UPMC and its subsidiary, UPMC Presbyterian Shadyside, single employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania CTW, CLC. Cases 06–CA–102465, 06–CA–102494, 06–CA–102516, 06–CA–102518, 06–CA–102525, 06–CA–102534, 06–CA–102540, 06–CA–102542, 06–CA–102544, 06–CA–102555, 06–CA–102559, 06–CA–104090, 06–CA–104104, 06–CA–106636, 06–CA–107127, 06–CA–107431, 06–CA–107532, 06–CA–107896, 06–CA–108547, 06–CA–111578, and 06–CA–115826

December 11, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

This dispute involves 22 different cases in which the General Counsel alleges that Respondent UPMC (UPMC) is a single employer together with its subsidiary, Respondent UPMC Presbyterian Shadyside (Presbyterian Shadyside). All of the disputed unfair labor practices were alleged to have been committed by Presbyterian Shadyside, and UPMC's disputed status as an alleged single employer would require extensive litigation, possibly taking many years to resolve, with no certainty as to outcome, and substantially delaying any final Board adjudication of the numerous alleged violations. However, there was a potentially promising development: UPMC agreed to resolve the disputed single-employer issue by offering to guarantee the performance of any remedies ultimately awarded against Presbyterian Shadyside. Administrative Law Judge Mark Carissimi accepted the offer, with modifications, over the objections of the General Counsel and Charging Party, both of whom filed exceptions to the judge's decision in this regard, which are before us now in the instant proceeding.[1]

In the interim, a divided Board, in *United States Postal Service*, 364 NLRB No. 116 (2016) (*Postal Service*), decided that judges are no longer permitted to accept a respondent's offered settlement terms, over the objection of the General Counsel and charging party or parties, unless the offer constitutes "a full remedy for all of the violations alleged in the complaint." Id., slip op. at 3.

We find, as did the judge, that UPMC's offer to act as guarantor of any remedies ultimately awarded against Presbyterian Shadyside effectuates the purposes of the National Labor Relations Act (NLRA or Act). Therefore, we find that the judge properly accepted the proffered terms in settlement of the single-employer allegation against UPMC.

Furthermore, we overrule *Postal Service*, and we agree with the dissenting views of Chairman (then-Member) Miscimarra in that case, who pointed out that *Postal Service* imposed an unacceptable constraint on the Board itself, which retained the right under prior law to review the reasonableness of any respondent's offered settlement terms that were accepted by the judge. We believe the "full remedy" standard adopted by the Board in *Postal Service* was an ill-advised and counterproductive departure from longstanding precedent. As illustrated by the instant case, adhering to the *Postal Service* standard would predictably cause incalculable delay in resolving the alleged violations, while potentially jeopardizing the prospect of obtaining *any* remedy against UPMC. Today, we return to the Board's prior practice of analyzing all settlement agreements, including consent settlement agreements, under the "reasonableness" standard set forth in *Independent Stave*, 287 NLRB 740 (1987).[2]

Background

The Amended Consolidated Complaint (Complaint) against UPMC and its subsidiary Presbyterian Shadyside issued in this matter on January 9, 2014, consolidating unfair labor practice allegations in 22 separate cases. In each of these 22 cases, Presbyterian Shadyside is alleged to be the culpable party. The Complaint's sole allegation against UPMC is that UPMC and Presbyterian Shadyside "are a single integrated business and a single employer within the meaning of the Act."

The hearing before Judge Carissimi began on February 12, 2014. Litigation of the single-employer allegation

[1] The judge issued the attached supplemental decision on July 31, 2015. The General Counsel and Charging Party each filed exceptions and a supporting brief, the Respondent filed an answering brief to the General Counsel's exceptions, and the General Counsel filed a reply brief. The Respondent filed a limited cross-exception and a supporting brief, and the General Counsel filed an answering brief. After considering the supplemental decision and the record in light of the exceptions, cross-exception, and briefs, we have decided, for the reasons stated in this opinion, to grant the Respondent's limited cross-exception, to modify the judge's recommended Order accordingly, and to affirm the judge's rulings, findings, and conclusions in all other respects.

[2] The Board has used various terms to describe settlement terms to which the respondent has agreed but the General Counsel and charging party or parties have not, including "consent order" and "unilateral settlement by consent order." See, e.g., *Lin Television Corp.*, 362 NLRB No. 197 (2015) (consent order); *Local 872*, 28-CB-118809, 2015 WL 153954 (Jan. 12, 2015) (unilateral settlement by consent order). We will refer to these as consent settlement agreements.

stalled over disputes regarding subpoenas issued by the General Counsel seeking documents allegedly relevant to that allegation. UPMC and Presbyterian Shadyside (collectively, the Respondents) petitioned to revoke the subpoenas. The judge denied the petitions in substantial part and ordered the Respondents to produce the subpoenaed documents. The Respondents refused to comply with the judge's order, and the General Counsel filed an application to enforce the subpoenas in federal district court. The court granted the General Counsel's application, and the Respondents appealed the district court's order to the Court of Appeals for the Third Circuit, where it remains pending.

After the General Counsel filed his application to enforce the subpoenas in federal district court, Judge Carissimi severed the single-employer allegation from the unfair labor practice allegations so as not "to delay [his] resolution of the substantive unfair labor practice issues in the complaint." The parties then proceeded to litigate the substantive unfair labor practice allegations against Presbyterian Shadyside over the course of a 19-day hearing, during which (according to the judge) "no evidence [was] presented . . . that UPMC independently committed any unfair labor practices." On November 14, 2014, the judge issued a 120-page decision, in which he found that Presbyterian Shadyside committed multiple violations of the Act. Exceptions to the judge's decision are pending before the Board. The single-employer allegation remained unlitigated and undecided.

On June 14, 2015, UPMC filed a Partial Motion to Dismiss, in which UPMC moved to dismiss the allegation that it constitutes a single employer with Presbyterian Shadyside. At the same time, UPMC offered to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Administrative Law Judge's Decision and Order [that] survive the exceptions and appeal process." In its Partial Motion to Dismiss, UPMC further stated that it "would be responsible for any remedy along with Presbyterian Shadyside."

In a supplemental decision issued July 31, 2015 (Supplemental Decision), Judge Carissimi accepted UPMC's offer and granted the Partial Motion to Dismiss, reasoning as follows:

> UPMC is now proposing that the single employer allegation in the complaint be resolved on the basis that it guarantees compliance with any remedies the Board may issue regarding any unfair labor practices committed by Presbyterian Shadyside in the original decision in this case that is presently pending before the Board. It is important to note that the complaint does not allege that UPMC independently committed any of the unfair labor practices alleged in the complaint. In addition, there was no evidence presented at the trial that UPMC independently committed any unfair labor practices. Thus, any liability that UPCM [sic] would have for any of the unfair labor practices committed by Presbyterian Shadyside would be solely dependent upon a finding that it constitutes a single employer with Presbyterian Shadyside.
>
> In my view, accepting UPMC's offer to serve as a guarantor and ensure that Presbyterian Shadyside complies with any remedies provided for in a Board order is an appropriate way to resolve the single employer allegation. In accepting this offer, I will dismiss the allegation in the complaint that UPMC and Presbyterian Shadyside constitute a single employer, but I will retain UPMC as a party to the case in order to ensure that there is a mechanism to enforce, if necessary, its willingness to serve as a guarantor for any remedies ordered by the Board.
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> . . . . . .
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> Accepting UPMC's offer to serve as a guarantor of any remedy that the Board may ultimately order against Presbyterian Shadyside and providing UPMC do so pursuant to an order, in my view, is as effective a remedy as I would provide if I were to find UPMC and Presbyterian Shadyside to be a single employer and thus jointly and severally liable for the unfair labor practices I have found were committed by Presbyterian Shadyside.

Having accepted UPMC's offer, the judge dismissed the single-employer allegation.

The General Counsel and Charging Party filed exceptions to the Supplemental Decision, arguing that the judge erred by finding that UPMC's guarantee is as effective as the remedy that would result from a single-employer finding. Specifically, the General Counsel argues that acceptance of UPMC's guarantee deprives the General Counsel of a finding that UPMC is jointly and severally liable and, as such, directly liable for the unfair labor practices found in this proceeding.[3]

UPMC filed a limited exception to the Supplemental Decision, objecting to the wording of the judge's recommended Order. The Supplemental Decision's recommended Order binds UPMC's "officers, agents, successors, and assigns" in addition to UPMC. UPMC argues that the Order's reference to "officers, agents, suc-

[3] The General Counsel and the Union also contend that by accepting UPMC's offer, the judge improperly infringed on the General Counsel's prosecutorial discretion. The Union raised the same argument to the judge, who rejected it and explained why. For the reasons stated by the judge, we reject the General Counsel's and Union's contention.

cessors, and assigns" exceeds "the parameters of UPMC's guarantor proposal," and UPMC requests that the Order be modified to state only that UPMC shall act as a guarantor.

Discussion

A. The Board's Longstanding Policy Has Been to Accept Settlements That Are Reasonable.

Section 10(a) of the Act gives the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy." *Borg-Warner Corp*, 121 NLRB 1492, 1495 (1958); see generally Section 10(a) of the Act (stating, in relevant part, that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise"). In exercising this power, "[t]he Board has long had a policy of encouraging the peaceful, nonlitigious resolution of disputes." *Independent Stave*, above at 741; see also *The Wallace Corporation v. NLRB*, 323 U.S. 248, 253–254 (1944) ("To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements.").

This policy has been pursued with great success. For example, in fiscal year 2016, 93 percent of meritorious unfair labor practice cases were settled.[4] This high rate of settlement assists the Board in effectuating the policies of the Act, both with regard to the settled cases themselves and by permitting the Agency to devote its limited resources to more intractable disputes, often involving nuanced or difficult issues of law. Nevertheless, settlement is not an end in itself. Precisely because Section 10(a) of the Act grants the Board exclusive jurisdiction to prevent unfair labor practices, the Board has the statutory authority to reject settlement agreements "at odds with the Act or the Board's policies." *Borg-Warner Corp*., above at 1495.

With this statutory responsibility in mind, the Board has traditionally considered a number of factors in reviewing settlement agreements to ensure they advance the policies of the Act, including "the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources." *Farmers Co-operative Gin Assn.*, 168 NLRB 367, 367 (1967). "The determination of the appropriate remedy in unfair labor practice cases is a matter of administrative judgment reached after the Board has balanced all factors and equities in light of the policies of the Act." *Roselle Shoe Corp*., 135 NLRB 472, 475 (1962), enfd. 315 F.2d 41 (D.C. Cir. 1963). In determining whether to approve settlement agreements, "the discretion of the Board is recognized as broad." Id. In applying its broad discretion, the Board has regularly approved settlement agreements that provide remedies less than would be awarded if the General Counsel were to prevail on every allegation of the complaint. For example, in *Roselle Shoe Corp*., the Board weighed the alleged incompleteness of the proposed remedy—providing only $12,000 of the $80,000 in backpay that the union claimed was owed—against the "normal uncertainties of litigation" and concluded that the settlement was "appropriate and proper." Id. at 474–478.

In *Independent Stave*, the Board reiterated its longstanding, multi-factored approach to determining whether a settlement agreement is appropriate. It did so in part to correct what it viewed as a shift in Board law that overemphasized one factor at the expense of others: whether the proposed settlement "substantially remedied" all alleged violations. *Independent Stave*, above at 742. This shift was apparent in *Clear Haven Nursing Home*, 236 NLRB 853 (1978), reconsideration denied 239 NLRB 1244 (1979) (*Clear Haven*). In *Clear Haven*, the Board rejected, over a dissent, a proposed settlement as inadequate on the basis that it provided for reinstatement of strikers but without backpay. In *Independent Stave*, the Board sided with the *Clear Haven* dissenters and found that the majority in *Clear Haven* had "too narrow a focus" on whether the settlement provided a full remedy. *Independent Stave*, above at 742. The Board criticized this approach as based on the faulty presumption that "the General Counsel would prevail on *every* violation alleged in the complaint." Id. (emphasis in original). The Board emphasized that at the settlement stage of litigation, the NLRB "is confronted with only *alleged* violations of the Act." Id. (emphasis in original).

In *Independent Stave* the Board made clear that the "substantial remedy" factor was not to predominate over other factors. Instead, the Board stated, it would "evaluate the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement." Id. at 743. Although the Board observed that it was "impossible to anticipate each and every factor which will have relevance to [its] review" of proposed settlement terms, id., it identified several nonexhaustive factors relevant to making this determination:

[4] See National Labor Relations Board, FY 2016, Performance and Accountability Report, at 16, available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/15184%20NLRB%202016%20PAR_508.pdf. A "meritorious" unfair labor practice case is one in which the regional director decides to issue complaint.

> [I]n evaluating . . . settlements in order to assess whether the purposes and policies underlying the Act would be effectuated by our approving the agreement, the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Id. Applying these factors, the Board found that the settlement in *Independent Stave* was "reasonable," even though, had the General Counsel been "fully successful" in litigating the unfair labor practice allegations, "the Charging Parties would have . . . been entitled to more backpay and the posting of a Board notice to employees." Id. at 743 fn. 17.

B. The Postal Service "Full Remedy" Standard Is Contrary to the Longstanding Board Policy of Approving All Settlements That the Board Finds Reasonable.

For nearly 30 years, the Board evaluated the reasonableness of all proposed settlement terms—including the proposed terms of consent settlement agreements—under the standard set forth in *Independent Stave*, above.[5] In *Postal Service*, above, a Board majority abruptly departed from this longstanding precedent, holding that "a proposed [consent] order protects the public interest and effectuates the purposes and policies of the Act only if it provides a full remedy for all of the violations alleged in the complaint." *Postal Service*, 364 NLRB No. 116, slip op. at 3. The *Postal Service* majority further stated: "In evaluating the completeness of the remedy, we will ask whether the proposed order includes all the relief that the aggrieved party would receive under the Board's established remedial practices were the case successfully litigated by the General Counsel to conclusion before the Board." Id.

We find that the Board majority in *Postal Service* adopted an ill-advised standard less likely to effectuate the purposes and policies of the Act than the Board's longstanding approach embodied in *Independent Stave*. As the instant case illustrates, adhering to the *Postal Service* standard would predictably cause incalculable delay in resolving the alleged violations in this case, while potentially jeopardizing the prospect of obtaining *any* remedy against UPMC.

For several reasons, we overrule *Postal Service* and return to the reasonableness standard articulated in *Independent Stave* when evaluating the terms of consent settlement agreements.

First and foremost, we find that it advances the purposes and policies of the Act to permit judges to accept settlement terms proffered by a respondent—even though the General Counsel and charging party or parties object to those terms—if the judge determines that the settlement is reasonable under *Independent Stave*, a determination that is subject to review by the Board. When a respondent offers to resolve disputed allegations based on terms that the judge *and* the Board deem reasonable under the circumstances, there is no valid reason for the Board to preclude such a resolution as a matter of law on the sole basis that the proffered terms include a less-than-full remedy, as *Postal Service* requires. Congress has granted the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy." *Borg-Warner Corp*, above at 1495. To preclude the early resolution of Board litigation, on reasonable terms, simply because a party insists on a full remedy for all unfair labor practice allegations undermines the Board's interest in "encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." *Independent Stave*, above at 743. Conversely, these purposes are advanced by permitting the acceptance of settlement terms that are reasonable, notwithstanding opposition by the General Counsel and charging parties.

Second, the Board's acceptance of reasonable settlement terms may well be in the best interest of parties who object to a consent settlement agreement, especially where those parties are unreasonably discounting the

[5] See, e.g., *Local 872*, 28–CB–118809, 2015 WL 153954 (Jan. 12, 2015) (agreeing with the judge that the proposed "unilateral settlement by consent order" met the requirements of *Independent Stave*); *Heil Environmental*, 10–CA–114054 et al., 2014 WL 2812204 (June 20, 2014) (same); *Postal Service*, 20–CA–31171 (May 27, 2004) (approving under *Independent Stave* a unilateral settlement offer opposed by the General Counsel and the charging party); *Leprino Foods Co.*, 07–CB–43599 (Jan. 24, 2003) (same); *Caterpillar, Inc.*, 33–CA–10164 (May 13, 1996) (same); *Propoco, Inc., d/b/a Professional Services*, 2–CA–27013 (June 26, 1995) (same); see also *Lin Television Corp.*, 362 NLRB No. 197 (2015) (setting aside "consent order" as it did not meet requirements of *Independent Stave*); *Enclosure Suppliers, LLC*, 09–CA–046169, 2011 WL 2837659 (July 14, 2011) (same); *Sea Jet Trucking Corp.*, 327 NLRB 540, 550 (1999) (setting aside unilateral settlement proposed by the respondent over the General Counsel's and charging party's objection as it did not satisfy *Independent Stave* requirements); *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB 215, 217 (1993) (same); *Food Lion, Inc.*, 304 NLRB 602, 602 fn. 4 (1991) (same). These cases demonstrate that the Board can adequately evaluate the proposed terms of consent settlement agreements under *Independent Stave*, and reject, where appropriate, settlements that do not effectuate the purposes and policies of the Act.

risks associated with litigation. As the Board stated in *Independent Stave*:

> At this stage of the litigation we are confronted only with *alleged* violations of the Act. Even though the allegations in the complaint issued after the Region's investigation and determination that reasonable cause exists to believe the allegations occurred, a charging party's right to a [full] remedy can be enforced, upon the authority of the Government, only after an adjudication. In addition, there are risks inherent in litigation. For example, witnesses may be unavailable or uncooperative; procedural delays may occur; the issues may be complex or novel; supporting documentation may have been destroyed or lost; and credibility resolutions may have to be made by the administrative law judge. By operating on a rigid requirement that the settlement must mirror a full remedy, we would be ignoring the realities of litigation.

Independent Stave, above at 742–743 (emphasis in original). The *Postal Service* majority's apparent belief that a "full remedy" standard will lead to consistently better outcomes for the General Counsel and charging parties than a "reasonableness" standard rested on the faulty assumption that the General Counsel is sure to prevail. Experience teaches the contrary lesson. Litigation is never certain. It is never certain that the General Counsel will prevail on any complaint allegation, let alone all of them. The Act entrusts the Board with the prevention of unfair labor practices, and the Board should use its statutory authority to approve settlement agreements that are reasonable, even over the opposition of the General Counsel and charging party.

Third, as noted previously, by refusing to approve less-than-full-remedy consent settlement agreements that are nonetheless reasonable, the majority opinion in *Postal Service* tied the hands not only of administrative judges but also of the Board itself. Again, it is the Board's adjudicatory duty, not that of the prosecuting General Counsel and certainly not that of the charging party, to make the final determination that settlement terms are reasonable. Congress entrusted the Board with the responsibility to apply the Act to the "complexities of industrial life,"[6] and in carrying out its responsibility, the Board should trust itself to do what is reasonable. It does not effectuate the purposes of the Act to craft unacceptable restraints on the Board's ability to make that final judgment.

Fourth, reasonable settlement terms reached at an early stage—even if the terms are less than complete—will often leave parties in a better position than would result from a Board adjudication, considering the substantial burdens and time involved in Board proceedings. The nature of Board litigation often entails substantial delay before disputed unfair labor practice allegations are resolved. Our procedures require the filing of a charge that is investigated by one of the Board's Regional Offices, which decides whether to issue a complaint, which is followed by a hearing before an administrative law judge, with posthearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions with the Board, which typically are supported by another round of briefs, and the Board renders a decision, which can be followed by court appeals. When the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's Regional Offices, which can result in additional hearings before administrative law judges, additional posthearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts. In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and, too often, causes unacceptable delays before any Board-ordered relief becomes available to the parties.[7]

Finally, we overrule *Postal Service* because it rests on faulty premises. The majority in *Postal Service* incorrectly stated that by adopting a "full remedy" standard for evaluating consent settlement agreements, the Board was returning "to the standard originally adopted by the Board" in *Local 201, Electronic Workers (General Electric)*, 188 NLRB 855 (1971).[8] In *General Electric*, contrary to the Board majority's claim in *Postal Service*, the Board did not "adopt[] the trial examiner's recommendation to approve the proposed order *on the ground that* it provided a full remedy for all the violations alleged in

[6] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[7] Cases may involve years of Board litigation and dozens or even hundreds of employee-claimants. For example, the dispute in *CNN America, Inc.*, 361 NLRB No. 47 (2014)—involving approximately 300 employee-claimants—required 82 days of hearings, more than 1,300 exhibits, more than 16,000 pages of transcript, and more than 10 years of Board litigation. Furthermore, the recent decision by the Court of Appeals for the District of Columbia Circuit, denying in part the Board's cross-application for enforcement of its order, leaves open the possibility that litigation will continue before the Board on remand. *NLRB v. CNN America, Inc.*, 865 F.3d 740 (D.C. Cir. 2017). Another case being pursued by the General Counsel involves consolidated claims against McDonald's USA, LLC, and 31 other employer parties, based on 61 unfair labor practice charges filed in six NLRB regions alleging 181 unfair labor practices involving employees at 30 restaurant locations. See, e.g., *McDonald's USA, LLC*, 363 NLRB No. 91 (2016). Should it proceed all the way to finality, the *McDonald's* litigation could last for decades.

[8] *Postal Service*, above, slip op. at 1.

the complaint." *Postal Service*, above, slip op. at 1–2 (emphasis added). Rather, the trial examiner recommended approving a consent settlement agreement that provided a full remedy, and the Board adopted the trial examiner's recommendation. *General Electric*, above at 855. The Board did not say that it was adopting the recommendation "on the ground that" the proposed order provided a full remedy. The Board did not say it would *only* approve consent settlement agreements that provide a full remedy. Nor can a "full remedy" standard be inferred from the *General Electric* decision. Merely because the Board in *General Electric* approved a consent settlement agreement that provided a full remedy, it does not follow that it would have *rejected* a consent settlement agreement that provided less than a full remedy. As Chairman (then-Member) Miscimarra noted in his *Postal Service* dissent, "a high jumper that clears the bar by a foot would also clear it if he had jumped 6 inches lower."[9] In short, the majority in *Postal Service* did not return Board law "to the standard originally adopted by the Board." Id., slip op. at 1. Rather, the *Postal Service* majority announced a brand-new "full remedy" standard for consent settlement agreements.

Prior to *Postal Service*, the Board consistently applied the *Independent Stave* standard to consent settlement agreements.[10] Indeed, *Independent Stave* itself demonstrates that the Board intended to apply a "reasonableness" standard to all types of voluntary dispute resolution by settlement agreement, including when the proposed terms are opposed by the charging party or parties and/or the General Counsel. Under the first *Independent Stave* factor, the Board asks "whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound," and it also considers "the position taken by the General Counsel regarding the settlement." *Independent Stave*, above at 743. Thus, the Board in *Independent Stave* clearly anticipated that unanimous agreement is not required for a settlement agreement to be approved. It is true that the Board in *Independent Stave* noted that certain charging parties had accepted the settlement, and the Board, in approving the settlement, was therefore "honoring the parties' agreements" by eliminating risks the parties "have decided to avoid." Id.[11] However, as the Board has tacitly recognized by applying *Independent Stave* in evaluating consent settlement agreements, the facts of that case do not constitute a holding that the agreement of the charging party or parties is prerequisite to acceptance of a proposed settlement. Rather, the test is the reasonableness of the proposed settlement under the circumstances, and whether all or even any parties (besides the charged party) consent to the agreement is merely one among several relevant factors the Board must consider in determining whether the settlement is reasonable and should be accepted.

For all of the foregoing reasons, we overrule the Board's decision in *Postal Service*, above, we reject the "full remedy" standard for evaluating consent settlement agreements, and we return to applying the "reasonableness" standard set forth in *Independent Stave* to evaluate such agreements.

C. The "Guarantor" Status Offered by UPMC Is Reasonable Under Independent Stave, and Accepting the Offer Effectuates the Purposes and Policies of the Act.

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should only be applied in future cases. In this regard, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)). Yet, the Supreme Court has indicated that "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

Applying the Supreme Court's balancing test, we believe it is appropriate to apply the standard we announce today retroactively to the instant case and to all other pending cases. We do not believe retroactivity will produce any "ill effects." Although the "reasonableness" standard may result in the acceptance of reasonable settlement terms that are somewhat less than what would result if the General Counsel prevailed on every allegation of the complaint after litigating the case to completion, this does not constitute a material disadvantage given the other considerations referenced above. As we have explained, the General Counsel and charging parties who reject settlement terms on the sole basis that they do not represent a full remedy for all alleged violations still stand to benefit from today's decision, which again makes it possible for parties to obtain a reasonable outcome on terms that are available much more quickly than would be the case if the parties were to await the conclusion of litigation. And the certainty of that outcome also

[9] *Postal Service*, above, slip op. at 5 (Member Miscimarra, dissenting).

[10] See above fn. 5.

[11] Contrary to Member Pearce's assertion, we do not conveniently omit *Independent Stave*'s language regarding "honoring the parties' agreements." Rather, we read it in context.

enables parties to avoid the risk that, after enduring the costs and delays of litigation, the outcome (from the perspective of the General Counsel and charging parties) may be no better than, or even worse than, the proffered settlement terms they unreasonably opposed.

Moreover, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, above. The Act grants the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy," *Borg-Warner Corp*, above at 1495, and by returning to a "reasonableness" standard to evaluate consent settlement agreements, the Board resumes the full exercise of its exclusive power by restoring to itself the discretion to approve such agreements over the unreasonable opposition of the General Counsel and charging party or parties. Moreover, the standard we return to today "encourage[s] voluntary dispute resolution, promot[es] industrial peace, conserv[es] the resources of the Board, and serv[es] the public interest." *Independent Stave*, above at 743. Accordingly, we find that application of our new standard in this and all pending cases will not work a "manifest injustice." *SNE Enterprises*, above. We proceed to do so now.

In his underlying decision, the judge addressed every allegation in this matter except for the lone allegation against UPMC—i.e., that UPMC is a single employer with Presbyterian Shadyside. Single-employer status does not, standing alone, constitute an unfair labor practice. Indeed, the judge found "there was no evidence presented at the trial that UPMC independently committed any unfair labor practices." Rather, if the Board determines that one entity (here, UPMC) is a single employer with a second entity (here, Presbyterian Shadyside), this provides a backup party—or a potential alternate party—that is responsible for providing whatever relief is ultimately ordered. In other words, when a parent company is found to be a single employer with its subsidiary, the parent company is liable for the subsidiary's unfair labor practices "to the same extent" as the subsidiary. *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006).

This outcome is effectively what UPMC is offering. Without further litigation, UPMC agrees to render itself liable to the same extent as Presbyterian Shadyside. In its Partial Motion to Dismiss, UPMC offered to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and the appeal process." In its reply to the General Counsel's and Charging Party's exceptions to the motion, UPMC again stated that it "guarantees the performance by Presbyterian Shadyside of any remedial aspects of the Administrative Law Judge's Decision and Order which survive the exceptions and appeal process. As such, UPMC would be responsible for any remedy along with Presbyterian Shadyside."

UPMC's offer constitutes the type of consent settlement agreement—an agreement opposed by the General Counsel and Charging Party—that the Board in *Postal Service* held must never be accepted by the judge unless the proffered terms constitute "a full remedy for all of the violations alleged in the complaint."[12] As stated above, however, we overrule *Postal Service*. Having done so, we instead evaluate the terms of the consent settlement agreement under *Independent Stave*. Thus, the Board examines all the surrounding circumstances to determine whether the settlement is reasonable, which includes evaluating the following factors:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

273 NLRB at 743.

The first *Independent Stave* factor is not conclusive: UPMC has agreed to be bound by its proposed "guarantor" status, but the General Counsel and Charging Party Union oppose resolving the single-employer allegation on this basis. The General Counsel's opposition "is an important consideration weighing against approval," but it is not determinative under *Independent Stave*. *McKenzie-Willamette Medical Center*, 361 NLRB No. 7, slip op. at 2 (2014); see also *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB at 217 (stating "it is clear" that the opposition of the General Counsel and the charging party "is not the decisive factor to be weighed"); *Sea Jet Trucking Corp.*, 327 NLRB at 550 (same).

Independent Stave factors 3 and 4 favor approval of UPMC's proposed remedial guarantee: there are no allegations of fraud, coercion, or duress, and there is no evidence that UPMC has a history of violating the Act or

[12] *Postal Service*, above, slip op. at 3.

has breached previous settlement agreements resolving unfair labor practice disputes.[13]

Finally, we find that the "reasonableness" factor—factor 2—favors approving the settlement, and this is the most important consideration when evaluating a consent settlement agreement. For the reasons explained below, we find UPMC's proposed remedial guarantee is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation, and we conclude that the General Counsel's and Charging Party's opposition to accepting UPMC's offer is outweighed by countervailing factors that warrant accepting the remedial guarantee and dismissing the single-employer allegation.

First, as the judge correctly found, UPMC's remedial guarantee is as effective as a finding of single-employer status. As noted above, when a parent company is found to be a single employer with its subsidiary, the parent company is liable for the subsidiary's unfair labor practices to the same extent as the subsidiary. The practical aim of the General Counsel's single-employer allegation in this matter, then, is to hold UPMC responsible for Presbyterian Shadyside's unfair labor practices along with Presbyterian Shadyside. UPMC's remedial guarantee achieves that aim. UPMC has offered to "guarantee the remediation of any violation" found in this case, adding that "as a guarantor, UPMC is liable for Presbyterian Shadyside's compliance with *any remedy ordered* and to the extent Presbyterian Shadyside *fails* to remediate any unfair labor practices on its own, UPMC must take *any necessary action* to ensure compliance" (emphasis added). In short—and in its own words—"UPMC would be responsible for any remedy along with Presbyterian Shadyside," just as UPMC would be were single-employer status established. Thus, the judge correctly found that UPMC's offer to guarantee Presbyterian Shadyside's performance of its remedial obligations provides a remedy "as effective as" a finding of single-employer status.[14]

Second, UPMC's remedial guarantee is reasonable in light of the circumstance that Presbyterian Shadyside, not UPMC, is the alleged wrongdoer here. In its exceptions, the General Counsel argues that a single-employer finding is necessary because it would render UPMC jointly and severally liable with Presbyterian Shadyside. Joint and several liability, the General Counsel argues, would allow the General Counsel to hold UPMC primarily and directly liable for any remedial failure, i.e., the General Counsel could institute contempt proceedings directly against UPMC for UPMC's failure to comply with the Board's Order. The General Counsel's insistence on joint and several liability might carry more weight if the General Counsel had alleged that UPMC had violated the Act in any way. There was no such allegation, and a 19-day hearing that resulted in a 120-page decision pro-

[13] Although UPMC subsidiaries, including Presbyterian Shadyside, have been found to violate the Act, this does not weigh against acceptance of UPMC's guarantee. In that case, as here, there was no allegation "that UPMC, as a separate entity, committed unfair labor practices." *UPMC*, 362 NLRB No. 191, slip op. at 1 fn. 2 (2015).

[14] Having accepted UPMC's remedial guarantee offer, the judge in his Supplemental Decision ordered that "UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order in the original decision in this case." UPMC has excepted to the inclusion of the "officers, agents, successors, and assigns" language on the ground that it was not included in UPMC's offer. We grant the cross-exception on that basis.

The omission of this language does not render UPMC's remedial guarantee unacceptable under *Independent Stave.* UPMC's offered "guarantor" status remains reasonable and sufficient to resolve the disputed single-employer allegation here, because the record reveals that both UPMC and Presbyterian Shadyside are stable corporate entities with substantial assets. Moreover, we agree with counsel for the General Counsel's statement in the General Counsel's Answering Brief in Opposition to Respondent UPMC's Exception that removal of the language "would change nothing from a legal standpoint" (Opposition p. 3). Under Supreme Court precedent and Federal Rule of Civil Procedure 65(d)(2)(b) and (c), our Order against UPMC is binding against its officers, agents, successors, and assigns to the extent those parties would be bound under the Federal Rules of Civil Procedure, regardless of whether the Order specifically includes such language. In *Regal Knitwear v. NLRB*, 324 U.S. 9 (1945), the Supreme Court addressed an employer's objection to the Board's addition of "officers, agents, successors and assigns" to its cease-and-desist order against the employer. The Court called the controversy "abstract" because the employer merely objected to the words of the order; the Board was "not attempting to reach or hold anyone in contempt by virtue of such orders," and no successor or assign appeared before the Court "complaining that these words put him in jeopardy." Id. at 15–16. The Court held that contempt liability against a successor or assign does not hinge on the inclusion of the words "successors or assigns" in the order itself, but upon a "concrete set of facts" demonstrated at a "judicial hearing." Id. at 16. Thus, although *Regal Knitwear* indicates that a court has the authority to make a Board order binding against a respondent's officers, agents, successors, and assigns, that is not the end of the analysis, at least as to successors or assigns. "Rather, the court must [then] look to the actual relationship between the persons enjoined and their 'successors and assigns,' and if the relationship qualifies [under Rule 65(d)], third persons will be bound by the injunction whether or not the order specifically refers to successors and assigns." 11A Charles Alan Wright, Arthur R. Miller, et al., Federal Practice & Procedure § 2956, Westlaw (database updated Apr. 2017).

We further modify the judge's recommended Order in one additional respect. The judge stated that UPMC, as guarantor, "must ensure that Respondent UPMC Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if UPMC Presbyterian Shadyside *is unable* to do so" (emphasis added). We shall substitute the word "fails" for the italicized phrase to better reflect UPMC's guarantee. See UPMC's Answering Brief in Opposition to Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Supplemental Decision, p. 6 ("[T]o the extent Presbyterian Shadyside *fails to* remediate any unfair labor practices on its own, UPMC must take any necessary action to ensure compliance" (emphasis added).).

duced no evidence that UPMC had independently committed a single unfair labor practice. Rather, all of the violations found by the judge involved Presbyterian Shadyside. Presbyterian Shadyside *should* be primarily responsible to remedy its own violations of the Act, and UPMC has reasonably offered to guarantee that Presbyterian Shadyside will do just that.[15]

Third, UPMC's remedial guarantee is reasonable in light of the risks inherent in litigating single-employer status and the stage of the litigation. Accepting UPMC's offer would remove the risk to the Charging Party Union and the alleged discriminatees that UPMC would *not* be found a single employer with Presbyterian Shadyside and thus would not bear *any* responsibility for Presbyterian Shadyside's compliance with the Board's ultimate order. If the Board rejects UPMC's offer, UPMC *may or may not* be found jointly and severally liable for any unfair labor practices committed by Presbyterian Shadyside. If the Board accepts UPMC's offer, UPMC *will* be responsible for Presbyterian Shadyside's performance of any remedies the Board orders. Rejecting UPMC's offer runs the risk that UPMC will not have any liability for Presbyterian Shadyside's unfair labor practices.

Finally, accepting UPMC's offer also greatly expedites the resolution of this proceeding. Barring settlement somewhere along the way, a long road stretches ahead for litigating and deciding the single-employer allegation. Since the subpoena enforcement dispute pending before the Third Circuit concerns documents potentially relevant to single-employer status, the parties must first await the Third Circuit's resolution of that dispute. Assuming the Third Circuit upholds the district court's decision, UPMC will comply with the subpoena, and a hearing on single-employer status will follow. Based on his knowledge of the case, Judge Carissimi estimated that such a hearing would take 4 or 5 days. As bad luck would have it (although the judge might disagree with that assessment), Judge Carissimi has retired, so another judge—one unfamiliar with the case—would conduct any further necessary hearings in this matter. See Section 102.36 of the Board's Rules and Regulations. This new judge will then draft a decision explaining why UPMC and Presbyterian Shadyside do or do not constitute a single employer. Any party may then file exceptions to this decision with the Board. The Board would then review the judge's decision and the record in light of the exceptions and the parties' briefs and issue a decision in the fullness of time. The Board's decision, of course, may not be the end of the matter, as a party might appeal the Board's determination to a federal court of appeals. This process could take years, and the outcome is anything but certain. Accepting UPMC's remedial guarantee offer would eliminate both the delay and the uncertainty.

[15] As stated above, Judge Carissimi's decision and recommended order are pending before the Board on exceptions. The Board does not prejudge the merits of this matter.

D. Response to the Dissents of Members Pearce and McFerran

Our colleagues' respective dissents present as long-settled Board law a false dichotomy that could not possibly have existed prior to the Board's decision in *Postal Service* little over a year ago. In particular, Member McFerran incorrectly claims that "[u]ntil today, the Board had two basic frameworks" for the evaluation of settlement agreements: *Independent Stave* where the settlement was a "true settlement," and *Postal Service* for consent settlement agreements. Not so. *Postal Service* issued barely more than one year ago, and the cases cited above in footnote 5 demonstrate that for three decades prior to *Postal Service*, the Board evaluated consent settlement agreements under *Independent Stave*. Indeed, by including as a relevant factor the position of the parties as to the settlement, *Independent Stave* itself clearly indicates that it applies to settlements where the General Counsel and/or the charging party objects. Above, we discuss at length why *Postal Service* constituted an unwarranted departure from precedent. It is no surprise that such an ill-advised approach has not long been the policy of the Board.

We may quickly dispense with a few additional objections raised by our dissenting colleagues. First, citing *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003), Member McFerran asserts that "[a] change in the Board's composition is not a basis for revisiting an earlier decision." The cited case is inapposite: *Visiting Nurse Health System* concerned a motion for reconsideration. In *Visiting Nurse Health System*, the Board rejected the charging party's argument that a change in the Board's composition constituted "extraordinary circumstances" warranting reconsideration of the prior Board's decision in the same case. No such argument has been made by the parties in the present case, which is not before the Board on a motion for reconsideration and therefore is not governed by the "extraordinary circumstances" standard. See Sec. 102.48 of the Board's Rules. Furthermore, Member McFerran's assertion to the contrary notwithstanding, "[i]t is a fact of life in NLRB lore" that the Board's interpretation of the Act will "invariably fluctuate with the changing compositions of the Board." *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001). Congress created the Board with five members whose

terms are staggered so that a different member's term expires every year, and the Board in recent years has exhibited no reluctance to modify well-established principles involving many of the most fundamental aspects of the Act. Our decision today reflects a reasoned evaluation of the modification a previous Board majority made in *Postal Service*. As explained above, and consistent with the views expressed by one Board member in that case,[16] we believe the majority's decision in *Postal Service* improperly deviated from policies favoring the appropriate settlement of disputed allegations. This is especially true given that under the preexisting standard, set forth in *Independent Stave*, settlements approved by regional directors or administrative law judges remain subject to review by the Board. Therefore, we overrule *Postal Service* for the reasons expressed above.

Second, contrary to our dissenting colleagues' assertions, the proper standard for assessing consent settlement agreements *is* at issue in this matter. UPMC's offer to guarantee Presbyterian Shadyside's compliance with any remedies the Board may order shares the key characteristics of a consent settlement agreement. Namely, Respondent UPMC has offered to resolve the single-employer allegation against it pursuant to terms that the judge found acceptable over the objections of the Charging Party and the General Counsel. The evaluation of a proffered settlement to which the General Counsel and charging party object falls squarely within the purview of *Postal Service*. Even though our dissenting colleagues claim not to see how the standard for consent settlement agreements might be at issue here, the General Counsel and Charging Party see it plainly enough. In his brief on exceptions to the judge's decision to accept UPMC's guarantee, the General Counsel, writing before the Board's decision in *Postal Service*, argued that the guarantee did not meet the Board's requirements for consent settlement agreements as set forth in *Independent Stave*. Furthermore, after the issuance of *Postal Service* by the Board, the Charging Party wrote "to advise the Board of a recent decision" that, in its view, supported its exceptions to the judge's order. In its letter, the Charging Party highlighted the similarities between *Postal Service* and the present matter, specifically noting that *Postal Service* and the judge's order "both involve an ALJ's adoption of an order incorporating a respondent's settlement offer over the objections of the charging party and the General Counsel to dispose of complaint allegations in a manner that did not fully remedy the violations alleged in the complaint."

[16] *Postal Service*, 364 NLRB No. 116, slip op. at 4–8 (Member Miscimarra, dissenting).

Third, Member McFerran argues that UPMC's guarantee "resolves nothing" because it is contingent on the outcome of the case against Presbyterian Shadyside. But that would be true even if the Board found that UPMC and Presbyterian Shadyside were a single employer. In either situation, Presbyterian Shadyside would be free to challenge the judge's unfair labor practice findings before the Board and in the court of appeals, UPMC would be free to assist it in doing so, and neither entity would be required to remedy any violations until a Board order finding those violations had been enforced by the court of appeals.

Fourth and finally, Member McFerran faults us for not inviting outside briefing. Neither the Act, the Board's Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent. The decision to allow such briefing is purely discretionary and is based on the circumstances of each case. In the case at hand, the Board is correcting a recent, ill-advised deviation from longstanding precedent. Moreover, the Board requested briefing in *Postal Service* last year, and interested parties weighed in at that time. Thus, the competing arguments have been made already and recently at that, and there is no reason to believe they have changed in the interim.

Furthermore, we respectfully disagree with Member McFerran's statement that the Board maintains a "routine practice" to issue a notice and invitation to file amicus briefs in "significant cases, particularly those where the Board is contemplating reversal of precedent." In the past decade, the Board has freely overruled or disregarded established precedent in numerous cases without supplemental briefing. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing).

For all these reasons, we find that UPMC's proposed remedial guarantee in exchange for the dismissal of the single-employer allegation against UPMC is reasonable, and we approve it.

REMEDY

We shall order that the single-employer allegation in the Complaint be dismissed, but we shall retain UPMC as a party for the purpose of ensuring enforcement of UPMC's guarantee of the remedies, if any, ultimately ordered against Presbyterian Shadyside.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge in his Supplemental Decision as modified below and orders that the Respondent, UPMC, Pittsburgh, Pennsylvania, shall take the action set forth in the Order as modified. The single-employer allegation in the Complaint is hereby dismissed, provided, however, that UPMC is retained as a party for the purpose indicated in the Remedy section, above.

The recommended Order is modified as follows: delete the words "officers, agents, successors, and assigns," and substitute the word "fails" for the words "is unable." Thus, UPMC, as guarantor, "must ensure that Respondent UPMC Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if UPMC Presbyterian Shadyside *fails* to do so" (emphasis added).

Dated, Washington, D.C. December 11, 2017

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Philip A. Miscimarra, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting.

What we have here is a classic case of an answer in search of a question. The sole issue presented is whether the judge correctly dismissed the complaint allegation that UPMC and its subsidiary, Presbyterian Shadyside, constitute a single employer, based on UPMC's offer to serve as a guarantor of any remedies ultimately ordered against Presbyterian Shadyside. As discussed below, the judge clearly erred in concluding that UPMC's guarantee was as effective a remedy as one that would result from a single-employer finding. Nonetheless, rather than address this issue, the newly-minted majority has substituted another issue—more to its liking—as a stratagem to reverse Board precedent. Specifically, the majority reaches out to overrule *Postal Service*, 364 NLRB No. 116 (2016), in which the Board clarified the appropriate standard for evaluating "consent" orders—and from which then-Member Miscimarra vigorously dissented, even though this case does not involve a consent order. Although I am not surprised by my colleagues' eleventh hour efforts, I strongly disagree with their decision to reverse precedent that is irrelevant to the disposition of this case and which neither the judge nor the parties addressed.[1]

Background

The General Counsel issued a complaint in this proceeding alleging that UPMC and Presbyterian Shadyside, as a single employer, engaged in extensive unfair labor practices in response to the Union's attempt to organize their nonclinical support employees. Prior to the unfair labor practice hearing, UPMC filed a motion to dismiss the single-employer allegation, which the Board denied. During the hearing, the judge denied UPMC's petitions to revoke subpoenas seeking documents relating to the single-employer allegation, and when UPMC persisted in its refusal to produce the documents, the judge severed that allegation from the remainder of the case, while the parties litigated the subpoena enforcement issue in federal court. Thereafter, the judge issued a decision finding that Presbyterian Shadyside committed more than 20 violations of Section 8(a)(1), (2), (3), and (4) of the Act.

While UPMC was continuing to contest its obligation to comply with the subpoenas pertaining to the single-employer allegation before the Third Circuit Court of Appeals, it also sought to avoid litigating the issue altogether by filing a "Partial Motion to Dismiss" with the judge. In that motion, UPMC asserted that it would not effectuate the purposes of the Act to proceed with UPMC as a party since no remedy was sought from it. UPMC further argued that, in any event, dismissal was appropriate because it was willing to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and appeal process." The General Counsel and the Charging

[1] Although Member McFerran and I write separately, I fully endorse the points raised in her dissent which persuasively demonstrate the majority's erroneous decision.

Party strongly opposed the Respondent's motion. They argued that dismissal was inappropriate because the General Counsel had not yet had the opportunity to present evidence in support of the single-employer allegation and that a litigated single-employer finding was necessary to achieve complete remedial relief and effectuate the policies of the Act.

Without holding a hearing on the single-employer allegation, the judge issued a supplemental decision granting UPMC's motion. The judge found that UPMC's guarantee was "as effective" as any remedy that would result from a single-employer finding, and ordered that "UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order" and, as the guarantor, UPMC "must ensure that . . . Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if . . . Presbyterian Shadyside is unable to do so."

UPMC excepts to the judge's supplemental decision, arguing that the judge's "officers, agents, successors, and assigns" language was not part of its guarantee, and must be struck. The General Counsel and the Charging Party also except, arguing that the judge erred in finding that "UPMC's offer to serve as a guarantor of any Board Order issued in this matter constitutes a remedy as effective as any remedy resulting from a finding that . . . UPMC and . . . Presbyterian Shadyside constitute a single employer." I agree with the General Counsel and Charging Party. Had the judge thoroughly analyzed and compared the remedies, he would have found the guarantee wholly inadequate.

Discussion

1. UPMC's guarantee is not as effective as the remedy that would result from a litigated single-employer finding.

Both the judge and the majority make the same error when they assert that UPMC's guarantee is "as effective" as the remedy that would result from a single-employer finding. If UPMC and Presbyterian Shadyside were found to be a single employer, the Board's Order would hold them both jointly and severally liable for the unfair labor practices committed by Presbyterian Shadyside. See *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007) (because "single-employer status exists . . . we will hold all four businesses jointly and severally liable to remedy the unfair labor practices found"), enfd. 551 F.3d 722, 733 (8th Cir. 2008). This means that UPMC and Presbyterian Shadyside, and their officers, agents, successors, and assigns, would each be liable to remedy the unfair labor practices from the outset and would be required to abide by all of the provisions in the Order, including both the cease-and-desist and affirmative order provisions. In contrast, under UPMC's guarantee, it will not be liable for remedying the unfair labor practices from the outset.

Thus, the majority's assertion that UPMC is liable to the same extent as its subsidiary, Presbyterian Shadyside, is simply incorrect. UPMC's guarantee is a form of contingent liability, which will *only* take effect if Presbyterian Shadyside defaults on its remedial obligations. Under joint and several liability, each entity is individually responsible for the entire obligation at the outset, whereas the guarantee obligates UPMC to remedy the unfair labor practices only if Presbyterian Shadyside fails to do so. Furthermore, contingent liability is not equivalent to joint and several liability because the imposition of liability on UPMC as the guarantor can only be invoked after a determination has been made that Presbyterian Shadyside has defaulted on its remedial obligations. See *Carpet, Linoleum & Soft-Tile Layers Local 1238 (Nielsen Bros., Inc.)*, 160 NLRB 475, 483 (1966) (An "aggrieved party . . . may not maintain an action against [a] guarantor . . . until legal remedies against the primary obligor have been exhausted."). Thus, obtaining the remedies to which aggrieved employees are entitled will be delayed until after a default determination is made—a determination that would likely involve further litigation.[2]

The majority's claim that UPMC is liable to the same extent as Presbyterian Shadyside is wrong for an additional reason. Under the guarantee, UPMC will not be liable for any prospective application of the cease-and-desist provisions of the Order and will not be subject to contempt sanctions for its *own* violations of the Order. By contrast, were UPMC and Presbyterian Shadyside found to be a single employer, each would be required to refrain from future unfair labor practices pursuant to the cease-and-desist provisions of the Order and each would be subject to contempt sanctions for any failure to do so.

The inadequacy of the judge's recommended Order is exacerbated by my colleagues' elimination of the customary Board remedy extending its Orders to respondents' officers, agents, successors, and assigns.[3] Under

[2] UPMC would undoubtedly continue its aggressive litigation strategy. It previously moved—unsuccessfully—to have the Board dismiss the single-employer allegation. Failing that, it refused to comply with subpoenas to produce information relevant to the single-employer allegation and has appealed a district court order enforcing the subpoenas to the Third Circuit Court of Appeals.

[3] The majority has twisted itself into a pretzel in an effort to mask the deficiencies in its decision. On the one hand, the majority grants UPMC's exception to the judge's inclusion of "officers, agents, successors, and assigns" language in the recommended Order (presumably because *UPMC made no such offer*). On the other hand, the majority

the majority's decision, if Presbyterian Shadyside fails to fulfill its remedial obligations, the General Counsel will seek to enforce UPMC's guarantee to obtain the ordered remedies. However, because the guarantee does not include "officers, agents, successors, and assigns" language, the General Counsel may not be able to enforce it if, for example, UPMC has ceased to operate or is sold to another entity. The omission of this language is especially problematic in the healthcare industry where corporate changes, including mergers and acquisitions, are common. Thus, the absence of "officers, agents, successors, and assigns" language in the guarantee raises serious enforcement problems that the Board avoids by routinely including this standard provision in its Orders.[4]

Indeed, I question whether the judge would have accepted UPMC's guarantee and found it as effective a remedy as would result from a litigated single-employer finding had the judge realized that UPMC would not agree to bind its officers, agents, successors, and assigns. I do not fault the judge for including this language—the exact contours of the guarantee were not spelled out in UPMC's Partial Motion to Dismiss and, as explained, "officers, agents, successors, and assigns" language is included in all Board Orders. However, the mismatch between the judge's recommended Order and UPMC's intended guarantee demonstrates that there was no meeting of the minds between the judge and UPMC. Moreover, my colleagues overreach by approving a guarantor proposal that was not even contemplated by the judge.

Underlying my colleagues' misguided acceptance of UPMC's inadequate guarantee is their failure to appreciate the significance of the single-employer allegation. A key objective of the Board's single-employer doctrine "is to ensure that the Board's decision and order are binding on the entity or entities responsible for controlling labor relations." See *Oaktree Capital Management, L.P. v. NLRB*, 452 Fed.Appx. 433, 438 (5th Cir. 2011). Here, the General Counsel has alleged that "there is reasonable cause to believe that *both* [UPMC and Presbyterian Shadyside] were intimately connected and had substantive co-accountability for labor relations." According to the General Counsel and the Charging Party, the evidence will show that UPMC has "comprehensive and ultimate authority over Presbyterian Shadyside" and that UPMC delegated authority over labor relations to Presbyterian Shadyside, but that delegation could be rescinded at any time. By accepting this guarantee, the General Counsel is denied the opportunity to litigate this important issue.

The majority's acceptance of the guarantee based on the judge's finding that no evidence was presented that UPMC independently committed unfair labor practices further reflects their failure to comprehend the remedial importance of a single-employer finding. "A 'single employer' relationship exists where two nominally separate entities are actually part of an integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'" *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). When two respondents are found to be a single employer, they are each jointly and severally liable for any unfair labor practices committed by the other. See *Lederach Electric, Inc.*, 362 NLRB No. 14, slip op. at 1 (2015), enfd. *Morris Road Partners, LLC v. NLRB*, 637 Fed.Appx. 682 (3d Cir. 2016); *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 722 fn. 2 (8th Cir. 2008) ("The single employer doctrine is a Board creation that treats two or more related enterprises as a single employer for purposes of holding the enterprises jointly . . . liab[le] for any unfair labor practices.") (citation omitted). Thus, contrary to the majority, it is entirely irrelevant that UPMC is not charged with directly committing any unfair labor practices. The majority is also wrong when they refer to UPMC as a mere "back-up party" and state that Presbyterian Shadyside "*should* be primarily responsible." Indeed, as they recognize elsewhere in their decision, "when a parent company is found to be a single employer with its subsidiary, the parent company is liable for the subsidiary's unfair labor

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disingenuously claims that the "Order is binding against [UPMC's] officers, agents, successors, and assigns to the extent those parties would be bound under the Federal Rules of Civil Procedure, regardless of whether the Order specifically includes such language" (in likely recognition that the absence of this requirement renders its Order wholly inadequate). The majority cannot have it both ways; indeed it fails as to each.

As an initial matter, I agree with Member McFerran that the majority has failed to demonstrate that Board Orders automatically run against "officers, agents, successors, and assigns" of adjudged respondents. This is not surprising as the Board, since its inception, has expressly included this important remedial language in its Orders—it has not left it to mere implication. See, e.g., *Oregon Worsted Co.*, 3 NLRB 36 (1937). Further, when evaluating a proposed settlement, the Board considers the actual terms offered by the respondent. The Board will not imply additional, not-agreed-upon terms. See, e.g., *Enclosure Suppliers, LLC*, 09–CA–046169, 2011 WL 2837659 (July 14, 2011) (rejecting a consent order because it expressly limited compliance to the notice-posting period even though the respondent argued that it implicitly provided for a standard compliance period).

At bottom, by granting UPMC's exception and deleting "officers, agents, successors, and assigns" from the Order, while simultaneously asserting that this obligation nonetheless remains, the majority attempts to fit the square peg of UPMC's guarantor offer into the round hole of consent orders. The pieces do not fit. And, as I explain below, consent orders simply are not at issue in this case.

[4] The majority mischaracterizes the General Counsel's position regarding the removal of this language. The General Counsel's statement that doing so "would change nothing from a legal standpoint" expresses only that UPMC's guarantee would have been deficient even had "officers, agents, successors, and assigns" been included.

practices *'to the same extent'* as the subsidiary," citing *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006) (emphasis added).[5]

2. The majority has overreached by addressing an issue not presented in this case and has failed to provide an adequate justification for overruling *Postal Service*.

Rather than resolving this case based on the issue before us, my colleagues have reached out to decide an issue that is clearly not presented: whether to overrule *Postal Service*, 364 NLRB No. 116. In *Postal Service*, the Board clarified the appropriate standard for evaluating consent orders and required that such orders which incorporate settlement terms proposed by a respondent, over the objections of the General Counsel and the charging party, provide a full remedy for all of the violations alleged in the complaint. Id., slip op. at 1.[6] *Postal Service* is inapplicable here because this case does not involve a consent order.[7] None of the parties has asked the Board to overrule *Postal Service* or even argued that *Independent Stave Co.*, 287 NLRB 740 (1987), is relevant to determining whether the judge erred in dismissing the single-employer allegation.[8]

I question my colleagues' motives and the wisdom of overruling recent precedent involving consent orders in a case where it is not implicated, solely to adopt Chairman Miscimarra's dissent in *Postal Service*. Further, their attempt to substitute *Postal Service* with *Independent Stave* fails both analytically and factually. *Independent Stave* involved non-Board settlement agreements between the respondent and three charging parties, opposed by the General Counsel. 287 NLRB at 740. Based on non-Board settlement agreements between the respondent and those charging parties, the Board granted the respondent's motion to dismiss complaint allegations relating to their claims. However, the *Independent Stave* Board rejected the respondent's motion to dismiss as to a fourth charging party who did not sign a settlement agreement. Id. at 744. Because there had been no agreement, complaint allegations as to that charging party were remanded for a hearing.

As the majority explained in *Postal Service*, none of the policies underlying the Board's *Independent Stave* decision applies in consent order cases. In *Independent Stave*, the Board repeatedly cited its "policy of encouraging the peaceful, nonlitigious resolution of disputes," "commitment to private negotiated settlement agreements," "policy of 'encouraging parties to resolve disputes without resort to Board processes,'" and "strong commitment to settlements." Id. at 741 (citations omitted). These considerations are obviously not present when only the respondent has agreed to be bound by the terms of the consent order.

Additionally, the *Independent Stave* Board's justification for accepting a less than full remedy does not apply in consent order cases. In *Independent Stave*, the Board explained that a less than full remedy was acceptable because the "parties to a non-Board settlement recognize[] that the outcome of litigation is uncertain" and "decide to accept a compromise" rather than face the risks of litigation. Id. at 743.[9] By contrast, in consent

[5] In *Flat Dog Productions*, as in all cases involving single-employer findings, the Board imposed joint and several liability on the parent and subsidiary companies, and their officers, agents, successors, and assigns, for the violations committed by the subsidiary company. See id.

[6] My colleagues refer to consent orders as "consent settlement agreements." As the Board explained in *Postal Service*, such a description is inaccurate because there is no "agreement" between any of the parties. Id., slip op. at 22 fn. 5.

[7] The majority incorrectly claims that the General Counsel agrees that the standard for consent orders is at issue here. In his exceptions brief, the General Counsel merely commented that "to the extent the judge's decision . . . *could be* considered equivalent to approving a *de facto* consent order, the *Independent Stave* standard is not met." (emphasis added.) The majority also asserts that, after the issuance of *Postal Service*, the Charging Party filed a letter with the Board requesting that it take notice of the decision. What is most relevant here is the position of UPMC and tellingly, the majority conveniently omits that UPMC repeatedly asserted to the Board that "the concept of consent orders is irrelevant to this matter" and that the judge "did not enter a consent order and did not accept a proposed settlement by UPMC." And in response to the Charging Party's letter to the Board (which the majority *again* fails to acknowledge), the Respondents vehemently argued that *Postal Service* had no bearing on this case. The Respondents stated:

> The authority submitted by the [Charging Party] concerns the standard to be used by administrative law judges in approving "consent orders," a concept that is neither pertinent nor significant to the pending exceptions. A consent order involves the dismissal of a complaint by an administrative law judge based on settlement terms proposed by a respondent over the objections of the General Counsel and charging party. [The administrative law judge] did not enter a consent order and did not accept a proposed settlement by UPMC. He did not rely on, analogize to, or in any way address consent order principles. Instead, he granted UPMC's partial motion to dismiss based on his express finding that further litigation would not effectuate the policies of the Act.

[8] Under *Independent Stave*, the Board considers all the circumstances surrounding a settlement agreement, including: "(1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes." 287 NLRB at 743.

[9] In *Independent Stave*, the Board criticized *Clear Haven Nursing Home*, 236 NLRB 853 (1978), where the Board had rejected a non-Board settlement agreement between the respondent and charging party

order cases, the charging party and the General Counsel have decided to accept the risks of litigation in the hopes of receiving a full remedy. Thus, nothing in *Independent Stave* suggests that the standard should apply to consent orders. Rather, the case was explicitly formulated to evaluate non-Board settlement agreements and was driven by the Board's policy favoring private dispute resolution and by deference to the charging party's judgment concerning its own interests in accepting less than a full remedy.

I strongly disagree with my colleagues' assertion that applying the *Independent Stave* standard in consent order cases "encourag[es] voluntary dispute resolution, promot[es] industrial peace, conserv[es] the resources of the Board, and serv[es] the public interest." It is absurd for the majority to claim that these purposes of the Act are achieved in consent order cases where the charging party objects to the respondent's proposed settlement terms. As the Board held in *Independent Stave*, "*honoring the parties' agreements* advances the Act's purposes of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." Id. (emphasis added).[10] When the Board approves a consent order, it is obviously not honoring the parties' agreement because only the respondent has agreed to be bound. Further, consent orders do not advance the *Independent Stave* goals of encouraging voluntary dispute resolution or promoting industrial peace because the charging party objects. In *Independent Stave*, the Board explained that the public interest is served by "encouraging the parties' achievement of *mutually agreeable* settlement without litigation." Id. at 742 (emphasis added). Clearly, a consent order is not a mutually agreeable outcome. Therefore, overruling *Postal Service* does not advance the purposes and policies of the Act.

None of the other reasons cited by my colleagues in support of applying the *Independent Stave* standard is persuasive. The majority asserts that applying *Independent Stave* to consent orders is consistent with the Board's longstanding policy of accepting reasonable settlement agreements. As discussed, the majority errs in equating consent orders with settlement agreements because there is no "agreement" between the parties in consent order cases. Further, they oversimplify the *Independent Stave* standard by referring to it as a test of reasonableness. As the Board explained in *Independent Stave*, the test is "whether it will effectuate the purposes of the Act to give effect to the [parties'] settlement" based on the consideration of a number of factors. Id. at 741. Indeed, the cases cited by the majority emphasize that the opposition of the General Counsel and the charging party is "[o]ne of the foremost considerations" and "is definitely significant and militates heavily against accepting" a proposed settlement offer. *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB 215, 217 (1993); see also *Sea Jet Trucking Corp.*, 327 NLRB 540, 550 (1999). My colleagues also contend that the Board's acceptance of a less than full remedy may be in the best interest of the parties and will often leave them in a better position than litigation. That is a question for all the parties to decide and it is impossible to know whether settlement or litigation will provide the best outcome for the parties. There is no reason for the Board to substitute its judgment for that of the parties in weighing the risks and benefits of litigation versus settlement. Moreover, as this is not a "settlement," it cannot be assessed under those standards.

In sum, not only have my colleagues failed to provide an adequate justification for their decision to overrule the *Postal Service* standard just one year after the Board adopted it, they have overreached to address this issue even though it is not presented in this case.

3. UPMC's guarantee does not satisfy *Postal Service* or *Independent Stave*.

Although neither *Postal Service* nor *Independent Stave* applies here because this case does not involve a consent order or settlement agreement, UPMC's guarantee is clearly insufficient under either standard. UPMC's guarantee fails the *Postal Service* standard because it does not provide a full remedy for all of the violations alleged in the complaint. 364 NLRB No. 116, slip op. at 1, 3. UPMC's guarantee also fails to satisfy the *Independent Stave* standard. 287 NLRB at 743. First, both the General Counsel and the Charging Party strenuously object to the guarantee. Second, it is not reasonable to accept the guarantee at this stage of the proceeding because, as explained, the guarantee does not provide an adequate remedy for the alleged violations.[11] Third, UPMC and its subsidiaries have been involved in ongoing litigation at

union even though it provided the union with a better remedy than it would have received had the General Counsel successfully litigated the case. 287 NLRB at 742. Contrary to my colleagues, the Board's discussion of *Clear Haven* does not support overruling *Postal Service* because *Clear Haven* involved a non-Board settlement and a more than full remedy.

[10] My colleagues conveniently omit the italicized portion of this quote.

[11] My colleagues believe that accepting the guarantee is reasonable in light of the risks inherent in litigation and in order to expedite the resolution of this proceeding. However, by strenuously objecting to the guarantee, the General Counsel and the Charging Party have agreed to assume the risk of further litigation. The Board should not, under the guise of efficiency and conservation of resources, force an inadequate guarantee upon the General Counsel and Charging Party, where they have chosen with open eyes to reject it.

the Board and UPMC's subsidiaries have been found to have violated the Act.[12] In addition, the violations alleged in this case may, if found, arguably constitute a breach of the previous settlement agreements, triggering the default provisions of those agreements. Thus, I would find that UPMC's guarantee fails to satisfy either the *Postal Service* or *Independent Stave* standards.

Ultimately, my colleagues have side-stepped the actual issue presented in this case in their zeal to reverse *Postal Service*, 364 NLRB No. 116 (2016), and embrace then-Member Miscimarra's dissent. On behalf of the Agency, I am disheartened by their actions; on the basis of the law, I dissent.

Dated, Washington, D.C. December 11, 2017

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

This case presents the Board's new majority with a pretext to overrule recent precedent[1]—without notice or an opportunity for briefing. But the majority does more than restore an earlier, flawed rule with respect to respondents' unilateral efforts to terminate Board litigation over the objections of the General Counsel and the charging party. It reaches a result that threatens to broadly frustrate the General Counsel's ability to establish a respondent's status as a "single employer" under the National Labor Relations Act and thus its liability for unfair labor practices committed by a nominally independent entity. Here, what the majority calls a "consent settlement agreement" (a misleading misnomer[2]) amounts to a potentially illusory promise by the respondent employer that does not terminate the litigation, but instead threatens to prolong it, and that does not represent even a rough equivalent of a single-employer finding. In no compelling way does the unprecedented outcome here effectuate the purposes of the National Labor Relations Act.

The majority's new approach, meanwhile, seemingly invites gamesmanship from respondents facing liability under the Act. They are effectively encouraged to find ways around the General Counsel and to deal directly with the Board, straining its statutory role of neutral adjudicator. I agree with Member Pearce's well-reasoned dissent here, but write separately to emphasize certain points.

I.

In this case, as I will explain, it became very difficult for the General Counsel to prosecute, and the administrative law judge to adjudicate, the single-employer allegation against UPMC in a timely way. The judge accepted UPMC's proffered way out of the dilemma—perhaps understandably, but nevertheless erroneously.

This case involves allegations that UPMC and its hospital subsidiary, Presbyterian Shadyside, are single employers who committed a wide range of unfair labor practices—from surveillance to discriminatory discharges—in resisting a union-organizing drive. After unsuccessfully moving to dismiss the single-employer allegation (the Board denied the motion), UPMC contested document subpoenas relating to the single-employer allegation and has now pursued that dispute to the U.S. Court of Appeals for the Third Circuit. The administrative law judge accordingly severed the single-employer allegation from the rest of the case, while proceeding to conduct a hearing on the remaining issues. As he explained, the judge's "reason for bifurcating the case was that [he] did not want ongoing subpoena enforcement proceedings regarding the single employer issue to delay [his] resolution of the substantive unfair labor practice issues."

The judge then found that Presbyterian Shadyside had committed a variety of unfair labor practices. (His decision is pending before the Board on exceptions from all parties.) In turn, UPMC asked the judge to dismiss the single-employer allegation, offering in its motion to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the [judge's] Decision and Order

[12] Some of these cases have resulted in settlement agreements requiring remedial action by UPMC's subsidiaries, including Presbyterian Shadyside. See, e.g., Cases 06–CA–081896 et al. (*UPMC I*); Cases 06–CA–119480 et al. (*UPMC III*). At least one case has resulted in a finding of a violation against Presbyterian Shadyside and another one of UPMC's subsidiaries. See *UPMC*, 362 NLRB No. 191, slip op. at 1 fn. 2 (2015), which also imposed remedial obligations on UPMC (pursuant to a stipulation) even though it was not found to violate the Act "as a separate entity." Other cases are pending. See, e.g., Cases 06–CA–171117 et al. (*UPMC IV*). In that case, as here, a single-employer allegation against UPMC has been severed for litigation after the conclusion of the merits litigation.

[1] *Postal Service*, 364 NLRB No. 116 (2016). As explained in Section II-A below, the majority cites no compelling reason for reversing precedent here, even if the issue decided in *Postal Service* were fairly presented on the facts of this case.

[2] In cases like this one, as the *Postal Service* Board pointed out, "there is no 'agreement' between any parties," and the Board's order is "involuntarily imposed on all parties other than the respondent." 364 NLRB No. 116, slip op. at 2–3 fn. 5. The majority today adopts the unfortunate terminology of then-Member Miscimarra's dissent in *Postal Service*.

[finding Presbyterian Shadyside liable] *which survive the exceptions and appeals process*" (emphasis added).

Over the objections of the General Counsel and charging party Union—and without holding a hearing on the single-employer allegation—the judge granted UPMC's motion. He found that UPMC's "offer to serve as a guarantor of any remedy that the Board may ultimately order . . . [was] as effective a remedy" as could result from a single-employer finding and the imposition of joint and several liability on UPMC and Shadyside. The judge cited the "time-consuming and expensive course of litigating the single employer issue to its conclusion" and the "risk that further litigation . . . [might] result in a finding that UPMC and Presbyterian Shadyside [were] not, in fact a single employer." Further litigation, the judge concluded, thus "would not effectuate the purposes of the Act."

Accordingly, the judge issued a recommended order reciting (1) that "UPMC, its officers, agents, successors, and assigns shall be the guarantor of any remedies that the Board may order in the original decision in this case" and (2) that

> [a]s the guarantor, Respondent UPMC must ensure that … Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, *if … Presbyterian Shadyside is unable to do so.* [emphasis added]

All parties have excepted to the judge's recommended order. The General Counsel and the Charging Party challenge the judge's finding that accepting UPMC's guarantee was the equivalent of a single-employer determination. UPMC excepts to the judge's inclusion of order language binding its "officers, agents, successor, and assigns," arguing that it had never offered such a commitment.

II.

The procedural posture of this case is unusual, perhaps unique, and as a result, the case does not fit neatly (if at all) into preexisting categories for evaluating situations in which the Board has been asked to end a proceeding over the objection of one or more of the parties involved. Until today, the Board had two basic frameworks. In the case of a true settlement to which the General Counsel *or* the charging party (in addition to the respondent) had agreed, the Board applied the framework of *Independent Stave Co.*, 287 NLRB 740 (1987). *Independent Stave* was based on the Board's longstanding "policy of encouraging the peaceful, nonlitigious resolution of disputes" through "private negotiated settlement agreements" and on the Board's corresponding deference to the parties' own determinations that compromise (i.e., accepting less than a full Board remedy) was in their best interests. Id. at 741–743.

In contrast, where *neither* the General Counsel *nor* the charging party had entered into a settlement with the respondent, but the respondent offered to consent to a Board remedial order (over the objections of both the General Counsel and the charging party), the Board applied the framework of *Postal Service*, supra. In *Postal Service*, the Board rejected the application of the *Independent Stave* standard to such situations, observing that "[n]either of the considerations that justify approving non-Board settlements that lack the full remedy called for under Board law are present in the case of a consent order agreed to by no party other than the respondent," 364 NLRB No. 116, slip op. at 2, but found that acceptance of such an order would serve the goals of the statute if, and only if, the respondent offered to consent to an order providing a full remedy for the alleged violations, as such an order would serve interests of administrative economy in preventing further unnecessary litigation. Id at 3.

A.

Initially, the majority today reaches out to overrule *Postal Service* and holds that *Independent Stave* applies uniformly, despite the fact that the circumstances here do not align with either of these frameworks. I believe that *Postal Service*, in which I participated, was correctly decided and that the majority errs in overruling that decision without even bothering to give notice or to invite briefing, a sharp break with well-established practice,[3]

[3] In the last decade, issuing a notice and invitation to file briefs has become the Board's routine practice in significant cases, particularly those where the Board is contemplating reversal of precedent. See, e.g., *Temple University Hospital, Inc.*, Case 04–RC–162716, Order Granting Review in Part and Invitation to File Briefs (filed Dec. 29, 2016), available at https://apps.nlrb.gov/link/document.aspx/09031d45822fb922 (whether the Board should exercise its discretion to decline jurisdiction over the employer); *King Soopers, Inc.*, 364 NLRB No. 93 (2016) (whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017); *Columbia University*, 364 NLRB No. 90 (2016) (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the National Labor Relations Act); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (whether the Board should adhere to its decision in *Oakwood Care Center,* 343 NLRB 659 (2004), which disallowed inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers); *Service Workers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015) (whether the Board should

reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances); *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (whether the Board should adhere to its existing joint employer standard or adopt a new standard); *Northwestern University*, 362 NLRB No. 167 (2015) (whether the Board should find grant-in-aid scholarship football players are employees under the NLRA); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (whether the Board should adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use it for Section 7 activity, subject only to the need to maintain production and discipline); *Pacific Lutheran University*, 361 NLRB 1404 (2014) (whether a religiously-affiliated university is subject to the Board's jurisdiction, and whether certain university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managerial employees); *Latino Express, Inc.*, 361 NLRB 1171 (2014) (whether, in awarding backpay, the Board should routinely require the respondent to: 1) submit documentation to the Social Security Administration so that backpay is allocated to the appropriate calendar quarters, and 2) pay for any excess federal and state income taxes owed as a result of receiving a lump-sum payment); *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (whether the Board should change the standard for determining when the Board should defer to an arbitration award), rev. denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); *New York University*, Case 02–RC–023481, Notice and Invitation to File Briefs (filed June 22, 2012), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3252/ntc_02-rc-23481_nyu_and_polytechnic_notice___invitation.pdf (whether graduate student assistants who perform services at a university in connection with their studies are or are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act); *Point Park University,* Case 06–RC–012276, Notice and Invitation to File Briefs (filed May 22, 2012), available at https://apps.nlrb.gov/link/document.aspx/09031d4580a0ee7d (whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managers); *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (whether mandatory arbitration agreements that preclude employees from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial, violate the NLRA), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013); *Hawaii Tribune-Herald*, Case 37–CA–007043, Notice and Invitation to File Briefs (filed March 2, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/stephensmediainvite.pdf (whether the Respondent had a duty to provide the Union with a statement provided to it by an employee or any other statements that it obtained in the course of its investigation of another employee's alleged misconduct); *Chicago Mathematics and Science Academy Charter School, Inc.*, Case 13–RM–001768, Notice and Invitation to File Briefs (filed January 10, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/chicago_mathematics_brief.pdf (whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (what constitutes an appropriate bargaining unit), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Roundy's Inc.*, Case 30–CA–017185, Notice and Invitation to File Briefs (filed November 12, 2010), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/roundys_notice_and_invitation.pdf (what standard the Board should apply to define discrimination in cases alleging unlawful employer discrimination in nonemployee access); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (what duties a successor employer has toward an incumbent union); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (whether, and how long, employees and other unions should have to file for an election following an employer's voluntary recognition of a union); *J. Picini Flooring*, 356 NLRB 11 (2010) (whether Board ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceedings any necessary factual showing should be required); *Kentucky River Medical Center*, 356 NLRB 6 (2010) (whether the Board should routinely order compound interest on backpay and other monetary awards in backpay cases and if so, what the standard period for compounding should be); *Long Island Head Start Child Development Services*, 354 NLRB No. 82 (2009) (two-member Board decision) (whether the Board should find contract termination based on bargaining even in the absence of any contractually-required notice); *Register Guard*, 351 NLRB 1110 (2007) (whether employees have a Section 7 right to use their employer's email system to communicate with one another, what standard should govern that determination, and whether an employer violates the Act if it permits other nonwork-related emails but prohibits emails on Section 7 matters), enfd. in part and remanded in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007) (whether the job targeting program at issue violated the Davis-Bacon Act), enfd. 340 Fed.Appx. 354 (9th Cir. 2009); *Dana Corp.*, 351 NLRB 434 (2007) (whether the Board should modify its recognition bar doctrine as articulated in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001)); *Alyeska Pipeline Service Co.*, 348 NLRB 779 (2006) (whether a systemwide presumption is warranted in the circumstances of the instant case); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (seeking comment relating to (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act; and (2) an appropriate test for determining unit placement of employees who take turns or "rotate" as supervisors), see also *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Heath Center*, 348 NLRB 727 (2006); *Firstline Transportation Security*, 347 NLRB 447 (2006) (whether the Board should assert jurisdiction over the employer, a private company contracting with the Transportation Security Administration).

and the process followed in *Postal Service* itself.[4] (None of the cases cited by the majority diminish the fact that inviting briefs has become an established Board norm – and the majority tellingly cites no recent case in which

[4] 364 NLRB No. 116, slip op. at 1 fn. 1 (referring to notice and invitation to file briefs). The majority insists the "decision to allow such briefing is purely discretionary and is based on the circumstances of each case," but its disregard for the recognized benefits of public participation in the Board's decision-making process is regrettable—and one can only hope that today's approach does not signal a new Board policy of excluding the public from important decisionmaking.

Remarkably, the majority points to the fact that the *Postal Service* Board invited briefing as a reason *not* to do so here, asserting that "there is no reason to believe" that different arguments might be presented to the Board. But our assumption should be that public participation is desirable, unless there are legitimate and compelling reasons to think otherwise. No party to this case, and no member of the public, has been permitted to address the Board's decision in *Postal Service* and its specific rationale, as opposed to the general question presented. Nor has there been an opportunity for the public to address the impact of the application of the *Postal Service* analysis to the decision of specific cases and controversies. The better course here would be to give interested persons (including those who did not file briefs in *Postal Service*) the opportunity to address the Board.

the Board refused to seek briefing over objections from a member.[5])

The majority presents no compelling justification for this reversal. A change in the Board's composition is not a basis for revisiting an earlier decision. See *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), citing *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954).[6] In addition, the majority does not even attempt to argue that the rule adopted in *Postal Service* is somehow contrary to the National Labor Relations Act. In fact, Section 10(a) of the Act makes explicit that the Board's authority to redress unfair labor practices by adjudicating cases "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. §160(a).

While the majority says that the *Postal Service* Board "improperly deviated from policies favoring the appropriate settlement of disputed allegations," it never persuasively explains how the prior Board erred in distinguishing between (1) a respondent's unilateral offer to resolve a case, over the objections of both the General Counsel and the charging party; and (2) a bilateral settlement that actually reflects the agreement of the respondent and at least one opposing party. To treat cases in which there has been no settlement between opposing parties as if there *had* been such a settlement—by making *Independent Stave* a unitary standard applicable to consent-order cases, as well as settlement cases—is irrational.[7]

[5] The majority asserts that there are "numerous" cases where the Board "has freely overruled or disregarded established precedent…without supplemental briefing." But the six decisions the majority cites are easily distinguishable from this one. See *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (considering whether unilateral changes made after expiration of a collective-bargaining agreement violate the Act); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (considering, inter alia, whether the Board is precluded from considering an unalleged failure to timely disclose that requested information does not exist when the unalleged issue is closely connected to the subject matter of the complaint and has been fully litigated); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (considering whether an employer, having voluntarily recognized a "mixed-guard union" as the representative of its security guards, lawfully may withdraw recognition if no collective-bargaining agreement is in place, even without an actual loss of majority support for the union); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (considering whether an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement); *Pressroom Cleaners*, 361 NLRB 643 (2014) (considering, inter alia, whether an employer can limit its backpay liability in compliance through an evidentiary showing or whether the predecessor employer's terms and conditions of employment should continue until the parties bargain to agreement or impasse); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (considering, inter alia, whether an employee was engaged in "concerted activity" for the purpose of "mutual aid or protection" when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer).

First, in all six cited cases a party explicitly and publicly asked the Board to overrule precedent, a fact surely not lost on persons interested in the development of federal labor law. (The General Counsel asked the Board to revisit or overrule precedent in *Fresh & Easy*, *Lincoln Lutheran*, *Loomis*, *Graymont*, and *Du Pont*; in *Pressroom Cleaners*, the Charging Party asked the Board to overrule precedent.)

In two cited cases, *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed. See *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (amicus brief filed by SEIU urging the Board to overrule *Wells Fargo Corp.*, 270 NLRB 787 (1984)); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (amicus brief filed by National Right to Work Legal Defense Foundation urging the Board not to overrule *Bethlehem Steel*, 136 NLRB 1500 (1962)).

Both *Du Pont* and *Lincoln Lutheran*, meanwhile, were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel.* See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history). And, as already pointed out, in none of the cases cited by the majority did the Board refuse to request briefing over the objection of one or more Board members.

The cases cited by the majority throw into even sharper relief the aberrance of the majority's process in this case. Unlike the six cases cited by the majority, here, no party—not the General Counsel, the Charging Party, or the Respondent—has asked us to revisit or overrule precedent. This decision is not the culmination of a long-running dialogue with a federal court of appeals. Neither the parties nor the public knew that the Board was planning to overrule precedent in this case.

[6] The majority points out that these cases involved parties' motions to reconsider earlier decisions, filed under Sec. 102.48 of the Board's Rules and Regulations. But the underlying principle applies where, as here, overruling recent precedent is the issue. Even when Board members change, Board law should stay the same, unless there is a good reason—independent of the Board's new composition—to change it. The majority quotes with apparent approval the observation of the U.S. Court of Appeals for the District of Columbia Circuit that Board doctrine will "invariably fluctuate with the changing compositions of the Board." *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001). It seems unlikely, however, that a reviewing court would approve the Board's reversal of precedent if the only credible reason offered for the change was that the Board had different members. Nor does the fact that a Board member's statutory term expires every year (also cited by the majority) mean that the Board can or should treat its precedent as perishable. Indeed, in *Wagner Iron Works*, supra, the Board observed that the "terms of [the Board's] members were arranged by Congress in a manner to prevent any abrupt dislocation in the discharge of its functions." 108 NLRB at 1239. Today's decision, of course, represents just such an "abrupt dislocation" of recent precedent.

[7] Reviewing courts will reject a legal rule adopted by the Board where it is irrational or where the Board's explication of the rule is "inadequate, irrational or arbitrary." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 796, 721 (2001), quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S., 359, 364 (1998). This strikes me as such a case.

The majority's argument essentially boils down to the fact that *Postal Service* should not be treated as precedent because it was "issued barely more than one year ago" and because the Board there overruled precedent. But as the *Postal Service* Board explained, its holding returned Board law to the standard adopted in *Electronic Workers IUE, Local 201 (General Electric Co.)*, 188 NLRB 855, 857 (1971).[8] The decisions overruled in *Postal Service*—which applied the *Independent Stave* standard to cases in which both the General Counsel and the charging party objected to the respondent's proffered settlement—reflect no consideration of the problem inherent in treating cases in which there has been no settlement as if such a settlement had been reached, invoking policies that are not genuinely implicated. In sum, *Postal Service* adopted a fully rationalized approach to an area where the Board's existing standard had never been persuasively explained (and could not be).

B.

But perhaps even more concerning than the majority's overreach in overruling *Postal Service* is the fact that acceptance of the Respondent's offer here is manifestly inappropriate *regardless* of which standard one chooses to apply. *None* of the policy goals that the Board has previously pursued by application of either *Independent Stave* or *Postal Service* are, or can conceivably be, achieved in this case.

Certainly, this outcome does not support the Board's preference for private resolution of disputes. There has been no *agreed-upon* resolution of the case whatsoever and so the policies favoring settlement underlying *Independent Stave* are not implicated at all. The General Counsel and the Charging Party have determined that their interests are best served by litigating the single-employer issue; the underlying dispute that led to the proceeding, meanwhile, remains very much alive.

The majority's outcome also does not support—and, indeed, is likely to undermine—the Board's interest in administrative economy and avoiding unnecessary litigation. UPMC's proffered "guarantee" finally resolves nothing. The "guarantee" applies if, but only if, a Board order imposing liability on Presbyterian Shadyside is enforced by a federal court of appeals. (As UPMC told the judge, the guarantee is subject to "the exceptions and appeals process.") In other words, the litigation continues—at the Board and on to the court of appeals—even after the Board adopts the judge's recommended order. Should the Board adopt the judge's findings against Presbyterian Shadyside, UPMC is entirely free to assist its subsidiary in challenging any Board remedial order running against the subsidiary and in challenging any subsequent order fixing liability in a separate compliance proceeding. The *Independent Stave* framework, of course, was designed for true settlements that finally resolve all issues in a Board proceeding and that terminate the case. The "guarantee" here is something quite different: it is entirely contingent on the ultimate outcome of the case against Presbyterian Shadyside. Even under the *Independent Stave* test, the fact that a resolution proffered by a respondent "will not necessarily save the parties from the time and expense of extensive litigation" is a powerful reason to reject it. *Copper State Rubber*, 301 NLRB 138, 138 (1991), overruled on other grounds in *Postal Service*, supra.

In addition, of course, the "guarantee" itself has spawned litigation—this case. Notably, today's order itself is subject to judicial review at the Charging Party's behest.[9] Should a court of appeals find that the Board erred in accepting UPMC's guarantee, the case would return to the Board and the single-employer issue would have to be litigated (absent a true settlement)—after a long and unwarranted delay. As his decision makes clear, the administrative law judge accepted UPMC's "guarantee" because—thanks in no small part to UPMC's tactics—litigation of the single-employer issue promised to be time-consuming. But accepting the "guarantee" only saved time for the judge in the proceeding he was conducting. It hardly brought a final resolution to the single-employer issue.

The majority insists that this fact makes no difference, because even the Board's determination that UPMC and Presbyterian Shadyside were a single employer would be subject to judicial review. But this claim misses the point. Here, the General Counsel (and the Charging Party) oppose accepting UPMC's "guarantee" and ask the Board instead to permit litigation and to adjudicate the single-employer issue. That process is the rule, not the exception—and so the burden should be on UPMC (and

[8] While the majority disputes whether the *General Electric* Board was purporting to establish a broadly applicable rule to say it would *only* approve consent settlement agreements that provide a full remedy, the Board in *General Electric* adopted the Trial Examiner's recommendation that the proposed consent order be adopted, and in so doing recited the Trial Examiner's findings. The Trial Examiner noted that he was approving the order on the grounds that the order "provide[s] a full remedy with respect to all aspects of the . . . violations alleged in the complaint . . . to which the General Counsel and Charging Party are entitled to under current Board law, *and that it also will protect the public interest and effectuate the purposes and policies of the Act*." 188 NLRB at 857 (emphasis added). Thus, the Trial Examiner's order suggests, contrary to the majority's suggestion, that a full remedy—as the Board recognized in *Postal Service*—is the minimum required to approve unilateral settlement proposals.

[9] See, e.g., *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994).

the majority) to demonstrate why accepting the "guarantee" is necessary. The fundamental premise of *Independent Stave*, of course, is that the consensual termination of a proceeding before the Board is generally desirable if it produces finality. Here there is neither consent, nor finality. Indeed, the majority's criticism of my view on this issue implicitly concedes the point that its own approach is no more expedient than the resolution of this case through normal Board processes. By asserting that both approaches could involve subsequent litigation, it undermines its argument that its approach can be justified by administrative economy.

And if this were not enough to give the Board pause, there is the matter of the terms of the "guarantee," as embodied in the Order adopted today, which seems likely to generate litigation on its own. UPMC has never proposed an actual Board order itself. It challenged the order recommended by the administrative law judge. And now the Board modifies the recommended order in two respects: (1) by agreeing with UPMC that the "officers, agents, successors, and assigns" language must be deleted, because "it was not included in UPMC's offer;" and (2) by reciting that UPMC must provide the remedies ordered against Shadyside if Shadyside "fails" to do so—in contrast to the recommended Order, under which UPMC must act only if Shadyside "is unable to do so."

As to the first modification, the majority insists that is immaterial, because even without the language objected to by UPMC, the Board's Order still would bind "its officers, agents, successors, and assigns." But there is no certainty about that. For one thing, in a compliance proceeding UPMC or its "officers, agents, successors, and assigns" might argue that the absence of order language specifically reaching the latter individuals and entities forecloses the Board from seeking compliance by them, notwithstanding the majority's unsupported assurances to the contrary. After all, it is the Board's *order*, not the reasoning in its decision, which drives the compliance process. See Sec. 10596 of the Compliance Manual (Procedures To Follow Upon Issuance of Board Order: The Compliance Officer should initiate compliance action with its remedial provisions as soon as a Board order issues by: Providing respondent with a copy of the Board's *order* and requesting, in writing, that respondent begin to take steps to comply with the Board's *order*.) (emphasis added). Further, in the event a Board order finding violations of the Act is appealed to and enforced by a federal appellate court (and UPMC's express restriction of its guarantee to those violations "which survive the exceptions *and appeals process*" plainly suggests that voluntary compliance with the Board's ultimate order would be unlikely), those individuals and entities might reasonably argue that any attempt by the Board to pursue them would be tantamount to an impermissible post-enforcement modification of the order.[10]

But even putting aside those potential roadblocks, it is far from clear that there would be anything automatic about imposing liability on UPMC's "officers, agents, successors, and assigns." In *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945), the Supreme Court considered the enforceability of the Board's standard successors and assigns language, concluding that it could be justified, but that the Court would "not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order. . . . (W)hether one brings himself in contempt as a 'successor or assign' depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order." Id. at 14–15. The Court affirmed this approach in *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), recognizing that Rule 65(d)[11] of the Federal Rules of Civil Procedure was "not a bar to judicial enforcement of the Board order entered against the bona fide successor in this case" but then considering whether the Board acted within its discretion by issuing the order against such a party, "striking a balance between the legitimate interests of the bona fide successor, the public, and the affected employee." Id. at 179, 181. In these cases, the Court seemed to signal that, far from broadly applying or inferring a "successors and assigns" clause, it would instead be cautious about the application of such language to entities that the Board seeks to hold liable.

Yet even if we are to assume the majority is correct that UPMC's successors and assigns still would be bound even absent express order language reaching those entities, it then makes no sense for the Board to delete such language at UPMC's urging. If, as the majority says, UPMC's successors and assigns would be bound in any event, there is no point in removing that language. UPMC obviously thought it important to insist on the removal of that language. Indeed, one must assume that, because the majority's statement about the Order's effect is contrary to UPMC's view, it might well trigger a challenge by UPMC to the order that the majority insists was agreed to by UPMC on one or more of the grounds above.

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[10] See *Scepter, Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006) ("The Board obviously cannot modify an order . . . that the court has enforced in a final judgment."); *NLRB v. Gimrock Construction, Inc.*, 695 F.3d 1188, 1192-1193 (11th Cir. 2012) (same); *Interstate Bakeries Corp.*, 360 NLRB 112, 112 fn. 4 (2014).

[11] This rule concerns which entities may be bound by an order.

As to the second modification, it alters a provision in the judge's recommended order to which UPMC never objected. The majority asserts that its modification—clearly a material change that strengthens the "guarantee"[12]—"better reflect[s] UPMC's guarantee." But UPMC has never consented to this modification and presumably might choose to challenge it as well. Moreover, this sua sponte alteration places the Board in the position akin to a party in the litigation, able to respond to proposed language and present counter-offers until a legally acceptable document is crafted. This strays far from the Board's recognized role as a neutral arbitrator. By doing so, the majority has encouraged parties to bargain with the Board rather than each other to settle their disputes. The majority does not dispute this observation, raising the question whether this is, in fact, their desired outcome.

In short, accepting UPMC's "guarantee" achieves very little with respect to effectuating either the Board's interest in private settlement or the central purpose of the Act: remedying unfair labor practices promptly, before labor disputes become even more disruptive.[13] This is especially so considering that the "guarantee" could have collateral consequences in any contemporaneous case where UPMC's relationship with Presbyterian Shadyside is or will be at issue. That is, inasmuch as the General Counsel here is prevented from seeking, and potentially securing, a single-employer finding, he would be required to try again in some other case—and potentially be confronted with a proffered "guarantee" again. In theory, under today's decision, any respondent confronted with a single-employer allegation will always have the option to proffer a manifestly inadequate "guarantee" like the one endorsed by the Board today—and thus might perennially avoid a single-employer finding, no matter the evidence and regardless of the General Counsel's determination that pursuing such a finding would effectuate the purposes of the Act.

III.

It should be clear, then, why both the General Counsel and the Charging Party have opposed UPMC's "guarantee." Of course, if either party had reached a true settlement with UPMC on the same terms, this would be a different case, and it would be proper to analyze it using the *Independent Stave* factors. And it could be, assuming that they were offered a settlement by UPMC, the General Counsel and the Charging Party made a mistake in turning it down, given the risks of litigation. But that decision should be theirs to make, at least in circumstances where, as here, a respondent's offer falls short of a complete remedy. (If the remedy were complete, then adjudicating the case would truly be a waste of time and resources).

Put somewhat differently, the Board should assume that the General Counsel and the Charging Party are rational actors. And it should be extremely reluctant—where no true settlement is involved—to abandon its role as an adjudicator, in favor of acting as a sort of super prosecutor ready to shape a deal with a respondent. In cutting off the General Counsel's path to the Board, today's decision seems to open a new path for respondents who wish to bargain directly with the Board itself. The majority's difficulty in crafting an Order that actually reflects what UPMC, alone, has consented to illustrates the pitfalls of this practice. Except in unusual circumstances, the Board should decide the cases brought to it, not settle them itself. The circumstances here do not justify a departure from the Board's normal role as an adjudicative body. Accordingly, I dissent.

Dated, Washington, D.C. December 11, 2017

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Julie Stern Esq., for the General Counsel.
Thomas Smock, Esq., for the Respondent UPMC.
Betty Grdina, Esq., for the Charging Party.[1]

SUPPLEMENTAL DECISION

MARK CARISSIMI, Administrative Law Judge. On January 9, 2014, pursuant to charges filed by SEIU Health care Pennsylvania, CTW, CLC (the Union) the General Counsel issued, a second order further consolidating cases and amended consolidated complaint (the complaint) alleging that Respondent UPMC (UPMC) and Respondent UPMC PresbyterianShadyside (Presbyterian Shadyside) constitute a single employer and that Presbyterian Shadyside committed various violations of Section 8 (a)(4), (3), (2), and (1) of the Act. Thereaf-

[12] Under the language of the judge's recommended order, the General Counsel would have been required to prove that Shadyside was "unable" to comply with the Board's order—perhaps because it was defunct or bankrupt—before UPMC's remedial obligations could be triggered. It is no wonder that UPMC had no objection to this language.

[13] As the Board observed in *Independent Stave*, the "early restoration of industrial peace . . . is a fundamental aim of the Act." 287 NLRB at 743.

[1] While the briefs filed by the Respondent and the Charging Party Union regarding Respondent UPMC's motion seeking dismissal of the complaint allegations alleging that it is a single employer with Respondent Presbyterian Shadyside list the names of several attorneys, I have listed only the attorneys who signed the briefs.

ter, both Respondents filed with the Board a motion to dismiss the complaint allegation that UPMC and Presbyterian Shadyside constitute a single employer. On February 7, 2014, the Board issued an order denying the Respondents' motion. Thereafter, on February 12, 2014, I opened a hearing that was conducted for 19 days during February, March, and April 2014. I issued an order on the record on April 3, 2014, severing the single employer allegations from the merits of the complaint. I determined it was appropriate under the circumstances to first issue a decision regarding the alleged unfair labor practices committed by Presbyterian Shadyside and later issue a supplemental decision regarding the issue of whether UPMC and Presbyterian Shadyside constitute a single employer. My reason for bifurcating the proceeding was that I did not want ongoing subpoena enforcement proceedings regarding the single employer issue to delay my resolution of the substantive unfair labor practice issues in the complaint.[2] On November 14, 2014, I issued a decision in this case (JD-62-14) in which I found that Presbyterian Shadyside committed various unfair labor practices. That case is presently pending before the Board pursuant to exceptions filed by all parties.

On June 4, 2015, UPMC filed with me a "Partial Motion to Dismiss" the complaint allegations that it constitutes a single employer with Presbyterian Shadyside and that it be dismissed as a party.[3] The General Counsel and the Union filed oppositions to the partial motion to dismiss filed by UPMC. Thereafter, with my permission, UPMC filed a reply to the oppositions filed by the General Counsel and the Union, and the General Counsel filed a response to the reply filed by UPMC. The briefs contained various attachments which the parties rely on in support of their respective positions. Since I find the briefs and the attachments to constitute a sufficient basis to issue a supplemental decision in this matter without further hearing, I order that the record be reopened for the limited purpose of receiving the briefs and attachments filed by the parties.

In its brief in support of its motion, UPMC requests that it be dismissed as a party in this matter and "that the severed single employer allegations of this matter also be resolved on the basis that Respondent UPMC shall guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and appeal process." (UPMC br. at 5.) In UPMC's reply brief it repeats this offer by stating "UPMC has indicated that it guarantees the performance by Presbyterian Shadyside of any remedial aspects of the Administrative Law Judge's Decision and Order which survive the exceptions and appeal process. As such, UPMC would be responsible for any remedy along with Presbyterian Shadyside." (UPMC reply at 2.) In its motion, however, UPMC does not stipulate that it is a single employer with Presbyterian Shadyside.

In opposing UPMC's motion to dismiss the single employer allegations of the complaint, the General Counsel contends, inter alia, that because the evidence regarding the single employer issue has not been presented, there is no factual basis to evaluate the appropriateness of UPMC's guarantee that it will ensure that Presbyterian Shadyside complies with any order ultimately issued by the Board. The General Counsel also asserts that UPMC's offer to guarantee compliance with any remedial order that may ultimately be issued in this case is ineffective because it is made in the context of seeking to be dismissed as a party from this proceeding. The General Counsel further contends that a finding that UPMC and Presbyterian Shadyside constitute a single employer and are thus jointly and severally liable for the unfair labor practices committed is necessary in order to properly effectuate the policies of the Act.

The Union argues, inter alia, that there is an insufficient basis to accept UPMC's offer to guarantee compliance with the remedy for violations that the Board finds that Presbyterian Shadyside committed. The Union contends, in this regard, that no guarantee has been attached to UPMC's motion.[4] The Union further argues that dismissing the single employer allegation would be contrary to the law of case as, prior to the opening of the hearing, the Board issued an order denying a motion filed by UPMC in which it sought dismissal of the amendments to the complaint alleging it to be a single employer with Presbyterian Shadyside. The Union further argues that a finding that UPMC and Presbyterian Shadyside constitute a single employer is necessary to achieve complete remedial relief in this matter.

Attached to the Union's opposition is a stipulation that the General Counsel, the Union, and Respondents UPMC, UPMC Presbyterian Shadyside, and Magee-Women's Hospital of UPMC entered into in Case 06–CA–081896[5] (U. Exh. A) that sets forth basic information regarding the relationship between UPMC and Presbyterian Shadyside. According to the parties' stipulation, UPMC is a holding company that owns various subsidiaries which operate 20 hospitals in Pennsylvania, with the majority of them located in the Pittsburgh, Pennsylvania area. UPMC, through its various subsidiaries, also operates

[2] On February 24, 2014, I denied, in substantial part, petitions to revoke the subpoenas duces tecum that the General Counsel had served on UPMC and Presbyterian Shadyside, respectively, and a subpoena duces tecum that the Union had served on UPMC. Consequently, I ordered both the Respondents to produce documents pursuant to the subpoenas. Thereafter, the Respondents indicated they would not comply with my order. On March 24, 2014, on behalf of the Board, the General Counsel filed an application to enforce all three subpoenas in United States District Court for the Western District of Pennsylvania. On August 22, 2014, the district court issued an order granting the Board's application for enforcement of all three subpoenas, which it amended on September 2, 2014. The district court stayed its order pending an appeal by the Respondents. Thereafter, the Respondents appealed the district court's order to the Third Circuit Court of Appeals, where the matter is presently pending.

[3] Since the record has opened in this case and the single employer issue remains pending before me, I have jurisdiction to rule on the partial motion to dismiss. Secs. 102.35(a)(8) and 102.24(a) of the Board's Rules and Regulations.

[4] The offer made in UPMC's motion is, of course, binding on it. The Board has long held that statements made by counsel in the management of litigation are binding upon a party. *Performance Friction Corp*., 335 NLRB 1117, 1149 (2001); *Florida Steel Corp*., 235 NLRB 1010, 1011–1012 (1978). Accordingly, I find no merit in the Union's contention regarding this issue.

[5] Part of this case was settled and the remaining part was litigated before an administrative law judge. A decision issued on April 19, 2013 (JD-28-13), which is presently pending before the Board on exceptions.

over 400 clinical locations in Western Pennsylvania. UPMC, through its various subsidiaries, has over 55,000 employees. Presbyterian Shadyside is a subsidiary of UPMC and employs more than 9500 employees.

Having duly considered the positions of the parties I have determined that it would not effectuate the policies of to further litigate the issue and make a determination regarding whether UPMC and Presbyterian Shadyside constitute a single employer. I construe UPMC's willingness to serve as the guarantor of any remedy that ultimately may be issued by the Board in this case as consent that it undertake such action pursuant to a Board order. Accordingly, I have concluded that it is appropriate to dismiss the allegations in the complaint that UPMC and Presbyterian Shadyside constitute a single employer but, based on its asserted willingness to do so, order UPMC to ensure that Presbyterian Shadyside complies with any remedy that may be ordered by the Board in this case. I believe that this approach eliminates what I now believe to be unnecessary litigation over the single employer issue and addresses the concern of the General Counsel and the Union regarding the manner in which UPMC's guarantee will be enforced.

The Board has long recognized that under certain circumstances it does not effectuate the policies of the Act to find that a violation of the Act has occurred and issue a remedial order. *Bellinger Shipyards*, 227 NLRB 620 (1976); *Wichita Eagle & Beacon Publishing Co.,* 206 NLRB 55 (1973); *Square D Co.* 204 NLRB 154 (1973); *American Federation of Musicians, Local 76 (Jimmy Wakely Show),* 202 NLRB 620 (1973); *Kentile Inc.,* 145 NLRB 135 (1963); *Fabrica De Muebles Puerto Rico*, 107 NLRB 905 (1954). Although the circumstances in those cases differ from the instant one in that none of them involved a single employer allegation, the similarity is that the allegedly unlawful conduct that occurred in those cases had been substantially remedied by later conduct.

In the instant case, as noted above, UPMC is now proposing that the single employer allegation in the complaint be resolved on the basis that it guarantees compliance with any remedies the Board may issue regarding any unfair labor practices committed by Presbyterian Shadyside in the original decision in this case that is presently pending before the Board. It is important to note that the complaint does not allege that UPMC independently committed any of the unfair labor practices alleged in the complaint. In addition, there was no evidence presented at the trial that UPMC independently committed any unfair labor practices. Thus, any liability that UPCM would have for any of the unfair labor practices committed by Presbyterian Shadyside would be solely dependent upon a finding that it constitutes a single employer with Presbyterian Shadyside.

In my view, accepting UPMC's offer to serve as a guarantor and ensure that Presbyterian Shadyside complies with any remedies provided for in a Board order is an appropriate way to resolve the single employer allegation. In accepting this offer, I will dismiss the allegation in the complaint that UPMC and Presbyterian Shadyside constitute a single employer, but I will retain UPMC as a party to the case in order to ensure that there is a mechanism to enforce, if necessary, its willingness to serve as a guarantor for any remedies ordered by the Board.

To agree with the oppositions filed by the General Counsel and the Union, would result in the dismissal of the Respondent's motion and the continued litigation of the issue of whether UPMC and Presbyterian Shadyside constitute a single employer. At present, the single employer allegation in the complaint is being held in abeyance because a subpoena enforcement proceeding involving documents relevant to this question is pending in the Third Circuit. If the General Counsel prevails in all or part of the subpoena enforcement proceeding, UPMC and Presbyterian Shadyside would be required to produce relevant documents for inspection by the General Counsel and the Union. After that review, the General Counsel would file a motion with me seeking to resume the hearing on the single employer allegation.[6] After scheduling hearing dates, the litigation of the single employer issue would resume. Based on my knowledge of this case I estimate that such a hearing would last 4 to 5 days. After the filing of briefs I would, of course, issue a decision regarding the merits of the allegation that UPMC and Presbyterian Shadyside constitute a single employer. If I should find that UPMC and Presbyterian Shadyside, in fact, constitute a single employer, I would further find, consistent with Board law, that they are jointly and severally liable for the violations of the Act found in the underlying unfair labor practice case. *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 fn. 5 (2012); *Emsing's Supermarket, Inc*., 284 NLRB 302 (1987). If I should conclude that UPMC and Presbyterian Shadyside do not constitute a single employer I would dismiss the single employer allegation from the complaint and consequently UPMC would no longer be a party to the case. Of course, any decision that I would issue would be subject to appeal to the Board thus engendering further litigation of the single employer issue.

Accepting UPMC's offer to serve as a guarantor of any remedy that the Board may ultimately order against Presbyterian Shadyside and providing that UPMC do so pursuant to an order, in my view, is as effective a remedy as I would provide if I were to find UPMC and Presbyterian Shadyside to be a single employer and thus jointly and severally liable for the unfair labor practices I have found were committed by Presbyterian Shadyside. The great benefit to this approach is that this additional safeguard to ensure that employees ultimately achieve a full remedy in this case is obtained without the time consuming and expensive course of litigating the single employer issue to its conclusion. This benefit is also obtained without the risk that further litigation of the single employer issue may result in a finding that UPMC and Presbyterian Shadyside are not, in fact, a single employer. If such a conclusion were to be reached, UPMC would have no liability for the unfair labor practices committed by Presbyterian Shadyside.

As indicated above, the approach I have outlined above addresses the concerns of the General Counsel and the Union regarding the manner in which UPMC's guarantee that Presby-

[6] It is, of course, possible that the circuit court will not affirm the district court's order requiring the Respondent to produce documents pursuant to the subpoenas. Since the General Counsel issued a complaint alleging that UPMC and Presbyterian Shadyside constitute a single employer without the subpoenaed documents, I presume that, even in this scenario, the General Counsel would wish to continue to litigate the single employer issue.

terian Shadyside will comply with any final Board order will be enforced, if necessary.

I do not find persuasive any of the other reasons advanced by the General Counsel and the Union as to why I should not accept UPMC's offer to guarantee compliance with any remedy ordered and resolve the single employer allegations on that basis.

As noted above, the Union claims that the Board's February 7, 2014 Order denying UPMC's motion to dismiss it as a Respondent is the established law of the case and compels the denial of UPMC's instant partial motion to dismiss. In its motion filed with the Board before the commencement of the hearing in this case, UPMC asserted, inter alia, that with respect to the amended consolidated complaint which issued on January 9, 2014, alleging that UPMC and UPMC Presbyterian Shadyside constitute a single employer, there were no substantive allegations involving UPMC, there was no complaint allegation alleging that UPMC Presbyterian Shadyside could not fully remedy any violation found, and that litigating the single employer issue would take time and expense, and waste the resources of all parties without furthering the purposes of the Act. The Board's order indicated "The Respondents' Motion to Dismiss Amendments 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." Clearly, the instant motion presents changed circumstances from those that UPMC relied on in filing its motion to dismiss with the Board. In the instant motion, UPMC seeks to dismiss the single employer allegation in the complaint on the basis that it is willing to serve as a guarantor and ensure that any remedy that the Board orders with respect to unfair labor practices committed by Presbyterian Shadyside are complied with. In filing its motion with the Board, UPMC did not make such an argument and accordingly the Board did not to consider it. In *Teamsters Local 75 (Schreiber Foods),* 349 NLRB 77 (2007), a case relied on by the Union in support of its position, the Board specifically indicated that changed circumstances may warrant departing from an initial order. Id. at 80. Accordingly, because of these changed circumstances that have occurred since the time of the Board's order of February 7, 2014, I do not find that order requires dismissal of the instant motion.

I further disagree with the Union's contention that in the present posture of this case the General Counsel possesses unreviewable discretion regarding the disposition of the single allegation in the complaint. In support of its position, the Union relies on *Sheet Metal Workers, Local 28 (American Elgen),* 306 NLRB 981 (1992). This case is factually inapposite because it involves the General Counsel's discretion to *withdraw* (emphasis supplied) a complaint after a hearing has opened but before any evidence has been introduced, when there is "no contention that a legal issue is ripe for adjudication on the parties' pleadings alone." Id. at 981. The instant case, of course, involves whether it is appropriate to *dismiss* (emphasis supplied) the single employer allegation of the complaint at this juncture based on a conclusion that further litigation of that issue would not effectuate the policies of the Act. In that context, I find that the Board's decision in *Sheet Metal Workers, Local 28*, supra, does offer some guidance on this issue. There, the Board indicated:

> At some point, however, a complaint may be said to have advanced so far into the adjudicatory process that a dismissal takes on the character of adjudication, and at that point the General Counsel no longer possesses unreviewable discretion in the matter. Thus, the Board has held that "where . . . relevant evidence has been adduced at a hearing, the General Counsel no longer retains absolute control over the complaint; and a subsequent motion to dismiss the complaint or any portion thereof is within the [administrative law judge's] discretionary authority." Id. at 982. (citations omitted)

The adjudication of the complaint in this case has progressed to the point that 19 days of hearing have been held and I have issued a decision on the substantive unfair labor practice allegations of the complaint. While not all of the evidence regarding the single employer allegation has been introduced, I find that the litigation has progressed to the point that UPMC's motion to resolve the single employer allegation on the basis of its offer to guarantee the remedy is appropriately within my authority to decide.

I find *Cincinnati Enquirer,* 298 NLRB 275 (1990), another case relied on by the Union, to be distinguishable from the instant matter. In that case, in a preliminary ruling, the administrative law judge concluded that a regional director was "without authority" to issue a complaint alleging a particular violation of Section 8(a)(5). The Board indicated the judge's statement was erroneous because the contents and issuance of a complaint are matters solely within the prosecutorial authority of the General Counsel. In the instant case, I recognize the General Counsel's unreviewable discretion to issue the single employer allegation of the complaint. I find, however, for the reasons that I set forth herein, that it does not effectuate the policies of the Act to continue the litigation on this issue, given UPMC's offer to guarantee compliance with any remedy ordered by the Board in this case, and therefore I shall dismiss that allegation of the complaint.

I also do not agree with the Union's argument that the Board's decision in *Three Sisters Sportswear*, 312 NLRB 853 (1993), supports the necessity of proceeding with the trial of the single employer allegations in order to achieve an appropriate remedy in this case.

Three Sisters involved a long and complex history of litigation. In summary, in a prior case, *Southland Knitwear, Inc.*, 260 NLRB 642 (1982), the Board found that Southland and Metropolitan, as a single integrated enterprise, committed violations of Section 8(a)(3), (2), and (1) including the discriminatory layoff of 83 employees. After the Board's decision, Southland and Metropolitan purportedly closed its operations in mid-September 1983. Thereafter, the General Counsel received information that those entities were still operating, but under the following names: *Three Sisters Sportswear Co.; Three Sisters Apparel Corp.; Bedford Cutting Mills Co.; Metropolitan Sweater Industries, Inc.; United Knitwear Industries, Inc.; United Knitwear Industries, Ltd.;* and *Skylight Fashions, Inc. d/b/a Skylight Trading*. Consequently, in June 1989, the General Counsel issued a backpay specification claiming that all of the above-named corporations were a single employer and alter

ego with Southland and Metropolitan and that all of those corporations were jointly and severally liable for back pay owed under the Board's order in *Southland Knitwear Inc*. In addition, in June 1991, the General Counsel issued a new complaint against the above-named corporations and 144 Spencer Realty Corp. (Spencer), alleging that all of these corporations were a single employer and had committed additional various violations of Section 8(a)(4), (3), and (1).

In March 1992, the parties entered into a stipulation in the compliance case providing that all of the named respondents named in the backpay specification and Spencer were jointly and severally liable for the full amount of the backpay owned by Southland and Metropolitan pursuant to the Board's order in *Southland Knitwear Inc.* The stipulation did not contain an admission that the corporations were a single employer or alter egos to each other or to Southland or Metropolitan.

In the unfair labor practice proceeding on the new complaint in *Three Sisters Sportswear*, the administrative law judge rejected a contention made by the respondents that the single employer issue should also not be decided during the unfair labor practice proceeding but should be deferred, if necessary, to a compliance proceeding in that case. In so finding, the judge noted that the relationship between the companies had already been extensively litigated at the hearing and that postponing a decision on the issue would require duplication of such litigation in the event that the respondents did not comply with the decision in the unfair labor practice proceeding. In addition, the judge decided that the connection between the named respondents and Southland and Metropolitan must be decided in order to determine the propriety of special remedies requested by the union. 312 NLRB at 857. In reaching this conclusion, the judge noted that the owners of Southland and Metropolitan carried out their unlawful threat to close the facility, but then reopened again under the new corporate names set forth above in order to avoid their responsibilities under the Act. Id. at 862.

I find the circumstances in *Three Sisters* to be quite different from those that exist in the instant case and thus find it to be distinguishable. In the first instance, in *Three Sisters,* the evidence regarding the complicated relationship between the various companies had already been presented at the unfair labor practice hearing. In addition, *Three Sisters* involved a situation where the owners of a relatively small facility with approximately 150 employees engaged in egregious violations of the Act and then attempted to evade their obligations to remedy that conduct by purportedly closing the facility and then reopening and operating it under a variety of corporate names. Thus, the case involved a history presenting the possibility of remedial failure.

In the instant case, the evidence regarding whether UPMC and Presbyterian Shadyside constitute a single employer has yet to be fully presented and accepting the proposal of UPMC avoids such expensive and time-consuming litigation. Both Presbyterian Shadyside and UPMC are substantial entities. Presbyterian Shadyside employs approximately 9500 employees and UPMC, through its subsidiaries, has approximately 55,000 employees. There is no evidence to suggest that there is a real possibility that Presbyterian Shadyside would be unable to effectuate any remedies ordered by the Board. Despite that, in order to avoid litigation of the single employer issue, UPMC is willing to guarantee that its subsidiary, Presbyterian Shadyside, will comply with any remedies ordered by the Board. Accordingly, I do not find that the Board's decision in *Three Sisters* supports the necessity of proceeding to further litigate the single employer issue in this case.

On the basis of the foregoing, I have concluded that it is appropriate to accept the proposal of UPMC that it be the guarantor of any remedy that the Board may order in the original decision in this case (JD-62-14) and I will issue an order requiring it to do so. On that basis, I have determined that it would not effectuate the policies of the Act to continue to continue to litigate the complaint allegation that UPMC and Presbyterian Shadyside constitute a single employer and I therefore dismiss that allegation in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order in the original decision in this case (JD-62-14). As the guarantor, Respondent UPMC must ensure that Respondent UPMC Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if UPMC Presbyterian Shadyside is unable to do so.

IT IS FURTHER ORDERED that the allegation in the complaint that Respondent UPMC and Respondent UPMC Presbyterian Shadyside constitute a single employer is dismissed as, under the circumstances, it would not effectuate the policies of the Act to continue to litigate and reach a decision regarding that allegation.

Dated, Washington, D.C., July 31, 2015.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.