i-3(b)(2); 42 C.F.R. § 483. Those obligations are not suspended in the event of a labor dispute. The Centers cannot in good conscience represent that they are fulfilling those obligations if they reinstate hundreds of workers without regard to the fact that at least some of those workers,

apparently at the Union's direction, perpetrated or were complicit in acts that endangered the health and safety of their vulnerable patients. Nor should they be forced to do so when there is a significant likelihood that this Court will conclude, either during the pendency of their appeal to the Second Circuit or in the course of reviewing this case on the merits, that the District Court lacked jurisdiction to enter such a remarkable order in the first place.

CONCLUSION

The Court should grant a partial stay of the injunction pending appeal, or in the alternative, treat this stay Application as a petition for certiorari, grant the petition, and partially stay the injunction pending full review.

Respectfully submitted,



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February 4, 2013

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

HEALTHBRIDGE MANAGEMENT, 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 HEALTHCARE 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,

Applicants,

v.

JONATHAN B. KREISBERG, REGIONAL DIRECTOR OF REGION 34 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that one copy of the attached Application for Emergency Stay was served on:

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Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JONATHAN B. KREISBERG, :

Petitioner, :

V. : Case No. 3:12-CV-1299 (RNC)

HEALTHBRIDGE MANAGEMENT, LLC, :
et al., :

Respondents. :

MEMORANDUM OPINION

Petitioner Jonathan B. Kreisberg, Regional Director of Region 34 of the National Labor Relations Board, brings this petition on the Board's behalf seeking a temporary injunction pursuant to section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), pending the final disposition of unfair labor practice charges contained in a complaint that is the subject of ongoing proceedings before Administrative Law Judge Kenneth Chu. Both the petition and the underlying complaint allege that HealthBridge Management, LLC, together with health care centers it operates in Connecticut ("Respondents"), have violated and are currently in violation of sections 8(a)(1)(3) and (5) of the Act, 29 U.S.C. §§ 158(a)(1)(3) and (5). On December 11, 2012, the Court granted the petition for injunctive relief

in an oral ruling and subsequent written order (Doc. 47). This memorandum opinion elaborates on the reasoning underlying the ruling and order.

I. Background

In 2003, Healthbridge became manager of six health care centers in Connecticut,¹ and assumed the prior management's contracts with the New England Health Care Employees Union, District 1199, SEIU ("the Union"), which represents approximately 700 workers at Respondents' facilities. Pursuant to a reopener in the predecessor contracts, Respondents attempted to negotiate new contracts with the Union in 2004. The centers all went into bankruptcy in 2005, however, and were unable to make payments into the Union's funds. Litigation and unfair labor practice charges ensued. The parties ultimately reached a settlement, the terms of which included a collective bargaining agreement ("CBA") between the Union and each center effective from December 31, 2004 to March 16, 2011.

¹ Five of these centers are Respondents here: Danbury Health Care Center; Long Ridge of Stamford; Newington Health Care Center; Westport Health Care Center; and West River Health Care Center. On June 11, 2012, Respondents closed a sixth facility, Wethersfield Health Care Center.

Respondents and the Union operated under these contracts without incident relevant to this litigation until 2010. In that year (the year before the collective bargaining agreements were set to expire), Respondents instituted several unilateral changes to the terms and conditions of employment of Union employees at various centers. Among other changes, Respondents subcontracted out their unionized housekeeping and laundry employees only to rehire them at reduced wages and benefits without first bargaining with the Union; laid off employees without providing the Union with the notice required under the CBA; implemented new eligibility standards for employees regarding holiday pay, personal days, vacation days, sick days, and uniform allowance; and discontinued their practice of including lunch breaks in calculating overtime. Union representatives filed multiple grievances with Respondents alleging that these changes violated the CBA, but the grievances were rejected. The Union filed charges with the Board alleging that Respondents had violated sections 8(a)(1)(3) and (5) of the Act, and Petitioner issued a complaint on March 21, 2011 ("Complaint I").²

²The unilateral changes were subsequently found to violate sections 8(a)(1)(3) and (5) of the Act. See

It was in this context that Respondents and the Union began negotiating a successor CBA on January 25, 2011. At the first bargaining session, Respondents' lead negotiator, Jonathan Kaplan, proposed changes to 38 of the 39 articles of the predecessor contracts, many of which sought to codify the unilateral changes underlying Complaint I. These proposed changes included: a substantial expansion of Respondents' management rights; increased flexibility for Respondents' to lay off employees; reductions in minimum wages; elimination of paid lunches; a change in benefit calculations from benefits based on hours actually worked to benefits based on "control hours," which were to be determined weekly by the centers; a doubling from 20 to 40 of the number of hours an employee must work per week to be eligible for benefits; reduced overtime eligibility; a reduction in paid holidays, vacations, and personal days; reduced health benefits; increased employee contributions to the employee health insurance plan; and replacement of the employees' pension plan with a 401(k) plan. See Affidavit of Suzanne Clark (Doc. 13, Aff. 1 at 2-10); Union's Initial

Healthbridge Mgmt., LLC, et al., S. 34-CA-12715, 2012 WL 3144346 (N.L.R.B. Div. of Judges Aug. 1, 2012).

Proposals (Doc. 13, Ex. 1).³

The Union's lead negotiator, David Pickus, called Respondents' proposed changes "draconian," a "whole rewrite of the contract," and stated that "because [Respondents] would not provide reasons for making these changes . . . there was nothing the Union could say to respond." Clark Aff. at 9-11. Also at this session, and at several subsequent meetings, the Union proposed that Respondents remedy the unilateral changes underlying Complaint I, but these changes remained in effect throughout the negotiations.

Including this initial meeting, the parties held thirty-eight contentious negotiating sessions over the next year and a half. Petitioner alleges that Respondents bargained in bad faith, largely sticking to their proposals without any economic explanation or justification to the Union. Respondents claim that the Union engaged in bad faith negotiating tactics, pointing out that the Union refused to move on key issues despite receiving more than

³According to Petitioner, "Respondents' . . . proposal on healthcare alone would amount to \$5,700 a year in health costs for employees making on average . . . \$31,000 a year . . . roughly one fourth or more of his or her take-home pay [after taxes]." Pet. Mem. In Support of Pet. For Temporary Inj. (Doc. 14) at 11.

100 proposals and counter proposals, refused to meet more than two or three days per month and then only in the late afternoon or evening, and persisted in bringing large numbers of boisterous employees to the bargaining sessions. Resp't Mem. In Opp'n (Doc. 14) at 2.

On October 27, 2011, Respondents presented a "Final Offer," which consisted of many of the initial proposals made on January 25, including replacing the Union pension plan with a 401(k). Respondents threatened the Union with a lockout if the Final Offer was not accepted. When the Union refused Respondents' proposal, Respondents locked out employees at West River Health Care Center in Milford, Connecticut on December 13, making it clear that the Union could end the lockout immediately by accepting the Final Offer.

On December 21, 2011, the parties met for their twenty-fourth bargaining session. The Union proposed that all open issues be submitted to binding arbitration. Respondents countered that they would end the lockout, give a three percent wage increase to all employees, and arbitrate all other open issues as long as the Union agreed to replace the pension plan with a 401(k). The Union refused. On December

22, the Union proposed that the employees would agree to contribute small amounts to their health insurance provided Respondents agreed to arbitrate all other issues, including the pension. Respondents countered with some additional economic concessions on December 28, but made no movement on the pension issue. Negotiations then broke off for a period of two months.

On February 29, 2012, Petitioner issued a complaint alleging that Respondents were engaging in bad faith bargaining and that the Milford lockout was unlawful. This complaint has since been merged into the complaint currently pending before ALJ Chu ("Complaint II"). Respondents ended the Milford lockout On April 4.⁴ On April 24, Respondents made their "Last, Best, and Final proposals" ("LBFs"), which included significant economic and noneconomic concessions⁵

⁴Respondents claim that they agreed to end the lockout because the Union agreed to meet for eight more bargaining sessions. Resp't Opp'n Br. (Doc. 18) at 9. Petitioner contends that Respondents ended the lockout only after learning that Petitioner had submitted the complaint over the lockout to the Board's General Counsel proposing a section 10(j) petition. Pet'r Mem. In Supp. 10(j) Pet. (Doc. 14) at 8.

⁵According to Respondents, these economic concessions included immediate 6 percent wage increases, a total of 8 percent in additional wage increases over the next five years, and a 25 percent match on all employee contributions to a 401(k) plan.

but left the 401(k) in place, as well as the "control hour" benefits standard,⁶ reduced holidays and sick leave, and increased employee contributions to health care. The Union also made concessions at this meeting, including agreeing to drop the penalty clause from its dues check-off proposal.

According to the Union's bargaining notes, on May 1, Kaplan asked Pickus and Union attorney John Creane if there were "no circumstance under which the union would agree to a 401k." The following dialogue ensued:

Pickus: I think our proposal to you is that we'd like to look at ways to save money and if we can find a way to save 4% [of gross payroll].

Creane: Let me ask this- it appears to the union that you're saying unless you're willing to agree to getting rid of the pension fund that the Employer is not willing to make changes to the other non-economics. Your stance seems part in parcel to you trying to reach the economic conditions of your non-union facilities.

Kaplan: I understand its important to you, I'm just trying to see if you would be willing to settle a contract without the pension in it.

Creane: Realistically, given your proposals, it's hard to imagine- our responses are more reflective of your overall proposals to the union than of the importance or willingness to look at the pension. . . .

Kaplan: We do not see any circumstance under which we can, we're not willing to sign a contract that has the current pension plan and evidently as far as we've seen up until now, you have not been willing to sign a

⁶"By the Union's estimates, 110 employees will be reclassified from full-time to part-time as a result of the "control-hours" definition, affecting . . . eligibility for benefits." Pet. Mem. In Supp. 10(j) Pet. (Doc 14) at 12.

contract that doesn't have the pension.

Creane: Yes, evidently.

Pickus: The problem is you have so many things you're trying to take away right now - if you give the workers enough money they might be willing to give up the pension. . . . You said in your letter that the pension was the major issue at stake, the main roadblock- I would say you're not being truthful, that the issues are a lot more than that. . . . So to say that you have tried to reach an agreement and that the pension is the only area of disagreement is just not true.

Kaplan: I didn't say it was the only area, there are other points of contention.

Pickus: A lot more than that- your proposal is whole sale rape. Call it what you want to call it. You want to give the workers a few million dollars we can get off the pension.

Creane: For clarification on your statement- is there no circumstances under which your client is willing to sign a contract with a defined benefit pension plan- are you talking about current employees or future hires?

Kaplan: Any obligation to a pension fund. Not willing to look at it.

Creane: So even if only for current and not future employees - still not acceptable?

Kaplan: No.

Creane: Apart from money is there any other factor?

Kaplan: Monetary

Creane: If we found equivalent in other area, though, you say that you're still not willing to do that?

Kaplan: the problem with these types of pensions is that they're open holes in the future. Everywhere everyone all over the country trying to get out of them.

Bargaining Notes of Suzanne Clark ("Clark Notes") (Doc. 37-14) at 362-63.

At the May 15 bargaining session, Kaplan again asked the Union negotiators if the Union had changed its position on the pension issue. Pickus responded:

[N]o, as I said we're not willing to negotiate with ourselves. Your proposal has so many givebacks and so many illegal proposals . . . I don't see that what you're saying is helpful. When you change that stance we have movement to make, but so far we haven't seen any movement from you. . . .We're not willing to talk about the pension in a vacuum.

Id. at 366. In a May 18 letter to Pickus, Respondents stated that they believed their proposals were "completely lawful" and the Union was "fully capable of accepting them," as evidenced by the fact that the Union "ha[d] agreed to contracts with other nursing center providers that contain the same or similar economic terms as those in the [LBFs]." Pet'r Ex. (Doc. 13) (P-11). Respondents informed Pickus that "If [the Union] maintains its current position and continues to refuse to make any further proposals, then it appears that [Respondents] and [the Union] have reached an impasse in their negotiations." Id. In its May 18 response letter, the Union labeled Respondents' suggestion that impasse had been reached as a "self-serving and disingenuous characterization." As evidence of the Union's willingness to compromise on the pension issue, the letter pointed to the hypothetical two-tier pension approach that Creane had proposed at the May 1 meeting, "with current Union employees remaining in the defined benefit Pension Plan, and new hires

going into a 401 K Plan." Pet'r Ex. (Doc. 13) (P-12).

At the penultimate bargaining session on May 22, Kaplan again asked if the Union was considering accepting Respondents' 401(k) proposal. Pickus answered "we told you before[,] depending on the overall proposal we would consider anything. . . . We need to understand your bargaining position." Clark Notes at 368. On June 16, Respondents sent a letter to the Union officially declaring impasse and announcing that Respondents would be implementing their LBFs. Upon Respondents' implementation of these LBF proposals on June 17, the Union provided Respondents with a ten-day notice that it would conduct an unfair labor practice strike. On June 22, the Union unconditionally offered to cancel the upcoming strike and continue working under the terms and conditions of employment in effect on June 16, 2012. Respondents informed the Union by letter on June 28 that any employee who went on strike would be permanently replaced. On July 3, the Union declared an unfair labor practice strike, with approximately 700 Union employees participating. On July 6, Petitioner amended Complaint II to include allegations that Respondents had implemented their LBFs in the absence of genuine, lawful

impasse. On July 19, the Union again offered to end the strike and return to the pre-LBF conditions, but Respondents refused. Respondents' brought in temporary workers, and had replaced all the Union strikers by the end of July.

In mid-July, Petitioner sought authorization from the Board to initiate section 10(j) proceedings. While the request was pending, Administrative Law Judge Steven Fish found that all of Respondents' 2010 unilateral changes forming the basis of Complaint I violated the Act and constituted unfair labor practices. See Healthbridge, 2012 WL 3144346. Thereafter, on August 16, authorization for this 10(j) proceeding was provided by both the Board and the Board's Acting General Counsel. Petitioner then filed the instant petition.

The petition charges that Respondents have engaged in unfair labor practices in violation of sections 8(a)(1)(3) and (5) of the Act. The petition points to Respondents' implementation of their LBF proposals without reaching impasse, the 2010 unilateral changes to employment conditions found unlawful by Judge Fish, and Respondents' lockout of employees at the West River facility. Petitioner asks the Court to order Respondents to reinstate the

striking Union employees at their previous wages and benefits, restore the terms and conditions of employment that predated Respondents' unilateral implementation of the LBFs, and bargain in good faith with the Union.⁷

The filing of the petition led to an initial round of briefing. An extensive record was also presented to the Court consisting of affidavits, correspondence, contract proposals, and bargaining notes of the parties. A hearing was held on October 22. At the hearing, Petitioner presented oral argument. Respondents presented oral argument and made an offer of proof regarding anticipated

⁷Respondents argue that the Court should not grant equitable relief because Petitioner's delay in bringing the petition exacerbated the harm sought to be prevented. The argument lacks merit. See Kaynard v. MMIC, Inc., 734 F.2d 950, 954 (2d Cir. 1984) ("There is no merit whatsoever in the company's final contention that the delays [2 months between the Board filing a complaint against the employer and the Regional Director bringing a 10(j) petition] have rendered [injunctive relief] inappropriate. The Board does not take lightly the commencement of a § 10(j) action."); Maram v. Universidad Interamericana De Puerto Rico, Inc., 722 F.2d 953, 960 (1st Cir. 1983) ("A busy administrative agency cannot operate overnight. The very fact that it must exercise discretion . . . indicate[s] that it should have time to investigate and deliberate. . . . We must reject the [district] court's reliance on the four months delay.").

testimony by Mr. Kaplan. Respondents requested leave to file a supplemental written brief and additional exhibits.⁸ Respondents subsequently filed an extensive supplemental brief, with affidavits and bargaining notes attached, along with a motion to dismiss for lack of subject matter jurisdiction. After carefully reviewing the parties' submissions and the underlying record, the Court issued an oral ruling on December 11, denying Respondents' motion to

⁸In their submissions, Respondents argue that the Court should have granted them expedited discovery and the opportunity to hold an evidentiary hearing because of the hotly contested facts at issue in this case. The argument is unavailing for several reasons. First, the statutory policies underlying section 10(j) call for expedited proceedings and deference to the Regional Director, even when facts are disputed. See Kaynard v. Mego, 633 F.2d 1026, 1031 (2d. Cir. 1980); Dunbar for & on Behalf of N.L.R.B. v. Landis Plastics, Inc., 977 F. Supp. 169, 176 (N.D.N.Y, 1997) ("[10(j)] injunction proceedings in federal court must not evolve into a hearing on the merits of the unfair labor practice charges because the district court must not usurp the NLRB's role."). Second, unlike applications for injunctions by private parties that reach the judiciary without any prior screening, section 10(j) petitions are investigated by the Board before they are filed in court. Notably, Respondents refused to participate in the Board's investigation. See Tr. Oral Argument of 10/22/12 (Doc. 35) at 19 ("[W]e got no cooperation from the employer, we never got their notes. We got some position statements, we got some nice letters with some legalese from the lawyers, and we got some copies of some of the proposals, but we didn't hear their side of things because they didn't want to give it.").

dismiss⁹ and granting the petition for injunctive relief.

II. Standard of Review

Section 10(j) authorizes district courts to grant temporary injunctions pending the outcome of unfair labor practice proceedings before the Board. 29 U.S.C. § 160(j). "The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief." 29 U.S.C. § 160(j). While an extraordinary remedy, 10(j) reflects Congress's recognition that, in the absence of injunctive relief, the Board's often lengthy administrative proceedings could render a final Board order ineffectual. Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 252-53 (S.D.N.Y. 1995) aff'd, 67 F.3d 1054 (2d Cir. 1995).

In reviewing a section 10(j) petition, the legal

⁹Respondents motion to dismiss for lack of subject matter jurisdiction was fully addressed and denied in the Court's oral ruling (Doc. 49). The Court rejected Respondents' argument that the Board's General Counsel lacked authority to authorize a 10(j) petition in this case for substantially the reasons stated in Paulsen v. Renaissance Equity Holdings, LLC, 849 F. Supp. 2d 335, 350 (E.D.N.Y. 2012) (finding that the Board's November 2011 delegation to the General Counsel constituted valid authority to bring a 10(j) petition under the NLRA).

standard is two-pronged: the court must determine (1) whether there is reasonable cause to believe that unfair labor practices have been committed and, if so, (2) whether the requested relief is 'just and proper.' Kaynard v. Mego Corp., 633 F.2d 1026, 1030 (2d Cir. 1980). Respondents argue that following the Supreme Court's decision in Winter v. Natural Res. Def. Council Inc., 555 U.S. 7 (2008), the traditional two-prong test should be replaced by a more demanding four-part test. See id. at 20 ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). Adopting the stricter approach urged by Respondents would be inconsistent with the remedial purposes of section 10(j), see Chester ex rel. N.L.R.B. v. Grane Healthcare Co., 666 F.3d 87, 96 (3d Cir. 2011),¹⁰ as well as Second Circuit precedent. See

¹⁰In Chester, the Third Circuit recently stated that: "Congress' clear purpose in creating § 10(j) was not to limit the scope of the Board's authority to decide violations, but to preserve its powers to do so by giving the NLRB an opportunity to seek an injunction of alleged violations before an injury becomes permanent or the Board's remedial purpose becomes meaningless. . . . Section 10(j) does not so expand the scope of the district court's role in labor disputes as to permit it

Mattina ex rel. N.L.R.B. v. Kingsbridge Heights Rehab. & Care Ctr., 329 F. App'x 319, 322 (2d Cir. 2009).

A. Reasonable Cause

Courts in this Circuit owe considerable deference to the Board's Regional Director when determining whether reasonable cause exists. Hoffman ex rel. N.L.R.B. v. Inn Credible Caterers, Ltd., 247 F.3d 360, 365 (2d Cir. 2001). The Regional Director need only present evidence "sufficient to spell out a likelihood of violation" to satisfy the reasonable cause requirement. Danielson v. Joint Bd. of Coat, Suit and Allied Garment Workers' Union, 494 F.2d 1230, 1243 (2d Cir. 1974); Silverman, 67 F.3d at 1059 ("The court need not make a final determination that the conduct in question is an unfair labor practice."). Even when disputed issues of fact exist, "the Regional Director's version of the facts should be sustained if within the range of rationality, . . . inferences from the facts should be drawn in favor of the charging party." Mego, 633 F.2d at 1031; Blyer v. Pratt Towers, Inc., 124 F. Supp. 2d 136, 143 (E.D.N.Y. 2000) ("In making its determinations, the Court

to intrude upon the Board's exclusive authority to decide the merits of the cases. . . . We do not believe the Court intended its decision[] in . . . Winter to extend to the context of such a distinct statutory scheme." 666 F.3d at 96.

should give the Regional Director's interpretation of the facts the benefit of the doubt."). By its very nature, the "reasonable cause" prong contemplates that a 10(j) injunction will be issued despite the existence of unresolved issues before the Board. Kingsbridge Heights, 329 F. App'x at 322. Even with respect to issues of law, "the Regional Director is not required to show that . . . the precedents governing the case are in perfect harmony," and "the district court should be hospitable to the views of the [Regional Director], however novel." Mego, 633 F.2d at 1031-33. A district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are "fatally flawed." Hoffman v. Polycast Tech. Div. of Uniroyal Tech. Corp., 79 F.3d 331, 333 (2d Cir. 1996).

B. *Just and Proper*

"Injunctive relief under § 10(j) is just and proper when it is necessary to prevent irreparable harm or to preserve the status quo." Kingsbridge Heights, 329 F. App'x at 321. The status quo that requires protection under § 10(j) is the status quo as it existed before the onset of the alleged unfair labor practices, not the status quo that has come into being as a result of the unfair labor

practices being litigated. Inn Credible Caterers, 247 F.3d at 360 (2d Cir. 2001); Seeler v. Trading Port, Inc., 517 F.2d 33, 38 (2d Cir. 1975). The Second Circuit has made it clear that courts should review petitions in § 10(j) cases "in accordance with traditional equity practice, as conditioned by the necessities of public interest which Congress has sought to protect." Morio v. N. Am. Soccer League, 632 F.2d 217, 218 (2d Cir.1980) (per curiam) (internal quotation marks omitted). Thus, in applying the just and proper standard, it is necessary to consider "the context of federal labor laws" and the "underlying purposes of § 10(j)," specifically, the "protect[ion of] employees' statutory collective bargaining rights," and the prevention of "irreparable harm to the union's position in the [workplace] [and] to the adjudicatory machinery of the NLRB." Inn Credible Caterers, 247 F.3d at 368; see also Kreisberg ex rel. N.L.R.B. v. Stamford Plaza Hotel & Conference Ctr., L.P., 849 F. Supp. 2d 279, 283-84 (D. Conn. 2012) ("The disappearance of the 'spark to unionize' may be an irreparable injury for the purposes of § 10(j).").

Consistent with these policies, the proper plaintiff in a proceeding under section 10(j) is the Regional Director

rather than the individual employees. Inn Credible Caterers, 247 F.3d at 369. The Regional Director's judgment that injunctive relief is necessary to promote the effectiveness of the Board's remedial procedures receives deference, especially in cases concerning fundamental and well-established tenets of federal labor law where "the prevailing legal standard is clear and the only dispute concerns the application of that standard to a particular set of facts." Mattina ex rel. N.L.R.B. v. Kingsbridge Heights Rehab. & Care Ctr., 08 CIV. 6550 (DLC), 2008 WL 3833949 (S.D.N.Y. Aug. 14, 2008) aff'd, 329 F. App'x 319 (2d Cir. 2009).

III. Discussion

A. *Is there reasonable cause to believe Respondents have violated the Act?*

The petition is based on Petitioner's determination that Respondents violated §§ 8(a)(1)(3) and (5) of the Act, when they unilaterally imposed new conditions on the Union on June 17, 2012, without first reaching lawful impasse. Accordingly, the first inquiry is whether the record before the Court provides reasonable cause to believe that lawful impasse had not been reached.

i. Did the parties bargain to impasse?

The duty to bargain collectively is defined in § 8(d) of the Act as the "mutual obligation of the employer and the representative of the employees to . . . confer in good faith." 29 U.S.C. § 158(d). The Supreme Court has divided the subjects of collective bargaining into two categories: mandatory and permissive. See N.L.R.B. v. Wooster Div. of Borg Warner Corp., 356 U.S. 342, 349 (1958). Mandatory subjects include rates of pay, wages, hours of employment, and other conditions of employment such as retirement and pension plans. See Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948) aff'd sub nom. Am. Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382 (1950) (citing NLRA §§ 8(a)(5), 9(a)). "When a collective agreement expires, an employer may not alter terms and conditions of employment involving mandatory subjects until it has bargained to an impasse over new terms." Kingsbridge Heights, 2008 WL 3833949 at *20; see also Carpenter Sprinkler Corp. v. N.L.R.B., 605 F.2d 60, 64 (2d Cir. 1979) ("Unilateral action by an employer concerning subjects of mandatory bargaining is a violation of the duty to bargain in good faith, in the

absence of a true impasse in negotiations.").

"Impasse," in the collective bargaining context, is an imprecise term of art:

The definition of an 'impasse' is understandable enough – that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless – but its application can be difficult. Given the many factors commonly itemized by the Board and courts in impasse cases, perhaps all that can be said with confidence is that an impasse is a 'state of facts in which the parties, despite the best of faith, are simply deadlocked.' The Board and courts look to such matters as the number of meetings between the company and the union, the length of those meetings and the period of time that has transpired between the start of negotiations and their breaking off. There is no magic number of meetings, hours or weeks which will reliably determine when an impasse has occurred."

Laborers Health & Welfare Trust Fund For N. California v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 544 (1988) (citing R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 448 (1976)). Put more succinctly, "an impasse is a situation where good-faith negotiations have exhausted the prospects of concluding an agreement." Anderson Enterprises, 329 NLRB 760, 823 (1999). For impasse to occur, both parties must be unwilling to compromise. Grinell Fire Protection Sys. Co., 328 NLRB 585,

586 (1999). When one party makes concessions and evinces a willingness to compromise further "it would be both erroneous as a matter of law and unwise as a matter of policy . . . to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party's unchanged terms." Id. Although impasse on a single critical issue can create impasse on an entire agreement, impasse on this critical issue must lead to a breakdown in the overall negotiations. Erie Brush & Mfg. Corp. v. N.L.R.B., 700 F.3d 17, 21 (D.C. Cir. Nov. 27, 2012).

The requirement that a clear impasse be reached before unilateral changes in the terms of employment are made exists to protect the integrity of the collective bargaining process. Carpenter, 605 F.2d at 65. Whether impasse has been reached "is a question of fact peculiarly suited to the NLRB's expertise," Carpenter, 605 F.2d at 65, and the burden of proving the existence of an impasse rests on the party asserting it. CJC Holdings Inc., 320 NLRB 1041, 1044 (1996).

Petitioner advances two distinct legal theories to support his conclusion that Respondents have violated the

Act: no impasse existed in fact, and no impasse existed as a matter of law.

a. No impasse in fact

It is undisputed that the terms and conditions of employment imposed by Respondents in their Last, Best and Final proposals constitute mandatory bargaining subjects. Petitioner urges that the record provides reasonable cause to believe that the imposition of these LBFs was unlawful because the parties did not, in fact, bargain to impasse as evidenced by the Union's demonstrated willingness to make movement on the pension and other issues after Respondents proposed their LBFs on April 24. Respondents contend that the record clearly demonstrates that neither party was willing to compromise on the pension issue and point to the lengthy negotiating period and number of bargaining sessions as objective indicia that further negotiations would have been futile. Respondents point to the Union's notes of the May 1 bargaining session as support for their position.

These notes reflect that Mr. Creane said it would be hard to imagine the Union agreeing to any contract with Respondents that did not have the pension in it, but he qualified his statement by adding that the Union's

"responses are more reflective of [Respondents'] overall proposals to the union than of the importance or willingness to look at the pension." Clark Notes at 362-363. The May 1 notes also show that the Union offered to figure out a way to save Respondents four percent of gross payroll, Pickus stated the Union would consider giving up the pension if Respondents would give the employees a few million dollars, and Creane asked Respondents if they would consider a two-tiered system in which current employees would retain their pensions while new employees would enroll in the 401(k) plan. Id. Respondents dismiss the Union's proposal to save four percent of payroll as a "bare promise," claim that Pickus actually said the Union would only give up the pension if Respondents gave "each worker" a few million dollars, and argue that Creane's two-tiered pension/401(k) hypothetical was not a proposal but merely a request for clarification of Respondents' position.

The burden of proving that the parties reached impasse on the pension issue, and that this impasse led to a breakdown in the overall negotiations, lies with Respondents. Erie Brush, 700 F.3d at 21. Whether a party has met this burden is a question Petitioner is particularly

well suited to evaluate. Carpenter, 605 F.2d at 65; see also, Mego, 633 F.2d at 1031. With this in mind, I find that the record provides reasonable cause to believe that the Union was willing to compromise further when Respondents declared impasse on June 17. Objectively viewed, the notes of the May bargaining sessions show that the Union was signaling a willingness to make concessions to retain the pension plan, to compromise on the pension plan, or to give up the pension plan altogether if offered enough economic concessions in exchange. In fact, it is undisputed that the Union has signed agreements with other nursing center employers that do not include a pension plan.

b. No impasse in law

Petitioner argues that Respondents could not declare impasse due to unremedied unfair labor practices. The law is clear that "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." In Re Titan Tire Corp., 333 NLRB 1156, 1158 (2001). An employer that has committed unfair labor practices cannot "parlay an impasse resulting from its own misconduct into a license to make unilateral changes." Id. (quoting Wayne's Dairy, 223 NLRB 260, 265 (1976)). Yet not all unremedied unfair labor

practices committed during negotiations will give rise to the conclusion that impasse was declared improperly. "Only serious unremedied unfair labor practices preclude declaration of impasse." Westin Providence Hotel, 38 NLRB AMR 81. Unremedied ULPs are serious when they "increase friction at the bargaining table. . . . [or,] by changing the status quo, . . . move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement." Alwin Mfg. Co., Inc. v. N.L.R.B., 192 F.3d 133, 139 (D.C. Cir. 1999).

Petitioner argues that the unfair labor practices underlying Complaint I, later found unlawful by ALJ Fish, were unremedied at the time of bargaining and undermined the Union's ability to effectively represent its employees. Petitioner claims that these unfair labor practices caused negotiations to start off badly when Respondents' refused to discuss them with the Union, weakened the Union's bargaining position, and antagonized Union representatives such that bargaining sessions were characterized by accusations of bad faith and lawbreaking. Respondents argue that no causal connection exists between the unfair labor practices found

by Judge Fish and the impasse at issue here because the unfair labor practices occurred well before bargaining began, were discussed only in passing in several bargaining sessions, and were unrelated to the pension plan. While Respondents' characterization may be factually accurate, it is devoid of legal significance. The relevant inquiry is whether the existence of these unremedied unfair labor practices increased friction at the bargaining table and made it harder for the parties to agree.

Judge Fish's factual findings and legal conclusions show that in 2010, only months before the negotiations at issue here began, Respondents subcontracted employees and rehired them at reduced wages and benefits, terminated employees without contractually mandated notice to the Union, and unilaterally changed significant terms and conditions of employment in violation of the parties' collective bargaining agreement. See Healthbridge Mgmt., LLC et al., S. 34-CA-12715, 2012 WL 3144346 (N.L.R.B. Div. of Judges Aug. 1, 2012). The Union filed internal grievances with Respondents over these practices to no avail. It is undisputed that these unilateral changes remained in place during the parties' negotiations for

successor contracts and that many were incorporated into the proposals that precipitated the West River lockout as well as the LBFs. It is reasonable to believe that Respondents' unfair labor practices, while not directly related to the pension issue, could indeed increase friction at the bargaining table and make it more difficult for the parties to reach agreement on any issue. Accordingly, there is reasonable cause to believe that Respondents' unilateral implementation of its LBFs constituted an unfair labor practice.

B. Is injunctive relief just and proper?

Petitioner urges that injunctive relief restoring the status quo is necessary to prevent irreparable harm because support for the Union is currently eroding and will continue to erode if the Union is perceived as being unable to adequately protect the employees or affect their working conditions. Since the strike began on July 3, between fifty and seventy-five employees have crossed picket lines and at least ten employees have resigned from the Union.

Petitioner argues that by the time the Board issues its final ruling on Complaint II, it will be too late to regain the original status quo with the same relative bargaining

position of the parties, making meaningful collective bargaining impossible and effectively rewarding Respondents for their unfair labor practices. These are exactly the harms the 10(j) mechanism was designed to prevent. See Inn Credible Caterers, 247 F.3d at 368-69. Respondents argue that the potential harm to patients at Respondents' health care facilities and harm to Respondents' finances are equitable considerations that outweigh any potential harm to the Union and make injunctive relief improper.

i. Patient safety

Respondents allege that, before striking, Union employees performed acts of sabotage such as mixing up the names on Alzheimer patients' doors, photos, and wristbands to confuse the new employees; stealing and hiding medical equipment; and breaking patient lifts. Respondent has submitted an affidavit from Registered Nurse Lorraine Mulligan stating that "a court order requiring the reinstatement of any of these striking workers who engaged in such sabotage and those who had knowledge of it and failed to act, could expose the residents to immediate danger and put them at risk of suffering serious harm or death." Mulligan Aff. (Doc. 27)

The right to reinstatement is not absolute and an employer may refuse to reinstate a specific unfair labor practice striker if the employer can demonstrate that the striker engaged in "serious misconduct" during the course of the strike. Mattina, 2008 WL at *27 (allowing hearings for evidence of misconduct by particular strikers only). Respondents' allegations of sabotage by union members are thus far unsubstantiated. Respondent has not submitted any evidence that Union employees committed sabotage, nor have they identified any suspected employees. Furthermore, it is undisputed that since the strike began Respondents have actively encouraged employees to cross picket lines and return to work. It is also undisputed that more than fifty employees have responded to this encouragement by returning to work.

Respondents also urge the Court to consider a related equitable argument, that patients prefer the replacement employees to the strikers. Assuming patients have such a preference, it does not justify withholding injunctive relief necessary to adequately serve the purposes of 10(j).

ii. Financial hardship

Pointing to the health centers' net operating losses in 2011 under the predecessor contracts, Respondents' argue that restoration of the June 16, 2012 terms and conditions of employment would significantly harm Respondents' financial stability. Respondents have operated since 2004 under the terms of the contracts with the Union as they existed on June 16, 2012, and never made these arguments of potential financial calamity to the Board when it conducted its 10(j) investigation or to the Union at the negotiating table.¹²

Granting the petition will have a significant impact on Respondents' replacement workers. The Court is not insensitive to their interests. It is well settled, however, that the right to interim reinstatement of workers striking in response to an unfair labor practice are superior to the interests of workers hired to replace them. See Aguayo for & on Behalf of N.L.R.B. v. Tomco Carburetor Co., 853 F.2d 744, 750 (9th Cir. 1988) overruled on other grounds by Miller for & on Behalf of N.L.R.B. v. California

¹² At the May 26, 2011 bargaining session Respondents' lead negotiator, Jonathan Kaplan, stated to Union negotiators "with respect to the pension . . . did you hear me say we can't afford it? . . . if I said that we'd have to open up our books, we're not pleading an inability to pay." Clark Notes at 159.

Pac. Med. Ctr., 19 F.3d 449 (9th Cir. 1994).

Finally, this is not, as Respondents' argue, a case in which Petitioner has sought interim relief in support of an unprecedented application of the Act. This case concerns fundamental and well-established questions of labor law, whether impasse was reached and whether strikers should be reinstated, where "the prevailing standard is clear and the only dispute concerns the application of that standard to a particular set of facts." Mattina, 2008 WL 3833949 at *25 (reinstating employees and requiring employer to bargain in good faith).¹³ "In such cases, deference to the Regional Director's considered decision that injunctive relief is necessary to insure the effectiveness of the NLRB's remedial procedures and to further the policies of the act is

¹³Contrary to respondents' assertions, cases where "a federal judge has issued a 10(j) injunction directing the respondent to 'bargain in good faith'" are not rare. Between 2001 and 2005, the NLRB brought four cases alleging failure to bargain in good faith in violation of Section 8(a)(5) or 8(b)(3) involving "a wide variety of violations." *End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings June 1, 2001, through December 31, 2005*, Memorandum GC 06-02, 2006 WL 118303 at *9 (January 6, 2006). The NLRB was successful in all four cases. See e.g., Miller v. Renzenberger, Inc., CIV. S-04-1518 WBS PAN (E.D. Ca. September 16, 2004) (issuing an interim bargaining order and a reinstatement order where respondent had failed to bargain in good faith).

'especially appropriate.'" Id. (quoting Silverman v. 40-41 Realty Associates, Inc., 668 F.2d 678, 679 (2d Cir. 1982)).

IV. Conclusion

Accordingly, there is reasonable cause to believe that Respondents have failed and refused to bargain with the Union in good faith as alleged in the petition, and the requested injunctive relief is just and proper.

Date: December 14, 2012

/s/RNC
Robert N. Chatigny
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JONATHAN B. KREISBERG, :
 :
 Petitioner, :
 :
 V. : Case No. 3:12-CV-1299 (RNC)
 :
 HEALTHBRIDGE MANAGEMENT, LLC, :
 et al. :
 :
 Respondents. :

RULING AND ORDER

On December 11, 2012, the Court issued an order granting the request of the petitioner, the Regional Director of Region 34 of the National Labor Relations Board, for injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) ("the Act"), requiring respondent Healthbridge Management, LLC, as well as health care facilities it operates in Connecticut, to reinstate hundreds of striking members of New England Health Care Employees Union, District 1199, SEIU ("the Union") pending the final disposition of unfair labor charges. Section 10(j) authorizes district courts to grant interim injunctive relief to prevent irreparable harm to a union's position in the workplace pending the outcome of unfair labor practice proceedings and to preserve the adjudicative and remedial authority of the Board. See Hoffman ex rel.

N.L.R.B. v. Inn Credible Caterers, Ltd., 247 F.3d 368-69 (2d Cir. 2001). The order granting the petitioner's request for injunctive relief in this case was issued following a telephone conference with counsel in which an oral ruling was provided to the parties explaining the basis for the Court's decision. See Transcript of Proceedings (ECF No. 49). The decision itself was reached after careful review and deliberation following extensive briefing and argument. Respondents have now moved pursuant to Rule 62(c) of the Federal Rules of Civil Procedure for a stay of the injunction pending appeal (Doc. 50). For the following reasons, the motion is denied.

Under Rule 62(c), courts examine four factors in deciding whether to stay an injunction pending an appeal: (1) whether the applicant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the applicant will be irreparably injured unless a stay is granted; (3) whether issuance of the stay will injure other parties interested in the proceeding; (4) and where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776-77 (1987). In this instance, all four factors weigh against respondents' request for a stay.

Respondents have not shown that they are likely to succeed on the merits of the appeal. As discussed during the telephone conference, petitioner has demonstrated that there is reasonable cause to believe that respondents have committed unfair labor practices in violation of the Act and that injunctive relief is just and proper. See Silverman v. Major League Baseball Player Relations Comm, Inc., 67 F.3d 1054, 1060 (2d Cir. 1995). In particular, petitioner has shown that respondents, in the course of bargaining with the Union following the expiration of collective bargaining agreements covering respondents' employees, declared impasse and unilaterally implemented proposals relating to wages, hours and other terms and conditions of employment, without first bargaining with the Union to a good faith impasse. In addition, petitioner has shown that no good faith impasse was possible in any event due to unremedied unfair labor practices previously committed by respondents, as found by Administrative Law Judge Fish in a separate proceeding following an evidentiary hearing. See HealthBridge Management, LLC, Case No. JD(NY)-23-12, S. 34-CA-12715, 2012 WL 3144346 (N.L.R.B. Div. of Judges Aug. 1, 2012). Further, petitioner has shown that there is a pressing need for

injunctive relief to restore the status quo as it existed before respondents declared impasse and unilaterally implemented the changes in the Union members' terms and conditions of employment in violation of the Act, thereby precipitating the strike that led to the hiring of the replacements. Respondents protest that the petition is ill-founded and no deference should be shown to the petitioner, but respondents are incorrect on both counts. Impartial review, undertaken with appropriate deference to petitioner, shows that the position of the petitioner in this case is legally correct and supported by the record. Accordingly, the likelihood of success factor weighs against respondents.

Respondents have not shown that they will be irreparably harmed unless a stay is granted. The injunctive relief requested by petitioner and granted by the Court requires respondents to restore the status quo by reinstating the striking union members and, if necessary, dismissing non-union workers hired by respondents as replacements. This type of relief is entirely just and proper. The status quo that requires protection under § 10(j) is the status quo as it existed before the onset of the alleged unfair labor practices in question, not the

status quo that has come into being as a result of those practices. Analyzed within this framework, any burden on respondents posed by the reinstatement order is clearly outweighed by the injury to the Union and the strikers that would result from a stay.

Respondents state that the reinstatement order could have potentially ruinous financial consequences. Respondents' claim is speculative in nature and not supported by the record. Respondents operated for many years under the terms of the contracts with the Union as they existed on June 16, 2012. At the bargaining table, respondents stated that these contracts were not sustainable. But respondents did not claim that it was urgently necessary to reduce wages and benefits.¹ Nor did they present such a claim to the Board when it conducted its 10(j) investigation. In this context, the Court cannot conclude that the financial consequences of reinstating the strikers would be so dire as to justify a stay.

Regarding other interests at stake, respondents claim

¹ Respondents' lead negotiator stated to Union negotiators, "with respect to the pension . . . did you hear me say we can't afford it? . . . if I said that we'd have to open up our books, we're not pleading an inability to pay." Exh. B at 159.

that reinstatement of the strikers poses a risk to patient welfare because acts of sabotage allegedly were committed at several facilities in connection with the onset of the strike. It is unclear what happened at the facilities; the allegations of sabotage remain under investigation.

However, the alleged acts, even if committed by union members, were isolated occurrences and it would be wrong to rely on them to prevent the reinstatement of hundreds of unfair labor practice strikers. It is undisputed, moreover, that respondents have actively encouraged striking workers to cross picket lines and return to work. According to petitioner, over fifty employees have done so. Given respondents' efforts to encourage strikers to return to work, their argument that reinstatement poses a risk to patient welfare rings hollow. See Mattina ex rel. N.L.R.B. v. Kingsbridge Heights Rehab. & Care Ctr., 08 CIV. 6550 (DLC), 2008 WL 3833949 (S.D.N.Y. Aug. 14, 2008) aff'd, 329 F. App'x 319 (2d Cir. 2009).

Finally, with respect to the public interest, equitable relief under 10(j) is "conditioned by the necessities of public interest which Congress has sought to protect." Morio v. N. Am. Soccer League, 632 F.2d 217, 218

(2d Cir. 1980). Considering the important purposes of § 10(j), "to protect the integrity of the collective bargaining process and to preserve the Board's remedial powers," id. at 368 n.5, the public interest factor requires that interim 10(j) relief be expedited, not stayed.

Accordingly, respondents' motion for a stay is hereby denied.

So ordered this 14th day of December 2012.

/s/RNC

Robert N. Chatigny
United States District Judge

Appendix C

D. Conn.
12-cv-1299
Chatigny, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of January, two thousand thirteen.

Present:

Pierre N. Leval,
Reena Raggi,
Circuit Judges,
Kenneth M. Karas,*
District Judge.

Jonathan B. Kreisberg, Regional Director of Region
34 of the National Labor Relations Board, for and
on behalf of the National Labor Relations Board,

Plaintiff-Appellee,

v.

12-4890

Healthbridge Management, LLC, DBA Danbury
HCC, *et al.*,

Defendants-Appellants.

Appellants, through counsel, move for a partial stay, pending appeal, of the district court's December 11, 2012 order granting a temporary injunction pursuant to section 10(j) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j). Upon due consideration, it is hereby ORDERED that the motion is DENIED because Appellants have not demonstrated that they will be irreparably injured absent a stay. *See McCue v. City of N.Y. (In re World Trade Ctr.*

*Judge Kenneth M. Karas, of the United States District Court for the Southern District of New York, sitting by designation.

Disaster Site Litig.), 503 F.3d 167, 170 (2d Cir. 2007); *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999). The motion of New England Health Care Employees Union, District 1199, SEIU for leave to appear as *amicus curiae* is DENIED as untimely. See Fed. R. App. P. 29(e).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

A circular seal of the United States Second Circuit Court of Appeals is positioned over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around its perimeter, with two stars on either side of the word "CIRCUIT".

Appendix D

Danbury Police Department

INCIDENT REPORT

| | | | | | | |
|--------------------------------|-----------------------------|------------|---|---|-----------------------|--------------------------|
| INCIDENT DATE 07/03/12, Tue | TIME 16:18 | CODE | TYPE OF INCIDENT Suspicious Activity | INVESTIGATING OFFICER Ofc. Christine Galgano 627 | REPORT TYPE Closed | INCIDENT # 2012-05819 |
| DATE OF REPORT 07/03/2012 | LOCATION OF INCIDENT 107 | STREET NO. | STREET NAME Osborne St. | APT NO./LOCATION | | |

STATUS CODE C - Complainant A - Arrestee J - Juvenile M - Missing S - Suspect V - Victim W - Witness I - Interviewed O - Other

| # | STATUS | LAST NAME | FIRST (M.I.) | SEX | RACE | DOB | AGE | PHONE | STREET | CITY | ST | REG # | ST |
|----|--------|-----------|--------------|-----|------|------|-----|--------------|----------------|---------|----|-------|----|
| 01 | C | Kelly | John | M | W | 1954 | | 201-792-8102 | 107 Osborne St | Danbury | CT | | |
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| # | STATUTE 1 | OFFENSE 1 | # | STATUTE 2 | ARRESTS | OFFENSE 2 | # | STATUTE 3 | # | STATUTE 4 |
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INCIDENT DETAILS

Today, 7/3/12 at approximately 1418 hours, I was dispatched to 107 Osborne St. on a report of suspicious activity at the Danbury Health Care Center. Administrator and complainant John Kelly stated that between the hours of 2300 on 7/2/12 and 0700 hours today, 7/3/12, there were several incidents that directly affected and potentially could have negatively impacted patient care. The incidents ranged from clean linens being thrown on the floor to more serious incidents whereby patients' identification wrist bands were removed as well as patient identifiers on room doors and wheelchairs. Kelly has already filed reports with the Health Department and was advised to file a police report for documentation purposes. There are no cameras in the facility as per health care facility and HIPAA regulations; there are no suspects; the persons involved are presumed to be employees who are part of a protest taking place outside against the Danbury Health Care Center. Copies of the in house incident reports have been included with this report. Report for documentation only

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|---|---|---|-------------------|----------------------|----|
| SIGNED OFFICER <i>Christine Galgano</i> Ofc. Christine Galgano, 627 | | DISTRIBUTION (FOR USE BY SHIFT COMM ONLY) | | FOLLOW-UP ACTIONS BY | |
| SUBSCRIBED AND SWORN TO BEFORE ME | THIS REPORT IS SIGNED UNDER THE PENALTIES PROVIDED BY STATE LAW FOR MAKING A FALSE STATEMENT. | RECORD CREATION DATE & TIME: 7/3/2012 5:03:45 PM | SHIFT COMM see | PG | OF |
| THIS 3rd DAY OF July 2012 | 1-24 CGS <input type="checkbox"/> NOTARY -PUBLIC | | | | |
| REVIEWED FIELD SUPV <i>[Signature]</i> | | | | | |

Crime/Incident Report

Print Date: 07/11/2012 16:31:08

Newington Police Department

| | | |
|--------------------------------------|--|--|
| Case Id 120122182 | Type Description CRIMMISREP Criminal Mischief for Report | Report Date 07/03/2012 14:18 |
| Location 240 Church Street | | Occurred From 07/02/2012 11:00 |
| District PA2 | | Occurred To 07/03/2012 06:00 |
| Linked Incident | | |

SYNOPSIS

OFFENSES

| OFFENSE | DESCRIPTION | LOCATION TYPE | UCR |
|---------|--|---------------|------|
| 033 | Larceny - Other Theft or concealment of items within building | DRUG | 06XI |

INVOLVED PARTIES

| | DOB | AGE | SEX | RACE | WEIGHT | HEIGHT | HAIR | EYE |
|--|-----|-----|-----|------|--------|--------|------|-----|
| COMPLAINANT Carmichael, Lizbeth 240 Church Street, Newington CT 06111 Home #: (860) SSN: Bus #: (860) 667-2256 Cell #: (DLN: | 763 | 49 | F | WHI | | | | BR |
| VICTIM Newington Health Care Center 240 Church Street, Newington CT 06111 Bus #: (860) 667-2256 | | | | | | | | |

PROPERTY

| Item # | Tag | Category | Make | Model | Serial # |
|---|-------------|----------|---|--------------|----------|
| 001 | | OTHER | | | |
| Description Stethoscopes | | | | | |
| Drug Type | Drug Weight | Quantity | Weapon | Size/Calibro | NCIC |
| | | 5 | | | |
| Ownership Name: Newington Health Care Center Phone: (860) Address: 240 Church Street apt. , Newington, CT 06111 | | | Property Status Estimate Stolen : Y 75.00 | | |
| Recovered/ Seized From Name: Address: Phone: (| | | Seizure Location: Officer: Recovered Date: | | |
| Item # | Tag | Category | Make | Model | Serial # |
| 002 | | OTHER | | | |
| DAN | | | | | |

Subscribed and sworn to before me this _____ day of _____ 20_____

Notary Signature: _____ Title _____

Reporting Officer Signature: _____

| | | | | | | | |
|--|-------------|--------------------------|---|---------------------------|-----------------|----------|--|
| Description BP cuff | | | | | | | |
| Drug Type | Drug Weight | Quantity 3 | Weapon | Size/Calibre | NCIC | UCR | |
| Ownership Name: Newington Health Care Center Phone: (860) Address: 240 Church Street apt: , Newington, CT 06111 | | | Property Status Stolen : Y | Estimate 135.00 | Property Status | Estimate | |
| Recovered/ Seized From Name: Address: Phone: (| | | Seizure Location: Officer: Recovered Date: | | | | |
| Item # 003 | Tag | Category OTHER | Make | Model | Serial # | | |
| DAN | | | | | | | |
| Description lift handles for Hoyer patient lift | | | | | | | |
| Drug Type | Drug Weight | Quantity 3 | Weapon | Size/Calibre | NCIC | UCR | |
| Ownership Name: Newington Health Care Center Phone: (860) Address: 240 Church Street apt: , Newington, CT 06111 | | | Property Status Stolen : Y | Estimate 375.00 | Property Status | Estimate | |
| Recovered/ Seized From Name: Address: Phone: (| | | Seizure Location: Officer: Recovered Date: | | | | |
| VEHICLES | | | | | | | |
| MO | | | | | | | |
| NARRATIVE | | | | | | | |
| <p>On 7/3/12 I was sent to 240 Church Street, Newington Health Care, to investigate a report of a possible larceny from the building. Upon my arrival I met and spoke with Lizbeth Carmichael.</p> <p>Carmichael is the Director for the facility. She explained that during this mornings patient wake up several items were discovered missing. There were six lift handles for a Hoyer brand lift missing. When the facility was checked three were recovered. According to Carmichael they had been concealed in an effort of make the lifts inoperable. Also missing were 5 stethoscopes and 4 BP cuffs from various units wthin the facility.</p> <p>The union workers for Newington Health Care went on a labor strike at 0600 HRS on 7/3/12, and it is believed that one of the evening or midnight employees working were responsible. There were approximately 38 employees working during the evening and midnight shift. A complete list of names and identifying information will be provided by Carmichael. She stated that all of these employees would have unrestricted, and unsupervised access for the entire facility during their shifts and there are no cameras anywhere in the facility that would assist in the narrowing down of this list.</p> <p>Also of note for disruptive behavior that occurred prior to the employee labor strike was: The name</p> | | | | | | | |

Subscribed and sworn to before me this ____ day of _____ 20____

Notary Signature: _____ Title _____

Reporting Officer Signature: _____

tags on the patient's doors for the Alzheimer's ward were mixed up. The photos attached to the medical records for these patients were removed further complicating, but not making impossible the identification of the patients. Also dietary blue stickers affixed to the door name tags were removed. Again there would be unrestricted, unsupervised access to the areas that that this occurred.

I spoke with Ofc. Cunningham, who escorted the striking employees from the building and he stated that he did not see anyone carrying anything other then their purses.

Based on the fact that there was unrestricted, unsupervised access to the entire building by every employee who worked the evening and midnight shift between 7/2/12 and 7/3/12 and that there are no cameras to provided any footage of the areas the items went missing there is a very low probability of identifying any suspects or witnesses.

SUMMARY

| | | |
|---|--|--|
| REVIEW STATUS: APPROVED | REVIEWED BY: 2536 | DATE: 07/08/2012 3:56:08AM |
| INVESTIGATOR ASSIGNED: | ASSIGNED DATE: | |
| DEPT. CASE DISPOSITION: INVG | DATE: 07/08/2012 3:56:04AM | |
| UCR STATUS: OPEN | DATE: 07/08/2012 3:56:06AM | IBR EXEP CLEAR CLASS: OPEN |
| Reporting Officer 2526 Guthrie,David Officer | Reviewed/Approved by 2536 Steiner,Claude Sergeant | Date Reviewed/Approved 07/08/2012 03:56 |

Subscribed and sworn to before me this _____ day of _____ 20____

Notary Signature: _____ Title _____

Reporting Officer Signature: _____

STAMFORD POLICE DEPARTMENT
INCIDENT REPORT

INCIDENT # 1207070191
DATE 7/2/12
TIME 5:00 AM

REPORTING OFFICER R. LONGO
OFFICER NO. 290
ADDRESS LONG RIDGE OF STAMFORD

TYPE OF INCIDENT: VANDALISM: RESIDENTIAL COMMERCIAL MUNICIPAL
STREET NAME: 710 LONG RIDGE RD
CITY: STAMFORD

| STATUS | LAST NAME | FIRST NAME | MI | SEX | INCE | MO | DATE OF BIRTH | TELEPHONE | ADDRESS | DOB OR S.S.N. |
|----------|-----------|------------|----|-----|------|----|---------------|-----------------------------|---------|---------------|
| R | HUNTLEY | DENNIS | K | M | W | 61 | 922-2206 | 710 LONG RIDGE RD, STAMFORD | | |
| ARRESTS | | | | | | | | | | |
| ARREST 1 | | | | | | | | | | |
| ARREST 2 | | | | | | | | | | |
| CHARGE 1 | | | | | | | | | | |
| CHARGE 2 | | | | | | | | | | |
| CHARGE 3 | | | | | | | | | | |

STATUS CODE: A - ABANDONED B - BICYCLE E - EVIDENCE F - FOUND L - LOST R - RECOVERED S - STOLEN T - TOWED V - VEHICLE
 CODE: CITY YEAR ITEM (BRAND MODEL) VEHICLE REGISTRATION STATE COLOR CHARACTERISTICS/CONDITIONS - SERIAL OR VIN EST. VALUE PRESENT LOCATION OF PROPERTY

PROPERTY DETAILS

Day: MONDAY Date: 7/2/12 Time (approx.): 1244 Weather: HOT, HUMID Witnesses?: No Yes (W above)

On the above date and time, undersigned officer was dispatched to the above location on a vandalism call. Upon arrival, officer spoke with DENNIS HUNTLEY (DIRECTOR OF PHYSICAL PLANT) Date/Time Vandalism Discovered: 7/2/12 APPROX 5:00 AM

ITEM(S) VANDALIZED: Mailbox Lawn Shrub(s) Window(s) Auto (V above) Structure (FIRST FLOOR)
 Other: UNIMAC INDUSTRIAL FRONT-LOADING WASHING MACHINE IN LAUNDRY ROOM.

NATURE OF VANDALISM: Damaged Missing Graffiti Other: DOOR GLASS SHATTERED (METHOD UNKNOWN)
 (WASHING MACHINE LAST SEEN INTACT AT APPROX 11:00 PM ON 7/1/12.)

EVIDENCE LEFT AT SCENE? No Yes

CANVASS OF AREA? No Yes

FOLLOW-UP REQUIRED? No Yes: REFER TO PROPERTY CRIMES - OTHER INCIDENTS MAY FOLLOW (SEE BELOW)

COMMENTS: LOCAL 1199 OF S.F.E.U. UNION IS GOING ON STRIKE AT 6:00 AM ON TUES 7/3/12 (MAY BE RELATED)

REPORTING OFFICER: R. LONGO
 INVESTIGATOR: UNIFORM NONE
 JUVENILE OFFICER: NONE

PAGE 1 OF 1

Appendix E



PRESS ADVISORY

OFFICE OF
THE CHIEF STATE'S ATTORNEY
300 CORPORATE PLACE
ROCKY HILL, CONNECTICUT 06067

TEL: (860) 258-5800

CHIEF STATE'S ATTORNEY
JOHN M. BAILEY

MEDIA ADVISORY

PRELIMINARY REPORT ON NURSING HOME STRIKE INCIDENTS

Chief State's Attorney John M. Bailey will release the preliminary report on the investigation into nursing home strike incidents at 3:00 p.m. today. Copies of the report will be available to the news media at the Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT, and on the Division of Criminal Justice website at www.state.ct.us/csao

FOR IMMEDIATE RELEASE: APRIL 10, 2001

PRESS CONTACT: Mark A. Dupuis, Communications Officer

(860) 258-5997



OFFICE OF
THE CHIEF STATE'S ATTORNEY
300 CORPORATE PLACE
ROCKY HILL, CONNECTICUT 06067
PHONE: (860) 258-5800 FAX: (860) 258-5858

Memorandum

TO: JOHN M. BAILEY, CHIEF STATE'S ATTORNEY
FROM: CHRISTOPHER L. MORANO, DEPUTY CHIEF STATE'S ATTORNEY
DATE: APRIL 10, 2001
SUBJECT: NURSING HOME STRIKE INCIDENTS

Pursuant to your instructions a task force of inspectors and attorneys was organized to investigate incidents alleged to have occurred during the recent one-day strike of nursing home workers on March 20, 2001. On Monday, April 2, 2001, I met with the team consisting of myself, three attorneys and 10 inspectors. During this meeting it was agreed that the investigation would seek to address the following issues.

- 1) What events occurred at each facility?
- 2) Could any of the acts be attributed to particular individuals?
- 3) Has there been a history of these types of incidents during past strikes?
- 4) What procedure was set up to allow for the filing of complaints related to activities of this nature?

Ten nursing homes were targeted based upon referrals from the Department of Health. They were located in Waterbury, Meriden, Colchester, Griswold, Bloomfield, Hartford, Manchester, New Haven and Farmington.

After dividing up into investigative teams, the task force spread out across the State. I contacted the State's Attorneys for each of the affected judicial districts and informed them of our actions.

Supervisory Inspector Steven Oborski was assigned to take the lead in the investigative stage. In that capacity I requested that he contact the Department of Health and inquire if there were any further complaints. Each investigative team was instructed to contact the affected local police departments to ascertain if they had their own investigations pending and to inform them of our actions in their towns.

Every morning the Task Force met to go over the prior day's results. In addition, S. I. Oborski briefed me at the end of each day. The following is an interim report detailing the results of the teams' efforts to date.

I) **Waterbury**
Olympus Health Care of Waterbury
1312 West Main Street
Waterbury, CT

Inspectors DiNino and Mazzone were assigned to this facility. Based on their investigation, thus far, they have substantiated that the following acts did take place at the facility.

1. Doors to offices and the oxygen storage room had super glue or its equivalent injected into the lock mechanism.
2. Non Narcotic medications were found missing from a medcart on one of the wings.
3. Patient photographs were removed from a kardex.
4. Patient wristbands were removed from 67 patients.
5. A shower was smeared with feces.
6. Patient names were removed from the outside of rooms and patient bed tables bearing their names were switched with other patients.

Despite a search by the facility's staff, none of the wristbands were located.

Currently there is not enough evidence to link any of these acts to a specific individual. However, there are several suspects. Further investigation is warranted to develop and pursue these leads.

The administrator of this home described the detailed procedure utilized to forward complaints regarding this strike to the Department of Public Health (DPH) and the Office of Emergency Management (OEM). A copy of the Department of Health's memo is attached.

There have been no prior strikes or job actions at this facility.

There is a need for the inspectors to conduct additional interviews in an effort to connect suspects to the above mentioned activities.

II) **Meriden**
A. Olympus Healthcare Center
33 Roy Street
Meriden, CT

Inspectors McCurdy and O'Brien were assigned to this facility. Their investigation revealed that a variety of complaints had been made related to incidents that occurred at the facility. They are as follows:

- 1) The pulling of a false fire alarm.
- 2) A large amount of harassing telephone calls received by the facility during the work action.
- 3) The theft of license plates from an employee's car.
- 4) The distribution of chocolates by a staff member to patients despite their dietary restrictions.
- 5) The removal of patient wristbands and other acts of potential criminal mischief.

All of these incidents were reported to the Meriden Police Department. This office is assisting that department in the investigations.

The false fire alarm case is already well documented. A suspect has been identified and terminated administratively by the facility. In addition, it appears that the local police will be submitting an arrest affidavit in the near future.

The harassing phone call investigation appears to have few leads at this point in time. The hang-up calls have been documented; however, a trap was not placed on the phone line in time to capture any evidence. The phone calls were isolated to a two-day period and have since stopped.

The theft of marker plates from an employee's vehicle occurred well after the strike and may or may not be directly related to the strike. There are no suspects at this time. The plate number has been entered into NCIC.

The candy complaint was reported through the Community Police Division of the Meriden Police Department and was only in the initial stages of investigation. That division has requested that this office complete the investigation due to manpower constraints. The subject of that investigation, Paula Jones, has agreed to speak to us as long as it is arranged through her union organizer, Rose Brown. A voice message has been left for Ms. Brown to arrange for a meeting. Paula Jones has given numerous newspaper and television interviews in which she admits to handing out the candy. She stated that those accounts are accurate and that she was not misquoted. In the articles she claims that her actions were innocent and represented no risk. Doctors have been quoted in the articles saying that a small amount of candy is not a serious risk to a diabetic. The administration took very brief written statements from the staff concerning this incident. Some said that candy was left out at the nursing station. Others stated that they didn't see candy at the station. The administration and others claim that candy is never left out and that handing it out would not be a regular course of conduct. Ms. Jones is currently suspended pending an administrative internal investigation. This incident seems to be confined to the third floor. There were fifty-five residents on that floor and twenty-eight were on altered diets at the time, including at least one potential choking patient who was on a puree diet.

The overall list of complaints regarding other incidents such as the removal of wristbands seems to be well documented although there are currently no witnesses. This is a 173-bed facility that was near capacity. Discovery of the missing wristbands was made prior to the arrival of the replacement workers. It is common for approximately 25% of residents to remove their own bracelets. However, on the date in question the facility reported that approximately 80% of the wristbands were missing. As of this date, none of the bands have been located.

The patient name tags on all the rooms were peeled off and have not been found. Again, it is common for some residents to remove some tags, but not all at once. The nameplates on approximately 5-6 files were switched. Six sharps containers on the med carts, which are used to dispose of bio-hazard materials, were locked down in the disposal position and they had to be replaced.

According to the home administrator incidents of this nature have occurred in the past. For example, while searching for the wristbands missing as a result of this strike, a worker found a Treatment Cardex Book that had been hidden in the ceiling of the nurse's locker room. The administrator said that the book has been missing since 1995-96 and had to be replaced. He feels that the book disappeared at that time, prior to an inspection by the Department of Health and was probably taken to embarrass the facility.

All complaints were filed with the Department of Health pursuant to the regular procedure as well as with the local police department.

The facility is still being searched for the missing wristbands. In addition, the inspectors have requested to view routine security videotapes for the time periods in question. Further investigation is warranted.

**B) Meriden Center - Nursing & Rehabilitation Center
Genesis ElderCare Network
845 Paddock Avenue
Meriden, CT 06450**

Both Inspectors McCurdy and O'Brien also investigated the following complaints at this facility.

- 1) The jamming of the fax machine.
- 2) The removal of wall moldings in two patient's bathrooms.
- 3) The loosening of a door jam and the removal of a hinge pin in a patient's room.
- 4) Towels and face clothes that were thrown into a dumpster.

The Administrator stated his facility has 130 beds. He believes 125 beds were filled at the time of the strike.

The Registered Nurses and the Licensed Practical Nurses are not members of the union and did not take part in the strike. The Certified Nursing Aids, Laundry, Dietary, Housekeeping and Recreation Aides are in the union and participated in the one-day strike.

The minor damage appeared to have taken place during the evening of March 19, 2001 or early morning hours of March 20, 2001, which was prior to the arrival of the "replacement workers".

The administrator had been asked by the Department of Public Health and his company to list all strike related incidents. There are no known witnesses to any of the incidents. The damage was minor and the administrator feels there is a good relationship between his facility and the striking employees.

As there was neither physical evidence nor witnesses to any of the incidents, the management does not feel that continued investigation would be fruitful. It is the recommendation of both the inspectors that there be no further investigation at this facility by this agency.

III) **New Haven**
Atrium Plaza Health Care Center
240 Winthrop Avenue
New Haven, CT

Inspectors Bannan and Hurley investigated the following complaints related to this facility.

- 1) The removal of patients wrist bands.
- 2) The damage to blood pressure cuffs.
- 3) The removal or theft of mechanical patient lift chains.
- 4) The loosening of bolts to a mechanical patient lift resulting in its collapse while being used to lift a patient.
- 5) The removal or theft of stethoscopes, customized patient splints, and heel poseys.
- 6) The puncture of the inner seals of formula feeding bottles. (With the outer seals being replaced concealing the contamination.)
- 7) The use of an unsterile uethral catheter kit on a patient. The kit's condition was not discovered as punctures to it had been concealed. Multiple kits were found to have been damaged in this manner.
- 8) The removal or switching of patient's name plates.
- 9) Patient's narcotics cards were put in disarray.
- 10) Johnny coats were tied in knots.
- 11) A supply room was ransacked and sprayed with shaving cream.

All the acts appear to have occurred during the second shift on March 19, 2001, the day prior to the strike. It is the opinion of the inspectors that some of the acts listed above are not worth investigating further as they are nuisances with little effect on patient health or safety. Other acts however warrant further investigation as they could have seriously jeopardized patient health and safety.

As of this writing, no suspects have been identified. Physical evidence only supports that the acts occurred. Most of the involved acts took place on two of four units encompassing approximately ten possible suspects.

A written report was filed March 23, 2001 by the facility administrator with the Department of Health pursuant to normal procedure.

There has been at least one previous strike at this facility. As a result of acts that occurred at that time barbed wire was placed on top of the fence surrounding the facility, including a gated driveway.

This investigation is in its early stages as the complaint was not received by this office until the middle of last week. The investigative team assigned to this matter is continuing to pursue these allegations.

**IV) Colchester
Harrington Court Genesis
Elder Care
Harrington Court
Colchester, Connecticut 06415**

Supervisory Inspector DiLullo and Inspector Brutnell were assigned to investigate the following complaints at this facility.

- 1.) The employee for house keeping had her cleaning equipment removed from her cart which necessitated her taking extra time to restock her cart.
- 2) The temperature log, which reflects daily temperature readings of water temperature, was missing from the kitchen.
- 3) The thermostats were turned up in various rooms. The maximum room temperature can only be 80 degrees and this problem was elevated by turning the temperature down.
- 4) The removal of patient identification wrist bands.

The last issue involved the removal of identification bands from approximately thirty-five patients. The facility administrator stated that all patients identification bands were checked by staff on March 19, 2001 at approximately four o'clock in the afternoon and found to be present. On March 20, 2001 between 4:00 p.m. and 5:00 p.m. he was alerted to the fact that thirty five patients were missing the identification bands. All the bands were replaced. It should be noted that thirty-three of these patients suffer from dementia.

Some interviews have been conducted and additional ones are scheduled for this week.

**V) Griswold
The Center for Optimum Care
97 Preston Road
Griswold, Connecticut 06351**

Supervisory Inspector DiLullo and Inspector Brutnell also investigated the following complaint at this institution.

- 1) The water temperature in the building was found to be at 139 degrees. Inspection of the valve revealed it had been turned one and one half times to produce excessively hot water.

The valve that was tampered with is located in the boiler room in the basement of the facility. The boiler room is unsecured. Frequently, nurses and staff enter the boiler room to adjust the thermostats for the various wings of the facility. No one was injured during the time that the water was excessively hot.

The environmental manager stated that the water temperature is tested at various times during the day. He advised the inspectors that he does maintain a hand written log of the date, time, location and degree of the water. He stated that his records would also reflect who tested the water. He attempted to supply the investigators with a copy of his records for March 19 & 20, but discovered that they were not in his book.

A complaint regarding this incident was filed with the Department of Health.

The administrator did not have any knowledge of any prior history of strike related incidents. The inspectors will continue with additional interviews this week.

VI) **Bloomfield**
Wintonbury Care Center
140 Park Avenue
Bloomfield, CT

Inspectors Leavitt and Perez investigated the following complaints related to this facility.

- 1) The removal of wrist identification bands from patients.
- 2) The loss or theft of four cases of ginger ale.

The assigned inspectors interviewed the facility administrator and learned that on March 17, 2001, the director of nursing reported that plastic wristbands of approximately 80 residents had been removed. The facility utilizes both plastic and metal wristbands however only plastic bands were removed. A majority of the patients whose bands were removed suffer from significant dementia, limiting their ability to assist in the investigation. The inspectors interviewed a number of patients with no success in ascertaining anyone responsible for this large-scale removal. One patient did admit that he had removed his own band. None of the missing wristbands were located.

Efforts were made to review any security videotapes for the dates in question however they had already been taped over.

The facility utilized the normal procedure and filed complaints with the Department of Health.

The administrator reported that there was no history of incidents of this nature during prior work actions.

The inspectors will continue to investigate the removal of the bands. This office is not pursuing the loss of the ginger ale.

VII) Hartford
Trinity Hill Care Center
151 Hillside Avenue
Hartford, CT.

Inspectors Leavitt and Perez also investigated the following complaints related to this facility:

- 1) The removal of patient identification wrist bands.
- 2) Patient flow sheets were found to be missing.

Inspectors Perez and Leavitt interviewed the administrator of Trinity Hill who stated that patient name bands and the Certified Nurse Assistants patient activity flow sheets were found to be missing on the morning of March 20, 2001. Neither the wristbands nor the patient activity flowsheets have been found as of this date. Video of the front lobby, front of facility and rear parking lot were taken by a private security force hired by the facility. Attempts are in progress to obtain these tapes.

In the course of this investigation six residents were interviewed. The interviews produced negative results as none of the residents remembered having their name bands removed.

The facility utilized the normal procedures and filed complaints with the Department of Health.

The administrator reported that there was no prior history of incidents of this nature during prior work actions.

VIII) Manchester
Olympus Health Care/West Side
349 Bidwell Street
Manchester, CT

Supervisory Inspector Oborski investigated a report that a picketing employee had a videotape of a replacement worker verbally abusing a resident of the above facility on March 22, 2001. A review of the tape, obtained by S.I. Oborski, shows a verbal confrontation between the person who is videotaping the event and the replacement worker. No actions were directed at a resident/patient. Accordingly, it is Mr. Oborski's recommendation that the matter be closed.

IX) Farmington
Olympus Healthcare Center
20 Scott Swamp Road
Farmington, Connecticut

This facility registered a complaint with the Department of Health stating that approximately 68 patients' identification wristbands were removed from the patients. As of this date, none of the wristbands has been located.

The Farmington Police Department is investigating the matter. This office has offered our assistance and will be kept apprised of the results of their efforts.

X) Prior Strike incidents
Village Manor Health Care
16 Windsor Avenue
Plainfield, Connecticut

During the course of the task force's investigation this office received unsolicited information from the administrator's designee for the above-mentioned facility. The administrator's designee was instructed to put the information in writing and forward it to this office. This was done by way of a letter addressed to you. Supervisory Inspector Oborski contacted the administrator's designee and discussed with him the details of his information. As the incidents described relate to a work action in 1998 I will not detail them at this time. In summary, however, many of the complaints mirror the actions reported to have occurred during this strike. Further details in this matter are available upon your request.

XI) Conclusion and recommendations

While the task force has only actively investigated these matters for the past week the inspectors have ascertained that a variety of incidents as stated above did occur. Due to the heavily politically charged environment as well as the fear and inability of residents to assist in the investigation few of the incidents can be connected to particular individuals at this time.

There is no doubt that while some of the acts in question are crimes of nuisance and mischief others could have had an effect resulting in seriously jeopardizing the resident's health and safety. It is my recommendation that these incidents continue to be vigorously investigated.

The investigation has shown that these types of incidents are common during work actions at facilities of this nature. Accordingly, efforts should be made to preserve evidence of such acts. Security video tapes should be preserved so that they are not taped over. Photographs should be taken of any damaged areas of a facility and physical evidence should be retrieved to assist in further investigations. All of this can be achieved if there are more timely efforts made in referring complaints to law enforcement officials.

Further details including each team's investigative reports are available for your review. I will await your further instructions and of course I am available should you have any questions or wish to discuss this matter in greater detail.

CLM/rpb
 Attachment

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JONATHAN B. KREISBERG, Regional Director of
Region 34 of the National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v.

HEALTHBRIDGE MANAGEMENT, 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 HEALTHCARE 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,

Respondents.

CIVIL NO.: 3:12-cv-01299 (RNC)

DECLARATION OF LORRAINE MULLIGAN

I, Lorraine Mulligan, hereby declare and state the following:

1. I am over the age of eighteen, have personal knowledge of the facts set forth in this affidavit, and if called as a witness, would testify to the same.

2. I am a Registered Nurse, an Advanced Practice Registered Nurse, and am Board Certified as an Adult Health Clinical Nurse Specialist. I have approximately twenty-five years of experience in the long term health care industry, including serving as an Independent Nurse Consultant for both private companies and at the direction of the State of Connecticut

Department of Public Health, monitoring and reviewing facilities under receivership or consent orders or to address specific issues such as infection control and/or wound care.

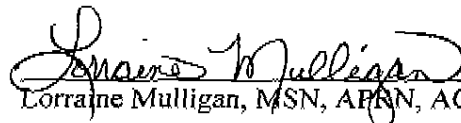
3. I was retained by HealthBridge Management, LLC to analyze the impact that the July 3, 2012 staff walk out has had on resident care.

4. Following my review and assessment, I provided the attached report, summarizing my analysis and conclusions.

5. The opinions provided in my attached report are my opinions, which are based upon a reasonable degree of professional certainty.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, information and belief.

Dated: October 19, 2012


Lorraine Mulligan, MSN, APRN, ACNS-BC, WCC

LORRAINE H. MULLIGAN, MSN, APRN, ACNS-BC, WCC
20 ARMITAGE DRIVE
BRIDGEPORT, CT 06605

October 13, 2012

RE: Jonathan B. Kreisberg, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board v. HealthBridge Management, 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 Healthcare 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 Weathersfield Health Care Center

Dear Ms. Alito,

As you requested I am providing this report in connection with the above-referenced matter. Beginning October 4, 2012, I reviewed documentation from Danbury Health Care Center, West River Health Care Center, Newington Health Care Center, Westport Health Care Center, and Long Ridge of Stamford Health Care Center to analyze the affect on resident care of the July 3, 2012 staff walk-out, which resulted in the replacement of a substantial portion of nursing and non-nursing staff at each of the facilities. My investigation comprised conversations with nursing and administrative staff and a comprehensive inspection of resident and facility records dating from January 1, 2012 to September 30, 2012.

I am a Registered Nurse, an Advanced Practice Registered Nurse, and am Board Certified as an Adult Health Clinical Nurse Specialist. I have approximately twenty-five years of experience in the long-term health care, including serving as an Independent Nurse Consultant both for private companies and at the direction of the State of Connecticut Department of Public Health, monitoring and reviewing facilities under receivership or consent orders or to address specific issues such as infection control and/or wound care.

Background and Summary of Facts

Events Creating Immediate Danger of Death or Serious Harm

Section 19-13-D8T of the Connecticut Public Health Code defines the term "Reportable Event" and requires chronic and convalescent nursing homes and rest homes with nursing supervision to immediately notify the Connecticut Department of Health when a "Class A", "Class B", or "Class C" event occurs. The most serious type of event, denoted "Class A", is defined as "an event that has caused or resulted in a patient's death or presents an immediate danger of death or serious harm."

Clinical documentation reveals a collection of alarming, malicious events of apparent sabotage by the hand of the original, pre-July 3 staff, that placed the health of many residents in immediate danger. These "Class A" incidents are detailed in event reports submitted as required by law to the Connecticut Department of Health and are summarized and analyzed below. Due to the gravity of the incidents, administrative staff also notified local police departments, and police officers responded.

Immediately after the union walk-out, staff of Newington Health Care Center determined that a substantial amount of critical facility equipment and critical resident documentation was missing and that some resident equipment had been altered. The staff correctly recognized the situation as presenting an immediate danger of death or serious harm and on July 3, 2012 reported it to the Department of Health as a "Class A" event.

The missing equipment comprised five stethoscopes, used to measure a person's heart rate and assess lung sounds, and three sphygmomanometers, used to measure a person's blood pressure. Many resident medications have blood pressure- and heart rate-dependent administration parameters, and an inability of facility staff to gather these vital signs when necessary creates the potential for residents not receiving critical medications when necessary. Additionally, without this equipment, staff cannot conduct routine resident assessments, which often identify clinical issues not exposed by residents' appearances, and cannot conduct assessments in an emergency situation, such as a resident going into cardiac arrest.

Multiple exclusive incidents of altered documentation and altered resident identifying materials are described in the "Class A" report. The first documented incident describes an alteration to Medication Administration Kardexes, which are documents used by nursing staff to determine the type and dose of medications administered to residents. As a safeguard to prevent a medication from being administered to the wrong resident, the Kardex documents are designed to contain a photograph of each resident, as a means of identity verification. In their "Class A" report, staff found that between twenty and twenty-five of the fifty-nine photographs in the book had been removed and that the photographs removed were of residents suffering from Dementia and Alzheimer's disease. Nearly all of these cognitively impaired residents are physically incapable of stating their names or identifying themselves, and the new, July 3 staff had no previous experience with the residents. The removal of Kardex document photos places any resident involved in peril generally, but since these residents are more difficult to identify, the removal of their photographs results in an even higher order of potential danger.

The second incident in the report describes an alteration of nameplates outside resident rooms. On all units, the name of each resident in each room is posted outside the doorway to the room. According to the report, staff found the nameplates switched for fourteen residents suffering from Dementia. The manner of alteration resulted in roommates having their identities switched. Since the new staff was unfamiliar with the residents and since almost all these residents are unable to identify themselves, this

second incident, like the first, placed the residents in immediate and serious danger. The nameplates are used by staff and outside vendors, and their alteration resulted in numerous and varying opportunities for the residents to be placed in serious harm. For example, staff might deliver the wrong meal tray to a resident, including possibly a meal that the resident has been determined to be unable to digest due to the possibility of choking; an x-ray technician might conduct an x-ray on the wrong resident, and staff and physicians would not know that the results they were viewing were not correct; a phlebotomist might draw blood on the wrong resident, causing a potentially harmful medication or procedure to be performed on the wrong resident, causing a resident to miss requiring routine testing for a serious condition, and causing a resident to be wrongly transferred to a hospital when instead the resident's roommate should have been sent.

The third incident in the report describes the removal of safety identifying information outside resident rooms. As residents with Dementia and Alzheimer's disease lose cognitive function, they also often develop problems with swallowing. Because of the prevalence of swallowing issues on the unit housing these residents and because of the residents' general inability to communicate and to understand their own swallowing abilities, blue-colored dots are placed outside the rooms of residents with dietary restrictions due to swallowing concerns, as an additional warning to staff to ensure vigilance in delivering the correct meals and fluids to the residents. In the Class A incident report, staff stated that approximately thirty of the blue dots on the unit had been removed. Again, the new staff were unfamiliar with these residents, and the residents generally are unable to identify themselves; so, the removal of the dots placed the residents in imminent and severe danger.

The fourth incident in the report describes the switching of approximately forty wheelchair cushions and name labels. Wheelchairs are customized for safety and comfort, and the use of an incorrect wheelchair can place a resident at risk for a fall and for the development of wounds. These alterations also occurred on the unit housing dementia residents, and those residents are generally unable to know whether a chair is theirs or what type of chair they are supposed to use.

The fifth incident in the report describes the absence for the entire month of June of "Intake and Output" sheets. The monitoring and control of fluid ingested by residents is an important area of care in long-term health care facilities. Many residents are afflicted with conditions that require their fluid intake to be restricted, and many residents do not ingest enough fluids, resulting in dehydration. Without Intake and Output sheets, which staff use to document and monitor the amount of fluids ingested by residents, nursing staff cannot successfully control the fluid intake of residents, and residents are placed at risk.

The sixth incident involves the tampering with six of the seven mechanical lifts in the facility. The lifts are used to raise and move residents unable to walk or bear any weight on their legs. Staff reported that the leg stabilization bar, a critical component of the lifts, was missing for six lifts in the facility. If a caregiver were to have used any of the six

lifts, there would have been a dangerous probability that the lift would have fallen over. Many injuries and deaths have resulted from falls from mechanical lifts. Staff report that some of the bars were later found deeply hidden in a linen closet.

On the morning of July 3, 2012 at Danbury Health Care Center, the replacement staff, which was on its first shift of the day, determined that the name bands of approximately thirty residents were missing. The name bands are a primary means of identifying residents, and nurses are required to check a resident's name band before administering medications to the resident. Being on its first shift in the facility, the replacement staff did not have any familiarity with the residents, and many of the residents involved have cognitive limitations and are unable to correctly state who they are. Without the name bands in place, staff were unable to determine who each resident was. Episodes of physiologic instability are common and some, such as chest pain or a very low blood sugar, are life-threatening and demand immediate response. Were one to have occurred, staff would have been unable to research the resident's medical history, including determining what standing emergency medication orders the resident had in place and which physician should be informed of the resident's condition.

Non-Incident Data

My investigation also included a review of non-incident data relating to the care and satisfaction of residents. These data include resident survey results, minutes of resident council meetings, and grievance logs. Most areas have improved or been maintained since the July 3, 2012 staff change.

A comparison of resident satisfaction survey data for all facilities for the period of April 2012 through June 2012, when nursing duties were carried out by the old staff, to the period of July 2012 to September 2012, when the new staff was present, show an improvement in five of the six categories identified. The other category was insignificantly changed.

Grievance Logs are used to document concerns voiced by residents and families. Documentation of issues related to direct care provided by CNAs and nurses to residents shows a reduction in the number of concerns raised since the July 2012 staff change. I also reviewed the minutes of resident council meetings for the same time frame. The number of negative comments made by residents substantially decreased as of July 2012, and the number of positive comments as of the same time substantially increased.

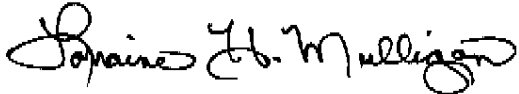
Conclusion

The nature and severity of the Class A incidents described above at HealthBridge's Danbury and Newington facilities put the safety, health and well-being of the residents of those facilities in immediate jeopardy. It is my professional opinion that if any of the striking workers were involved in the behaviors described above, a court order requiring the reinstatement of any of them or additionally those who had knowledge of sabotage and failed to act would expose the residents to immediate danger and put them at risk of

suffering serious harm or death. In view of this risk, together with the general improvement in most areas I reviewed with respect to non-incident data relating to the care and satisfaction of residents, I believe that reinstatement of any worker who engaged in sabotage and those who were complicit would be contrary to the public policy of ensuring resident safety.

Please feel free to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read "Lorraine H. Mulligan". The signature is written in a cursive, flowing style.

Lorraine Mulligan, MSN, APRN, ACNS-BC, WCC

20 ARMITAGE DRIVE • BRIDGEPORT, CT 06605
PHONE (203) 522-2011 • E-MAIL LORRAINEHM@GMAIL.COM

LORRAINE H. MULLIGAN, MSN, APRN, WCC

WORK EXPERIENCE

2004-Present Multiple Facilities

Independent Nurse Consultant

- Served as a consultant for facilities under Receivership and as the Nurse Monitor and consultant in buildings under Consent Orders by the Connecticut Department of Health. In addition to being approved for the oversight of facilities under general Consent Orders, also approved by the Department of Health for oversight of facilities with provisions specific to infection control and/or wound care.

2003-2004 Southport Manor Healthcare Center Southport, CT

Director of Nursing

- Managed a 140-bed facility, leading 45 licensed nurses and 75 Certified Nursing Assistants.
- Directed the revival of a facility in Receivership, operating under a Consent Order from the Department of Health.
 - Wrote, implemented, and managed the Plan of Correction, which included a Directed Plan of Correction mandated by the Department of Health. Achieved 100% compliance for all deficiencies on resurvey. Drafted and implemented the Continuous Quality Improvement Plan to ensure consistency in administering quality care.

2002-2003 Mediplex of Stamford Stamford, CT

Director of Nursing

- Coordinated health care programs and provided facility management for a 120-bed nursing home.
- Led a staff of over 110 nurses and Certified Nursing Assistants, and supervised them in the performance of their duties.
- Revitalized a facility out of compliance with State of Connecticut health care standards, successfully achieving every required State certification.
 - Drafted and executed the Plan of Correction and trained management and staff on its implementation. Wrote the facility's Continuous Quality Improvement Plan in order to monitor continued adherence to required standards.

1987-2002 Fairfield Manor Health Care Center Norwalk, CT
Director of Nursing, Director of In-Service Education, Wound Care Coordinator

- Ensured compliance with State standards while serving as Director of Nursing from 2001-2002.
- Managed the care of residents in a 240-bed facility, personally directing a staff of over 180 health care workers to provide first-rate treatment and improve patients' quality-of-life.
- As In-Service Director, educated over 260 personnel in mandated training on OSHA and State requirements and on specific departmental issues.
- While serving as Wound Care Coordinator, achieved a remarkable Nosocomial Pressure Ulcer rate below 1%, reinvigorating the facility's devotion to providing total-spectrum care.

1975-1979 Bridgeport Hospital School of Nursing Bridgeport, CT
Curriculum Coordinator, Instructor

1973-1975 Boston University School of Nursing Boston, MA
Instructor

1972-1973 Salve Regina College School of Nursing Newport, RI
Instructor

1971-1972 Hollywood Presbyterian Hospital Hollywood, CA
Instructor School of Nursing

EDUCATION

2006 Capital Community College Hartford, CT
Infection Control In Long Term Care

2000 Fairfield University Fairfield, CT
Family Nurse Practitioner Program

1970-1971 The Catholic University of America Washington, DC
Master of Science, Medical-Surgical Nursing

1965-1969 Long Island University New York City
Bachelor of Science, Nursing

- *Graduated with Departmental Honors*
- *Received the Nursing Service Award*

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JONATHAN B. KREISBERG, Regional Director of
Region 34 of the National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v.

HEALTHBRIDGE MANAGEMENT, LLC; 107
OSBORNE STREET OPERATING COMPANY II,
L.L.C 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 HEALTHCARE 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,

Respondents.

CIVIL NO.: 3:12-cv-01299 (RNC)

DECLARATION OF CORINNE SCHWARZ

I, Corrine Schwarz, hereby declare as follows:

1. I am over the age of eighteen, have personal knowledge of the facts set forth in this affidavit, and if called as a witness, would testify to the same.
2. I have more than eighteen years of experience in the health care industry, with a focus on clinical support and compliance in home care and long term sub-acute healthcare. I am a Registered Nurse with a B.S, A.S. and WCC (National Wound Care Certification). I currently provide services as a Nurse Consultant for long-term care as the President of Clinical Management Services, LLC, specializing in regulatory compliance and quality care improvement

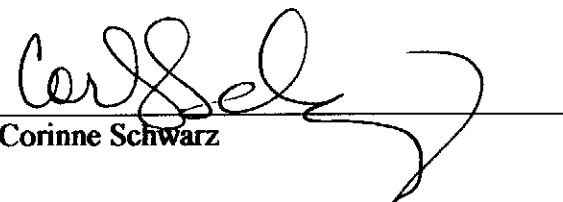
3. I was retained by HealthBridge Management, LLC with the intention of establishing a professional opinion on the level of care that exists at each of the five observations of five Connecticut Health Bridge skilled nursing homes, including the Danbury Healthcare Center, the Long Ridge of Stamford Health Care Center, the Newington Healthcare Center, the Westport Healthcare Center, and the West River Health Care Center (the "Centers") and at the Centers collectively, and to determine whether reinstatement of the old staff would be in the public interest.

4. Following my review and assessment, I provided the attached report, summarizing my analysis and conclusions.

5. The opinions provided in my attached report are my opinions, which are based upon a reasonable degree of professional certainty.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, information and belief.

Dated: October 19, 2012


Corinne Schwarz



Corinne Schwarz, President
tel. 860-508-1032
eschwarz@cms-ct.com
www.cms-ct.com

RE: Jonathan B. Kreisberg, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board v. HealthBridge Management, 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 Healthcare 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

Dear Ms. Alito,

As you requested I am providing this report in connection with the above-referenced matter. I performed on-site observations of five Connecticut Health Bridge skilled nursing homes, including the Danbury Healthcare Center, the Long Ridge of Stamford Health Care Center, the Newington Healthcare Center, the Westport Healthcare Center, and the West River Health Care Center (the "Centers") with the intention of establishing a professional opinion on the level of care that exists at each facility and at the Centers collectively, and to determine whether reinstatement of the old staff would be in the public interest.

As set forth in more detail on my attached resume, I have more than eighteen years of experience in the health care industry, with a focus on clinical support and compliance in home care and long term sub-acute healthcare. I am a Registered Nurse with a B.S, A.S. and WCC (National Wound Care Certification). I currently provide services as a Nurse Consultant for long-term care as the President of Clinical Management Services, LLC, specializing in regulatory compliance and quality care improvement.

Based upon my on-site observations and analysis of the statistical data I collected and reviewed related to the five Connecticut HealthBridge facilities listed above, it is my professional opinion that requiring the Centers to reinstate the striking workers would create a substantial and significant disruption in care. Requiring a further adjustment to the continuity and enhancements in care the residents are receiving and would be contrary to the interests of the residents and contrary to the public interest.

Summary of Method, Data Collected and Assessments

The method I used was the comparison of clinical indicators, looking at data collected over the period from January 2012 through September 2012, broken down by calendar quarter. More specifically, I reviewed data in the areas of facility acquired pressure ulcer development, falls, falls with injury, injury of unknown origin, allegations of abuse, and weight loss. In addition to the statistical data I performed direct observation on the units, read and summarized resident grievances and interviewed alert and orientated residents. Rounding on the facility units allowed me to assess the milieu of each unit. I observed the way the residents looked in general. Their hair, clothes, equipment they were sitting on, any odors that may indicate untimely incontinent care or poor hygiene.

Observation of Facilities

In all five facilities I found the residents to be well dressed, clean, with no odors. The residents were observed to be positioned well both in bed and out of bed with adaptive equipment that I would expect to see, such as pressure reducing cushions, splints, Low air loss mattresses, chair and bed alarms and heels up cushions. Staff was observed in each facility to have positive interactions with the residents. Many staff was seen smiling, conversing with the residents both in their rooms and in the hallways.

Review and Assessment of Clinical Statistics

In review of the facility clinical statistics that were gathered from January 2012 through September 2012 while I was in the facility showed both increases and decreases in the clinical statistics in each of the Centers, as explained below.

a) Pressure Ulcers: In the area of pressure ulcers, I did not see any substantial increases in the percentages of facility acquired wounds. This would lead me to preliminarily state that the facilities are turning and repositioning residents, providing adequate hydration and nutrition and using risk reduction interventions to prevent the development of pressure ulcers.

b) Falls: In the area of falls, the clinical statistics in all facilities showed an increase. However, I do not attribute this to a decrease in the quality of care that the patients are receiving. In speaking to the administration in a few facilities, I was told by the administration at a few facilities that the residents are “now ambulating” and “being encouraged to engage in activities.” This is a change from the practice in place with the prior staff and is obviously a positive development for overall patient well-being. In addition, with a large turn over in direct care staff, I would expect to see an increase in clinical indicator percentages in some areas due to the learning curve of staff in relation to knowing the residents’ routines and care needs. Thus, as time goes on and the new staff is more familiar with these routines and care needs, I

would expect to see a decrease in these incidents. In all facilities, the administration was aware of their increase in falls and stated they were educating and reviewing each resident fall.

c) Weight Loss: The area of weight loss statistics did not show any drastic change in percentages. This led me to the determination that residents are receiving adequate nutrition and supplements.

d) Grievances: In the area of resident grievances, I did not see any grievances that would be of immediate concern. Most grievances of the facility are recorded in multiple facilities across the state of Connecticut. Moreover, and of particular significance here, the grievances in relation to resident care issues decreased in the past quarter.

e) Resident Interviews: During resident interviews, residents in three of the facilities expressed a strong preference for the “new staff” or replacement workers while residents in one facility made both positive and negative comments about both the new and old staff and one facility had consistently positive comments about the old staff. Resident interviews were performed by a private interview with consistent questions. In each facility I targeted the resident council president and vice president. The resident council president is a voted position by the majority of other residents in the facility. This resident is then the “voice” of other residents in the facility and attends the monthly resident council. In three out of the five facilities, the residents were quite direct that they preferred the “new” staff over the “old” staff. Comments such as “They are not as pushy as the old staff”, “Call lights are answered quickly now”, “They try extra hard to please us”, The old staff “don’t value us they think we are dumb”, The current staff “talk to me more” “Staff is better friendlier and more helpful”, “They get to me quicker”, The previous staff “didn’t want to take care of us because they had to go on break”, “Care is better” “I have never met a staff like this they make it seem like home”. The positive comments about the previous staff were consistent from one of the facilities. The comments they stated were “It was like family”, “We got along good”, “They were very nice, they were very good”, “I like them better”, “I miss them”. The majority of the residents commented on the current staff as trying harder more respectful and even though one facility leaned towards wanting the previous staff back, they felt the new staff were treating them with dignity and their needs were being met.

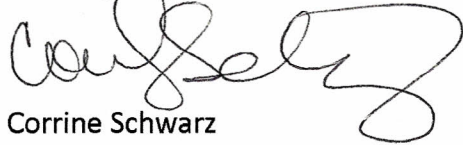
Impact and Conclusion

The adjustment period for most staff in a new position is approximately 90 days. The new staff will need continuous education and time to get into a routine in all the buildings and time to learn what the residents’ likes and dislikes are. Based on my experience, I have observed that it

is very difficult for a resident who has resided in a facility for many years to have all new caregivers overnight. The previous staff, as a general matter, knew the residents better and in a situation like this the uneasiness a resident feels can be overwhelming. As a result, residents are typically adverse to change and may be resistant to accepting new, replacement staff. Therefore, it was eye opening and informative to hear the residents voice their opinions as they did, and indicative of the type of care they were receiving previously. In other words, given that the new staff have been in the Centers for only 90 days and some residents are likely to be still adjusting to the new staff, the level of vocal support expressed for the new staff was significant. This, in conjunction with the statistical data, leads me to conclude that the overall level of care has improved and that it would be contrary to the interests of the residents and the public interest to require the Centers to reinstate the previous staff.

Please feel free to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'Corrine Schwarz', written in a cursive style.

Corrine Schwarz

CORINNE S. SCHWARZ, R.N. B.S. A.S. WCC
16 Fir Grove Rd
MANCHESTER CT 06040
(860) 508-1032

EMPLOYMENT:

August 2003-Present: **PRESIDENT CLINICAL MANAGEMENT SERVICES, LLC**

Nurse Consultant for long-term care

- Certified MDS 3.0 instructor
- * Wound certified WCC
- * Assistance in the implementation of Accu Nurse-Real time EHR system
- * Assistance in Implementation of American Health Tech-MDS 3.0
- * Certified in performing Mock Surveys with detailed plan of correction
- specializing in Regulatory compliance and quality care improvement
- Assist in improving quality indicators and quality measures
- Development of clinical policy procedures and protocols
- Survey preparation, IDR preparation, Plan of correction development.
- Educational programs
- Care plan development, c.n.a. assignment enhancement
- Assistance with Wound care program, Falls programs, Restraint reduction, Dining enhancement programs.

2008-2010: I-CARE MANAGEMENT

Chief Clinical Officer

- Clinical Support and oversight of 9 Skilled Nursing Facilities
- * Successful in leading a 234 bed facility into compliance and off the Federal SFF list within the first year.
- * 25 % decrease in D level tags in the first year
- * 75 % decrease in G level or higher tags in the first year
- Survey Management and regulatory compliance
- Direct Clinical Resource and Leader for Facility Staff
- Oversight of company Wound Program
- Policy and Procedure Development
- Program Development

2004 – 2008: MARATHON HEALTHCARE GROUP

Chief Clinical Officer

- Clinical Support and system development for startup company taking 4 facilities out of bankruptcy and state receivership and turning them into quality facilities with improved outcomes in all areas.
- Development support and orientation of facility clinical teams
- 100% reduction in G tags by third year
- Policy and Procedure Development of all clinical policies and systems
- Increased Quality Mix
- Census development by improving care and Marketing from 75% - 98% occupancy
- Clinical Responsibility for the entire Marathon Healthcare portfolio.

- Acquisition due diligence and clinical assessment of newly purchased facilities
 - Maintains positive relationships with regulatory agencies.
-

April 2002-August 2003: NATIONAL HEALTH CARE, EAST HARTFORD, CT.

Regional Clinical Coordinator

- Clinical quality care management of 4 Connecticut facilities
- Monthly site visits to facilities which focus on analysis of quality indicators and the CQI process

March 2001-June 2002: HEALTHCARE CONSULTATION AND EDUCATION RESOURCES. NORWALK, CT.

Clinical Nurse Consultant

- Responsible for the oversight of direct patient care in Connecticut facilities.
- Function as a liaison between the facility and the State of Connecticut Department of Public Health, with responsibility of reporting to the DPH as well as improving overall performance in the Facility.
- Perform continuous on-going education of the facility employees._____

October 1999 to March 2001: HARBORSIDE HEALTH CARE, WEST HARTFORD, CT.

Regional Clinical Service Manager

- Clinical manager of six skilled, rehabilitation and one independent living facility in Connecticut.
- Lead regional team in mock survey process. Analyzed findings and developed action plans to improve healthcare delivery in each facility.
- Successful implementation of quality standards and new clinical programs.
- Monthly site visits to facilities which focused on analysis of quality indicators and the CQI process.
- Coordination and implementation of clinical enhancement and training programs

April 1993-October 1999 MANCHESTER MANOR, MANCHESTER, CT.

Director Of Nursing Services

- Manager of a 126 bed sub-acute/skilled nursing facility with direct supervision of over 150 employees
- Ensured clinical compliance of all nursing staff with state and federal guidelines
- Nursing recruitment which included hiring and performance evaluations for all nursing staff
- Liaison between managed care contracts and resident care delivery to ensure cost effective quality of care.
- Developed and implemented a fall prevention program
- Continuing Care Accreditation Committee, CCAC evaluator

Assistant Director of Nursing Services

- Team leader for successful sub-acute JCAHO accreditation
- Staff Development

- Infection Control Certification
- OSHA coordinator
- Health care focus for Long Range Planning Committee
- Developed wound care protocols for facility
Resident Care Supervisor- MDS Coordinator

9/96 MANCHESTER VISITING NURSE, MANCHESTER, CT.
Staff Nurse – Home care, Per Diem

Nov.1994–Oct 1996 MANCHESTER MEMORIAL HOSPITAL, MANCHESTER,CT.
Staff Nurse- Special Care unit/ I.C.U.

EDUCATION:

March 1996-2001 CHARTER OAK STATE COLLEGE, NEW BRITAIN, CT.
Bachelor of Science Degree
Major: Health Administration

July 1993 QUINNIPIAC COLLEGE, HAMDEN CT.
Associates of Science Degree, Nursing
President of nursing class (114 students)

May 1991 MANCHESTER COMMUNITY COLLEGE, MANCHESTER, CT.
Associates of Science -Business Administration and Accounting

PROFESSIONAL DEVELOPMENT:

May 2007-present **CONNECTICUT ASSOCIATION OF HEALTH CARE FACILITIES**
Chairperson for Clinical Committee
Agenda Development, coordination and Teacher for DNS Leadership
Course

CONNDONA/NADONNA Member

WCC National Wound Certification

MDS-CT MDS 3.0 Certified Instructor National Resident Assessment Institute

REFERENCES: Furnished Upon Request

Appendix G

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JONATHAN B. KREISBERG, Regional Director of
Region 34 of the National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v.

HEALTHBRIDGE MANAGEMENT, 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 HEALTHCARE 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,

Respondents.

CIVIL NO.: 3:12-cv-01299 (RNC)

DECLARATION OF JACK HERR

I, Jack Herr, hereby declare the following:

1. My wife is a resident at HealthBridge's Danbury Health Care Center (the "Center"). She has been a resident of the Center for approximately two years. I have personal knowledge of the facts set forth herein based on my personal observations and experiences assessing the quality of care provided to my wife during the time she has been a resident at the Center.

2. I have noticed a significant improvement in the quality of care that my wife has been receiving since July 2012 when the new staff replaced the workers who are currently

striking. I am extremely happy with the care that my wife is now receiving. The new staff at the Center seem much more interested in providing care to my wife and the other residents. They are more friendly and greet both the residents and visitors in a pleasant manner at the Center.

3. I am happier with the care that my wife is receiving now as compared with the care she was receiving prior to the strike. For example, when my wife or I would complain to the workers who are now on strike, it would go over their heads and they wouldn't listen.

4. My son and I have discussed the change to the quality of care and he agrees with me that things are much better since the workers went out on strike.

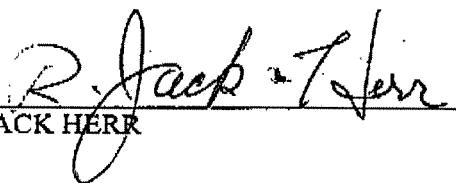
5. Even my wife, who cannot speak to me, has indicated by shaking her head that she likes the new staff better than the prior staff.

6. My wife has a closer relationship with the new staff and I sleep better at night knowing that she is being well cared for now.

7. It would be upsetting to me, my son and my wife if the workers who are out on strike were to come back to work.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, information and belief.

Dated: October __, 2012



JACK HERR

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JONATHAN B. KREISBERG, Regional Director of
Region 34 of the National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

CIVIL NO.: 3:12-cv-01299 (RNC)

Petitioner,

v.

HEALTHBRIDGE MANAGEMENT, 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;
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D/B/A WESTPORT HEALTHCARE CENTER;
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II, LLC D/B/A WEST RIVER HEALTH CARE
CENTER; 341 JORDAN LANE OPERATING
COMPANY II, LLC D/B/A WETHERSFIELD
HEALTH CARE CENTER,

Respondents.

DECLARATION OF BARBARA RECKER

I, Barbara Recker, hereby declare the following:

1. My mother is a resident at HealthBridge's Westport Health Care Center (the "Center"). She has been a resident of the Center for approximately six and one half years. I have personal knowledge of the facts set forth herein based on my personal observations and experiences (including the time I spend volunteering at lunch time at the Center) assessing my mother's interactions with staff and the quality of care provided to my mother during the time she has been a resident at the Center.

2. Given that my mother has been a resident at the Center for many years, it was an incredibly traumatic experience for my mother and me when the Center's workers left and went on strike in July 2012. My mother felt abandoned by the striking workers and was very upset when they began the strike.

3. The staff that was at the Center following the strike went above and beyond to help make sure that my mother, who is very active and alert, was okay and to help her with the transition.

4. My mother and I felt that the transition to the new staff went smoothly and we both believe that it would be awkward, difficult and strained for my mother if the striking workers were to come back now.

5. I feel that the quality of my mother's care now is very strong.

6. I spoke with my mother yesterday about how she would feel about the striking workers coming back to work now and she and I both agreed that it would be difficult for her and other residents if the striking workers were to come back at this point.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, information and belief.

Dated: October 21, 2012


BARBARA RECKER

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JONATHAN B. KREISBERG, Regional Director of
Region 34 of the National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v.

HEALTHBRIDGE MANAGEMENT, 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 HEALTHCARE 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,

Respondents.

CIVIL NO.: 3:12-cv-01299 (RNC)

DECLARATION OF LAURA RIGO

I, Laura Rigo, hereby declare the following:

1. My mother is a resident at HealthBridge's Long Ridge Health Care Center (the "Center"). She has been a resident of the Center for approximately a year ^{LR} ~~and one half~~. I have personal knowledge of the facts set forth herein based on my personal observations and experiences.

2. I visit my mother daily and also work on a per diem basis at the front desk at the Center. As a result, I feel that I have a very good understanding of the quality of care that my mother and the residents in the Center are receiving.

2. There has been a huge improvement in the atmosphere in the Center since the workers who went on strike were replaced by the replacement workers who are in the Center now.

3. The new staff smile, are warm, caring and attentive and, I believe, really want to be at work at the Center. On the other hand, the workers who are now on strike were frequently inattentive. For example, when my mother would press the call button, it would often take about 40 minutes for the staff to come to her.

4. The striking workers were also very nasty. For example, on one occasion my mother was having difficulty breathing and one of the workers who are now striking told her that she would not give her oxygen to help her breathe until she said "please." On another occasion, in the evening, I heard one of the now-striking workers tell my mother that she "better tell [me] everything you want right now because [I] am not coming back tonight."


5. Although my mother regularly responds to my questions about how she feels by saying, "I don't want to be here" she has recently commented that the replacement staff is very nice to her.

6. The striking workers are causing big disruptions to the care of the residents. They have been pounding on drums outside the Center and have kicked my tires and told me to go *&%^ myself when I am entering or leaving the Center.

7. Overall, while I recognize that the new staff is making some mistakes because it takes time to learn all of the residents' likes and dislikes, I believe that both the quality of care and the atmosphere have significantly improved since the replacement workers replaced the workers on strike. I do not want to see the striking workers return.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, information and belief.

Dated: October 21, 2012


LAURA RIGO

Appendix H

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JONATHAN B. KREISBERG, Regional Director of
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and on behalf of the NATIONAL LABOR
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Respondents.

DECLARATION OF V. MATTHEW MARCOS

I, V. Matthew Marcos, hereby declare the following:

1. I am the Chief Financial Officer for HealthBridge Management, LLC (“HealthBridge”), one of the Respondents in the above-referenced matter. I have personal knowledge of the facts set forth herein.

2. Respondent HealthBridge is the contract manager of sub-acute care, long term nursing care and assisted living healthcare facilities for the elderly located throughout the State of Connecticut and elsewhere. Respondents 107 Osborne Street Operating Company II, LLC d/b/a Danbury HCC (“Danbury”), 710 Long Ridge Road Operating Company II, LLC d/b/a

Long Ridge of Stamford (“Long Ridge”), 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (“Newington”), 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center (“Westport”), 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (“West River”) (collectively “the “Centers”) are five such facilities in Connecticut managed by HealthBridge.¹ The New England Health Care Employees Union, District 1199 (“Union”) represents for collective bargaining purposes units of employees at each of the five Centers.

3. Each of the five Centers had substantial net operating losses in 2011 while operating under the terms and conditions of separate collective bargaining agreements (“CBAs”) with the Union that expired on March 16, 2011. The Centers ceased operating under the terms and conditions of the expired CBAs with the Union effective June 17, 2012, when they implemented Last, Best and Final Proposals.

4. Given the financial strain of operating under the terms and conditions of the expired CBAs with the Union, the Centers gave serious consideration in 2012 to filing applications for closure with the State of Connecticut’s Department of Social Service. If forced to return to the terms and conditions of under the expired Union contracts, the Centers would likely need to do the same again.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, information and belief.

Dated: October 15, 2012



V. MATTHEW MARCOS

¹A sixth HealthBridge-managed facility, 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (“Wethersfield”), closed earlier this year.

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CIVIL NO.: 3:12-cv-01299 (RNC)

DECLARATION OF GARY M. RICHTER

I, Gary M. Richter, hereby declare the following:

1. I am a Director at Marcum, LLP (“Marcum”). I have personal knowledge of the matters stated herein.
2. Marcum was retained by HealthBridge Management, LLC (“HealthBridge”), to develop a comparison of the average salary/wage and benefit costs of the six Connecticut-based nursing facilities managed HealthBridge that had employees represented by the New England

Health Care Employees Union-District 1199 (“Union”) (collectively the “Centers”)¹ with the averages computed for other nursing facilities in Connecticut and specified groupings of facilities. Additionally, we totaled reported gain and loss information for nursing facilities based on the same facility groupings used for the salary/wage and benefit comparisons.

3. All nursing facilities that participate in the Medicaid program are required under state regulations to file the Annual Report of Long Term Care Facility (“Annual Report”) by December 31st of each year with the Department of Social Services (“DSS”). The Annual Report includes detailed cost, employee hours, revenue, service utilization and ownership information associated with the filing nursing facility for the period October 1st through September 30th. The Annual Report filings are publicly available, and on an annual basis Marcum purchases the Long Term Care Facility Annual Report Database (“Annual Report Database”) from the DSS.

4. On March 15, 2012, we obtained the Annual Report Database for 2011, which consists of Excel spreadsheets containing the information filed for the 2011 report period by 223 nursing facilities that participate in the Medicaid program. Facilities may amend their Annual Report filings. All 2011 information contained in this Declaration is based upon the data received in March 2012 and it does not reflect changes made by any amendments that may have been filed by nursing facilities after the date information was transmitted to us.

5. From our review of the Annual Report Database, we were able to present reported gain and loss information, and compute reported wage and salary costs on a per resident day and employee hour basis, as well as, reported benefit costs on a per resident day and employee hour

¹ The six Centers are: Danbury Health Care Center (“Danbury”), Long Ridge of Stamford (“Long Ridge”), Newington Health Care Center (“Newington”), West River Health Care Center (“West River”), Westport Health Care Center (“Westport”) and Wethersfield Health Care Center (“Wethersfield”).

basis for various groupings of facilities. Instructions for the preparation of the Annual Report indicate that facilities should report all “paid hours”; therefore, hours reported by facilities should be inclusive of hours associated with paid regular time, overtime, vacation, holidays, etc. Since reported salaries, wages and hours include both regular and overtime rates of pay, per hour cost computations do not equate to hourly rates of pay. Totals or averages for the 223 nursing facilities with 2011 Annual Report information contained in the Annual Report Database will be referred to as “State-wide”.

6. Information in the Annual Report Database indicated that the six Centers reported losses totaling \$3,720,141 in 2011 (Page 35 of Cost Report, Line B.6.-Gain or Loss for Period), representing an average loss of \$620,024 per Center. All six Centers had reported losses in 2011. Reported losses by Center were: Danbury (\$1,546,363); Stamford (\$476,694); Newington (\$530,742); Westport (\$133,827); West River (\$64,811); and Wethersfield (\$967,704). The total of reported gains and losses in the Annual Report Database was \$13,898,180 representing a State-wide average reported gain of \$62,324 per facility.

7. Reported total salaries and wages of the employees at the six Centers averaged \$158.98 per reported resident day in 2011 based on the information in the Annual Report Database. By comparison, total salaries and wages State-wide was \$142.10 per reported resident day in 2011 based on the information in the Annual Report Database. The salaries and wages comparison on an hourly basis is \$24.01 per hour for the six Centers and \$21.53 per hour State-wide.

8. Reported employee benefits (comprised of Annual Report line items- Worker’s Compensation, Disability Insurance, Unemployment Insurance, Social Security (F.I.C.A), Health Insurance, Life Insurance, Pensions, Uniform Allowance, Other Benefits and Personal

Retirement Plans), at the six Centers averaged \$58.39 per reported resident day in 2011. By comparison, total employee benefit costs State-wide was \$39.50 per resident day in 2011 based on the information in the Annual Report Database. The employee benefit cost comparison on an hourly basis is \$8.82 per reported hour for the six Centers and \$5.98 per reported hour State-wide.

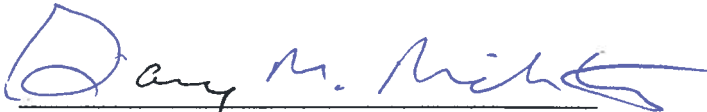
9. To the best of my knowledge, thus far in calendar 2012, eight nursing facilities filed for Federal bankruptcy protection or have been operated by State-court appointed receivers. Of those eight, it is my understanding that seven facilities had employees represented by the New England Health Care Employees Union- District 1199. Information in the Annual Report Database indicated that those seven facilities reported \$3,365,034 in losses in 2011 or \$480,719 per facility. Reported salaries and wages by the seven facilities averaged \$143.86 per reported resident day in 2011 based on the information in the Annual Report Database. Reported employee benefits by the seven facilities averaged \$47.65 per reported resident day in 2011. The 2011 per resident day salary and wages (\$143.86) and employee benefits (\$47.65) for the seven facilities are lower than the comparable 2011 per resident day costs for the six HealthBridge Centers of \$158.98 and \$58.39, respectively.

10. To the best of my knowledge, four nursing facilities closed during calendar 2011. Information in the 2010 Annual Report Database indicated that all four facilities reported losses and the losses totaled \$1,988,667 or \$497,167 per facility. Reported salaries and wages by the four facilities averaged \$139.87 per reported resident day based on the information in the 2010 Annual Report Database. Reported employee benefits by the four facilities averaged \$50.45 per reported resident day in 2010. The 2010 per resident day salary and wages (\$139.87) and

employee benefits (\$50.45) for the four facilities are lower than the comparable 2011 per resident day costs for the six HealthBridge Centers of \$158.98 and \$58.39, respectively.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, information and belief.

Dated: October 15, 2012


GARY M. RICHTER