

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**Nos. 14-4523**

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**UPMC PRESBYTERIAN SHADYSIDE,  
*Appellant,***

**v.**

**NATIONAL LABOR RELATIONS BOARD,  
*Appellee.***

*[caption continued on next page]*

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**APPELLANTS' BRIEF**

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**On Appeal from the United States District Court for the  
Western District of Pennsylvania  
Nos. 2:14-mc-00109, 2:14-mc-00110, 2:14-mc-00111**

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**Nos. 14-4524**

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**UPMC,**  
*Appellant,*

**v.**

**NATIONAL LABOR RELATIONS BOARD,**  
*Appellee.*

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**Nos. 14-4525**

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**UPMC,**  
*Appellant,*

**v.**

**NATIONAL LABOR RELATIONS BOARD,**  
*Appellee.*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28, UPMC states that it has no parent corporation. No publicly held corporation owns an interest in UPMC, which is a non-stock, non-profit Pennsylvania corporation. UPMC Presbyterian Shadyside is a wholly owned subsidiary of UPMC.

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## **STATEMENT OF JURISDICTION**

The United States District Court for the Western District of Pennsylvania had jurisdiction under Section 11(2) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 161(2). On September 2, 2014, the District Court granted the National Labor Relations Board’s motions to enforce three administrative subpoenas *duces tecum* and then stayed its ruling to permit an appeal. JA64. On October 27, 2014, the District Court denied UPMC and UPMC Presbyterian Shadyside’s Motions for Reconsideration. JA66-68. UPMC and UPMC Presbyterian Shadyside filed timely notices of appeal on November 18, 2014. JA1-6. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007).

## **STATEMENT OF THE ISSUE**

Did the District Court abuse its discretion and commit an error of law when it held that it was “constrained” to “rubber stamp” the enforcement of the NLRB’s subpoenas *duces tecum*, even though it found that the subpoenas were overly broad and burdensome and did not meet this Court’s precedent for enforcement?

**STATEMENT OF THE CASE**

Appellee the National Labor Relations Board applied first to an Administrative Law Judge and then to the United States District Court for the Western District of Pennsylvania for enforcement of three subpoenas *duces tecum* the NLRB had issued: (1) one to UPMC; (2) one to UPMC Presbyterian Shadyside; and (3) one to UPMC, on behalf of the Service Employees International Union (“the Union”). (For clarity, this brief refers to UPMC and UPMC Presbyterian Shadyside collectively as “Appellants.”) The NLRB issued the subpoenas in the context of unfair labor practice proceedings arising from the Union’s complaint that Presbyterian Shadyside—not UPMC—had committed various unfair labor practices. After Appellants filed petitions to revoke the subpoenas, the Administrative Law Judge modified the subpoenas in part and ordered enforcement. Appellants notified the NLRB of their continuing objections; and the NLRB then filed these civil actions seeking enforcement in the District Court.

The District Court found that the subpoenas were “overly broad and unfocused;” that they bore “minimal or no relationship” to the underlying case; that they sought “highly confidential and proprietary information;” and that compliance with them would be “extensive, expensive, time-consuming, and

potentially disruptive.” JA23, 29. So, concluded the District Court, “based upon the current record and applying the applicable ‘test’ . . . , the Court would deny the three (3) Applications to Enforce Subpoenas Duces Tecum in their current form.” JA29-30.

Despite this, the District Court ordered enforcement, holding that it was “constrained” to act as a “rubber stamp” because (so the District Court thought) two of this Court’s recent cases changed long-standing Circuit precedent with respect to judicial enforcement of agency subpoenas and stripped the federal courts of authority to review and determine their enforceability. JA31. As the District Court explained it, this Court’s recent precedent relegated district courts to “essentially rubber stamp[ing]” the enforcement of agency subpoenas. JA31.

Viewing itself as a mere rubber stamp, the District Court granted enforcement of the subpoenas and then stayed its ruling to permit an appeal. JA32, 64. Appellants appealed. The NLRB filed Motions for Summary Affirmance and to Lift the Stay Pending Appeal. This Court denied the NLRB’s motions by Order dated March 9, 2015.

## **STATEMENT OF THE FACTS**

### ***The NLRB Proceedings***

In April 2013, the Union filed numerous unfair labor practice charges against UPMC and the separately-incorporated and operated UPMC Presbyterian Shadyside (“Presbyterian Shadyside”). JA25. These charges uniformly included allegations that Presbyterian Shadyside and UPMC were a single employer. After investigating the Union’s unfair labor practice charges, the NLRB issued its initial consolidated complaint. JA88. That complaint included only unfair labor practice charges against Presbyterian Shadyside: it did not name UPMC as a respondent, contain any allegations about UPMC, or allege anything about a “single employer” theory. Moreover, the employees who were the subject of the charges were all on the payroll of and employed by Presbyterian Shadyside.

On January 9, 2014—just one month before the scheduled hearing on the underlying charges—the NLRB filed its Second Amended Consolidated Complaint (the “Complaint”) under Section 10(b) of the NLRA, 29 U.S.C. § 151 *et seq.* JA96. This Complaint differed from the initial complaint in one critical respect: although the NLRB previously directed the Union to file amended charges removing the single employer allegations, the NLRB unexpectedly reversed course, opted to name UPMC as an additional respondent, and included a

paragraph alleging that UPMC and Presbyterian Shadyside were a “single employer.” *See* JA105-06, 329.

As had the initial complaint, the Complaint alleged specific instances of unfair labor practices—every single one of which occurred only at Presbyterian Shadyside. It referenced multiple facilities—every single one of which are owned or operated only by Presbyterian Shadyside. It alleged conduct of managers, supervisors, agents, and employees—every single one of whom is employed only by Presbyterian Shadyside (which is not surprising given that UPMC, the parent holding company, does not have any employees). And, it requested relief only with regard to Presbyterian Shadyside (*e.g.*, the posting of a notice at Presbyterian Shadyside, reading the notice at a meeting of Presbyterian Shadyside employees, and granting the Union access to public areas of Presbyterian Shadyside). JA118-20. Further, there is no doubt that Presbyterian Shadyside alone would be able to satisfy any remedy ultimately ordered in the underlying unfair labor practice proceeding.

In a mere single-paragraph allegation, the Complaint avers that UPMC (as a purported “single employer”) had been “engaged in the government and supervision of Respondent UPMC’s subsidiaries, including Respondent Presbyterian Shadyside.” JA105. Yet, the Complaint did not contain any

allegations about any other UPMC subsidiary, and contained just this one specific allegation related to Presbyterian Shadyside:

[Appellants] have had interrelated operations with common system-wide technology resources under a long-term contract with a software vendor which is in effect until 2019; [and] have applied for and are jointly and severally obligated for payments on, Revenue Bonds Series 2011A issued by the Allegheny County Hospital Development Authority.

JA105-06.<sup>1</sup>

A few days after it filed the Complaint, the NLRB issued in the underlying unfair labor practice proceeding the three subpoenas *duces tecum* at issue in this appeal, under Section 11(1) of the NLRA, 29 U.S.C. § 161(1): (1) one to UPMC; (2) one to Presbyterian Shadyside; and (3) one to UPMC, on behalf of the Union. JA33-63.<sup>2</sup> The subpoenas contain more than 160 broad, wide-ranging

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<sup>1</sup> Paragraph 3(a) of the Complaint also contains general allegations that simply enumerate the factors used to determine single employer status: that Appellants share common ownership, administer a common labor policy, share facilities, and interchange personnel. JA105. Paragraph 3(b) then states in conclusory fashion, “Based on its operations described above in paragraph 3(a), [Appellants] constitute a single-integrated enterprise and a single employer within the meaning of the Act.” JA106.

<sup>2</sup> In point of fact, the first two subpoenas *duces tecum* were issued, completed, and served by the NLRB. As for the third subpoena *duces tecum*, the Union drafted the document requests and completed what was otherwise a largely blank form and served the subpoena *duces tecum* on UPMC. See 29 C.F.R.

...Continued

requests. They seek, for example, Appellants' corporate minutes, any contracts related to security services, copies of all advertisements soliciting applications for employment, any applications for public funding, lists including the names and addresses of Appellants' suppliers and non-patient customers, locations and account numbers of joint or commonly controlled bank accounts, employee health and benefit plans, copies of all letterhead, terms of the employment or contractual relationship of various employees, and all documents issued by the Office of Ethics, Compliance, and Audit Services. JA33-63.

Appellants filed petitions to revoke on the grounds that the subpoenas were overly broad, sought confidential and proprietary business information, sought irrelevant information, and did not describe the material requested with specificity and particularity. JA192-98. The ALJ modified the two subpoenas issued by the NLRB in small part and modified the subpoena issued on behalf of the Union to a greater extent, but otherwise denied the petitions to revoke. JA290-93.<sup>3</sup> Appellants notified the NLRB that they would not comply with the

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§ 102.31. For ease of reference, this brief refers to the subpoenas collectively as having been issued by the NLRB.

<sup>3</sup> The ALJ revoked one request in each of the NLRB's subpoenas to UPMC and Presbyterian Shadyside, and 27 of the 69 requests in the subpoena issued  
*...Continued*

subpoenas; the NLRB then filed the applications to enforce in federal district court that are the subject of this appeal. JA87.

Meanwhile, the ALJ bifurcated the underlying unfair labor practice proceedings, severing the single employer allegation pending the outcome of this litigation, so the proceedings on the underlying unfair labor practice charges continued apace. The ALJ ultimately found in the NLRB's favor in large part. Appellants filed exceptions to the ALJ's decision and the Board is currently reviewing those exceptions.

### ***District Court Proceedings***

As noted, the NLRB filed applications to enforce the three subpoenas in federal district court, arguing that the applications should be summarily granted because the subpoenas seek relevant information. JA87-92. Appellants opposed the applications arguing, *inter alia*, that the subpoenas were unduly burdensome; UPMC was not a proper party; the subpoenas were issued for an improper purpose; and the documents sought were not relevant to the issues in the underlying unfair

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on behalf of the Union. The ALJ found most of the stricken requests were "overly broad," as well as some that were "not relevant." *See* JA290-93.



labor practice dispute because it involved only Presbyterian Shadyside employees.

*See* JA332-38.

After reviewing the subpoenas and the parties' arguments, the District Court made the following factual findings:

- The “scope and nature” of the subpoenas were “overly broad and unfocused.” JA23.
- The Board’s request was “massive.” JA23.
- The Court did “not see how these requests have any legitimate relationship or relevance to the underlying alleged unfair labor practices.” JA23.
- The subpoenas requested “highly confidential and proprietary information.” JA23.
- The subpoenas have “no proportionality to the underlying charges.” JA23.
- The subpoenas “seek information that a union would not be entitled to receive as part of a normal organization effort.” JA23.
- The “scope and nature of the requests, coupled with the NLRB’s efforts to obtain said documents for, and on behalf of, the [Union]” moved “the NLRB from its investigatory function and enforcer of federal labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union.” JA23-24.
- There was “minimal or no relationship between the Subpoenas and the underlying unfair labor practice charges.” JA29.
- The “unfair labor practices are being used, under the guise of the ‘single employer’ rubric, to attempt to legitimize a massive document request.” JA29.

- Compliance “would be extensive, expensive, time-consuming, and potentially disruptive of the daily business activities of the Respondents” and require “the disclosure of highly confidential and proprietary information.” JA29.

In applying these factual findings, the District Court set forth this Court’s long-established test for the enforcement of administrative agency subpoenas. As the District Court explained, such subpoenas will be enforced where the agency demonstrates that: “(1) its investigation has a legitimate purpose, (2) the inquiry is relevant to that purpose, (3) the agency does not already possess the information requested, (4) the agency has complied with relevant administrative requirements, and (5) the demand is not ‘unreasonably broad or burdensome.’” JA29.

Applying this legal test to its factual findings, the District Court concluded that, “based upon the current record and applying the applicable ‘test’ . . . , the Court would deny the three (3) Applications to Enforce Subpoena Duces Tecum in their current form.” JA29-30.

Despite both its factual findings and its correct understanding of this Court’s long-standing precedent, the District Court nonetheless held that the subpoenas should be enforced. It did so based on its (mistaken, as discussed *infra* Section I.B) belief that this Court’s recent decisions in *EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010) (*Kronos I*), and *EEOC v. Kronos Inc.*, 694 F.3d 351 (3d

Cir. 2012) (*Kronos II*), “constrained” it to “rubber stamp” the subpoenas. As the District Court put it, it was “constrained in the current case, in that any denial of the present Applications to Enforce Subpoenas will not be affirmed.” JA31; *see also* JA31 (“[T]he practical effect of case law as to enforcement of subpoenas of federal government agencies is that this Court is constrained to essentially ‘rubber stamp’ the enforcement of the Subpoenas at hand.”).

### ***The Payroll Tax Case***

On September 29, 2014, Appellants moved for reconsideration on the basis that newly discovered evidence obtained through a Right-To-Know inquiry confirmed that the administrative subpoena process was not being used for a legitimate purpose related to the NLRB proceeding, but rather to assist the Union and its allies in a separate case, brought by the City of Pittsburgh alleging that UPMC was a single employer for purposes of paying past payroll taxes. JA340. That evidence included invoices submitted to the City of Pittsburgh by its outside counsel showing that Union lawyers had orchestrated that separate lawsuit. The chronology is revealing:

- March 20, 2013: The City of Pittsburgh filed a complaint in the Allegheny Court of Common Pleas, alleging that UPMC, the parent entity, owed back payroll taxes from which it had wrongfully claimed to be exempt. JA346.

- October 21, 2013: The Honorable R. Stanton Wettick, Jr., the presiding Judge, raised whether the City had sued the correct entity, given his understanding that the parent corporation had no employees. JA350.
- October 28, 2013: The City filed a Second Amended Complaint alleging that UPMC and its subsidiaries were properly viewed as a “single employing enterprise.” JA351.
- November 11, 2013: UPMC filed preliminary objections to the Second Amended Complaint. JA351.
- December 6, 2013: The City filed a brief in opposition to UPMC’s preliminary objections arguing, among other things, that UPMC was a “single employer” for purposes of the NLRA and therefore for purposes of payroll tax. JA352.

Also on December 6, 2013, counsel for the NLRB contacted UPMC’s counsel and notified them that the NLRB’s initial complaint in the unfair labor practice proceeding would be amended to include single employer allegations. JA352. The NLRB accomplished this when it filed the Complaint just over a month later on January 9, 2014.

The Court of Common Pleas ultimately dismissed the City’s lawsuit on the ground that UPMC is a holding company that has no employees. *City of Pittsburgh v. UPMC*, 2014 Pa. Dist. & Cnty. Dec. Lexis 119 (C.P. Allegheny 2014) (Wettick, J.).

***District Court's Denial of Motion for Reconsideration***

Meanwhile, the District Court denied Appellants' motions for reconsideration. JA66-68. In its opinion, the Court reiterated its previous conclusion that "based upon the current record and the applicable 'test' (whether the NLRB inquiry is relevant to a legitimate purpose and is unreasonably broad and burdensome), the Court would deny the three (3) applications," but that because of the *Kronos* opinions, it "ultimately was constrained to enforce the administrative subpoenas." JA67.

The District Court explained that, based on "the NLRB's rubric that 'abuse of this Board's administrative process is not a question for a district court's consideration[,] . . . this Court lacks authority to conduct a meaningful review of the subpoena enforcement requests and to investigate these serious allegations, essentially leaving UPMC without a judicial remedy under the law." JA68. As the Court noted, because of the NLRB's contention that such allegations can be addressed only in Board proceedings, UPMC "is confined to a circular course whereby UPMC's only remedy relating to an alleged abuse of the subpoena process is confined to a resolution through the NLRB's *own* process." JA68 (emphasis in original).

## **STATEMENT OF RELATED PROCEEDINGS**

These three consolidated cases have not been before the Court previously. Counsel is unaware of any related case or proceeding aside from the underlying NLRB action that is proceeding before the Board.

## **SUMMARY OF THE ARGUMENT**

Under the framework Congress has created, animated by Constitutional separation of powers principles, the NLRB does not itself have the authority to order enforcement of its own subpoenas *duces tecum*. Rather, it must seek enforcement from a federal district court, so that litigants have the protection of judicial review. In order to carry its burden in the district court, the NLRB must demonstrate “that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency’s possession, and that the administrative steps required by the statute have been followed. The demand for information must not be unreasonably broad or burdensome.” *Univ. of Med. & Dentistry v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (quoting *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995)).

In this case, contrary to the separation of powers principles underlying the statutory framework and controlling precedent, the District Court ordered enforcement of the subpoenas *duces tecum* despite its express, extensive factual

findings that the subpoenas did not meet this Circuit’s precedent for enforcement. The District Court did so based on its mistaken belief that this Court’s recent decisions in *Kronos* displaced long-standing Circuit precedent, with “the practical effect” of leaving district courts “constrained to essentially ‘rubber stamp’ the enforcement of the Subpoenas at hand.” JA31. Yet the *Kronos* decisions did not—and could not have—displaced the established precedent. Moreover, the subpoenas here in particular needed the District Court’s careful review because (as the District Court found) they contain requests that are overly broad, unrelated to the claims at issue, and seek highly confidential and proprietary business information.

By failing to follow controlling precedent and acting as a “rubber stamp,” automatically granting *in toto* the NLRB’s document requests, the District Court abused its discretion and committed an error of law. This Court should rely on the District Court’s findings, reverse the District Court’s judgment, and deny enforcement of the subpoenas. In the alternative, this Court should remand the case for the District Court to review the subpoenas in light of the controlling precedent.

## ARGUMENT

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION AND COMMITTED LEGAL ERROR BY HOLDING THAT IT WAS “CONSTRAINED” TO “RUBBER STAMP” BROAD AND BURDENSOME AGENCY REQUESTS FOR ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS.**

#### **Standard of Review**

This Court reviews the District Court’s decision to enforce the subpoenas *duces tecum* issued by the NLRB for abuse of discretion. *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992). A district court abuses its discretion when its “decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.” *Id.* (citing *Int’l Union v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987)).

The District Court abused its discretion and committed an error of law in concluding that it was “constrained” to “rubber stamp” the NLRB’s requests for enforcement for two basic reasons. *First*, the federal district courts are required by Constitutional separation of powers principles to exercise judicial review over agency subpoenas. These separation of powers principles drive and are reflected in both statute and precedent. A district court cannot abrogate its responsibility, as the District Court did here, leaving individuals and corporations with no judicial review or recourse whatsoever. *Second*, contrary to the District Court’s belief, this



Court's decisions in the *Kronos* cases did not—and could not have—altered Circuit precedent.

**A. In View of the Constitutional Separation of Powers Principles at Issue, Both Statute and Precedent Require Federal Courts to Exercise Judicial Review over Agency Requests for Enforcement of Subpoenas.**

Section 11(2) of the NLRA, 29 U.S.C. § 161(2), is the statute that gives the federal district courts the authority to enforce NLRB subpoenas *duces tecum*. It provides:

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States . . . , upon application by the [National Labor Relations] Board shall have jurisdiction to issue to such person an order requiring such person to . . . produce evidence if so ordered . . . ; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

29 U.S.C. § 161(2).

The statute is animated by our Constitutional separation of powers framework. As Justice Frankfurter has explained:

Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative.

They were discharging judicial power with all the implications of the judicial function in our constitutional scheme.

*Penfield v. SEC*, 330 U.S. 585, 604 (1947) (Frankfurter, J., dissenting) (citing *ICC v. Brimson*, 154 U.S. 447 (1894)).

It is for this reason that administrative agencies lack authority to enforce their own subpoenas; rather, federal courts must do so. *See In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (administrative agency “could not self enforce its subpoenas by fine or imprisonment, thereby insulating them from judicial review, but must seek a judicial enforcement order”). As this Court has explained, “[i]t is well settled that an administrative agency, like an Article III court, is a tribunal of limited jurisdiction. An administrative agency may exercise only the powers granted by the statute reposing power in it. . . . These powers are limited by the scope of the jurisdictional statute in the same way that a federal court’s powers are limited by the Constitution and statute.” *NLRB v. New Vista Nursing & Rehab*, 719 F.3d 203, 211 (3d Cir. 2013) (internal quotations and citations omitted), *abrogated on other grounds by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). “This structural limitation on the NLRB’s authority, emanating from the Constitution’s separation of powers . . . requirements, ‘protect[s] against abuse of subpoena power.’” *NLRB v. Interbake Foods*, 637 F.3d 492, 498 (4th Cir. 2011) (internal citation omitted); *see also NLRB v. Int’l Medication Sys., Ltd.*, 640

F.2d 1110, 1116 (9th Cir. 1981) (“We may not infer that Congress intended to authorize agencies to bypass district court enforcement proceedings. An efficient and fair enforcement mechanism has been provided and was meant to be used.”); *NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970) (“Congress has made elaborate provision for obtaining and enforcing [NLRB] subpoenas. . . . It was obviously its intention that this machinery be utilized.” (internal citation omitted)).

Accordingly, before a district court can order enforcement of an administrative agency’s subpoena *duces tecum*, it must first conclude that the subpoena “is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). While the “reasonably relevant” inquiry is “not especially constraining,” courts may not construe it so broadly as to “render[] that requirement a nullity.” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68, 69 (1984). Thus, “when a court is asked to enforce a [] subpoena, its responsibility is to ‘satisfy itself that the charge is valid and the material requested is ‘relevant’ to the charge.’” *Univ. of Penn. v. EEOC*, 493 U.S. 182, 191 (1990) (quoting *Shell Oil*, 466 U.S. at 72 n.26)).

This Circuit's precedent requires an agency to demonstrate that a subpoena *duces tecum* meets certain threshold requirements before it can be enforced. *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (3d Cir. 1981) (*en banc*). "Courts must insist that the agency 'not act arbitrarily or in excess of (its) statutory authority.'" *NLRB v. Interstate Dress Carriers*, 610 F.2d 99, 111 (3d Cir. 1979) (quoting *Okla. Press Publ'g Co. v. Walling*, 327 U.S 186, 216 (1946)). Specifically, a district court can enforce an administrative subpoena only if the "agency can show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency's possession, and that the administrative steps required by the statute have been followed. The demand for information must not be unreasonably broad or burdensome." *Corrigan*, 347 F.3d at 64 (internal quotation and citation omitted).<sup>4</sup>

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<sup>4</sup> The judicial standards for enforcement of administrative agencies do not differ by agency. While agencies may have varying degrees of investigatory authority as set forth by their governing statute, the requirements for subpoena enforcement are applied uniformly. For example, the factors set forth in this Court's opinion in *Corrigan*, which dealt with an administrative subpoena issued by the Department of Health and Human Services, quoted the requirements from a case dealing with a subpoena issued by the Federal Deposit Insurance Corporation. *See Corrigan*, 347 F.3d at 64 (quoting *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995)). *Corrigan* similarly has been applied in administrative subpoena enforcement cases where the Equal

...Continued

Moreover, contrary to what the District Court here thought, this Circuit's precedent specifically and expressly prohibits a district court from acting as a "rubber stamp." "[T]he federal courts have never lent their enforcement machinery to an executive branch investigative body in the manner of a rubber stamp." *In re Grand Jury Proceedings*, 486 F.2d at 94. "The district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding." *Wentz*, 55 F.3d at 908 (citing *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir. 1980)); *see also Interbake Foods*, 637 F.3d at 499 ("[C]ourts do not simply order the enforcement of subpoenas as a matter of course, and certainly not blindly.").

The District Court ran afoul of the statute and controlling precedent, both animated by our Constitutional separation of powers framework, by failing to conduct a thorough, meaningful review of the subpoenas prior to enforcing them. As discussed more thoroughly *infra* Section II, after concluding that, were it not for the *Kronos* decisions, it would deny enforcement, the District Court (its factual findings notwithstanding) failed to undertake the elementary requirements set forth

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*Continued from previous page*

Employment Opportunity Commission issued the subpoenas at issue. *See, e.g., Kronos*, 620 F.3d at 296 n.4.

in *Morton Salt*—to determine which of the 130 subpoena requests were too broad and indefinite and which were reasonably relevant to the charges.

Despite its factual findings, including that it did “not see how these requests have any legitimate relationship or relevance to the underlying alleged unfair labor practices” and were “overly broad and unfocused,” JA23, the District Court ordered enforcement. In so doing, it—in its own words—acted as mere “rubber stamp” of the agency. It abrogated its judicial function, leaving Appellants without the judicial remedy to which they are entitled. Thus, the District Court abused its discretion and committed an error of law, requiring reversal by this Court.

**B. This Court’s Decisions in *Kronos I* and *Kronos II* Did Not—and Could Not Have—Altered this Circuit’s Precedent.**

The District Court was entirely correct in its factual findings, its understanding of controlling precedent, and its conclusion that the proper application of the facts to the law required it to deny enforcement of the subpoenas. Where the District Court went astray was in interpreting the *Kronos* opinions as somehow changing this Court’s precedent—which they did not and, of course, could not do. *See* 3d Cir. I.O.P. 9.1 (only *en banc* court can overrule panel opinion).

Contrary to the District Court's belief, nothing in the *Kronos* opinions changed this Circuit's precedent with regard to enforcement of agency subpoenas. The NLRB apparently agrees. *See* Mot. Summ. Affirmance at 19 ("While the District Court below felt constrained in its analysis for enforcement by this Court's decisions in *Kronos I* and *Kronos II*, those decisions do not prohibit a district court from examining relevancy of the requested information and whether the demand for information is unreasonably burdensome.").

A brief discussion of the *Kronos* cases is in order. In *Kronos*, the Equal Employment Opportunity Commission sought enforcement of a subpoena *duces tecum* it issued to a non-party corporation that created and administered a national supermarket chain's employment assessment. *See EEOC v. Kronos Inc.*, 2009 U.S. Dist. Lexis 45449 (W.D. Pa. 2009). The underlying case before the EEOC involved a disability discrimination claim at one of the supermarket chain's stores that had denied an applicant employment based on the results of the employment assessment. The subpoena sought information about all data relating to the supermarket chain's use of the assessment, such as results, ratings, and scores of individual test-takers. *See id.* at \*3. The district court limited the subpoena to information related to the specific disability discrimination charge—employment assessment data in only the state where the underlying claim arose, only three job positions, and for a time period of sixteen months. *See id.* at \*6.

The district court also struck the EEOC's request targeting documents analyzing the assessment's potential adverse impact based on an individual's race. *Id.*

Additionally, the district court entered a confidentiality order proposed by Kronos and added to the order that the "confidential material shall not be entered into a centralized database." *See Kronos I*, 620 F.3d at 295.

In *Kronos I*, this Court reversed, holding that the EEOC was entitled to appellee's data on the supermarket's use of the employment assessment nationally, without the geographic, topical, and temporal restrictions the district court had imposed. *See* 620 F.3d at 287. The Court upheld the district court's order striking the EEOC's request targeting information regarding racial discrimination, holding that the express inquiry into race (as opposed to disability) constituted "an impermissible fishing expedition." *Id.* at 301. The Court then remanded just the confidentiality order to the district court for that court to conduct a good cause balancing test. *See id.* at 304.

On remand, the district court entered a new confidentiality order and modified the subpoenas again, this time adding limitations to certain requests, such as that the EEOC was entitled to studies and evidence on the employment assessment only if such studies related to persons with disabilities. *See EEOC v. Kronos Inc.*, 2011 U.S. Dist. Lexis 29127, \*49-50 (W.D. Pa. 2011). In *Kronos II*,



this Court again reversed the district court with regard to the district court's modifications to the subpoenas, concluding it failed to comply with the mandate of *Kronos I* by impermissibly limiting the subpoenas once again. 694 F.3d at 364-65. The Court remanded with instructions for the district court to strike the additional limitations on the subpoenas. *See id.* at 369-70.

Contrary to the District Court's belief, this Court never suggested in the *Kronos* decisions that they displaced controlling precedent in the Circuit or that a district court's role in reviewing agency subpoenas would now be relegated to a mere "rubber stamp." Quite to the contrary, *Kronos I* contains an in-depth discussion of the controlling precedent:

Nonetheless, the EEOC's power of investigation is anchored to the charge of discrimination, and courts must be careful not to construe the charge and relevance requirements so broadly as to confer "unconstrained investigative authority" upon the EEOC. *Shell Oil*, 466 U.S. at 64-65; *see also EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002). The relevance requirement "is designed to cabin the EEOC's authority and prevent fishing expeditions." *United Air Lines*, 287 F.3d at 653 (quotation marks omitted). The EEOC bears the burden of demonstrating relevance. *See EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209, 211 (5th Cir. 2001).

*Kronos I*, 620 F.3d at 296-97. In fact, as noted, in *Kronos I*, the Court upheld one of the district court's modifications, prohibiting the targeted inquiry into racial discrimination when the charges were related to disability discrimination. And in

*Kronos II*, it reversed because the district court had not followed its mandate, not because it thought the court lacked authority to review the subpoenas at issue.

Thus, there is no basis in the *Kronos* opinions to conclude that a district court must “rubber stamp” agency requests for enforcement of subpoenas. Agencies such as the NLRB do not have *carte blanche*, unchecked, and unreviewable power to obtain information through its subpoena powers, leaving the subpoena recipients without judicial recourse.

Indeed, neither of the two courts of appeal that has considered *Kronos* has interpreted it to narrow a district court’s authority in this area. *See EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1158 (10th Cir. 2012) (rejecting the EEOC’s reliance on *Kronos I* in seeking reversal of a district court’s determination that the subpoena at issue sought information not relevant to a charge under investigation); *EEOC v. Schwan’s Home Serv.*, 644 F.3d 742, 747-48 (8th Cir. 2011) (holding that *Kronos I* was consistent with application of the relevance requirement as set forth by the Supreme Court in *Shell Oil* and that the opinion demonstrated that an administrative subpoena cannot “wander into wholly unrelated areas”).

Thus, contrary to what the District Court here thought, there is no basis in the *Kronos* opinions to conclude that a district court must “rubber stamp”

agency requests for enforcement of subpoenas. Agencies do not have unchecked and unreviewable subpoena power. And the recipients of agency subpoenas are entitled to a judicial remedy. The District Court failed to perform its basic function and so abused its discretion and committed an error of law.

**II. THIS COURT SHOULD EITHER DENY ENFORCEMENT OF THESE BROAD AND BURDENSOME SUBPOENAS, OR, AT A MINIMUM, REMAND FOR THE DISTRICT COURT TO UNDERTAKE A CAREFUL REVIEW.**

The subpoenas at issue contain more than 130 requests (excluding those the ALJ removed). They contain requests that are so overly broad that it would be virtually impossible for Appellants even to conduct the requisite searches in their records. Further, they seek information wholly unrelated to the claims at issue, as well as highly confidential and proprietary business information—all of which, if the NLRB has its way, likely would be provided to the Union.

The District Court made extensive factual findings, determining that there was “minimal or no relationship between the Subpoenas and the unfair labor practice charges;” that the “unfair labor charges are being used, under the guise of the ‘single employer’ rubric, to attempt to legitimize a massive document request;” that compliance with the subpoenas “would be [] extensive, expensive, time-consuming, and potentially disruptive of the daily business activities of the

[Appellants];” and that the scope and nature of the subpoenas was “overly broad and unfocused.” JA23, 31.

Because of this, the District Court said that (were it not for the *Kronos* opinions), it would deny enforcement. JA30. If this Court concludes (as it should) that the *Kronos* opinions did not alter the legal landscape for enforcement of agency subpoenas, this Court should reverse the District Court’s grant of enforcement, and enter judgment denying enforcement on this basis alone. The alternative course of action is a remand to the District Court for it to discharge its judicial function and conduct the requisite review of the subpoenas. Even a cursory review of the subpoenas demonstrates that such review of the subpoenas is warranted.<sup>5</sup>

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<sup>5</sup> Appellants do not undertake a lengthy explanation of the overly broad and irrelevant requests in the subpoenas, as such a review is the job of the District Court—not this Court on appeal. The examples provided in this section are merely illustrative, to give the Court a sense of the breathtaking scope of the subpoenas.

First, as the District Court correctly held, the scope and nature of these subpoena requests is “overly broad and unfocused.” JA23. Examples of such overly broad requests include:

- “Produce all non-privileged Documents relating to any contracts or agreements you have entered into with any third party vendors or consultants or funding you have provided relating to security services for the benefit of UPMC Presbyterian Shadyside or any other UPMC-Related Facility or Operation.” JA53-54.
- “Copies of any and all advertisements used by UPMC Presbyterian Shadyside for the purpose of soliciting business for the subject period.” JA38.
- “Documents reflecting any advertisements used by UPMC for the purpose of soliciting applicants for employment by UPMC for the subject period.” JA45.
- “Documents reflecting any applications filed by UPMC Presbyterian Shadyside for public funding of any of its operations.” JA38.
- “Documents reflecting any pension or other benefit plans offered to employees of UPMC Presbyterian Shadyside.” JA38.

Second, as the District Court found, many of the requests are irrelevant to the underlying charges. *See* JA23, 31. Single employer status is determined based on four factors: “(1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations.” *Limbach Co. v. Sheet Metal Workers Int’l Ass’n*, 949 F.2d 1241, 1259 (3d Cir. 1991) (citing *Radio & Television Broad. Technicians Local 1264 v. Broad.*

*Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965)). Aside from general allegations that simply recite these factors, the Complaint’s only specific allegation that UPMC and Presbyterian Shadyside constitute a single employer is as follows:

[Appellants] have had interrelated operations with common system-wide technology resources under a long-term contract with a software vendor which is in effect until 2019; [and] have applied for and are jointly and severally obligated for payments on, Revenue Bonds Series 2011A issued by the Allegheny County Hospital Development Authority.

JA105-06.

Yet, a number of the requests at issue do not even relate to the four general factors, let alone to the specific single employer allegation related to Appellants’ software vendors and revenue bonds. Such requests include, for example:

- “[C]opies of documents showing the names and addresses of non-patient customers of UPMC Presbyterian Shadyside.” JA36; *see also* JA43 (identical request made to UPMC).
- “Documents issued by UPMC Presbyterian Shadyside’s Office of Ethics, Compliance and Audit Services.” JA38.

Nor do these single employer allegations or subpoena requests relate in any way to the relief the NLRB is seeking in the Complaint—namely, the reinstatement of certain Presbyterian Shadyside employees, the posting of signs at Presbyterian Shadyside, reading a notice at a meeting of Presbyterian Shadyside

employees, and granting the Union access to public areas of Presbyterian Shadyside. *See* JA118-20.

Third, as the District Court correctly concluded, many of the requests seek “highly confidential and proprietary information.” JA23. For example, the requests seek:

- “Documents identifying the locations and account numbers of” any joint or commonly controlled bank accounts, securities, notes, or bonds. JA53.
- Documents identifying “the terms of the employment or contractual relationship” with Presbyterian Shadyside’s “Senior Executive, President, Chief Executive Officer, Chief Operating Officer, Chief Nursing Officer, Medical Director, Department Chairpersons and Chiefs of Service.” JA56.

All of these requests must be viewed—and indeed were viewed by the District Court—against a backdrop. That backdrop includes the NLRB’s eleventh-hour addition of the single employer claim into the proceedings. And the City’s effort (aided by the Union’s counsel) to advance a single employer theory, based on the NLRA, in its payroll tax case. As the District Court found, the “scope and nature of the requests, coupled with the NLRB’s efforts to obtain said documents for, and on behalf of, the SEIU” moved “the NLRB from its investigatory function and enforcer of federal labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union.” JA23-24.

In short, upholding the District Court's decision ordering compliance with these subpoenas would set a troubling precedent whereby the NLRB can simply recite single employer allegations in a mechanical manner and—regardless how tenuous the connection between that claim and the relief sought and how thin the factual allegations providing the basis for the supposed single employer status—become entitled to almost the entirety of a corporation's documents.

This is not, cannot, and should not be countenanced.



**CONCLUSION**

For all these reasons, the District Court committed an error of law and abused its discretion in ordering enforcement of the subpoenas *duces tecum*.

Appellants respectfully request that the Court reverse the judgment of the District Court and deny enforcement of the subpoenas or, in the alternative, remand the case to the District Court with instructions that it review the subpoenas in accordance with this Circuit's precedent.

Respectfully submitted,

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Dated: April 8, 2015

**CERTIFICATE OF COMPLIANCE**

I, Nancy Winkelman, certify:

***Bar Membership.*** Paul Titus, Shannon L.C. Ammon, Jay Glunt, and I are members in good standing of the Bar of this Court.

***Word Count.*** This brief complies with Federal Rule of Appellate Procedure 32(a)(7) and contains 6,767 words, as counted by Microsoft Office word-processing software.

***Typeface.*** This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

***Electronic Filing.*** I prepared the electronic version of this brief in portable document format; it is identical to the paper version of the brief filed with the Court. I ran a virus scan on the electronic version of this brief using Symantec Anti-Virus Corporate Edition Version 10.6.52 software, and no virus was detected.

/s/ Nancy Winkelman  
Nancy Winkelman

Dated: April 8, 2015

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
	)	
Applicant,	)	Civil Action No. 2:14-mc-00109-AJS
	)	
v.	)	Judge Arthur J. Schwab
	)	
UPMC PRESBYTERIAN SHADYSIDE,	)	JURY TRIAL DEMANDED
	)	
Respondent.	)	
	)	

**NOTICE OF APPEAL**

Notice is hereby given that Respondent, UPMC Presbyterian Shadyside, in the above-captioned matter, hereby appeals to the United States Court of Appeals for the Third Circuit from the following Opinions and Orders of Court:

- (1) the Court’s August 22, 2014 Order of Court, (Doc. 25), and the Court’s accompanying Memorandum Opinion (Doc. 24);
- (2) the Court’s August 26, 2014 Supplement/Amendment to its August 22, 2014 Memorandum Opinion (Doc. 26);
- (3) the Court’s September 2, 2014 Supplemental/Amended Order of Court (Doc. 28), and the Court’s accompanying Supplemental/Amended Memorandum Opinion (Doc. 27); and
- (4) the Court’s October 27, 2014 Order on Motion(s) for Reconsideration (Doc. 34).



**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
	)	
Applicant,	)	Civil Action No. 2:14-mc-00110-AJS
	)	
v.	)	Judge Arthur J. Schwab
	)	
UPMC,	)	JURY TRIAL DEMANDED
	)	
Respondent.	)	
	)	

**NOTICE OF APPEAL**

Notice is hereby given that Respondent, UPMC, in the above-captioned matter, hereby appeals to the United States Court of Appeals for the Third Circuit from the following Opinions and Orders of Court:

- (1) the Court’s August 22, 2014 Order of Court, (Doc. 24), and the Court’s accompanying Memorandum Opinion (Doc. 23);
- (2) the Court’s August 26, 2014 Supplement/Amendment to its August 22, 2014 Memorandum Opinion (Doc. 25);
- (3) the Court’s September 2, 2014 Supplemental/Amended Order of Court (Doc. 27), and the Court’s accompanying Supplemental/Amended Memorandum Opinion (Doc. 26); and
- (4) the Court’s October 27, 2014 Order on Motion(s) for Reconsideration (Doc. 35).



**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
	)	
Applicant,	)	Civil Action No. 2:14-mc-00111-AJS
	)	
v.	)	Judge Arthur J. Schwab
	)	
UPMC,	)	JURY TRIAL DEMANDED
	)	
Respondent.	)	
	)	

**NOTICE OF APPEAL**

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- (1) the Court’s August 22, 2014 Order of Court, (Doc. 26), and the Court’s accompanying Memorandum Opinion (Doc. 25);
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- (3) the Court’s September 2, 2014 Supplemental/Amended Order of Court (Doc. 29), and the Court’s accompanying Supplemental/Amended Memorandum Opinion (Doc. 28); and
- (4) the Court’s October 27, 2014 Order on Motion(s) for Reconsideration (Doc. 35).





IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC PRESBYTERIAN  
SHADYSIDE,

Respondent.

14mc00109

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00110

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00111

**ELECTRONICALLY FILED**

**MEMORANDUM OPINION GRANTING NLRB'S THREE APPLICATIONS TO  
ENFORCE SUBPOENA DUCES TECUM**

I. Overview

The matters currently pending before this Court, which were assigned while the undersigned was serving as the Miscellaneous Judge at the time of filing, are three (3)

Applications for Summary Order(s) Enforcing Subpoena Duces Tecum:

1. The National Labor Relation Board's (NLRB's) Subpoena Duces Tecum No. B-720565, directed to UPMC Presbyterian Shadyside ("Presbyterian"), filed at 14mc00109;
2. NLRB's Subpoena Duces Tecum No. B-720563, directed to UPMC, filed at 14mc00110; and
3. NLRB's Subpoena Duces Tecum No. 720504, issued at the request of SEIU Union ("SEIU" or "Union"), directed to UPMC, filed at 14mc00111.

The scope and nature of the three (3) Subpoenas, individually and collectively, are overly broad and unfocused. The Court has never seen a document request/Subpoena Duces Tecum of such a massive nature. The Court does not see how these requests have any legitimate relationship or relevance to the underlying alleged unfair labor practices;<sup>1</sup> instead, the requests seek highly confidential and proprietary information (except for a few public documents); the requests have no proportionality to the underlying charges;<sup>2</sup> and, the requests seek information that a union would not be entitled to receive as part of a normal organization effort. Indeed, the scope and nature of the requests, coupled with the NLRB's efforts to obtain said documents for,

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<sup>1</sup> The NLRB, in its briefing, does little to tie these requests to the underlying charges, except with respect to the single employer allegations, and a broad statement that the Consolidated Complaint "alleged violations of Section 8(a)(1), (3) and (4) of the Act." Doc. No. 2 at p. 2.

<sup>2</sup> While the Court notes that Federal Rule of Civil Procedure 26 is not solely applicable to the present scenario (as Federal Rule of Civil Procedure 45 addresses subpoena issues), there are newly approved amendments to the Federal Rules of Civil Procedure (pending Judicial Conference Review) addressing the need for proportionality of discovery requests. The language of the proposed amendment to Rule 26(b)(1) states: "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." [www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil\\_rules\\_redline.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil_rules_redline.pdf). (emphasis added.) The Court notes also that Respondent essentially argues proportionality in its responsive briefing. Doc. No. 14 at p. 6-7.

and on behalf of, the SEIU, arguably moves the NLRB from its investigatory function and enforcer of federal labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union.<sup>3</sup>

The requests are so extensive that the Court will not attempt to list them in this Opinion, but instead has attached these requests hereto. See Attachment 1 (14mc00109), Attachment 2 (14mc00110), and Attachment 3 (14mc00111).

## II. Background

Certain employees at Presbyterian were in the early stages of attempting to unionize through the SEIU when certain unfair labor practices allegedly began to occur.

The underlying charges argue that on November 19, 2012, Presbyterian began engaging in: surveillance of its employee's union activities and making the surveillance known to employees; interrogating its employees about their union activities; threatening and impliedly threatening employees with discipline and even arrest, if they continued to support the union movement; and selectively enforcing its solicitation policies against employees who supported the union. (Doc. No. 1-3 at p.15; Doc. No. 1-8 p. 2.)

SEIU filed charges with the NLRB in relation to these unfair labor practices and then the National Labor Relations Board issued an Order Consolidating the Cases. In its Amended Consolidated Complaint, the NLRB alleged that Presbyterian and UPMC are a single-employer within the meaning of the National Labor Relations Act (NLRA). 29 U.S.C. § 161, *et. seq.*<sup>4</sup>

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<sup>3</sup> On March 20, 2014, the same day as the Application for Summary Order Enforcing Subpoena Duces Tecum No. was filed by the NLRB at 14mc00109, 14mc00110, and in 14mc00111, counsel for the SEIU filed her appearance as an "interested party." See Doc. No. 3.

<sup>4</sup>29 U.S.C. § 162(c) states: "In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of

UPMC contends that it is not a single employer and therefore is not a proper party to this suit. This argument was previously raised by UPMC in a motion before the ALJ, which was denied. (Doc. No. 1-12).

### III. Procedural History

The following is the procedural history for Subpoena Duces Tecum Nos. B-7205654 (14mc00109), No. B-720563 (14mc00110), and No. B-720504 (14mc00111), respectively:

- April 2013 – the SEIU filed numerous unfair labor practice charges against UPMC and Presbyterian alleging various violations of the NLRA with respect to approximately 22 separate case numbers. (Doc. No. 1-10 p. 2; Doc. No. 1-3).<sup>5</sup>
- September 30, 2013 – the Regional Director of Region 6 of the NLRB issued an Order Consolidating Cases and a Consolidated Complaint, and Notice of Hearing Against Respondent (UPMC and Presbyterian). (Doc. No. 1-10 p. 3).
- October 25, 2013 - At the request of Counsel for the SEIU and pursuant to Section 11(1) of the NLRA, the Regional Director for Region 6 issued Subpoena B-720504, directing the Custodian of Records of the Respondent to appear before an ALJ on the NLRB, which was reset twice (due to a government shutdown) to occur on February 3, 2014, to produce various documents. (Doc. No. 1-10. p 3.)
- November 5, 2013 – the Regional Director of Region 6 issued an Order further Consolidating Cases and Amendment to Consolidated complaint against Respondent Presbyterian. (Doc. No. 1-11 at p.3).
- January 9, 2014 – the Regional Director issued Second Order Further Consolidating Cases and Amended Consolidated Complaint. This Order added 2 additional cases beyond the 22 that appeared in the initial Consolidated Complaint, Cases 6-CA-111578, and 6-CA-115826. Further, in the Amended Consolidated Complaint, single employer allegations were added. (Doc. No. 1-11pp. 2-3).

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contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.”

<sup>5</sup> The Court has referenced the docket of the first case, 14mc00109, although the procedural history of all three matters is basically the same.

- January 14, 2014 - Pursuant to Section 11(1) of the NLRA, the Regional Director issued Subpoenas Duces Tecum Nos. B-720565 and B-720563, directing the Custodian of Records of Respondent to appear before an ALJ of the NLRB on February 2, 2014, to produce various documents (Doc. 1. p. 3).
- On or about January 23-27, 2014 - Respondents filed Petitions to Revoke all three (3) Subpoenas. (Doc. No. 1. p. 4).
- January 27, 2014 – Respondents moved that (1) single employer allegations concerning UPMC and Presbyterian be dismissed; and (2) UPMC be dismissed as a Respondent. (Doc. No. 1-11 p. 1).
- February 7, 2014 - ALJ denied Motion to Dismiss, which read in its entirety “[t]he Respondents’ Motion to Dismiss Amendment to the consolidated complaint is denied. The Respondents have failed to establish that the amendments are improper and that they are entitled to judgment as a matter of law.” (Doc. No. 1 p. 5 and Doc. No. 1-12).
- February 24, 2014 - ALJ denied Respondents’ Petition to Revoke Subpoenas on the record at a hearing in the alleged unfair labor practice proceeding except as follows:
  - Paragraph 35 in No. 720565:
  - Paragraph 35 in No. 720563
  - Paragraphs 1-4, 10-11, 17, 19-21, 26-28, 39, 49-53, 57, 60-65, and 67-69 in No. 720504 (Doc. No. 1-9, pp. 5-6).
  - Nothing prohibits in the ALJ’s decision prohibits the NLRB from sharing said documents with the SEIU, or with anyone else (Doc. No. 1-9).
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- March 20, 2014 - NLRB filed the instant Applications for Summary Order(s) Enforcing Subpoenas in this Court (Doc. No. 1).

#### IV. Standard of Review

A District Court should enforce an administrative subpoena if the following elements are met: (1) if is for a legitimate and proper purpose; (2) if the inquiry is reasonably relevant to the purpose; and (3) if the demand is not too indefinite, too broad, or unreasonable. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1964); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992) (citing *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-255, 13 L.Ed.2d 112 (1964)). As set forth by the United States Court of Appeals for the Third Circuit, “Courts must insist that the agency ‘not act arbitrarily or in excess of [its] statutory authority . . . .’” *NLRB v. Interstate Dress Carriers*, 610 F.2d 99, 111 (3d Cir. 1979) (quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216, 66 S.Ct. 494, 509, 90 L.Ed. 614 (1946)).

Therefore, in order to enforce these Administrative Subpoenas, the NLRB must demonstrate that: (1) its investigation has a legitimate purpose; (2) the inquiry is relevant to that purpose; (3) the agency does not already possess the information requested; (4) the agency has complied with relevant administrative requirements; and (5) the demand is not “unreasonably broad or burdensome.” See 09mc00079 at Doc. No. 32-1 at 11, *E.E.O.C. v. Kronos Inc.*, 620 F.2d 287 (3d Cir. 2010) (citing *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (other citations omitted)).

## V. Discussion

### 1. Applicable Test

Section 11(1) of the NLRA, 29 U.S.C. Section 161(1), provides that the Board shall have access to any evidence “that relates to any matter under investigation or in question.” While the Board has no independent authority to enforce its subpoenas, Section 11(2) of the NLRA, 29 U.S.C. Section 161(2), grants jurisdiction to this Court to enforce Board subpoenas. An application for enforcement of an administrative subpoena is a summary proceeding, and the subpoena “must be enforced if the documents sought could be pertinent to a legitimate agency inquiry.” *United States v. O’Neill*, 619 F.2d 222, 228 (3d Cir. 1980). *See also NLRB v. O- T Shoe Mfg. Co.*, 409 F.2d 1247, 1253 (3d Cir. 1969).

The enforcement of subpoenas is confined to the discretion of Federal District Courts, although in passing on a request for enforcement of a subpoena, the NLRB contends that the District Court’s intrusion into the NLRB’s domain is narrowly restricted. Doc. No. 2 at 5. *See also Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450 (6th Cir. 1941). A court ordinarily will enforce an NLRB subpoena if the underlying investigation is within its authority and jurisdiction, the subpoena is not too indefinite, and the information sought is reasonably relevant to the investigation. *NLRB v. North American Van Lines, Inc.*, 611 F.Supp. 760 (N.D. 1985). Because the requirement that a subpoena for the production of evidence must merely relate to a matter under investigation, the scope of a District Court’s inquiry includes determining whether: (1) the matter under investigation or pending before the NLRB is within the NLRB’s jurisdiction *NLRB v. ITT Telecommunications*, 415 F.2d 768 (6th Cir. 1969); *NLRB ex rel. Intern. Union of Elec., Radio and Mach Workers, AFL-CIO-CLC v. Dutch Boy, Inc. Glow Lite Division*, 606 F.2d 929 (10th Cir. 1979); (2) the subpoena to produce evidence describes matters sought with



sufficient particularity with respect to the matter under investigation *NLRB v. ITT Telecommunications*, 415 F.2d 768 (6th Cir. 1969); and (3) the subpoena was regularly issued, duly served, and not obeyed by the party against whom it was issued. *Goodyear Tire & Rubber Co., v. NLRB*, 122 F.2d 450 (6th Cir. 1941).

As stated above, to obtain enforcement of an administrative subpoena, an agency must demonstrate that 1) its investigation has a legitimate purpose, 2) the inquiry is relevant to that purpose, 3) the agency does not already possess the information requested, 4) the agency has complied with relevant administrative requirements, and 5) the demand is not “unreasonably broad or burdensome.” *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (quoting *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995)).

To this Court, its review of the three (3) Subpoena Duces Tecum demonstrates that (a) there is a minimal or no relationship between the Subpoenas and the underlying unfair labor practice charges; and (b) the unfair labor practices are being used, under the guise of the “single employer” rubric, to attempt to legitimize a massive document request. Further, after studying the three (3) Subpoena Duces Tecum (attached hereto), the Court concludes that compliance with the three (3) Subpoena Duces Tecum, as directed by the ALJ, would be an extensive, expensive, time-consuming, and potentially disruptive of the daily business activities of the Respondents, as well as requiring the disclosure of highly confidential and proprietary information (except for a few items that are public). Thus, based upon the current record and applying the applicable “test” (regarding whether the inquiry is relevant to a legitimate purpose and whether the demand is unreasonably broad and burdensome), the Court would deny the three (3) Applications to Enforce Subpoena Duces Tecum in their current form.

## 2. Kronos' Appellate Decisions

However, the Court's role in determining whether to enforce an agency subpoena is limited by the recent rulings of the United States Court of Appeals for the Third Circuit. *EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010) (*Kronos I*); *EEOC v. Kronos Inc.*, 694 F.2d 351 (3d Cir. 2012) (*Kronos II*). In *Kronos*, the United States Court of Appeals instructed this Court to enforce a broad subpoena issued by the EEOC to a non-party, Kronos Incorporated. By way of background, Kronos provided assessment testing services for Kroger, which used these services in its hiring process. The subpoena at issue was based upon a single complaint by an allegedly disabled woman who was not hired at Kroger's Clarksburg, West Virginia store, which the applicant alleged was in violation of the Americans with Disabilities Act of 1990. 42 U.S.C. § 12010, et seq. See 09mc00079 at Doc. No. 32. This Court denied the motion to enforce this subpoena because, although based upon a single complaint, at a single store, the subpoena would have required Kronos to provide information as to every Kroger store across the country and as to each employee who used this test. *Id.* at doc. no. 32-1 at pg. 16. On appeal, in *Kronos I*, the United States Court of Appeals for the Third Circuit directed this Court to order the enforcement of this subpoena.

In its subsequent Order (upon remand), this Court granted in part and denied in part the Application to Enforce the Administrative Subpoena. This Court denied the Application in part out of concern that a single instance of alleged discrimination, at a single store, was being used to obtain unrelated information as to Kronos and its testing methods. 09mc00079 at Doc. No. 50 at pgs. 31-32. The Court was also concerned about the implications of this subpoena on Kroger. In a second precedential opinion (*Kronos II*), the United States Court of Appeals for the Third Circuit rejected these concerns.

This Court's experience with the Kronos matter and its subsequent appellate history, leads this Court to believe that it is constrained in the current case, in that any denial of the present Applications to Enforce Subpoenas will not be affirmed. The Court remains concerned about the effects of broad subpoenas, especially in light of the fact that the investigation into Kronos/Kroger is still ongoing, despite the fact that the single underlying charge was filed over seven years ago. See Status Report of 03/28/2014 at 09mc00079, at doc. no. 79 at pg. 2.

### 3. Current Legal Predicament

This Court does not mean to suggest that the "applicable" legal framework for review of a subpoena of an administrative agency is no longer sound law (requiring a finding of legitimate purpose, that the inquiry be reasonably relevant to the purpose, and that the demand should not be too indefinite, too broad, or unreasonable). However, the practical effect of case law as to enforcement of subpoenas of federal government agencies is that this Court is constrained to essentially "rubber stamp" the enforcement of the Subpoenas at hand. As NLRB states in its brief,

The Board's subpoena enforcement proceedings, authorized by Section 11(2) of the Act, are summary in nature . . . . [T]he proceedings plainly are of a summary nature not requiring the issuance of process, hearing, finding of fact, and the elaborate process of a civil suit . . . . District courts may 'undertake only an extremely limited inquiry' when determining whether an administrative subpoena is enforced.

Doc. No. 2 at pp. 3-4.

If the practical effect of this legal predicament is to be altered, it is not the District Court's role to do so, but the role of the appellate court. The Court is at a loss of how to adequately address the above issues of whether the matter under investigation serves legitimate purposes, whether the inquiry is relevant to that purpose, and not unduly broad or burdensome,

while still conforming to the extremely narrow and limited nature of the proceedings at hand. If the United States Court of Appeals for the Third Circuit finds that the District Court has the authority to conduct a meaningful and/or thorough review of the three (3) Subpoena Duces Tecum at issue here, the Court is prepared to do so.

VI. Conclusion

Therefore, the Court will grant the three (3) Applications to Enforce Subpoena Duces Tecum, but will stay the implementation of this Order, so the Respondents may appeal the foregoing decision. An appropriate order follows.

SO ORDERED, this 22nd day of August, 2014

s/ Arthur J. Schwab  
Arthur J. Schwab  
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC PRESBYTERIAN  
SHADYSIDE,

Respondent.

14mc00109

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00110

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00111

**ELECTRONICALLY FILED**

**Order of Court**

And now, this 22<sup>nd</sup> day of August, 2014, for the reasons set forth in the Accompanying Memorandum Opinion, the Court will GRANT the Applications for Summary Orders Enforcing

Subpoena Duces Tecum in all of the above captioned matters (doc. no. 1 at 14mc00109, 14mc00110, and 14mc00111). The Court will stay the implementation of this Order, so that Respondents may appeal this Order, if they elect to do so.

SO ORDERED, this 22nd day of August, 2014

s/ Arthur J. Schwab  
Arthur J. Schwab  
United States District Court Judge

cc: All ECF registered counsel of record

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC PRESBYTERIAN  
SHADYSIDE,

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14mc00109

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

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14mc00110

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

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Respondent.

14mc00111

**ELECTRONICALLY FILED**

**Supplement/Amendment to Memorandum Opinion at doc. nos. 24 and 25**

\* \* \*

#### IV. Standard of Review<sup>6</sup>

**SO ORDERED** this 26th day of August, 2014.

s/Arthur J. Schwab  
Arthur J. Schwab  
United States District Judge

cc: All Registered ECF Counsel and Parties

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<sup>6</sup> As the Court set forth above, the NLRB's functions include "its investigatory function and enforcer of federal labor law." As further detailed above, the history of the current matter through various stages, included the filing of unfair labor practices, the investigation, the filing by the NLRB of a complaint and amended complaint, the issuance of the three Subpoenas currently in dispute, the proceedings before the Administrative Law Judge, and his rulings on UPMC's challenges to said Subpoenas. Thus, the NLRB proceeding has advanced from an administrative investigation to an administrative litigation/trial proceeding. However, the case law and applicable legal standards involving enforcement of subpoenas, whether issued pursuant to an administrative investigation or in the context of an administrative litigation/trial proceeding, are instructive and applicable. In fact, the briefing by both the NLRB and UPMC includes citations to the enforcement of subpoenas, whether they be in an investigatory or litigation/trial posture, interchangeably, see doc. nos. 2, 14, and 22, consistent with the language of § 161(2), which states this Court shall have jurisdiction "to issue to such a person an order requiring such person to appear before the Board . . . to produce evidence if so ordered . . . touching the matter under investigation or in question." 29 U.S.C. § 161(2).



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

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14mc00109

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**SUPPLEMENTAL/AMENDED MEMORANDUM OPINION GRANTING NLRB'S  
THREE APPLICATIONS TO ENFORCE SUBPOENA DUCES TECUM**

I. Overview

The matters currently pending before this Court, which were assigned while the undersigned was serving as the Miscellaneous Judge at the time of filing, are three (3)

Applications for Summary Order(s) Enforcing Subpoena Duces Tecum:

1. The National Labor Relation Board's (NLRB's) Subpoena Duces Tecum No. B-720565, directed to UPMC Presbyterian Shadyside ("Presbyterian"), filed at 14mc00109;
2. NLRB's Subpoena Duces Tecum No. B-720563, directed to UPMC, filed at 14mc00110; and
3. NLRB's Subpoena Duces Tecum No. 720504, issued at the request of SEIU Union ("SEIU" or "Union"), directed to UPMC, filed at 14mc00111.

The scope and nature of the three (3) Subpoenas, individually and collectively, are overly broad and unfocused. The Court has never seen a document request/Subpoena Duces Tecum of such a massive nature. The Court does not see how these requests have any legitimate relationship or relevance to the underlying alleged unfair labor practices;<sup>1</sup> instead, the requests seek highly confidential and proprietary information (except for a few public documents); the requests have no proportionality to the underlying charges;<sup>2</sup> and, the requests seek information that a union would not be entitled to receive as part of a normal organization effort. Indeed, the scope and nature of the requests, coupled with the NLRB's efforts to obtain said documents for,

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<sup>1</sup> The NLRB, in its briefing, does little to tie these requests to the underlying charges, except with respect to the single employer allegations, and a broad statement that the Consolidated Complaint "alleged violations of Section 8(a)(1), (3) and (4) of the Act." Doc. No. 2 at p. 2.

<sup>2</sup> While the Court notes that Federal Rule of Civil Procedure 26 is not solely applicable to the present scenario (as Federal Rule of Civil Procedure 45 addresses subpoena issues), there are newly approved amendments to the Federal Rules of Civil Procedure (pending Judicial Conference Review) addressing the need for proportionality of discovery requests. The language of the proposed amendment to Rule 26(b)(1) states: "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." [www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil\\_rules\\_redline.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil_rules_redline.pdf). (emphasis added.) The Court notes also that Respondent essentially argues proportionality in its responsive briefing. Doc. No. 14 at p. 6-7.

and on behalf of, the SEIU, arguably moves the NLRB from its investigatory function and enforcer of federal labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union.<sup>3</sup>

The requests are so extensive that the Court will not attempt to list them in this Opinion, but instead has attached these requests hereto. See Attachment 1 (14mc00109), Attachment 2 (14mc00110), and Attachment 3 (14mc00111).

## II. Background

Certain employees at Presbyterian were in the early stages of attempting to unionize through the SEIU when certain unfair labor practices allegedly began to occur.

The underlying charges argue that on November 19, 2012, Presbyterian began engaging in: surveillance of its employee's union activities and making the surveillance known to employees; interrogating its employees about their union activities; threatening and impliedly threatening employees with discipline and even arrest, if they continued to support the union movement; and selectively enforcing its solicitation policies against employees who supported the union. (Doc. No. 1-3 at p.15; Doc. No. 1-8 p. 2.)

SEIU filed charges with the NLRB in relation to these unfair labor practices and then the National Labor Relations Board issued an Order Consolidating the Cases. In its Amended Consolidated Complaint, the NLRB alleged that Presbyterian and UPMC are a single-employer within the meaning of the National Labor Relations Act (NLRA). 29 U.S.C. § 161, *et. seq.*<sup>4</sup>

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<sup>3</sup> On March 20, 2014, the same day as the Application for Summary Order Enforcing Subpoena Duces Tecum No. was filed by the NLRB at 14mc00109, 14mc00110, and in 14mc00111, counsel for the SEIU filed her appearance as an "interested party." See Doc. No. 3.

<sup>4</sup>29 U.S.C. § 162(c) states: "In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of

UPMC contends that it is not a single employer and therefore is not a proper party to this suit. This argument was previously raised by UPMC in a motion before the ALJ, which was denied. (Doc. No. 1-12).

### III. Procedural History

The following is the procedural history for Subpoena Duces Tecum Nos. B-7205654 (14mc00109), No. B-720563 (14mc00110), and No. B-720504 (14mc00111), respectively:

- April 2013 – the SEIU filed numerous unfair labor practice charges against UPMC and Presbyterian alleging various violations of the NLRA with respect to approximately 22 separate case numbers. (Doc. No. 1-10 p. 2; Doc. No. 1-3).<sup>5</sup>
- September 30, 2013 – the Regional Director of Region 6 of the NLRB issued an Order Consolidating Cases and a Consolidated Complaint, and Notice of Hearing Against Respondent (UPMC and Presbyterian). (Doc. No. 1-10 p. 3).
- October 25, 2013 - At the request of Counsel for the SEIU and pursuant to Section 11(1) of the NLRA, the Regional Director for Region 6 issued Subpoena B-720504, directing the Custodian of Records of the Respondent to appear before an ALJ on the NLRB, which was reset twice (due to a government shutdown) to occur on February 3, 2014, to produce various documents. (Doc. No. 1-10. p 3.)
- November 5, 2013 – the Regional Director of Region 6 issued an Order further Consolidating Cases and Amendment to Consolidated complaint against Respondent Presbyterian. (Doc. No. 1-11 at p.3).
- January 9, 2014 – the Regional Director issued Second Order Further Consolidating Cases and Amended Consolidated Complaint. This Order added 2 additional cases beyond the 22 that appeared in the initial Consolidated Complaint, Cases 6-CA-111578, and 6-CA-115826. Further, in the Amended Consolidated Complaint, single employer allegations were added. (Doc. No. 1-11pp. 2-3).

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contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.”

<sup>5</sup> The Court has referenced the docket of the first case, 14mc00109, although the procedural history of all three matters is basically the same.

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- On or about January 23-27, 2014 - Respondents filed Petitions to Revoke all three (3) Subpoenas. (Doc. No. 1. p. 4).
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- February 7, 2014 - ALJ denied Motion to Dismiss, which read in its entirety “[t]he Respondents’ Motion to Dismiss Amendment to the consolidated complaint is denied. The Respondents have failed to establish that the amendments are improper and that they are entitled to judgment as a matter of law.” (Doc. No. 1 p. 5 and Doc. No. 1-12).
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  - Nothing prohibits in the ALJ’s decision prohibits the NLRB from sharing said documents with the SEIU, or with anyone else (Doc. No. 1-9).
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#### IV. Standard of Review<sup>6</sup>

A District Court should enforce an administrative subpoena if the following elements are met: (1) if is for a legitimate and proper purpose; (2) if the inquiry is reasonably relevant to the purpose; and (3) if the demand is not too indefinite, too broad, or unreasonable. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1964); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992) (citing *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-255, 13 L.Ed.2d 112 (1964)). As set forth by the United States Court of Appeals for the Third Circuit, “Courts must insist that the agency ‘not act arbitrarily or in excess of [its] statutory authority . . . .’” *NLRB v. Interstate Dress Carriers*, 610 F.2d 99, 111 (3d Cir. 1979) (quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216, 66 S.Ct. 494, 509, 90 L.Ed. 614 (1946)).

Therefore, in order to enforce these Administrative Subpoenas, the NLRB must demonstrate that: (1) its investigation has a legitimate purpose; (2) the inquiry is relevant to that purpose; (3) the agency does not already possess the information requested; (4) the agency has complied with relevant administrative requirements; and (5) the demand is not “unreasonably broad or burdensome.” See 09mc00079 at Doc. No. 32-1 at 11, *E.E.O.C. v. Kronos Inc.*, 620

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<sup>6</sup> As the Court set forth above, the NLRB’s functions include “its investigatory function and enforcer of federal labor law.” As further detailed above, the history of the current matter through various stages, included the filing of unfair labor practices, the investigation, the filing by the NLRB of a complaint and amended complaint, the issuance of the three Subpoenas currently in dispute, the proceedings before the Administrative Law Judge, and his rulings on UPMC’s challenges to said Subpoenas. Thus, the NLRB proceeding has advanced from an administrative investigation to an administrative litigation/trial proceeding. However, the case law and applicable legal standards involving enforcement of subpoenas, whether issued pursuant to an administrative investigation or in the context of an administrative litigation/trial proceeding, are instructive and applicable. In fact, the briefing by both the NLRB and UPMC includes citations to the enforcement of subpoenas, whether they be in an investigatory or litigation/trial posture, interchangeably, see doc. nos. 2, 14, and 22, consistent with the language of § 161(2), which states this Court shall have jurisdiction “to issue to such a person an order requiring such person to appear before the Board . . . to produce evidence if so ordered . . . touching the matter under investigation or in question.” 29 U.S.C. § 161(2).

F.2d 287 (3d Cir. 2010) (citing *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (other citations omitted)).

## V. Discussion

### 1. Applicable Test

Section 11(1) of the NLRA, 29 U.S.C. Section 161(1), provides that the Board shall have access to any evidence “that relates to any matter under investigation or in question.” While the Board has no independent authority to enforce its subpoenas, Section 11(2) of the NLRA, 29 U.S.C. Section 161(2), grants jurisdiction to this Court to enforce Board subpoenas. An application for enforcement of an administrative subpoena is a summary proceeding, and the subpoena “must be enforced if the documents sought could be pertinent to a legitimate agency inquiry.” *United States v. O’Neill*, 619 F.2d. 222, 228 (3d Cir. 1980). *See also NLRB v. O- T Shoe Mfg. Co.*, 409 F.2d 1247, 1253 (3d Cir. 1969).

The enforcement of subpoenas is confined to the discretion of Federal District Courts, although in passing on a request for enforcement of a subpoena, the NLRB contends that the District Court’s intrusion into the NLRB’s domain is narrowly restricted. Doc. No. 2 at 5. *See also Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450 (6th Cir. 1941). A court ordinarily will enforce an NLRB subpoena if the underlying investigation is within its authority and jurisdiction, the subpoena is not too indefinite, and the information sought is reasonably relevant to the investigation. *NLRB v. North American Van Lines, Inc.*, 611 F.Supp. 760 (N.D. 1985). Because the requirement that a subpoena for the production of evidence must merely relate to a matter under investigation, the scope of a District Court’s inquiry includes determining whether: (1) the matter under investigation or pending before the NLRB is within the NLRB’s jurisdiction

*NLRB v. ITT Telecommunications*, 415 F.2d 768 (6th Cir. 1969); *NLRB ex rel. Intern. Union of Elec., Radio and Mach Workers, AFL-CIO-CLC v. Dutch Boy, Inc. Glow Lite Division*, 606 F.2d 929 (10th Cir. 1979); (2) the subpoena to produce evidence describes matters sought with sufficient particularity with respect to the matter under investigation *NLRB v. ITT Telecommunications*, 415 F.2d 768 (6th Cir. 1969); and (3) the subpoena was regularly issued, duly served, and not obeyed by the party against whom it was issued. *Goodyear Tire & Rubber Co., v. NLRB*, 122 F.2d 450 (6th Cir. 1941).

As stated above, to obtain enforcement of an administrative subpoena, an agency must demonstrate that 1) its investigation has a legitimate purpose, 2) the inquiry is relevant to that purpose, 3) the agency does not already possess the information requested, 4) the agency has complied with relevant administrative requirements, and 5) the demand is not “unreasonably broad or burdensome.” *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (quoting *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995)).

To this Court, its review of the three (3) Subpoena Duces Tecum demonstrates that (a) there is a minimal or no relationship between the Subpoenas and the underlying unfair labor practice charges; and (b) the unfair labor practices are being used, under the guise of the “single employer” rubric, to attempt to legitimize a massive document request. Further, after studying the three (3) Subpoena Duces Tecum (attached hereto), the Court concludes that compliance with the three (3) Subpoena Duces Tecum, as directed by the ALJ, would be an extensive, expensive, time-consuming, and potentially disruptive of the daily business activities of the Respondents, as well as requiring the disclosure of highly confidential and proprietary information (except for a few items that are public). Thus, based upon the current record and applying the applicable “test” (regarding whether the inquiry is relevant to a legitimate purpose and whether the demand



is unreasonably broad and burdensome), the Court would deny the three (3) Applications to Enforce Subpoena Duces Tecum in their current form.

## 2. Kronos' Appellate Decisions

However, the Court's role in determining whether to enforce an agency subpoena is limited by the recent rulings of the United States Court of Appeals for the Third Circuit. *EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010) (*Kronos I*); *EEOC v. Kronos Inc.*, 694 F.2d 351 (3d Cir. 2012) (*Kronos II*). In *Kronos*, the United States Court of Appeals instructed this Court to enforce a broad subpoena issued by the EEOC to a non-party, Kronos Incorporated. By way of background, Kronos provided assessment testing services for Kroger, which used these services in its hiring process. The subpoena at issue was based upon a single complaint by an allegedly disabled woman who was not hired at Kroger's Clarksburg, West Virginia store, which the applicant alleged was in violation of the Americans with Disabilities Act of 1990. 42 U.S.C. § 12010, et seq. See 09mc00079 at Doc. No. 32. This Court denied the motion to enforce this subpoena because, although based upon a single complaint, at a single store, the subpoena would have required Kronos to provide information as to every Kroger store across the country and as to each employee who used this test. *Id.* at doc. no. 32-1 at pg. 16. On appeal, in *Kronos I*, the United States Court of Appeals for the Third Circuit directed this Court to order the enforcement of this subpoena.

In its subsequent Order (upon remand), this Court granted in part and denied in part the Application to Enforce the Administrative Subpoena. This Court denied the Application in part out of concern that a single instance of alleged discrimination, at a single store, was being used to obtain unrelated information as to Kronos and its testing methods. 09mc00079 at Doc. No. 50

at pgs. 31-32. The Court was also concerned about the implications of this subpoena on Kroger. In a second precedential opinion (*Kronos II*), the United States Court of Appeals for the Third Circuit rejected these concerns.

This Court's experience with the Kronos matter and its subsequent appellate history, leads this Court to believe that it is constrained in the current case, in that any denial of the present Applications to Enforce Subpoenas will not be affirmed. The Court remains concerned about the effects of broad subpoenas, especially in light of the fact that the investigation into Kronos/Kroger is still ongoing, despite the fact that the single underlying charge was filed over seven years ago. See Status Report of 03/28/2014 at 09mc00079, at doc. no. 79 at pg. 2.

### 3. Current Legal Predicament

This Court does not mean to suggest that the "applicable" legal framework for review of a subpoena of an administrative agency is no longer sound law (requiring a finding of legitimate purpose, that the inquiry be reasonably relevant to the purpose, and that the demand should not be too indefinite, too broad, or unreasonable). However, the practical effect of case law as to enforcement of subpoenas of federal government agencies is that this Court is constrained to essentially "rubber stamp" the enforcement of the Subpoenas at hand. As NLRB states in its brief,

The Board's subpoena enforcement proceedings, authorized by Section 11(2) of the Act, are summary in nature . . . [T]he proceedings plainly are of a summary nature not requiring the issuance of process, hearing, finding of fact, and the elaborate process of a civil suit . . . District courts may 'undertake only an extremely limited inquiry' when determining whether an administrative subpoena is enforced.

Doc. No. 2 at pp. 3-4.

If the practical effect of this legal predicament is to be altered, it is not the District Court's role to do so, but the role of the appellate court. The Court is at a loss of how to adequately address the above issues of whether the matter under investigation serves legitimate purposes, whether the inquiry is relevant to that purpose, and not unduly broad or burdensome, while still conforming to the extremely narrow and limited nature of the proceedings at hand. If the United States Court of Appeals for the Third Circuit finds that the District Court has the authority to conduct a meaningful and/or thorough review of the three (3) Subpoena Duces Tecum at issue here, the Court is prepared to do so.

VI. Conclusion

Therefore, the Court will grant the three (3) Applications to Enforce Subpoena Duces Tecum, but will stay the implementation of this Order, so the Respondents may appeal the foregoing decision. An appropriate order follows.

SO ORDERED, this 2nd day of September, 2014

s/ Arthur J. Schwab  
Arthur J. Schwab  
United States District Court Judge

FORM NLRB-31 (12-12)

SUBPOENA DUCES TECUM

EXHIBIT B

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

To Custodian of Records UPMC Presbyterian Shadyside 600 Grant Street, 58th Floor, Pittsburgh, PA 15219-2739

As requested by Suzanne S. Donsky, Attorney and Julie R. Stern, Attorney for the National Labor Relations Board whose address is William S. Moorhead Federal Building, 1000 Liberty Avenue, Room 904, Pittsburgh, Pennsylvania 15222 (Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge of the National Labor Relations Board

at William S. Moorhead Federal Building, RM 904, 1000 Liberty Ave., in the City of Pittsburgh, PA 15222

on the 3rd day of February 20 14 at 1:00 (a.m.) (p.m.) or any adjourned or rescheduled date to testify in UPMC and its subsidiary UPMC Presbyterian Shadyside, Single Employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital Case 06-CA-102465, et al (Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See attachment

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

B - 720565

Issued at Pittsburgh, Pennsylvania,

this 14th day of January 20 14



Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

## ATTACHMENT

UPMC, et al.  
Cases 06-CA-102465, et al.

### DEFINITIONS AND INSTRUCTIONS

1. The word "document" or "documents" means, without limitation, the following items, whether printed or recorded or reproduced by any other mechanical process, or written or produced by hand, or any existing printed, typewritten, handwritten or otherwise recorded material of whatever kind and/or character, including, but not limited to: agreements, communications, correspondence, telegrams, letters, memoranda, facsimile transmissions, minutes, notes of any character, diaries, calendars, statements, affidavits, photographs, microfilm or microfiche, audio and/or video tapes, statistics, pamphlets, newsletters, press releases, bulletins, transcripts, summaries or records of telephone conversations or telephonic text messages, summaries or records or personal conversations or interviews, conferences, transcripts or summaries or reports of investigations and/or negotiations, drafts, internal or inter-office memoranda or correspondence, lists, data contained in computers, computer printouts, computer discs and/or files and all data contained therein, electronically stored records and electronic or "e" mail, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, and all other writings, figures or symbols of any kind, including but not limited to carbon, photographic or other duplicative copies of any such material in the possession of, control of or available to the subpoenaed party, or any agent, representative, or other persons acting in cooperation with, in concert with, or on behalf of said subpoenaed party.
2. The words "employee" and "employees" mean all full-time and regular part-time employees employed by UPMC Presbyterian Shadyside.
3. The "Union" refers to SEIU Healthcare Pennsylvania, CTW, CLC, its agents, officers, and/or representatives.
4. Whenever used herein, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include the past tense, and vice versa; references to parties shall be deemed to refer to any and all of their owners, officers, directors, owners, managers, supervisors, agents, and representatives; "and" and "or" and any other conjunctions shall be deemed both conjunctively and disjunctively so as to make the request inclusive rather than exclusive and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears; and, "any," "each," "every," and "all" shall be deemed to be all inclusive and to require production of each and every document responsive to the request in which such terms appear.
5. This subpoena is intended to cover all documents that are in your possession, custody or control, as well as documents that are in the possession, custody or control of your present or former agents, attorneys, accountants, advisors, investigators, and any other persons or companies directly or indirectly employed by, or connected with you.

6. As to any documents not produced in compliance with this subpoena on any ground or if any requested document was, through inadvertence or otherwise, destroyed or no longer in the possession of you, state:

- (a) the author;
- (b) the recipient;
- (c) the name of each person to whom the original or a copy was sent;
- (d) the date of the document;
- (e) the subject matter of the document; and
- (f) the circumstances under which the document was destroyed, withheld or is no longer in your possession.

7. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

8. This request contemplates production of responsive documents in their entirety, without abbreviation, redaction, or expurgation.

9. All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or set of documents are responsive to, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

10. Unless otherwise stated, each item requested covers the period from January 1, 2012, to the date of service herein (the subject period).

11. This subpoena specifically requests the described documents, whether held or maintained at any facility operated by UPMC Presbyterian Shadyside, at one or another of UPMC Presbyterian Shadyside's offices, or at some other location.

**DOCUMENTS SUBJECT TO SUBPOENA NO. B-720565**

1. Copies of the original Articles and/or Certificate of Incorporation and/or partnership agreement of UPMC Presbyterian Shadyside.
2. Copies of any amendments to the original Articles and/or Certificate and/or partnership agreement of UPMC Presbyterian Shadyside effective during the subject period.
3. Copies of all leases, sales agreements, loans, extensions of credit, and other documents between UPMC Presbyterian Shadyside and any shareholders or partners thereof and UPMC and any shareholders or partners thereof.
4. \*Copies of documents showing the names and addresses of non-patient customers of UPMC Presbyterian Shadyside during the subject period.
5. \*Copies of documents showing the names and addresses of suppliers of UPMC Presbyterian Shadyside during the subject period.
6. Copies of documents showing the gift, lease, sale or other transfer of real or personal property, equipment or machinery between UPMC Presbyterian Shadyside and any shareholders or partners thereof and UPMC and any shareholders or partners thereof, and showing the terms of such gift, lease, sale or other transfer.
7. Copies of any and all minutes of meetings of the board of directors of UPMC Presbyterian Shadyside or other documents showing the actions of UPMC Presbyterian Shadyside relating to the relationship between UPMC Presbyterian Shadyside and any shareholder or partner thereof and UPMC and any shareholder or partner thereof.
8. Documents as will show the relationship between UPMC Presbyterian Shadyside and UPMC including the ownership interest of UPMC Presbyterian Shadyside or any of its shareholders or partners in UPMC for the subject period.
9. Copies of Annual Reports of UPMC Presbyterian Shadyside for 2011, 2012 and 2013.
10. Copies of audited Financial Statements of UPMC Presbyterian Shadyside for 2011, 2012 and 2013.
11. Copies of any documents showing the capital investment of each of the shareholders or partners of UPMC Presbyterian Shadyside in UPMC and UPMC Presbyterian Shadyside.
12. Copies of any documents showing the ownership interest of each of the shareholders or partners of UPMC Presbyterian Shadyside in UPMC and UPMC Presbyterian Shadyside.
13. \*Documents of UPMC Presbyterian Shadyside, including corporate minutes, which disclose the names of all directors of UPMC Presbyterian Shadyside and the dates during which each such person was a director for the subject period.
14. \*Documents of UPMC Presbyterian Shadyside, including corporate minutes, which disclose the following information for the subject period; the names of all officers of UPMC

Presbyterian Shadyside, the office(s) each such individual held, and the dates on which each such individual held such office(s).

15. \*Documents of UPMC Presbyterian Shadyside which disclose the following information for the subject period; the names of all stockholders of UPMC Presbyterian Shadyside, the number and classes of shares held by each stockholder, and the dates and amounts of stock acquired or disposed of by each stockholder of UPMC Presbyterian Shadyside.

17. Documents that will show the organizational structure and chain of command or authority of UPMC Presbyterian Shadyside, including the name, title and position of all individuals within that organizational structure.

18. Documents of UPMC Presbyterian Shadyside which disclose the dates and amounts of all rent paid by UPMC Presbyterian Shadyside to UPMC for the subject period.

19. Documents of UPMC Presbyterian Shadyside which disclose the dates and amounts of all rent received by UPMC Presbyterian Shadyside from UPMC for the subject period.

20. All written agreements between UPMC Presbyterian Shadyside and UPMC pertaining to the lease, rental or provision of equipment by UPMC to UPMC Presbyterian Shadyside for the subject period.

21. Documents of UPMC Presbyterian Shadyside, including canceled checks, which disclose the dates and amounts of all payments by UPMC Presbyterian Shadyside to UPMC for use of equipment owned by UPMC for the subject period.

22. Documents of UPMC Presbyterian Shadyside which disclose the dates and amounts of all payments by UPMC to UPMC Presbyterian Shadyside for use of equipment owned by UPMC Presbyterian Shadyside for the subject period.

23. All written agreements in effect or entered into at any time during the subject period between UPMC Presbyterian Shadyside and UPMC pertaining to the use by UPMC Presbyterian Shadyside of individuals employed or contracted by UPMC and/or to the furnishing of services by UPMC to UPMC Presbyterian Shadyside.

24. Documents of UPMC Presbyterian Shadyside, including canceled checks, which disclose the dates and amounts of all payments by UPMC Presbyterian Shadyside to UPMC for services during the subject period, and the nature of the service provided by UPMC.

25. Documents of UPMC Presbyterian Shadyside for the subject period which show the number of hours spent by individuals employed or contracted by UPMC Presbyterian Shadyside in providing services to UPMC.

26. All written agreements in effect or entered into at any time during the subject period between UPMC Presbyterian Shadyside and UPMC pertaining to the use by UPMC of individuals employed or contracted by UPMC Presbyterian Shadyside and/or to the furnishing of services by UPMC Presbyterian Shadyside to UPMC.



27. Documents of UPMC Presbyterian Shadyside, which disclose the dates and amounts of all payments by UPMC to UPMC Presbyterian Shadyside for any services for the subject period.
28. Documents of UPMC Presbyterian Shadyside for the subject period which show the number of hours spent by individuals employed by UPMC Presbyterian Shadyside in providing services to UPMC, and which describe the nature of those services.
29. Documents of UPMC Presbyterian Shadyside which disclose the identity of the medical and health insurance plan for employees of UPMC Presbyterian Shadyside in effect at any time during the subject period, and which disclose the identity of the employee group covered by the plan.
30. Documents of UPMC Presbyterian Shadyside which disclose the identity of the pension plan for employees of UPMC Presbyterian Shadyside in effect at any time during the subject period and which disclose the identity of the employee group covered by the plan.
31. Federal and state tax returns filed by UPMC Presbyterian Shadyside for the calendar years 2011 and 2012, or, if appropriate, fiscal years 2011 and 2012.
32. Documents reflecting the telephone numbers assigned to UPMC Presbyterian Shadyside operations.
33. Copies of any and all letterheads used for business correspondence by UPMC Presbyterian Shadyside.
34. Copies of any and all advertisements used by UPMC Presbyterian Shadyside for the purpose of soliciting business for the subject period.
35. Documents reflecting any advertisements used by UPMC Presbyterian Shadyside for the purpose of soliciting applicants for employment by UPMC Presbyterian Shadyside for the period subject period.
36. Documents reflecting any applications filed by UPMC Presbyterian Shadyside for public funding of any of its operations.
37. Documents reflecting any pension or other benefit plans offered to employees of UPMC Presbyterian Shadyside.
38. Documents showing the identity of all entities having an ownership interest in the real and physical property at which UPMC Presbyterian Shadyside has its operations in Pittsburgh, Pennsylvania.
39. Copy of the Ethics, Compliance and Audit Services policies followed by UPMC Presbyterian Shadyside.
40. Documents issued by UPMC Presbyterian Shadyside's Office of Ethics, Compliance and Audit Services during the subject period.
41. Copy of the Utilization Review processes followed by UPMC Presbyterian Shadyside.

42. Documents which show all quotes or bids for contracts for goods and/or services submitted by UPMC Presbyterian Shadyside or any of its officers, directors or agents to UPMC at any time during the subject period.
43. Documents reflecting all loans issued by UPMC Presbyterian Shadyside to UPMC during the subject period.
44. Documents reflecting all lines of credit extended by UPMC Presbyterian Shadyside to UPMC during the subject period.
45. Documents reflecting the entity which owns the property used by UPMC Presbyterian Shadyside in conducting its business during the subject period.
46. Copy of any affiliation agreement between UPMC Presbyterian Shadyside and UPMC in effect at any time during the subject period.
47. Copy of any agreement between UPMC Presbyterian Shadyside and any UPMC-owned or affiliated entity including, but not limited to, Ebenefts Solutions, for the provision of human resources and/or personnel management services, in effect at any time during the subject period.

\*In lieu of original documents required above, compliance with this Subpoena may be accomplished by the submission in affidavit form of compilations and/or analyses made from the original documents, setting forth the information required, provided that pertinent records be made available for checking the accuracy of the statement in the event such action is deemed necessary.

**SUBPOENA DUCES TECUM**

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

To Custodian of Records  
UPMC  
600 Grant Street, 58<sup>th</sup> Floor, Pittsburgh, PA 15219-2739

As requested by Suzanne S. Donsky, Attorney and Julie R. Stern, Attorney for the National Labor Relations Board  
whose address is William S. Moorhead Federal Building, 1000 Liberty Avenue, Room 904, Pittsburgh, Pennsylvania 15222  
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE \_\_\_\_\_  
an Administrative Law Judge \_\_\_\_\_ of the National Labor Relations Board

at William S. Moorhead Federal Building, RM 904, 1000 Liberty Ave.

in the City of Pittsburgh, PA 15222

on the 3rd day of February 20 14 at 11:00 (a.m.) (p.m.) or any adjourned  
or rescheduled date to testify in UPMC and its subsidiary UPMC Presbyterian Shadyside, Single Employer, d/b/a  
UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital Case 06-CA-102465, et al  
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See attachment

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

**B - 720563**

Issued at Pittsburgh, Pennsylvania,

this 14<sup>th</sup> day of January

20 14



*[Signature]*  
Chairman, National Labor Relations Board

**NOTICE TO WITNESS.** Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

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## ATTACHMENT

**UPMC, et al.**  
Cases 06-CA-102465, et al.

### DEFINITIONS AND INSTRUCTIONS

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2. The words "employee" and "employees" mean all full-time and regular part-time employees employed by UPMC and/or its subsidiary UPMC Presbyterian Shadyside d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital.
3. The "Union" refers to SEIU Healthcare Pennsylvania, CTW, CLC, its agents, officers, and/or representatives.
4. Whenever used herein, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include the past tense, and vice versa; references to parties shall be deemed to refer to any and all of their owners, officers, directors, owners, managers, supervisors, agents, and representatives; "and" and "or" and any other conjunctions shall be deemed both conjunctively and disjunctively so as to make the request inclusive rather than exclusive and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears; and, "any," "each," "every," and "all" shall be deemed to be all inclusive and to require production of each and every document responsive to the request in which such terms appear.
5. This subpoena is intended to cover all documents that are in your possession, custody or control, as well as documents that are in the possession, custody or control of your present or former agents, attorneys, accountants, advisors, investigators, and any other persons or companies directly or indirectly employed by, or connected with you.

6. As to any documents not produced in compliance with this subpoena on any ground or if any requested document was, through inadvertence or otherwise, destroyed or no longer in the possession of you, state:

- (a) the author;
- (b) the recipient;
- (c) the name of each person to whom the original or a copy was sent;
- (d) the date of the document;
- (e) the subject matter of the document; and
- (f) the circumstances under which the document was destroyed, withheld or is no longer in your possession.

7. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

8. This request contemplates production of responsive documents in their entirety, without abbreviation, redaction, or expurgation.

9. All documents produced pursuant to this subpoena are to be organized by what subpoena paragraph each document or set of documents are responsive to, and labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

10. Unless otherwise stated, each item requested covers the period from January 1, 2012, to the date of service herein (the subject period).

11. This subpoena specifically requests the described documents, whether held or maintained at any UPMC facility, at one or another of UPMC's offices, or at some other location.

**DOCUMENTS SUBJECT TO SUBPOENA NO. B-720563**

1. Correct copies of the original Articles and/or Certificate of Incorporation and/or partnership agreement of UPMC.
2. Copies of any amendments to the original Articles and/or Certificate and/or partnership agreement of UPMC effective during the subject period.
3. Copies of all leases, sales agreements, loans, extensions of credit, and other documents between UPMC and any shareholders or partners thereof and UPMC Presbyterian Shadyside and any shareholders or partners thereof.
4. \*Copies of documents showing the names and addresses of non-patient customers of UPMC during the subject period.
5. \*Copies of documents showing the names and addresses of suppliers of UPMC during the subject period.
6. Copies of documents showing the gift, lease, sale or other transfer of real or personal property, equipment or machinery between UPMC and any shareholders or partners thereof and UPMC Presbyterian Shadyside and any shareholders or partners thereof, and showing the terms of such gift, lease, sale or other transfer.
7. Copies of any and all minutes of meetings of the board of directors of UPMC or other documents showing the actions of UPMC relating to the relationship between UPMC and any shareholder or partner thereof and UPMC Presbyterian Shadyside and any shareholder or partner thereof.
8. Documents that will show the relationship between UPMC and UPMC Presbyterian Shadyside including the ownership interest of UPMC or any of its shareholders or partners in UPMC Presbyterian Shadyside for the subject period.
9. Copies of Annual Reports of UPMC for 2011, 2012 and 2013.
10. Copies of Audited Financial Statements of UPMC for 2011, 2012 and 2013.
11. Copies of any documents showing the capital investment of each of the shareholders or partners of UPMC in UPMC Presbyterian Shadyside and UPMC.
12. Copies of any documents showing the ownership interest of each of the shareholders or partners of UPMC in UPMC Presbyterian Shadyside and UPMC.
13. \*Documents of UPMC, including corporate minutes, which disclose the names of all directors of UPMC and the dates during which each such person was a director for the subject period.
14. \*Documents of UPMC, including corporate minutes, which disclose the following information for the subject period; the names of all officers of UPMC, the office(s) each such individual held, and the dates on which each such individual held such office(s).

15. \*Documents of UPMC which disclose the following information for the subject period; the names of all stockholders of UPMC, the number and classes of shares held by each stockholder, and the dates and amounts of stock acquired or disposed of by each stockholder of UPMC.
16. Documents that will show the organizational structure and chain of command or authority of UPMC, including the name, title and position of all individuals within that organizational structure.
17. Documents of UPMC which disclose the dates and amounts of all rent paid by UPMC to UPMC Presbyterian Shadyside for the subject period.
18. Documents of UPMC which disclose the dates and amounts of all rent received by UPMC from UPMC Presbyterian Shadyside for the subject period.
19. All written agreements between UPMC and UPMC Presbyterian Shadyside pertaining to the lease, rental or provision of equipment by UPMC Presbyterian Shadyside to UPMC for the subject period.
20. Documents of UPMC, including canceled checks, which disclose the dates and amounts of all payments by UPMC to UPMC Presbyterian Shadyside for use of equipment owned by UPMC Presbyterian Shadyside for the subject period.
21. Documents of UPMC which disclose the dates and amounts of all payments by UPMC Presbyterian Shadyside to UPMC for use of equipment owned by UPMC for the subject period.
22. All written agreements in effect or entered into at any time during the subject period between UPMC and UPMC Presbyterian Shadyside pertaining to the use by UPMC of individuals employed or contracted by UPMC Presbyterian Shadyside and/or to the furnishing of services by UPMC Presbyterian Shadyside to UPMC.
23. Documents of UPMC, including canceled checks, which disclose the dates and amounts of all payments by UPMC to UPMC Presbyterian Shadyside for services for the subject period, and the nature of the service provided by UPMC Presbyterian Shadyside.
24. Documents of UPMC for the subject period which show the number of hours spent by individuals employed or contracted by UPMC in providing services to UPMC Presbyterian Shadyside.
25. All written agreements in effect or entered into at any time during the subject period between UPMC and UPMC Presbyterian Shadyside pertaining to the use by UPMC Presbyterian Shadyside of individuals employed or contracted by UPMC and/or to the furnishing of services by UPMC to UPMC Presbyterian Shadyside.
26. Documents of UPMC, which disclose the dates and amounts of all payments by UPMC Presbyterian Shadyside to UPMC for services for the subject period.

27. Documents of UPMC for the subject period which show the number of hours spent by individuals employed by UPMC in providing services to UPMC Presbyterian Shadyside, and which describe the nature of those services.
28. Documents of UPMC which disclose the identity of the medical and health insurance plan for employees of UPMC in effect at any time during the subject period, and which disclose the identity of the employee group covered by the plan.
29. Documents of UPMC which disclose the identity of the pension plan for employees of UPMC in effect at any time during the subject period, and which disclose the identity of the employee group covered by the plan.
30. Federal and state tax returns filed by UPMC for the calendar years 2011 and 2012, or, if appropriate, fiscal years 2011 and 2012.
31. Documents reflecting the telephone numbers assigned to UPMC operations.
32. Copies of any and all letterheads used for business correspondence by UPMC.
33. Documents reflecting any advertisements used by UPMC for the purpose of soliciting business for the subject period.
34. Documents reflecting any advertisements used by UPMC for the purpose of soliciting applicants for employment by UPMC for the subject period.
35. Documents reflecting any applications filed by UPMC for public funding of any of its operations.
36. Documents reflecting any pension or other benefit plan administered by UPMC and offered to employees of UPMC and/or UPMC Presbyterian Shadyside Hospital.
37. Documents showing the identity of all entities having an ownership interest in the real and physical property at which UPMC Presbyterian Shadyside has its operations in Pittsburgh, Pennsylvania.
38. Copy of the policies of UPMC's Office of Ethics, Compliance and Audit Services.
39. Copy of UPMC's utilization review processes.
40. \*Documents reflecting all UPMC system-wide policies which apply to UPMC Presbyterian Shadyside.
41. Copy of UPMC Infonet Systemwide Policies homepage.
42. Copies of all Official Statements, with appendices, for all Allegheny County Hospital Development Authority Revenue Bonds offered from January 1, 2011 to the date of this subpoena.
43. Copies of all Official Statements, with appendices, for all Monroeville Finance Authority Bonds offered from January 1, 2011 to the date of this subpoena.



44. Documents which show all quotes or bids for contracts for goods and/or services submitted by UPMC or any of its officers, directors or agents to UPMC Presbyterian Shadyside at any time during the subject period.
45. Documents reflecting all loans issued by UPMC to UPMC Presbyterian Shadyside during the subject period.
46. Documents reflecting all lines of credit extended by UPMC to UPMC Presbyterian Shadyside during the subject period.
47. Copy of any affiliation agreement between UPMC and UPMC Presbyterian Shadyside in effect at any time during the subject period.
48. Copy of any agreement between any UPMC-owned or affiliated entity including, but not limited to, Ebenefits Solutions, and UPMC Presbyterian Shadyside for the provision of human resources and/or personnel management services, in effect at any time during the subject period.

\*In lieu of original records required above, compliance with this Subpoena may be accomplished by the submission in affidavit form of compilations and/or analyses made from the original documents, setting forth the information required, provided that pertinent documents be made available for checking the accuracy of the statement in the event such action is deemed necessary.

FORM NLRB-31  
(12-12)

**SUBPOENA DUCES TECUM**

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

To Custodian of Records - UPMC  
600 Grant Street, 58th Floor, Pittsburgh, PA 15219

As requested by Claudia Davidson, Counsel for SEIU Healthcare Pennsylvania, CTW, CLC  
whose address is 429 Fourth Ave-5th Floor, Pittsburgh, PA 15219  
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE \_\_\_\_\_  
an Administrative Law Judge \_\_\_\_\_ of the National Labor Relations Board  
at a hearing to be held at 1000 Liberty Ave., Room 904  
in the City of Pittsburgh, PA

on the 3rd day of February 20 14 at 11 00 (a.m.) (p.m.) or any adjourned  
or rescheduled date to testify in \_\_\_\_\_

UPMC, ET AL., CASES 06-CA-102465, ET AL.

(Case Name and Number)

UPMC and its subsidiary UPMC Presbyterian Shadyside, single employer,  
d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital  
And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence,  
and documents:

See schedule of documents attached

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.86(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

**B - 720504**

Issued at Pittsburgh, Pennsylvania

this 25th day of October 20 13



*[Signature]*  
Chairman, National Labor Relations Board

**NOTICE TO WITNESS.** Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

**RESPONDENT UPMC**

**SUBPOENA DUCES TECUM**  
**ATTACHMENT A**

**DEFINITIONS**

- A. **RESPONDENT, YOU, YOUR, and ANYONE ACTING ON YOUR BEHALF** includes Respondent UPMC and all its directors, officials, agents, supervisors, managers, employees, attorneys, accountants, investigators, representatives, and anyone else acting or purporting to act on its behalf.
- B. **UPMC PRESBYTERIAN SHADYSIDE** refers to the non-profit corporation doing business as UPMC Presbyterian Hospital and doing business as UPMC Shadyside Hospital, and all its directors, officials, agents, supervisors, managers, employees, attorneys, accountants, investigators, representatives, and anyone else acting or purporting to act on its behalf.
- C. **UPMC-RELATED FACILITY OR OPERATION** shall mean any entity in which UPMC, or any of its subsidiaries, joint venture partners or affiliates maintains an ownership, operational or affiliation interest or connection.
- D. **PERSON** includes a natural person, firm, association, organization, partnership, joint venture, business, trust, corporation, or government entity, and every other form and kind of public or private entity. Reference herein to any PERSON includes representatives, agents and employees of such PERSON.
- E. **UNION** refers to SEIU Healthcare Pennsylvania (including and regardless of whatever names or designations by which that organization is referred to in documents responsive to these Requests). **UNION ORGANIZING CAMPAIGN** refers to the UNION's or UPMC Presbyterian Shadyside's employees' efforts to persuade UPMC Presbyterian

Shadyside's employees to support, assist, participate in or associate with the UNION, sign a UNION authorization card or other expression of support or interest, select the UNION as their exclusive representative under the National Labor Relations Act, or engage in any other protected, concerted Section 7 activity under the auspices of the Union.

F. DOCUMENT(S) shall mean the same as the words "writings and recordings" as defined in Rule 1001 of the Federal Rules of Evidence which provides:

"Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."

DOCUMENTS thus includes, but is not limited to, any and all sound recordings, tape recordings, video or film recordings, sound and video recordings, sound and film recordings, electronic mail ("E-mail"), voicemails, text messages, photographs, notes, note-books, memoranda, proposals, discussions, schedules, timesheets, calendars, diaries, correspondence, letters, telexes, telegrams, facsimile transmissions, reports, statements, policies, manuals or binders, handbooks, books, business records, personal records, financial statements, audit reports, budget documents, forecast documents, ledgers, employment applications, notices, warnings, medical records, checkbooks, checks, check stubs, employment references, employment resumes, diplomas, transcripts, incident reports, patient logs, affidavits, declarations under penalty of perjury, and unsworn statements. DOCUMENT also includes, as used herein, all drafts and non-identical copies of any document, including but not limited to those that contain markings, symbols, interlineations, comments, "post-it notes" or notations of any kind on the front or back thereof. DOCUMENT also includes ESI as defined below.

G. DOCUMENTS "RELATING TO" or "RELATED TO" includes all DOCUMENTS "concerning," "pertaining to," "relating to," "related to," "mentioning," or "referring in any way to," the matters specified in the Request.

H. COMMUNICATIONS includes all verbal and written contact, conversations, discussions, emails, electronic communications, text messages, instant messages, social media, and DOCUMENTS conveyed to or from or between the persons designated in the Request.

I. DISCIPLINE includes any and all forms of corrective action taken by a supervisor or manager relating to an employee's work performance and employment by Respondent, including without limitation, counseling, warning, reprimands, memo's, performance improvement plans, and termination, regardless of whether such action was later rescinded.

J. COMPLAINT refers to the Second Amended Consolidated Complaint issued by the Regional Director in this matter on January 9, 2014.

K. ESI or ELECTRONICALLY STORED INFORMATION shall mean and include all information that is stored on any medium other than paper, including, but not limited to, computer files, photographs, digital images, data of any sort, databases, word processing, emails, text messages, instant messages, social media, metadata relating to any other data, and all information stored on electronic devices of any kinds, shape or category. ESI includes, but is not limited to, data stored on computers, networks, servers, PDAs, cell phones, smart phones, tablets, iPads, laptops, disks drives, flash memory, cameras, video, Blackberry devices (or similar devices by other manufacturers), internet storage, backup media, and all other information stored, sent, retrieved or read with the aid of electronic devices.

L. Unless otherwise specified, the time periods included in this Document Request are from January 1, 2012 to the present date.

M. If any document is withheld from your response on grounds of any privilege or objection, you shall describe in full the nature of the information or document withheld and provide a detailed explanation of the basis for any claim of privilege or objection in a privilege log.

In accordance with the attached subpoena, please produce the following documents:

**REQUESTS FOR DOCUMENTS**

1. Produce all non-privileged Documents relating to the allegations in ¶¶2(a) and (b) of the Complaint. This Request includes all non-privileged Documents relating to any denial of, or defense to, any of the allegations in ¶¶2(a) and (b) of the Complaint, and the bases therefore.

2. Produce all non-privileged Documents relating to the allegations in ¶¶3(a) and (b) of the Complaint. This Request includes all non-privileged Documents relating to any denial of, or defense to, any of the allegations in ¶¶3(a) and (b) of the Complaint, and the bases therefore.

3. Produce all non-privileged Documents relating to the Second through Eleventh Affirmative Defenses in Respondent UPMC Presbyterian Shadyside's Answer to the Amended Consolidated Complaint dated November 18, 2013.

4. Produce all non-privileged Documents relating to Respondent's knowledge or involvement in any of the incidents or allegations in ¶¶8-55 of the Complaint. This Request includes all non-privileged Documents relating to any denial of, or defense to, any of the allegations in ¶¶8-55 of the Complaint, and the bases therefore, including that the incident did not occur on the date or in the manner or with the persons alleged in that paragraph or that Respondent did not act with a discriminatory intention or motive.

5. Produce all non-privileged Documents relating to any of your officers, owners, directors, management and supervisors who are employed by or hold any position with UPMC Presbyterian Shadyside.
6. Produce all non-privileged Documents relating to any labor or employment policy you have formulated and/or administered with, by, for, or for the benefit of, UPMC Presbyterian Shadyside.
7. Produce all non-privileged Documents relating to any premises or facilities owned, leased or occupied by you in which UPMC Presbyterian Shadyside has any offices or conducts any operations, and any premises or facilities owned, leased or occupied by UPMC Presbyterian Shadyside in which you have any offices or conduct any operations.
8. Produce all non-privileged Documents relating to any services you have provided for UPMC Presbyterian Shadyside, including but not limited to, information services, Human Resources, regulatory/compliance, finance, treasury, risk management, facilities, quality and governmental relations.
9. Produce all non-privileged Documents relating to any services UPMC Presbyterian Shadyside has provided to you, including but not limited to the services set forth in Request No. 8, above.
10. Produce all non-privileged Documents relating to any facilities or operations in which you and UPMC Presbyterian Shadyside share common system-wide technology resources.
11. Produce all non-privileged Documents relating to any investment portfolios for UPMC Presbyterian Shadyside.

12. Produce all non-privileged Documents relating to any Revenue Bonds issued by any person, including but not limited to the Allegheny County Hospital Development Authority, on which you and UPMC Presbyterian Shadyside are jointly and severally obligated.

13. Produce all non-privileged Documents relating to your joint or common ownership or leases of any real property with UPMC Presbyterian Shadyside, including identification of each property or lease and the respective percentage ownership of each.

14. Produce all non-privileged Documents relating to any health and life insurance, pension, stock option, retirement or other benefit plans sponsored or administered by you for the benefit of the employees UPMC Presbyterian Shadyside.

15. Produce all non-privileged Documents relating to your joint or common ownership or control of any bank accounts, securities, notes, bonds, and/or other types of financial instruments or assets with UPMC Presbyterian Shadyside. This Request includes Documents identifying the locations and account numbers of such accounts, instruments or assets and the individuals designated as authorized signators or having comparable authority with respect to each.

16. Produce all non-privileged Documents relating to any liability insurance you provide for UPMC Presbyterian Shadyside.

17. Produce all non-privileged Documents relating to any contracts or agreements you have entered into with any third party vendors or consultants, or funding you have provided, relating to providing quality improvement, technology, or patient safety consulting services for the benefit of UPMC Presbyterian Shadyside or any other UPMC-Related Facility or Operation.

18. Produce all non-privileged Documents relating to any contracts or agreements you have entered into with any third party vendors or consultants or funding you have provided



relating to security services for the benefit of UPMC Presbyterian Shadyside or any other UPMC-Related Facility or Operation.

19. Produce all non-privileged Documents related to the delegation of any authority or functions, including but not limited to policy making, from UPMC to UPMC Presbyterian Shadyside. This Request includes all Documents related to the implementation by you or UPMC Presbyterian Shadyside of such delegation.

20. Produce all non-privileged Documents relating to the withdrawal of the delegation of any authority or functions to UPMC Presbyterian Shadyside . This Request includes all Documents related to the implementation by you of such withdrawal of delegation.

21. Produce all non-privileged Documents relating to any actions of the UPMC Ethics and Compliance Committee of the UPMC Board concerning the review and approval of the UPMC Code of Conduct.

22. Produce all non-privileged Documents relating to UPMC's implementation, delegation or withdrawal of the delegation of any labor or industrial relations functions to UPMC Presbyterian Shadyside.

23. Produce all non-privileged Documents relating to UPMC's implementation, delegation, or withdrawal of the delegation of any employee relations functions to UPMC Presbyterian Shadyside.

24. Produce all non-privileged Documents relating to UPMC's implementation, delegation, or withdrawal of the delegation of any human resources or personnel functions to UPMC Presbyterian Shadyside.

25. Produce all non-privileged Documents relating to UPMC's implementation, delegation, or withdrawal of the delegation of any employee disciplinary functions to UPMC Presbyterian Shadyside.

26. Produce all non-privileged Documents relating to policies and procedures concerning UPMC's operation, administration and governance, including UPMC's human resources, personnel and labor relations.

27. Produce all non-privileged Documents relating to UPMC's policies and procedures concerning its relationships or dealings with UPMC Presbyterian Shadyside.

28. Produce all non-privileged Documents relating to UPMC's governance, supervision or oversight of UPMC Presbyterian Shadyside, including but not limited to any reports by UPMC Presbyterian Shadyside to UPMC.

29. Produce all non-privileged Documents relating to UPMC's creation, approval or oversight of, or participation in the formulation or implementation of, any strategic plans related to UPMC Presbyterian Shadyside, including but not limited to any reports by UPMC Presbyterian Shadyside to UPMC regarding such strategic plans.

30. Produce all non-privileged Documents relating to UPMC's creation, approval or oversight of, or participation in the formulation or implementation of, any operating and capital budgets, borrowing or any transaction relating to indebtedness for UPMC Presbyterian Shadyside, including but not limited to any reports by UPMC Presbyterian to UPMC regarding such matters. This Request includes all Documents relating to any pledge of assets, major expenditures outside the approved budgets, and audited financial reports.

31. Produce all non-privileged Documents relating to UPMC's approval, oversight of, or involvement in, any UPMC Presbyterian Shadyside transactions involving the acquisition or sale of real property or improvements thereto, or material leases for the same.

32. Produce all non-privileged Documents relating to UPMC's approval of, or involvement in, any amendments to the Articles of Incorporation or the Bylaws of UPMC Presbyterian Shadyside.

33. Produce all non-privileged Documents relating to UPMC's approval of or involvement, in the hiring or appointment of any senior management staff, however structured or titled, at UPMC Presbyterian Shadyside. This Request includes but is not limited to, approval for or involvement in, the hiring or appointment of, UPMC Presbyterian Shadyside's Senior Executive, President, Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, Chief Nursing Officer, Medical Director, Department Chairpersons and Chiefs of Service, as well as the terms of the employment or contractual relationship with each.

34. Produce all non-privileged Documents relating to UPMC's approval of or involvement in, any decisions regarding the provision of management services to UPMC Presbyterian Shadyside, including but not limited to services to be provided by UPMC or other subsidiaries of UPMC.

35. Produce all non-privileged Documents relating to UPMC's approval of or involvement in any change in corporate structure or reorganization for UPMC Presbyterian Shadyside.

36. Produce all non-privileged Documents relating to UPMC's approval of or involvement in, UPMC Presbyterian Shadyside's major information systems and other operational systems.

37. Produce all non-privileged Documents relating to UPMC's approval of or involvement in, UPMC Presbyterian Shadyside's contracts, including clinical, administrative or other, employee benefits and compensation plans.

38. Produce all non-privileged Documents relating to UPMC's Articles of Incorporation and By Laws, including all amendments.

39. Produce all non-privileged Documents relating to minutes of all UPMC Board of Directors and Board Committee meetings, including any other documents utilized in conjunction with these meetings for any purpose.

40. Produce all non-privileged Documents relating to the identities and employment position of each member of the UPMC Board of Directors, each UPMC corporate officer, and each UPMC executive or senior management employee.

41. Produce all non-privileged Documents relating to each member of the UPMC Board of Directors who is also a member of the Board of Directors of UPMC Presbyterian Shadyside. This Request includes all Documents identifying such common Board members by name, title, employment and position held.

42. Produce all non-privileged Documents relating to each UPMC corporate officer, executive, or member of senior management who is also employed by or who holds any position with UPMC Presbyterian Shadyside. This Request includes all Documents identifying such common officials and employees, and each position held with UPMC and with UPMC Presbyterian Shadyside.

43. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any versions of the Solicitation Policy (HS

HR 0717) relating to solicitations and distribution of literature not related to UPMC business, from January 1, 2012 to the present.

44. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any versions of the Solicitation Policy (HS HR 0717) relating to the use of the UPMC electronic messaging system to engage in solicitation, from January 1, 2012 to the present.

45. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any versions of the Solicitation Policy (HS HR 0717) relating to the wearing of non-UPMC approved buttons or insignia, from January 1, 2012 to the present.

46. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any versions of the Solicitation Policy (HS HR 0717) relating to the use of UPMC bulletin boards for purposes not approved by or related to, UPMC sponsored matters, from January 1, 2012 to the present.

47. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any versions of the Electronic Mail and Messaging Policy (HS ISO 147) from January 1, 2012 to the present.

48. Produce all non-privileged Documents relating to any training, guidance, instruction or directives provided to any UPMC manager or supervisors or UPMC Presbyterian Shadyside manager or supervisor, relating to the enforcement or non-enforcement of any version of UPMC's Solicitation Policy (HS HR 0717) or the Electronic Mail and Messaging Policy (HS ISO 147) from January 1, 2012 to the present.

49. Produce all non-privileged Documents which relate to any audit or investigation undertaken since January 2012 of the non-work use of the UPMC electronic messaging system by any employees of UPMC Presbyterian Shadyside and the results of same.

50. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any version of the UPMC Absenteeism and Tardiness Policy (HR-03) , including any audit or investigation undertaken since January 2012 of the implementation and/or enforcement of this Policy in any or all departments of UPMC Presbyterian Shadyside and the results of same.

51. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any version of the UPMC Time Entry Submission Policy (HS HR-0741) , including any audit or investigation undertaken since January 2012 of the implementation and/or enforcement of this Policy in any or all departments of UPMC Presbyterian Shadyside and the results of same.

52. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any version of the UPMC Supply Chain Management – Distribution and Materials Management Attendance Policy, including any audit or investigation undertaken since January 2012 of the implementation and/or enforcement of this Policy in any or all departments of UPMC Presbyterian Shadyside and the results of same.

53. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any version of the UPMC Supply Chain Management – Distribution and Materials Management Tardiness Policy, including any audit or investigation undertaken since January 2012 of the implementation and/or enforcement of this Policy in any or all departments of UPMC Presbyterian Shadyside and the results of same.

54. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any versions of the Corrective Action and Discharge Policy (HS HR 0704) from January 1, 2012 to the present. This Request also includes any other policies relating to the placement and/or monitoring of employees placed on Performance Improvement Plans.

55. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any policies relating to job abandonment from January 1, 2012 to the present.

56. Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of any versions of the UPMC Grievance Procedure Policy (HS-HR 0707) from January 1, 2012 to the present.

Produce all non-privileged Documents relating to the interpretation, application, dissemination, enforcement or non-enforcement of the any policies governing the use of cell phones by employees of Presbyterian Shadyside in the Corporate Services/Employee Transit Department.

57. Produce all non-privileged Documents relating to compliance with the National Labor Relations Act (NLRA), consequences of non-compliance with the NLRA, compliance with the settlement agreements in *UPMC I* (Case Nos. 06-CA-081896 et al), and consequences of non-compliance with the settlement agreements in *UPMC I* (Case Nos. 06-CA-081896 et al). This Request includes any training, guidance, directives or instruction given to or received by any person employed by or holding any position with UPMC Presbyterian Shadyside relating to the foregoing topics.

58. For each person identified in ¶7 (a) and ¶7 (b) of the Complaint, produce all non-privileged Documents relating to any Discipline imposed upon that person, relating to any of the

incidents alleged in any of the Complaints in *UPMC I* (Case Nos. 06-CA-081896 et al) or the Complaint in the instant case. This Request includes any training, guidance, directives or instruction given to or received by each identified person.

59. For each person employed and identified in ¶7 (a) and ¶7 (b) of the Complaint, produce all non-privileged Documents relating to any Discipline imposed by that person upon any employees of Respondent Presbyterian Shadyside from January 1, 2012 to the present.

60. For each person identified in ¶7 (a) and ¶7 (b) of the Complaint, produce all non-privileged Documents relating to any training, guidance, directives or instruction given to or received by that person relating to the Union, the Union Organizing Campaign, Union avoidance, preventing the Union from representing the employees of UPMC Presbyterian Shadyside, or any activity in support of or opposition to the Union.

61. Produce all non-privileged Documents relating to any meeting concerning the Union, the Union Organizing Campaign, Union avoidance, preventing the Union from representing the employees of UPMC Presbyterian Shadyside, or any activity in support of or opposition to the Union. This Request includes, but is not limited to, all minutes, recordings, notes, and materials disseminated at such meetings.

62. Produce all non-privileged Documents relating to any training, guidance, directives, or instruction provided to employees of UPMC Presbyterian Shadyside relating to the Union, the Union Organizing Campaign, Union avoidance, preventing the Union from representing the employees of UPMC Presbyterian Shadyside, or any activity in support of or opposition to the Union.

63. Produce all non-privileged Documents relating to any contract, agreement or arrangement with any consultant or vendor relating to the training of management and



supervisory personnel of UPMC Presbyterian Shadyside concerning the Union, the Union Organizing Campaign, union-avoidance or maintaining a "union free" workplace, preventing the Union from representing the employees of UPMC Presbyterian Shadyside, or any activity in support of or opposition to the Union.

64. Produce all non-privileged Documents relating to any internal complaints or observations by any employee of UPMC Presbyterian Shadyside concerning discrimination, retaliation, abusive treatment, or hostile work environment because of actual or perceived support for the Union from January 1, 2012 to the present.

65. Produce all non-privileged Documents relating to the Union and/or the Union Organizing Campaign, including without limitation, electronic intranet postings, employee computer monitor screen savers, web pages, archived web pages, social media postings, Communications between and among managers and supervisors, and Communications with employees of UPMC Presbyterian Shadyside or any other UPMC-related facility or operation. This Request includes all Documents relating to the creation, placement, transmission and distribution of each computer monitor screen saver in each of UPMC Presbyterian Shadyside's facilities or at any other UPMC-related facility or operation, as well as the duration, timing, manner and locations of their display.

66. Produce all non-privileged Documents relating to the maintenance, operation, establishment, and utilization of the UPMC Infonet website. This Request includes all Documents relating to any joint maintenance, operation, establishment, and utilization of the UPMC Infonet with UPMC Presbyterian Shadyside.

67. Produce all non-privileged Documents relating to the incident which occurred in the cafeteria of Presbyterian Hospital on February 21, 2013 as described in ¶¶11-14 of the

Complaint. This Request includes but is not limited to, incident reports, logs, telephone records, investigations, directives, instructions, guidance, photographs and recordings relating to the incident.

68. Produce all non-privileged Documents relating to any incident, event or occurrence where UPMC Presbyterian Shadyside's agents or employees conducted surveillance or were instructed to conduct surveillance or appear to conduct surveillance upon any of UPMC Presbyterian Shadyside's employees concerning any matter related to the Union or the employees' concerted activities.

69. Produce all non-privileged non-work-related emails sent or received by, or from, each supervisor or manager of UPMC Presbyterian Shadyside to any other employee of UPMC Presbyterian Shadyside, using the UPMC email system from January 1, 2012 to the present.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC PRESBYTERIAN  
SHADYSIDE,

Respondent.

14mc00109

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00110

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00111

**ELECTRONICALLY FILED**

**Supplemental/Amended Order of Court**

And now, this 2<sup>nd</sup> day of September, 2014, for the reasons set forth in the Accompanying Memorandum Opinion, the Court will GRANT the Applications for Summary Orders Enforcing

Subpoena Duces Tecum in all of the above captioned matters (doc. no. 1 at 14mc00109, 14mc00110, and 14mc00111). The Court will stay the implementation of this Order, so that Respondents may appeal this Order, if they elect to do so.

SO ORDERED, this 2nd day of September, 2014

s/ Arthur J. Schwab  
Arthur J. Schwab  
United States District Court Judge

cc: All ECF registered counsel of record

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC PRESBYTERIAN  
SHADYSIDE,

Respondent.

14mc00109

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00110

**ELECTRONICALLY FILED**

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NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UPMC,

Respondent.

14mc00111

**ELECTRONICALLY FILED**

**Order on Motion(s) for Reconsideration**

Pending before this Court are UPMC's Motions for Reconsideration of this Court's prior Order(s) granting the National Labor Relations Board's three (3) Applications/Motions to Enforce Subpoena Duces Tecum (doc. no. 29 at 14-mc-00109, doc. no. 28 at 14-mc-00110, doc. no. 30 at 14-mc-00111).

In this Court's prior Opinion(s), it expressed concern "that the scope and nature of the requests, coupled with the NLRB's efforts to obtain said documents for, and on behalf of, the SEIU, arguably moves the NLRB from its investigatory function and enforcer of federal labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union." Doc. No. 27 at 14-mc-00109, see also fn. 6; Doc. No. 26 at 14-mc-00110, see also fn. 6; and Doc. No. 27 at 14-mc-00111. This Court concluded that based upon the current record and the applicable "test" (whether the NLRB inquiry is relevant to a legitimate purpose and is unreasonably broad and burdensome), the Court would deny the three (3) applications. Nonetheless, the Court found that its role in determining whether to enforce an agency subpoena is substantially limited by the recent rulings of the United States Court of Appeals for the Third Circuit (*EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010) (*Kronos I*); *EEOC v. Kronos Inc.*, 694 F.2d 351 (3d Cir. 2012) (*Kronos II*)) and other precedents of the United States Court of Appeals for the Third Circuit. The Court ultimately was constrained to enforce the administrative subpoenas, but stayed the enforcement thereof, pending any appeal to the United States Court of Appeals for the Third Circuit.

In UPMC's current Motion(s) for Reconsideration, UPMC places before this Court substantial evidence relating to the Court's prior concern that the NLRB is acting as the "litigation arm" of the Union. However, in the introductory lines of its Response, the NLRB again seeks to drive home the following point: "[A]buse of the Board's administrative processes is

not a question for a district court's consideration in a summary enforcement proceeding. Rather, the relevant question is whether the court's processes would be abused if the subpoena were to be enforced." Doc. No. 31 at 2 (14-mc-00109); Doc. No. 30 at 2 (14-mc-00110); Doc. No. 32 at 2 (14-mc-00111).

Therefore, under the NLRB's rubric that "abuse of this Board's administrative process is not a question for a district court's consideration" (doc. no. 31 at 2 (14-mc-109); doc. no. 30 at 2. (14-mc-00110) and doc. no. 32 at 2 (14-mc-00111), and under what appear to be the very limited role of the district court in these subpoena enforcement proceedings under current precedents, this Court lacks authority to conduct a meaningful review of the subpoena enforcement requests and to investigate these serious allegations, essentially leaving UPMC without a judicial remedy under the law.<sup>1</sup> For these reasons, this Court is constrained to deny UPMC's Motion(s) for Reconsideration.

Accordingly, this 27<sup>th</sup> day of October, 2014, it is HEREBY ORDERED that the Motion(s) for Reconsideration are DENIED (doc. no. 29 at 14-mc-00109, doc. no. 28 at 14-mc-00110, doc. no. 30 at 14-mc-00111).

s/Arthur J. Schwab  
Arthur J. Schwab  
United States District Judge

cc: All Registered ECF Counsel and Parties

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<sup>1</sup> The NLRB contends, "[W]hen allegations are made that the Board's processes are being abused, the Board defends the integrity of its administrative process and will, in *its own proceedings*, address such allegations." See Doc. No. 31, at fn. 12 (emphasis in original) (14-mc-00109); Doc. No. 30, at fn. 12 (14-mc-00110); Doc. No. 32, at fn. 12 (14-mc-00111). Therefore, UPMC is confined to a circular course whereby UPMC's only remedy relating to an alleged abuse of the subpoena process is confined to a resolution through the NLRB's *own* process.

**CERTIFICATE OF SERVICE**

I, Nancy Winkelman, certify that on April 8, 2015, I caused Appellants' Brief and accompanying Joint Appendix Volumes I and II to be served on all counsel of record listed on the CM/ECF Service List.

/s/ Nancy Winkelman  
Nancy Winkelman