*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS WEST, Charging Party, v. EL CAMINO HEALTHCARE DISTRICT, EL CAMINO HOSPITAL, and SILICON VALLEY MEDICAL DEVELOPMENT, LLC, Respondents.	Case No. SF-CE-1698-M PERB Decision No. 2868-M August 15, 2023

Appearances: Weinberg, Roger & Rosenfeld by Bruce Harland, William Hanley, and Michaela Posner, Attorneys, for Service Employees International Union, United Healthcare Workers West; Best, Best & Krieger by Stacey Sheston, Attorney, for El Camino Healthcare District; Arnold & Porter Kaye Scholer by David Reis and Matthew Diton, Attorneys, for El Camino Hospital; Nixon Peabody by Michael Lindsay and Andrea Chavez, Attorneys, for Silicon Valley Medical Development.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) for a decision based on the evidentiary record from a hearing before an administrative law judge (ALJ). Charging Party Service Employees International Union, United Health Care Workers West (SEIU) filed this case against three Respondents: (1) El Camino Healthcare District; (2) El Camino Hospital (ECH), a California nonprofit corporation whose sole member is the District, meaning that the District appoints ECH's Board of Directors (see Corp. Code, § 5056); and (3) Silicon

Valley Medical Development, LLC (SVMD), a single-member limited liability corporation (LLC) wholly owned by ECH. [1]

The District does not provide public services directly; it instead does so only through affiliated entities as described further below. ECH operates two inpatient hospitals and two outpatient clinics, where SEIU exclusively represents a broad unit of employees. SVMD operates 11 outpatient clinics. All ECH and SVMD locations offer health care under the business name "El Camino Health." While that remains true as of this writing, at various stages throughout this litigation, ECH and SVMD have increasingly referred to SVMD using the business name "El Camino Health Medical Network."

In 2003, Region 32 of the National Labor Relations Board (NLRB) disclaimed jurisdiction over ECH, finding it to be a "political subdivision" under 29 United States Code section 152(2) and thereby exempt from the National Labor Relations Act (NLRA).[2] Thereafter, SEIU pursued a PERB charge against ECH and the District, leading to the Board's eventual decision in *El Camino Hospital District* (2009) PERB Decision No. 2033-M (*El Camino I*).[3] There, the Board held that even though ECH is a private nonprofit corporation, it qualifies as a governmental subdivision covered by the

[1] A single-member LLC is one where a single person or entity owns the LLC. (Corp. Code, § 17704.01(a).)

[2] The NLRA is codified at 29 United States Code section 151, et seq.

[3] SVMD was not involved in *El Camino I*. Indeed, SVMD did not yet exist when SEIU filed its charge in *El Camino I*. Moreover, when SEIU successfully moved to amend the complaint in *El Camino I* to add the District, SEIU labeled the District as "El Camino Hospital District," which was the District's name at the time. The District changed its name in 2013, replacing the word "Hospital" with the word "Healthcare."

Meyers-Milias-Brown Act (MMBA).[4] (*Id*. at p. 18.) The Board further held that, for purposes of collective bargaining, the District and ECH had a single-employer relationship with respect to ECH employees. (*Id*. at pp. 18-22.)

This case does not involve the ECH hospitals and clinics at issue in *El Camino I*. Rather, the present dispute arose at five clinics that SVMD began operating on April 1, 2019, after purchasing them from Verity Medical Foundation and Verity Health System of California (collectively, Verity).

SEIU represented an employee bargaining unit at the former Verity clinics (alternatively referred to below as the acquired clinics) through the last day Verity operated them. On April 5, 2019, SVMD acknowledged that it was a successor to Verity and therefore had a duty to bargain with SEIU regarding terms and conditions of employment at the acquired clinics. While this acknowledgement averted any dispute over whether SVMD was a successor employer, four disputes nonetheless arose in the wake of SVMD taking over from Verity.

First, the parties disagree whether SVMD is subject to the NLRA or the MMBA. Respondents claim that SVMD falls under the NLRA, while SEIU claims that SVMD, like ECH, qualifies as a governmental subdivision subject to the MMBA. We analyze this jurisdictional question in Part I of the legal discussion, *post*, concluding that SVMD is subject to the MMBA.

The parties' second dispute concerns whether only SVMD must bargain with SEIU over terms and conditions of employment at the former Verity clinics, or whether

[4] The MMBA is codified at Government Code section 3500 et seq. Undesignated statutory references are to the Government Code.

all Respondents have such an obligation. In Part II of our analysis, we find that all three Respondents have a duty to bargain with SEIU upon request, because Respondents have a single-employer relationship with respect to SEIU-represented employees at the five former Verity clinics. However, the record does not show that SEIU has, to date, asked to bargain with the District, and we therefore exercise our discretion to dismiss all allegations against the District.

Third, the complaint alleges unlawful unilateral changes in terms and conditions of employment at the acquired clinics after April 1, 2019. For the reasons explained in Parts III(A) through III(E) below, we sustain certain allegations and dismiss others.

The complaint's final claim arises under the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD).[5] Specifically, the complaint alleges that Respondents violated the PEDD by disseminating unilateral mass communications concerning employee decisions whether to join or support a union. Part III(F) explains why we sustain this claim.

FACTUAL FINDINGS

In 1956, voters in certain areas of Santa Clara County approved a ballot measure to form the District under California's Local Heath Care District Law, Health & Safety Code section 32000 et seq. The District's boundaries span most of Mountain View, Los Altos, and Los Altos Hills, plus parts of Sunnyvale, Cupertino, Palo Alto, and the City of Santa Clara. The District's governing board has five publicly elected members.

[5] The PEDD is codified at section 3550 et seq. Notably, determining whether the MMBA covers SVMD similarly resolves whether the PEDD covers it. (See PEDD, § 3552(c) [PEDD applies to employers subject to any of California's public sector labor relations statutes, including the MMBA].)

Section 32121 of the Local Health Care District Law, Health & Safety Code section 32000 et seq., authorizes the District, among other functions:

> "(c) To hold, lease, use, and enjoy property of every kind and description within and without the limits of the district, and to control, dispose of, convey, and encumber the same and create a leasehold interest in the same for the benefit of the district.
>
> [¶ . . . ¶]
>
> "(h) To prescribe the duties and powers of the health care facility administrator, secretary, and other officers and employees of any health care facilities of the district, to establish offices as may be appropriate and to appoint board members or employees to those offices, and to determine the number of, and appoint, all officers and employees and to fix their compensation. The officers and employees shall hold their offices or positions at the pleasure of the boards of directors.
>
> [¶ . . . ¶]
>
> "(j) To establish, maintain, and operate, or provide assistance in the operation of, one or more health facilities or health services, including, but not limited to, outpatient programs, services, and facilities; retirement programs, services, and facilities; chemical dependency programs, services, and facilities; or other health care programs, services, and facilities and activities at any location within or without the district for the benefit of the district and the people served by the district.
>
> [¶ . . . ¶]
>
> "(m) To establish, maintain, and operate, or provide assistance in the operation of . . . diagnostic and testing centers, . . . and any other health care services provider, groups, and organizations that are necessary for the maintenance of good physical and mental health in the communities served by the district.
>
> [¶ . . . ¶]

> "(o) To establish, maintain, and carry on its activities through one or more corporations, joint ventures, or partnerships for the benefit of the health care district.
>
> [¶ . . . ¶]
>
> "(p)(1) To transfer, at fair market value, any part of its assets to one or more corporations to operate and maintain the assets. . .
>
> "(2) To transfer, for the benefit of the communities served by the district . . . any part of the assets of the district . . . to one or more nonprofit corporations to operate and maintain its assets."

(*Id.*, § 32121(c), (h), (j), (m), (o) & (p).)

In the 67 years since its creation, the District has evolved to comprise six integrally related entities: the District, ECH, SVMD, a surgery center, a hospital foundation, and an employee assistance program.[6] The latter three entities are not at issue in this case, and the below factual findings therefore focus on three central areas: (A) the District transferring to ECH virtually all of the District's hospital assets; (B) ECH creating SVMD and authorizing SVMD to purchase the Verity clinics; and (C) the events that occurred after SVMD did so.

A. The Relationship Between the District and ECH

In 1961, the District established a general acute care hospital in Mountain View. In 1992, the District decided to form ECH and transfer to it all hospital-related assets other than the land on which the hospital stood. (*El Camino I*, *supra*, PERB Decision

[6] In the introductory section of the District's financial reports for the fiscal years ending June 30, 2017, and June 30, 2018, management wrote that the District "is comprised of" these six entities. The record supports this unvarnished statement that District management made before it anticipated this litigation. To the extent certain witnesses tried to evade or counter this reality in their testimony, we find that testimony to be highly misleading and we do not credit it.

No. 2033-M, pp. 3-4.) ECH's articles of incorporation stated that its purposes included operating acute care hospitals, establishing medical clinics, and providing health care services to meet community needs. (*Id*. at p. 3.)

After the California Attorney General raised questions about the District's transfer of assets to ECH, the District sued to void the transaction. (*El Camino I*, *supra*, PERB Decision No. 2033-M, p. 5.) The litigation led to a settlement under which the District became the sole member of ECH and obtained exclusive authority to appoint and replace ECH's Board of Directors. (*Id*. at pp. 5-6 & 8-9.) This has remained the case thereafter. *El Camino I* noted that ECH's bylaws required that it "shall have one voting Member: [the] District, a political subdivision of the State of California" and "shall have no other voting members." (*Id*. at pp. 5-6.) The record in this case shows that ECH's updated bylaws continue to include the same language.

As of the 2009 *El Camino I* decision, ECH had a six-member Board of Directors, and the District had filled these six director positions with the five members of the District's own board plus ECH's Chief Executive Officer (CEO). (*El Camino I*, *supra*, PERB Decision No. 2033-M, pp. 5-6.) ECH's current bylaws continue to grant the District sole authority to nominate and elect all ECH directors, while allowing the District discretion to adjust total membership on the ECH Board of Directors at any level between five and ten directors.[7] The District also has the right to remove ECH directors, with or without cause, and to fill vacancies. The ECH Board of Directors, in turn, can select ECH's CEO, but the District has full veto power over any such selection.

[7] At present, the ECH Board of Directors has ten members, five of whom are members of the District's board.

ECH expanded in 2009, adding a second hospital campus in Los Gatos. While this campus falls outside the District's boundaries, as noted, California law authorizes the District to take actions to establish or assist health care facilities outside the District, for the benefit of the District and those that it serves. (Health & Saf. Code, § 32121(j).)

Since 2000, SEIU has represented a unified bargaining unit of ECH employees in professional, licensed, technical, and maintenance positions. ECH and SEIU have been parties to a series of labor contracts covering this unit, dating back to 2001.

B. ECH's Role with Respect to SVMD and the Transaction with Verity

In 2008, ECH created SVMD. At that time, and ever since, SVMD has been a California single-member LLC wholly owned by ECH. SVMD initially opened six outpatient clinics in Santa Clara County, including two on land the District owns. At those two District-owned sites, SVMD leases clinic space from ECH. The parties did not introduce evidence that SEIU or any other union has sought to represent employees at the first six clinics SVMD opened.

The record reflects the following salient facts about SVMD, its relationship with ECH, and the decision to purchase clinics from Verity.

1. SVMD Leaders

ECH controls who sits on SVMD's governing board, known as the Board of Managers. When this dispute arose, the SVMD Board of Managers had five managers, all of whom had full voting rights. One of these five manager positions was allocated to the SVMD President, whom ECH selects. Moreover, ECH, as the sole member of SVMD, also appointed the other four managers, as follows: ECH's CEO; ECH's Chief Financial Officer; ECH's Chief Medical Officer; and a member of ECH's Board of

Directors. ECH's CEO had the right to remove and replace all managers, with or without cause, and to fill any vacancies.

In December 2019, after the facts giving rise to this dispute, the number of managers on SVMD's board expanded from five to nine. One slot continued to be reserved for the SVMD President selected by ECH. The other eight managers were as follows: ECH's CEO, five additional managers appointed by ECH's CEO, and two physicians whom the Board of Managers appoints, subject to approval by ECH. As of the time of hearing, one of the managers that ECH appointed was Peter Fung, a publicly elected District Director who was simultaneously serving on the ECH Board of Directors. Besides Fung, there was one other person who served as both an ECH Director and SVMD Manager as of the time of hearing. As under the prior structure, ECH's CEO has the right to remove any SVMD Manager and fill any vacancies.

ECH's CEO appoints and supervises SVMD's President. And ECH has loaned its own officials to fill multiple SVMD executive roles, including the position of SVMD President. For instance, when ECH appointed Bruce Harrison as SVMD President in February 2018, he was an ECH official on loan to SVMD, and he also performed separate consulting services for ECH that were unrelated to SVMD. In announcing this appointment, ECH wrote: "As a senior member of the [ECH] executive management team, the SVMD president is a key contributor in the development, implementation, and management of long-range strategic plans that support El Camino Hospital's mission." (<https://www.elcaminohealth.org/newsroom/el-camino-hospital-appoints-president-silicon-valley-medical-development-llc> [as of August 14, 2023].)[8]

[8] The parties introduced into evidence multiple web pages from Respondents' various websites. To the extent we cite web pages the parties did not introduce,

Harrison continued to serve as SVMD President until March 2021. At that point, ECH sought a new person to fill the SVMD President position. In its job announcement, ECH referred to the position as "El Camino Health Medical Network – President."

2. SVMD Finances

A single-member LLC is normally a "disregarded entity" for tax purposes—meaning that tax law treats it as if it is part of its sole owner—unless the single-member LLC elects to have taxing authorities treat it as a corporation with its own tax status. (United States Internal Revenue Service, Single Member Limited Liability Companies, <https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies> [as of August 14, 2023]; Gutterman, *California Transactions Forms—Business Entities* (March 2023 Update) ¶ 16:67; Pearce & Lipin, *The Uncertain Viability of a Single Member Limited Liability Company as a Choice of Entity* (Spring 2013) 9 Hastings Bus. L.J. 423, 426.) Here, ECH requires SVMD to "take steps to be treated as other than a corporation," thereby choosing to be a disregarded entity. Because SVMD has no separate tax status, ECH requires it to refrain from "any activity that would jeopardize [ECH's] status as a tax-exempt organization."

SVMD's profits and losses are allocated to ECH, and ECH monthly reports include specific line items for SVMD's financial performance. As of 2021, these reports no longer referenced SVMD by name, but instead referenced SVMD as "El Camino Health Medical Network."

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including more updated versions of the same web pages introduced into evidence, we take administrative notice of those web pages (*State of California (California Correctional Health Care Services)* (2022) PERB Decision No. 2823-S, p. 8 [judicial appeal pending]), and the statements on which we rely are admissible admissions (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 23, fn. 11).

As of January 10, 2018, ECH had allocated up to $1.3 million as an initial capital contribution to SVMD. On January 30, 2019, the ECH Board of Directors Finance Committee approved $8 million in capital funding "for tenant improvements to build out, fit up and equip a new SVMD Clinic." In March 2019, ECH approved an additional $4.6 million in funding to upgrade the SVMD clinics to ECH's information technology system.

ECH has approval authority over SVMD's annual budget. This authority, together with ECH's control over who serves as SVMD's President, and who serves on the SVMD Board of Managers, gives ECH overarching authority over SVMD decision-making, including expenditures. While there is no evidence that SVMD's President has ever made a significant expenditure without ECH approval, in any event SVMD's President has limited signature authority, extending only up to $250,000 in annual expenditures.

ECH has discretion to direct SVMD to make distributions to ECH at any time and in any amount that ECH chooses.

3. The Transaction with Verity

On February 6, 2019,[9] ECH's Board of Directors voted to authorize SVMD to spend $1.27 million to buy five clinics from Verity (which was going through bankruptcy proceedings), and to incorporate these five clinics into El Camino Health.[10] This purchase became effective April 1, bringing the total number of SVMD clinics up to 11.

[9] All further date references are to 2019 unless otherwise noted.

[10] As noted in *County of Santa Clara* (2019) PERB Decision No. 2670-M, Santa Clara County bought two hospitals from Verity as part of the same bankruptcy proceedings. (*Id*. at p. 5.) In that case, it was undisputed that the two formerly private sector hospitals became subject to the MMBA when Santa Clara County bought them.

SEIU represented employees at the five Verity clinics and had an existing labor contract with Verity that expired on March 31.

4. SVMD's Participation in El Camino Health

The SVMD clinics hold themselves out to the public as El Camino Health clinics, including via signage at each location. ECH, for its part, advertises that "[t]hrough our affiliated partner Silicon Valley Medical Development, we now provide care in 11 locations across Santa Clara County."

ECH maintains a website that shows all El Camino Health medical providers, services, and locations. (<https://www.elcaminohealth.org/> [as of August 14, 2023].) The website incorporates SVMD providers, services, and locations, without noting that SVMD operates them or otherwise mentioning SVMD. (*Ibid*.) SVMD patients use this website as a means to message medical providers; schedule, view, or cancel appointments; request prescription refills; access health records; and pay medical bills. (<https://mycare.elcaminohospital.org/mychart/Authentication/Login> [as of August 14, 2023].) At the time of hearing, SVMD maintained a very limited website of its own that did not have any of these capabilities or features. It was viewable from a root web page found at www.svmdmed.org. As of this writing, the former SVMD website redirects all visitors to a web page of the main El Camino Health website labeled "El Camino Health Medical Network." (<https://www.svmdmed.org> [as of August 14, 2023], redirecting to <https://www.elcaminohealth.org/about-us/el-camino-health-medical-network/> [as of August 14, 2023].) When visitors are redirected, they receive a message reading as

follows: “This content has moved to El Camino Health Medical Network web page on ElCaminoHealth.org. You will be redirected now.” (*Ibid*.)[11]

SVMD does not store medical records for care provided at SVMD clinics; rather, ECH stores all such records. For that reason, when a patient asks to send SVMD medical records to a provider outside of El Camino Health, it is ECH that fulfills that request. Furthermore, when SVMD employees log into a patient’s electronic medical record, El Camino Hospital is identified as the care provider. Similarly, SVMD employees must check patients’ insurance eligibility using software known as “OneSource,” and when the software asks for the National Provider Identifier, SVMD employees have only one choice: they must enter “El Camino Hospital” as the provider, no matter what insurance the patient has or what medical services the patient needs.

SVMD managers supervise SVMD employees, and employees do not transfer or rotate from an SVMD facility to an ECH facility or vice versa. SVMD employees do travel to an ECH hospital campus to receive training from ECH on the electronic medical records system. SVMD employees also consult ECH training materials on other topics, including “Tip Sheets” on printing patient labels and inputting copayments during registration. At the time of hearing, anyone emailing an SVMD employee did so at an e-mail address containing the domain name “svmdmed.org.”

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[11] SVMD’s online integration within the El Camino Health website has other facets as well. For instance, the El Camino Health Medical Network web page directs the public to visit the main El Camino Health web page for information on clinic locations, and it directs medical professionals to various El Camino Health web pages for information on applying for job openings. (<https://www.elcaminohealth.org/about-us/el-camino-health-medical-network/> [as of August 14, 2023].) As noted above, the El Camino Health web pages that list clinic locations do not distinguish the locations that are operated by SVMD.

5. The Operating Agreement Between SVMD and ECH

SVMD and ECH have at all relevant times been parties to an Operating Agreement (OA). While they periodically amend the OA, these negotiations are explicitly not at arm's length, as the OA gives ECH sole power to amend the OA without input from SVMD. Furthermore, SVMD cannot end the OA without approval from ECH.

OA Paragraph 3 provides that ECH's General Counsel serves as SVMD's agent for service of process.

OA Paragraph 4 provides that ECH has authority to amend or cancel SVMD's articles of organization at any time.

OA Paragraphs 5 and 11 require SVMD to refrain from any activity that would jeopardize ECH's tax-exempt status and, as noted above, require SVMD to elect to be a disregarded entity.

OA Paragraph 6.1 specifies, among other items, ECH's role in selecting and approving who serves on SVMD's Board of Managers.

OA Paragraph 6.2 gives ECH sole authority whether to approve: SVMD's budget; certain business decisions such as SVMD's annual strategic plan, selecting an auditor, any transfer or sale of SVMD assets, and any merger, consolidation, reorganization, or dissolution involving SVMD; and unbudgeted SVMD expenditures exceeding $1 million or capital expenditures exceeding $5 million.[12]

[12] The record leaves unexplained whether there are circumstances in which it would be practical for SVMD to undertake, without explicit prior ECH approval, unbudgeted expenditures up to $1 million or capital expenditures up to $5 million. These possibilities appear remote given SVMD's President has signature authority only up to $250,000 per year. In any event, ECH has effective control over SVMD expenditures via multiple overlapping avenues, as discussed above.

OA Paragraph 6.4 requires SVMD to submit reports to ECH on a quarterly, annual, and semiannual basis.[13]

OA Paragraph 7 states that ECH has authority to appoint SVMD's President.

OA Paragraph 8 requires SVMD to indemnify, defend, and hold harmless ECH and its directors, officers, and employees, from liability, loss, or damage incurred by virtue of their roles on behalf of SVMD, including their acts or omissions in connection with SVMD, with specified exceptions.

OA Paragraph 9 states that third parties dealing with SVMD may rely on certificates signed by ECH as to SVMD affairs.

OA Paragraph 12 states that SVMD's profits and losses are allocated to ECH.

OA Paragraph 13 provides ECH with authority to direct SVMD to issue distributions to ECH in any amount at any time.

OA Paragraph 14 provides ECH with authority to dissolve SVMD at any time without approval of SVMD's Board of Managers.

OA Paragraph 16 provides ECH with unilateral authority to amend the OA at any time without approval from SVMD.

6. The Administrative Services Agreement Between SVMD and ECH

SVMD and ECH have at all relevant times been parties to an Administrative Services Agreement (ASA). They first executed an ASA in 2008 and amended it in 2016, 2017, and twice in 2018. They then executed a Restated ASA effective April 1, 2019, which they later amended on June 29, 2019, August 12, 2019, and October 1,

[13] While most OA provisions are identical in the two versions the parties introduced into evidence—one dated 2018 and one dated 2019—Paragraph 6.4 appears only in the latter version.

2020. Except where otherwise noted, we focus on the Restated ASA that took effect on April 1, 2019, because that was when the five former Verity clinics came under SVMD's auspices, and this dispute arose.

Restated ASA Paragraphs 1.3, 1.4, and 1.5 state that SVMD and ECH are independent entities with no management authority over one another's business affairs and operations and that neither entity is the other's agent.

Restated ASA Appendix A lists the services ECH performs for SVMD, as follows:

Appendix A, Paragraphs 1, 2, 5, and 8 empower and require ECH to perform critical roles in bookkeeping, accounting, billing, collection, procurement, and payment of invoices. On the expenditure side, ECH procures "equipment, inventory, and supplies" for clinical operations as requested by SVMD. To pay third parties whom SVMD owes money, ECH and SVMD divided the work as follows: SVMD's Accounts Payable Manager works with other SVMD employees to enter and approve invoices in ECH's Workday software system, after which ECH's Accounts Payable staff issues payments for the amounts owed. Meanwhile, for SVMD to receive income for providing medical care, SVMD employees fill out the basic diagnosis and charge information, and ECH performs all other billing and collection functions, including entering charges, generating claims and statements, posting payments, and administering delinquent accounts. Finally, with respect to accounting, ECH provides SVMD with "[f]ully trained and knowledgeable [ ] staff" to "provide bookkeeping services; to assist in preparation of accounting records, financial statements, and reports; and to assist in the course of financial audits." SVMD, for its part, must "comply with ECH audit protocols, including process, audit firm, and reporting requirements."

Under Appendix A, Paragraph 3, ECH provides SVMD with computer-based and telephonic informational technology (IT) support services, including: the clinics' electronic medical records system; biomedical, clinical, engineering, and telephone equipment and related IT support; connectivity to the ECH network; website construction and support; data storage and backup on ECH's server; strategic IT guidance; and help desk technical and user support.

Appendix A, Paragraph 4 requires ECH to provide SVMD with support for clinic facilities, including leasing.

Appendix A, Paragraph 6 requires ECH to provide SVMD with marketing and communications services as requested, while allowing SVMD to use the ECH name as an affiliated organization.

Appendix A, Paragraph 7 included the following executive staffing provision as of April 1, 2019, when SVMD began operating the former Verity clinics:

> "7. Transitional Executive Staffing: The following SVMD executives shall be employed by ECH and allocated to SVMD during a transitional period until such time that SVMD develops capacity to employ such executives:
>
> "SVMD President (reports to ECH CEO) 0.5 FTE
> "SVMD Executive, Integration & Performance 1.0 FTE
> "SVMD Provider Service Specialist 1.0 FTE
> "SVMD Director, Operations Planning & Physician Contracting 0.5 FTE
> "SVMD Executive Director of Operations 1.0 FTE
> "SVMD V[ice] P[resident] of Human Resources 1.0 FTE"

Under the ASA in effect prior to April 1, 2019, ECH had similarly provided SVMD with 5.5 full-time equivalents of executive staff, including the SVMD President and Human Resources Director. Later, when ECH and SVMD amended the Restated ASA in June

2019 and thereafter, they downgraded the level of executive support ECH provided, though ECH continued to provide the SVMD President.[14]

Appendix A, Paragraphs 9 and 10 require ECH to provide SVMD with compliance oversight and legal services, including legal support for the SVMD Board of Managers, SVMD executives, clinic operations, and physician contracting.

Under the original ASA, before ECH and SVMD restated it effective April 1, 2019, ECH provided "human resources support services to SVMD, including but not limited to assistance in recruitment and hiring; employee relations; and management of benefits, including workers' compensation coverage." ECH also initially provided SVMD employees with the same or substantially equivalent benefits as ECH employees. The Restated ASA deleted these provisions, though ECH continued to provide Vivian Young to serve as Vice President of Human Resources from April 1 through June 29, 2019, at which point she continued her role but as a direct SVMD official rather than as an ECH official working for SVMD. As part of this evolution, SVMD now oversees its own employment relations (including setting employment policies and hiring or firing employees), and SVMD clinic employees now receive medical benefits via SVMD's benefits plan rather than through ECH. SVMD has a separate payroll and human

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[14] As of June 29, 2019, ECH provided four officers, as follows:

"SVMD President (reports to ECH CEO)	0.5 FTE
"SVMD Provider Service Specialist	1.0 FTE
"SVMD Director, Operations Planning & Physician Contracting	0.5 FTE
"SVMD Executive Director of Operations	1.0 FTE"

By the time the record in this matter closed, ECH continued to provide only the SVMD Provider Service Specialist and the SVMD President, who continued to report to ECH's CEO.

resources information system for its employees.

C. The Events Giving Rise to This Dispute

By letter dated April 3, 2019, SEIU asked SVMD to recognize it as the exclusive representative of employees working at the five former Verity clinics. On April 5, SVMD acknowledged that it was a successor employer for recognition and bargaining purposes, and it agreed to bargain with SEIU regarding represented former Verity employees. ECH's General Counsel was a part of SVMD's bargaining team for the first several months of its negotiations with SEIU. SVMD's acknowledgement that it was a successor employer did not prevent disputes from arising. Indeed, though SVMD and SEIU ultimately reached a collective bargaining agreement covering the former Verity clinics, they did not resolve the complaint's allegations, which we summarize below.

1. ECH's Refusal to Bargain

By letter dated April 10, SEIU wrote to SVMD and indicated that bargaining over terms and conditions of employment at the former Verity clinics should be folded into SEIU's ongoing negotiations with ECH for a new labor agreement. Young responded on April 11, stating that SVMD was willing to bargain with SEIU as the representative of employees at the former Verity clinics, but SVMD did not agree to meet as a part of SEIU's negotiations with ECH. Young asserted that SVMD is subject to private sector labor law and is separate from ECH, arguing: "We understand that El Camino Hospital is a public employer subject to PERB rules. This difference alone makes it clear that there should be separate bargaining."

ECH has admitted, and we therefore find, that ECH refused to bargain with SEIU over terms and conditions of employment at the former Verity clinics, as ECH asserts it

has no duty to do so. However, the record does not show that SEIU asked the District to bargain, and the District has not admitted that it refused to do so.

2. Dress Code Changes

On April 11, SEIU e-mailed Young to inquire about a rumor that SVMD planned to change the Patient Service Representative (PSR) dress code at the former Verity clinics. SEIU demanded that SVMD cease and desist implementing any such change and bargain over the matter. Receiving no response, SEIU raised the matter again via e-mail on April 15, and then by certified mail on April 22. Without acknowledging SEIU's correspondence, on May 8, SVMD implemented a new "Dress Code/Personal Appearance" policy that required PSRs "to dress as business professionals" and prohibited them from wearing scrubs, which they were previously permitted to wear. SVMD admits that it changed the PSRs' dress code without affording SEIU notice and an opportunity to bargain over the decision and/or the effects thereof.

3. Discipline

On April 24, after learning that SVMD had terminated two employees for alleged performance issues, SEIU demanded that SVMD reinstate the two employees, bargain with SEIU regarding discretionary disciplinary actions, and cease and desist from such actions in the interim. SVMD did not comply with these demands, and it admits it terminated the two SEIU-represented employees pursuant to a discretionary disciplinary policy, without affording SEIU notice and an opportunity to bargain over the decision and/or the effects thereof.

4. New Solicitation and Distribution Policy

On July 29, SEIU wrote to SVMD alleging that after recognizing SEIU, SVMD promulgated a new solicitation and distribution policy restricting protected activities at

the acquired clinics, where no such policy had previously existed. SEIU asked SVMD to bargain over the change and to cease and desist from implementing it pending negotiations. SVMD admits that prior to June 11, it did not have a solicitation and distribution policy at the former Verity clinics, and that on or about June 11, SVMD implemented such a policy at those clinics without affording SEIU notice and an opportunity to bargain over the decision and/or the effects thereof.

5. Change in Work Location

On August 2, SEIU e-mailed Young to challenge SVMD's direction to Call Center Representatives (CCRs) at the former Verity clinics to relocate their work locations to a centralized facility. SEIU asked SVMD to bargain over the decision and its effects, while not implementing the relocation pending negotiations. SVMD admits that it relocated CCRs at the former Verity clinics without affording SEIU notice and the opportunity to bargain over the decision and/or the effects thereof.

6. Mass Communications

On June 20, Young e-mailed a letter to SEIU-represented employees at the former Verity clinics. The letter stated, in part:

> "If you received this letter, you are working at one of the five newly acquired clinics in a job classification that is represented by [SEIU]. This means that [SEIU] is your representative for the terms and conditions of employment including, but are [*sic*] not limited to, wages, medical benefits, schedules, and time off.
>
> "While SVMD was required to recognize [SEIU] as the representative for the union-represented employees who worked for [Verity], it was not required to adopt the recently expired labor contract [SEIU] had with [Verity]. That means SVMD, as a new employer, will be negotiating with [SEIU] for a new contract.

> "As part of this process, we are required by federal law to provide [SEIU] with a complete list of the names, home addresses and telephone numbers, and available personal email addresses and cell phone numbers for all employees who are in the bargaining unit.
>
> "SVMD takes your personal privacy very seriously. We would never give your personal information to a third party unless required to by law. In this case, the law requires us to provide this information to the union. We have no control over what the union does with it.
>
> "SVMD is here to support you with the facts as we begin bargaining with [SEIU] for a new labor contract.
>
> "We respect your right to be free from harassment by the union at work or at home.
>
> "You have the legal right to:
>
> "• Participate, or not participate, in union activities[.]
>
> "• Talk with union organizers at home, or ask them to leave you alone[.]
>
> "• Talk with union organizers during your authorized breaks, or before and after your shift, or ask them to leave you alone[.]
>
> "• Ask questions of the union and of SVMD[.]
>
> "If you have questions about why your personal information was provided to the union, your rights when it comes to privacy or you are concerned about being harassed by the union, please contact me at [number redacted]."

On June 27, SVMD distributed a flyer to SEIU-represented employees at the former Verity clinics. The flyer made a series of statements, including the following:

> "• Our focus is, first and foremost, on our mission of delivering high quality, affordable healthcare with extraordinary customer/guest services while balancing SVMD's financial health even when dealing with unions. We work hard to make sure that our mission is never compromised.

"• We seek to create a patient-friendly healthcare organization and we know our employees—union or non-union—are our most valuable resource in making this happen.

"• We view a direct working relationship with employees as the most effective way to meet the needs of our employees.

"• Where necessary, we will work through a third party to establish fair terms and conditions of employment while maintaining our focus on our mission of delivering high quality healthcare with extraordinary customer/guest services.

"• We provide employees with a total compensation package that is competitive with ambulatory care/outpatient organizations. We provide safe working conditions, open two-way communications, and policies that promote a fair and respectful work environment. We offer employees the opportunity to develop their skills in a premier clinical setting."

Also on June 27, SVMD distributed a second flyer to SEIU-represented employees at the former Verity clinics. The flyer included the following language:

"Fact

"Unions are allowed to use misinformation and propaganda, according to federal law.

"Fact

"Employers are legally required to always be truthful.

"Fact

"SVMD immediately agreed to recognize the union and bargain after purchasing the clinics. El Camino Hospital is not involved in the bargaining process.

"Ask the union . . .

"Why it believes it is bargaining with El Camino Hospital, a separate company, and why it claims to have waited for months to get started?"

SVMD did not afford SEIU notice and an opportunity to bargain over the content of the June 20 letter or the June 27 flyers.

PROCEDURAL HISTORY

SEIU filed this charge on May 24, and amended it on October 7. Respondents filed written opposition statements to the charge and amended charge. PERB's Office of the General Counsel (OGC) issued a complaint on January 9, 2020. Respondents answered the complaints and alleged, among other things, that the employees in question are private sector employees falling outside of PERB's jurisdiction.

SVMD moved for summary judgment in October 2021, and SEIU filed a cross-motion for summary adjudication the following month. The ALJ then issued a ruling that effectively denied both motions, finding there were dispositive factual disputes.[15]

The ALJ held a formal hearing on November 30 and December 1, 2021. The parties filed simultaneous post-hearing briefs on February 11, 2022, and they filed simultaneous response briefs on March 1, 2022. On January 12, 2023, after the ALJ transferred to a different agency within the State of California without having issued a proposed decision, the Board's Appeals Office placed the case on the Board's docket for decision.[16]

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[15] While the ALJ asserted that the motions would "be addressed in a proposed decision following the Formal hearing," his ruling effectively denied the motions. To the extent the ALJ's ruling could suggest that the motions remained pending, we deny them as moot based on this decision.

[16] PERB Regulation 32215 allows the Board itself to direct a Board agent to "submit the record of the case to the Board itself for decision." PERB Regulation 32320(a)(1) allows the Board itself to "[i]ssue a decision based upon the record of hearing." (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

DISCUSSION

The parties' jurisdictional dispute, covered in Part I, concerns whether SVMD is sufficiently public in character to be excluded from the NLRA and instead subject to the MMBA.[17] After answering that question in the affirmative, in Part II we conclude that Respondents have a single-employer relationship and therefore all three Respondents must bargain in good faith over terms and conditions of employment at the former Verity clinics. Finally, Part III analyzes each unfair practice claim alleged in the complaint.

I. Jurisdiction

The MMBA expansively defines a covered "public agency" to include "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." (MMBA, § 3501(c).)

To decide whether an entity is a "governmental subdivision" within the meaning of MMBA section 3501, we refer primarily to precedent defining the circumstances in which an entity qualifies as a "political subdivision" under 29 U.S.C. section 152(2), thereby exempting the entity from the NLRA. This jurisprudence begins with *National Labor Relations Bd. v. Natural Gas Utility Dist. of Hawkins County, Tenn.* (1971) 402 U.S. 600 (*Hawkins County*) and includes later decisions that apply *Hawkins County* to

[17] While Verity was governed by the NLRB, health care facilities commonly go back and forth between NLRB coverage and PERB coverage based on ownership changes. (*County of San Mateo* (2019) PERB Decision No. IR-61-M, p. 23; see, e.g., *County of Santa Clara*, *supra*, PERB Decision No. 2670-M, pp. 13-14; *El Camino I*, *supra*, PERB Decision No. 2033-M, p. 15; *Regents of the University of California* (1999) PERB Order No. Ad-293-H, adopting administrative determination at p. 8.)

interpret both the NLRA and other federal statutes that exclude political subdivisions. Indeed, while decisions interpreting the NLRA constitute only persuasive precedent when interpreting California public sector labor relations statutes, PERB interprets "governmental subdivisions" covered under MMBA section 3501(c) to correspond to "political subdivisions" excluded from the NLRA under 29 United States Code section 152(2). (*Central Contra Costa Transit Authority* (2012) PERB Decision No. 2263-M, p. 25 (*Transit Authority*); *El Camino I*, *supra*, PERB Decision No. 2033-M, pp. 17-18.)[18]

Hawkins County, *supra*, held that a private or quasi-private entity qualifies as a political subdivision if it is either: "(1) created directly by the State, so as to constitute a departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." (*Id*., 402 U.S. at pp. 604-605.) The *Hawkins County* categories turn on the "actual operations and characteristics" of the entities in question rather than on mere labels, and a state's laws are therefore salient if and only if they mandate or create operations or characteristics relevant to one or both categories.[19] (*Id*. at p. 605.)

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[18] While the NLRB has interpreted *Hawkins County* somewhat inconsistently over the years, the fact that we find *Hawkins County* relevant does not mean we necessarily follow subsequent developments in NLRB precedent. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 13 (*Napa*).)

[19] For instance, California charter schools qualify as political subdivisions—even though charter schools in certain other states may not—because California charter schools are both publicly created and responsible to public officials. This difference exists, in part, because of the Charter Schools Act of 1992 (Ed. Code, § 47600 et seq.) and the state constitutional provision that prohibits directly or indirectly placing any part of the public school system under the jurisdiction of any authority not included in that system (Cal. Const., art. IX, § 6). Indeed, precedent dictates that charter schools are constitutional in California only because chartering entities maintain supervisorial oversight and the Legislature determines how charter

We express no opinion whether SVMD falls within the first *Hawkins County* category, because SEIU argues only that SVMD qualifies as a political subdivision under the second category. In *Workforce Investment Board* (2014) PERB Order No. Ad-418-M (*WIB*), the Board analyzed facts relevant to this inquiry under three main headings: "Public Purpose," "Public Funding," and "Public Control." (*Id*. at pp. 24-26.) The parties similarly do so in their briefing. We accordingly do so as well, though we alter the order of the headings. Specifically, we first analyze the extent to which SVMD is subject to public control, since that factor will often be vital to deciding whether an entity is administered by individuals who are responsible to public officials or voters.

A. Public Control

The phrase "public control" encompasses multiple potential aspects of governmental involvement in creating, supervising, or otherwise controlling private entities. For present purposes, however, it is sufficient to recognize that if public officials have authority to decide who fills a majority of seats on an entity's governing board, that means the entity is administered by individuals who are responsible to public officials or the general electorate. (*Transit Authority*, *supra*, PERB Decision No. 2263-M, p. 24; accord *WIB*, *supra*, PERB Order No. 418-M, pp. 8, 11, 13-14, 18, 25-28, & 30-31, and adopting administrative determination at pp. 2 & 4.)

Respondents contend that the power to appoint is only persuasive proof if public officials use such authority to appoint *themselves* to a private entity's governing board. To support this argument, Respondents note that when the Board decided *El Camino I*,

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schools come into being, who can attend, who can teach, and how they are structured, governed, funded, evaluated, and held accountable. (*Wilson v. State Bd. of Educ.* (1999) 75 Cal.App.4th 1125, 1131-1132, 1135 & 1140-1142.)

supra, PERB Decision No. 2033-M, the District appointed its own board members to five of the six slots on ECH's Board of Directors. (*Id*., p. 18.) Respondents then suggest that *El Camino I* would be decided differently today now that ECH has expanded its Board of Directors to ten seats, meaning that only half the slots are filled by District board members.

This argument, however, contravenes *Transit Authority*, *supra*, PERB Decision No. 2263-M and *WIB*, *supra*, PERB Order No. 418-M, both of which focus on the power to appoint rather than who is appointed. The facts of this case also undercut Respondents' argument, showing that ECH is still a governmental subdivision given that: (1) the District remains the sole member of ECH with exclusive power to nominate, elect, and approve all ten board members, as well as exclusive power to fill board vacancies and to remove board members at any time with or without cause; and (2) while the ECH Board of Directors selects ECH's CEO, the District can veto any such selection. Accordingly, ECH continues to be administered by individuals who are responsible to public officials. (See *Hawkins County*, *supra*, 402 U.S. at p. 605 [test is not whether entity is administered by state-appointed or elected officials, but rather whether the entity is "administered by individuals who are responsible to public officials or to the general electorate"]; *WIB*, *supra*, PERB Order No. Ad-418-M, p. 22 [MMBA section 3501(c) includes entities that have achieved the status of a "public agency" by statute, constitutional provision, case law, or administrative precedent].)[20]

[20] SVMD argues, repeatedly, that a public entity must exercise "total control" over a private entity for the latter to qualify as a public agency. But that claim egregiously misstates *Hawkins County* and *El Camino I* and therefore falls of its own weight.

ECH, in turn, has sole power to appoint and remove SVMD's President and Board of Managers. First, as noted above, ECH's CEO appoints SVMD's President, who, in turn, reports to ECH's CEO. ECH appointed Harrison as SVMD President in February 2018, and from then until March 2021—which included the period relevant to this dispute—Harrison was an ECH official who was on loan to SVMD while also performing limited services for ECH. Second, when this dispute arose on April 1, 2019, five managers served on SVMD's board. ECH, as the sole member of SVMD, appointed the five managers: ECH's CEO; ECH's Chief Financial Officer; ECH's Chief Medical Officer; a member of ECH's Board of Directors; and SVMD's President. ECH, moreover, had the right to remove any member of the Board of Managers and to fill any vacancy.[21]

These facts establish that SVMD is administered by individuals "responsible to" ECH officials. ECH officials, in turn, are responsible to the District, as they were when *El Camino I* issued. Thus, under California Corporations Code section 5064, which provides that a "'parent' of a specified corporation is an affiliate controlling such corporation directly or indirectly through one or more intermediaries," the District is the parent of both ECH and SVMD.

Respondents nonetheless argue that SVMD's leaders are not "responsible to public officials or to the general electorate" under *Hawkins County*, *supra*, 402 U.S. at pp. 604-605. For this to be correct, two things would have to be true. First, it would have to be the case that only District officials—not ECH officials—are "public officials."

[21] After the facts giving rise to this dispute, SVMD's board expanded to nine managers. At that point, ECH directly appointed seven of these nine managers, while the SVMD board could nominate candidates to fill its final two slots, but ECH had sole authority whether to approve those selections. As under the prior structure, ECH's CEO maintained the right to remove any manager and to fill vacancies.

Second, it would have to be true that SVMD leaders are not "responsible to" District officials, because the intervening layer of ECH sufficiently interrupts the chain of responsibility. Neither of these suppositions holds. Accordingly, there are two, independent reasons why SVMD falls within the second *Hawkins County* category: its leaders are ultimately responsible to District officials and, even were that not true, its leaders are responsible to ECH officials who constitute "public officials." We explain.

The District's control over ECH, and the integration between the District and ECH, militate against the idea that ECH provides true separation between SVMD and the District. Indeed, treating the District and ECH as truly separate would render the District a bare skeleton of an agency, as it has no operations of its own and has chosen to offer health care—its sole purpose—through ECH. Notably, ECH continues to exist as a District subsidiary only because when the District reversed its decision to privatize its hospital, the District found it inconvenient to completely dissolve ECH as a nonprofit corporation and decided instead to maintain its existence with the District as its single member. (*El Camino I*, *supra*, PERB Decision No. 2033-M, p. 9 ["To transition the existing 501(c)(3) governance structure back to the District structure would take considerably longer and cost a great deal"].) In these circumstances, ECH officials are not merely "responsible to" the District, but practically speaking, are indivisible from it.

Furthermore, Respondents' argument, if accepted, would open a significant inconsistency in the law and would allow use of two single-member entities to change what law applies. Specifically, Respondents' argument suggests that when public officials appoint the leaders of a single-member nonprofit corporation or single-member LLC, the nonprofit or LLC is a political subdivision for collective bargaining purposes, but if that single-member nonprofit or single-member LLC is itself the single member of

a nonprofit corporation or LLC, and appoints the leaders thereof, the nested entity would fall under the NLRA. Labor law is not so brittle, idiosyncratic, or inconsistent.

Finally, even if we were to assume that SVMD leaders are not responsible to the District, that would be of no import. It is sufficient that SVMD leaders are responsible to ECH, which is a public agency for MMBA purposes based on both the Board's controlling decision in *El Camino I* and the record here. Therefore, if a single-member LLC is responsible to ECH, as is the case for SVMD, *Hawkins County* principles dictate that the single-member LLC also qualifies as a political subdivision. In other words, because ECH is a public agency under the MMBA, its top officials are public officials for *Hawkins County* purposes.[22]

B. Public Funding

SVMD has received significant public funding. For example, ECH has invested $14 million in SVMD, including a $1.3 million initial capital contribution, $8 million for

[22] While the above analysis is dispositive, Respondents point to the parties' stipulations that SVMD's Board of Managers oversee all SVMD affairs, and that SVMD officials supervise, direct, and control SVMD clinic employees, handle SVMD hiring and firing, and set SVMD wages, employment policies, and procedures. SEIU counters with other facts, including that ECH has the sole, unilateral power to amend or terminate its OA with SVMD at any time without input from SVMD, meaning that the following OA terms are locked in, unless ECH decides to change them: (1) ECH has full authority to amend or cancel SVMD's articles of organization at any time, to decide who serves as SVMD President, and to direct SVMD to issue distributions to ECH in any amount at any time; and (2) ECH has sole authority whether to approve SVMD's annual budget and key business decisions. It is not necessary to weigh these factors against one another given ECH's power to appoint and remove SVMD's leaders. This is because even were it the case that SVMD's Board of Managers and President run the business, and even ignoring that an ECH official served as SVMD's President at the relevant time, these SVMD leaders are responsible to ECH under the authority explained *ante* beginning at page 25.

tenant improvements, and $4.6 million to upgrade SVMD's information technology. Respondents argue that most ECH resources come from patient fees, insurance, Medicare, and Medi-Cal, and that these are the funds that ECH has used to fund SVMD. But this argument fails for several independent reasons. First, because ECH is a public agency for collective bargaining purposes, that alone means that all ECH funds end up public in character, even those derived from sources other than tax revenue.

In any event, ECH receives substantial resources derived from taxes. As noted in *El Camino I*, *supra*, PERB Decision No. 2033-M, the District transferred its hospital-related assets to ECH, including a hospital building, improvements, fixtures, and other related assets. (*Id*. at pp. 3, 7.) The District also provided between $2 million and $2.5 million in funds annually to ECH for capital expenditures, and the District prevailed in a $148 million parcel tax measure for capital improvements to the hospital. (*Id*. at p. 7.) Receipt of tax dollars from the District frees up money for ECH to invest in SVMD. In other words, if the District did not pay ECH's capital expenses with tax dollars, ECH would have to spend its net income from operations on such purposes, and indeed it might even run a deficit. Thus, ECH's ability to fund SVMD to purchase clinics from Verity, and, for instance, perform tenant improvements and upgrade information technology, flows from ECH having tax dollars to cover so many of its needs.

Other financial ties similarly support our finding that SVMD receives public funding. Most importantly, SVMD's profits and losses are allocated to ECH, SVMD's financial performance appears as a specific line item in ECH's reports, and ECH requires SVMD to elect to be a disregarded entity for tax purposes.

C. Public Purpose

SVMD, like ECH, pursues goals that fall squarely within the District's public purposes. Most notably, Health and Safety Code section 32121 authorizes the District to "establish, maintain, and operate, or provide assistance in the operation of, health facilities or health services, including, but not limited to, outpatient programs, services, and facilities . . . or other health care programs, services, and facilities and activities at any location within or without the district for the benefit of the district and the people served by the district." (*Id.*, § 32121(j).) Section 32121 also authorizes the District to "establish, maintain, and carry on its activities through one or more corporations, joint ventures, or partnerships for the benefit of the health care district." (*Id.*, § 32121(o).) ECH and SVMD fall squarely within these purposes. Indeed, ECH summarized SVMD's purpose, and its integration with ECH's purpose, in a 2018 press release that announced its appointment of Harrison as SVMD President and stated in relevant part: "SVMD is an affiliate of El Camino Hospital and is the entity responsible for the growth, development, and operations of the outpatient clinics affiliated with El Camino Hospital." (<https://www.elcaminohealth.org/newsroom/el-camino-hospital-appoints-president-silicon-valley-medical-development-llc> [as of August 14, 2023].)

Thus, there can be no serious dispute that the District's public purposes became ECH's purposes by virtue of the District becoming ECH's sole owner and exercising plenary control over it, and the same extension occurred when ECH created SVMD to further these purposes. ECH holds out SVMD as its affiliated partner, is the sole owner of SVMD, and engages in important business functions for SVMD, as noted above. We conclude that ECH and SVMD engage in these acts to further the public purposes of their parent, the District.

Respondents argue that SVMD does not serve public purposes because it has clinics outside the District's boundaries. But as noted above, Health and Safety Code section 32121 specifically authorizes the District to "provide assistance in the operation of . . . health care programs, services, and facilities and activities at any location within or without the district for the benefit of the district and the people served by the district." (*Id.*, § 32121(j).) Indeed, the District's website notes that "it has become increasingly important to expand services strategically beyond District boundaries to engage the broader Silicon Valley population." (<www.elcaminohealthcaredistrict.org/about/echd-structure> [as of August 14, 2023].)

It is especially problematic for the District and ECH to argue that SVMD's purposes lie outside the District's purposes, since that would wrongly imply that public officials have egregiously misspent their efforts and the resources entrusted to them. Fortunately, the record overwhelmingly disproves that notion.

For these reasons, SVMD falls within the second *Hawkins County* category and is a "governmental subdivision" within the meaning of MMBA section 3501(c). There is therefore no cause for us to consider whether SVMD is a "public corporation," "quasi-public corporation," or "public service corporation" under section 3501(c).[23]

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[23] In *El Camino I*, *supra*, PERB Decision No. 2033-M, the Board similarly concluded that ECH is a political subdivision under the second *Hawkins County* category and therefore a "governmental subdivision" under MMBA section 3501(c). The Board expressed no opinion as to whether ECH might also qualify under one or more other categories covered in MMBA section 3501(c), such as a public corporation, quasi-public corporation, or public service corporation, though the Board noted a decision finding a different nonprofit hospital was not any of those types of corporations. (*Id*. at pp. 12-16, citing *Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal.App.3d 400 (*Roseville*).) The Board distinguished *Roseville* on its facts and noted that the California Supreme Court later disapproved of a critical premise upon which *Roseville* relied: that employees would

Finally, taking a broader view, it bears noting that *El Camino I* and this case follow the NLRB disclaiming jurisdiction over ECH. (See *El Camino I*, *supra*, PERB Decision No. 2033-M, pp. 8-9.) Although the NLRB has never considered its jurisdiction over SVMD, and we need not follow every development in NLRB precedent (see *ante* at footnote 18), we are confident that the NLRB would find that SVMD, too, falls within the second *Hawkins County* category. Furthermore, where an entity has significant public characteristics, the NLRB has, at times, exercised its discretion to decline jurisdiction in the interest of comity, irrespective of whether the entity technically falls within one of the *Hawkins County* categories. (See, e.g., *Temple University* (1972) 194 NLRB 1160, 1161.) Exercising such discretion would be an alternative basis for the NLRB to decline jurisdiction, even if it did not believe SVMD falls within *Hawkins County*. Either way, given that SVMD leaders are responsible to ECH, an entity the NLRB treats as a political subdivision, SVMD and ECH logically fall within the same jurisdiction rather than operating under separate labor law frameworks.

II. Single-Employer Analysis

SEIU contends that Respondents have either a joint-employer relationship or a single-employer relationship. Multiple entities have a joint-employer relationship if

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lose the right to strike if they were public employees. (*El Camino I*, *supra*, pp. 14-16, citing *County Sanitation Dist. No. 2 v. Los Angeles County Employee Assn*. (1985) 38 Cal.3d 564, 570, fn. 9.) *El Camino I* therefore noted it was unclear whether *Roseville* was still valid law in its "rigid interpretation" of the terms "public corporation," quasi-public corporation," and "public service corporation." (*El Camino I*, *supra*, p. 14.) In any event, even if *Roseville* correctly defined those terms, *Roseville* did not consider whether the entity at issue was a governmental subdivision. Indeed, *Roseville* did not even mention *Hawkins County*. Therefore, given that decisions are not authority for propositions not considered (*Riverside County Sheriff's Dep't v. Stiglitz* (2014) 60 Cal.4th 624, 641), *Roseville* has no import for our inquiry.

each entity has at least a partial right to control certain employment conditions or direct the manner and method in which work is performed. (*County of Ventura* (2018) PERB Decision No. 2600-M, pp. 28-29 (*Ventura*).)

In assessing a single-employer claim, in contrast, PERB looks at four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or common financial control. (*Ventura*, *supra*, PERB Decision No. 2600-M, p. 18.) Single employer status does not require the presence of all four factors. (*Ibid.*) Indeed, our inquiry must consider not only how many factors are present, but also to what extent they are present. (*Id*. at p. 19.) Accordingly, even when a preponderance of the evidence supports a single-employer conclusion, there is likely to be evidence of commonality in certain respects mixed with evidence of independence in others. (*Ibid*.) The four factors ultimately assist PERB in analyzing the practical realities to determine whether requiring bargaining on a single-employer basis will foster fair and effective collective bargaining by bringing to the table the parties who are able to work out difficult issues and foster harmonious labor relations. (*Alliance Judy Ivie Burton Technology Academy High School et al.* (2020) PERB Decision No. 2719, pp. 49-50 [judicial appeal pending]; *Ventura*, *supra*, pp. 22, 25 & fn. 29.)

Entities in a single-employer relationship must bargain over all terms and conditions of employment, while those in a joint employer relationship must bargain only over terms they control or partially control. (*Ventura*, *supra*, PERB Decision No. 2600-M, p. 33.) Neither a joint-employer relationship nor a single-employer relationship reflects a formal merger of separate entities. (*Id*. at pp. 40-41.) Rather, each is a legal construct for collective bargaining purposes. (*Id*. at pp. 40-43.) Such a

construct has legal significance only for the purpose of representation and collective bargaining. (*Id*. at pp. 41-42 & 49.)

A single-employer or joint-employer finding neither expands nor contracts the entities under PERB's jurisdiction. (*Ventura*, *supra*, PERB Decision No. 2600-M, pp. 41-43.) The Board at one time held otherwise, concluding in *El Camino I*, *supra*, PERB Decision No. 2033-M, that it had jurisdiction not only under *Hawkins County*, but also, in the alternative, because the District and ECH had a single-employer relationship vis-à-vis ECH employees. (*Id*. at p. 22). This alternative holding was wrong, however. The Board overruled it in *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545, p. 12, and the Board later explained in *Ventura* that PERB does not, in fact, gain jurisdiction over an entity merely because it is part of a single-employer relationship with a PERB-covered entity.[24] (*Ventura*, *supra*, p. 40.) Thus, when a single-employer or joint-employer relationship exists, PERB asserts jurisdiction only over those entities in the relationship that otherwise fall under PERB jurisdiction.[25] (*Id*. at pp. 39-43.)

For the reasons discussed below, SEIU has satisfied its burden to show all three Respondents are parties to a single-employer relationship. We therefore need not reach the joint-employer question. (*County of Ventura v. Public Employment Relations Bd.* (2019) 42 Cal.App.5th 443, 452, fn. 2.)

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[24] In contrast, the Board has reaffirmed *El Camino I*'s primary jurisdictional holding—that ECH falls within the second *Hawkins County* category. (*Ventura*, *supra*, PERB Decision No. 2600-M, p. 22, fn. 25; *Alliance College-Ready Public Schools*, *supra*, PERB Decision No. 2545, p. 12.)

[25] In *Ventura*, *supra*, PERB Decision No. 2600-M, we treated the clinic corporations as if they were subject to the NLRA, without so deciding, because the charging party neither named them as respondents nor asked us to find that they were public agencies within the meaning of MMBA section 3501(c).

A. Functional Integration of Operations

The factual findings set forth above include considerable facts showing integration, as well as certain countervailing facts showing some independence. Without repeating all such facts, we note several of the most salient.

SVMD is part of an integrated health network known as El Camino Health. (See *ante* at pp. 12-13.) Integrated provision of services and use of a common business name are significant factors in a single-employer analysis. (*Ventura*, *supra*, PERB Decision No. 2600-M, pp. 19-20 & 42-43; *California Virtual Academies* (2016) PERB Decision No. 2484, pp. 67 & 70.)

ECH created SVMD to effectuate the District's purposes and has invested heavily in SVMD's success, including an initial capital investment, tenant improvements, and upgrades to SVMD's information technology and medical records capabilities to allow further integration. Moreover, at the time of the dispute, SVMD's Board of Managers and top leaders were ECH officials. SVMD's President continues to serve at ECH's pleasure and to report to ECH's CEO. ECH has approval power over SVMD's annual budget as part of ECH's consolidated budget. Thus, while SVMD develops and administers its own proposed budget, ECH has full authority whether to approve that budget. Similarly, while the two budgets are not "comingled," in the sense that separate records exist, SVMD's profits and losses are allocated to ECH and SVMD's financial performance appears as a specific line item in ECH's reports.

In *El Camino I*, *supra*, PERB Decision No. 2033-M, we found similar factors demonstrated significant functional integration between ECH and the District, its sole owner, even though ECH had day-to-day control of the hospital's operations. (*Id*. at pp. 19-20.) While certain specific facts in the instant record show more integration than

in *El Camino I* and others show less, the overall record suggests that ECH has always intended to, and does, make sure that SVMD's outpatient clinics operate in a manner that furthers ECH's enterprise. ECH does so not only by exercising supervisorial control over SVMD's President, but by integrating itself into most significant executive, professional, and business affairs that are critical to operating a modern health care enterprise. (See *ante* at pp. 8-18.)

The arrangements in place at the time the dispute arose are most important, and Respondents reveal the weakness of their case by strenuously urging us to disregard the Restated ASA that took effect April 1, 2019, and instead to focus on changes that occurred later, when ECH stopped providing SVMD with a Vice President of Human Resources and several other executives. But even if later iterations of the Restated ASA also have some relevance, the later changes left most aspects of Respondents' integration unaltered.

Indeed, under the most recent ASA, reflecting amendments on October 1, 2020, ECH still provides SVMD's President, who still reports to ECH's CEO, and ECH is still integrally involved in: SVMD's billing; collections; accounting; bookkeeping; financial reporting; external auditing; third party payments; negotiation of contracts; information technology; leasing and other facilities matters; procurement; marketing; communications; legal work; compliance oversight (including compliance planning, policies, procedures, and internal auditing); health information management; radiology and laboratory services; patient satisfaction surveys; data analysis; patient grievance system; and employee recognition programs.[26]

[26] The record does not reflect whether SVMD has paid ECH market rates for services performed under the ASAs in effect over the past 15 years. No issue in this

Other record elements reflect that SVMD maintains independence below the level of its president, with lower level SVMD supervisors partly insulated from ECH by intervening levels of management. The record also does not reflect employee interchange between SVMD clinics and ECH clinics, though SVMD employees do travel to an ECH hospital campus to receive training from ECH on the electronic medical records system, and they consult ECH training materials on other topics, including "Tip Sheets" on printing patient labels and on inputting copayments during registration.

Balancing all aspects of the record, functional integration points more toward a single-employer relationship. Significantly, because the District not only owns ECH but exclusively relies on ECH to carry out the District's entire mission, the integration extends to the District as well.

B. Centralized Control of Labor Relations

Centralized control over labor relations is a close factor in this case, as both SEIU and Respondents have plausible arguments based on precedent.

We start with *El Camino I*, *supra*, PERB Decision No. 2033-M, where this factor supported finding the District and ECH to have a single-employer relationship even though ECH had its own human resources division that administered labor relations with SEIU on a day-to-day basis, ECH's Human Resources Director negotiated labor agreements, and the District had no authority to dictate wages or other employment terms or conditions. (*Id*. at pp. 20-21.) In finding centralized control despite these facts,

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case turns on that determination, particularly given the substantial financial integration between ECH and SVMD. Indeed, even if Respondents had shown that SVMD paid market rates, such payments would be to an entity that controls it, funds it in material part, and already absorbs all SVMD profits and losses.

the Board noted that ECH's board members, five of whom were District board members, had authority to ratify labor agreements. (*Id*. at p. 21.)

Just as it was critical that the District's board members held sway over ECH's board in *El Camino I*, *supra*, PERB Decision No. 2033-M, p. 20, here ECH has authority over who sits on SVMD's Board of Managers, ECH selects SVMD's President (who reports to ECH's CEO), and at the time the facts of this case arose, ECH officials filled not only the role of SVMD President but also the role of SVMD Vice President of Human Resources. Thus, while Respondents argue that ECH does not directly decide whether to ratify SVMD labor agreements, the facts relative to that issue fall within the ambit of *El Camino I*.

In *Ventura*, *supra*, Decision No. 2600-M, the Board considered whether Ventura County had a single-employer relationship with more than a dozen private clinic corporations operating outpatient clinics under the same business name the county used, "Ventura County Medical Center." (*Id*. at pp. 8 & 42.) The clinic corporations largely handled their own human resources matters, including hiring, discipline, and compensation. (*Id*. at p. 21.) However, the Board explained that "centralized control of labor relations does not necessarily depend on centralized authority over day-to-day matters," as "devolved management structures are common even when there is only one entity involved in managing a public enterprise." (*Id*. at pp. 21-22.) Because the county had authority whether to approve budgets for each private corporation, the reality was that if a clinic corporation wished to substantially increase expenditures to start a pension plan, for instance, county approval would be necessary; this supported a single-employer conclusion even though the clinics managed day-to-day human resources issues. (*Id*. at p. 22.) Here, similarly, ECH has authority whether to approve

SVMD's budget, and that step is hardly pro forma given that SVMD's profits and losses are attributed to ECH. Moreover, some of the critical evidence here is similar to that in *Ventura*, such as the fact that ECH has authority over who sits on SVMD's Board of Managers, ECH selects SVMD's President (who reports to ECH's CEO), and at the time the facts of this case arose ECH officials filled not only the role of SVMD President but also the role of SVMD Vice President of Human Resources.

In other respects, however, the record is more mixed as to centralized control over labor relations. For instance, unlike in *Ventura*, *supra*, PERB Decision No. 2600-M, there is no evidence here that ECH requires SVMD clinic employees provide backup staffing for ECH clinics. Moreover, Respondents in this case can rely, in part, on relevant stipulated facts, including the following:

> "25. SVMD Clinics and ECH have separate governing boards, separate business offices, and separate leadership teams.
>
> "26. SVMD Clinics has its own leadership team that handles the administration, operation and maintenance of SVMD Clinics.
>
> "27. The business of SVMD Clinics is managed by the SVMD Clinics Board of Managers.
>
> "28. Employees of SVMD Clinics are subject to the direction and control of SVMD Clinics' management and human resources personnel.
>
> "29. Hiring and firing decisions of SVMD Clinics' employees are made exclusively by SVMD Clinics personnel.
>
> "30. SVMD Clinics sets its own employment policies and procedures.
>
> "31. SVMD Clinics sets its employees' wages and schedules.

> "32. SVMD Clinics' employees were never covered by the ECH-SEIU-UHW CBA.
>
> [¶ . . . ¶]
>
> "58. SVMD has a separate ADP payroll and human resources information system for its employees.
>
> "59. SVMD clinic employees receive benefits through SVMD's own health care benefits plan, which is separate from the Hospital's health care benefits plan for its hospital employees.[27]
>
> "60. There is no interchange of employees between SVMD and the Hospital. SVMD clinic employees do not float to Hospital positions, nor do Hospital employees float to SVMD positions. SVMD clinic employees are supervised by SVMD managers, not Hospital managers."

Notably, these are stipulated facts rather than mixed stipulations of law and fact, and they therefore afford SEIU leeway to argue in favor of the various single-employer factors based on the full record. Indeed, as discussed above, the stipulations do not prevent SEIU from establishing functional integration.

On centralized control of labor relations, ECH's overarching control over SVMD via the Board of Managers and SVMD's President (and Vice President of Human Resources when this case arose), as well as its authority whether to approve SVMD's budget, provide important context to each stipulation and render this factor a close one that is in many ways akin to *Ventura* and *El Camino I*. Nonetheless, on a factor as close as this one, the combined force of the above stipulations warrant finding that centralized control of labor relations is not present to the same degree as it was in *El Camino I* or

[27] Although ECH made the same or similar employee benefits available to ECH and SVMD employees under the original ASA, by April 1, 2019, SVMD maintained its own separate health care plan for SVMD employees.

Ventura. We conclude that this factor at least slightly weighs against a single-employer conclusion.

C. Common Management

In assessing common management, the above-noted stipulations again provide some evidence in favor of Respondents' position. On this factor, however, the countervailing evidence is stronger. As discussed in detail above, ECH controls SVMD at the highest levels, including by appointing its president who, in turn, reports to ECH's CEO. While lower levels of management are separate, that is true even in a typical city, county, or school system, where devolved management means that separate parts of the enterprise have entirely separate management all the way up until the very highest level(s). (*Ventura*, *supra*, PERB Decision No. 2600-M, pp. 22 & 24.) For that reason, we look to management at higher levels, which can be "common" even though there is localized control over many affairs. (*Id*. at p. 24.) In other words, "common management can be found even in the presence of a dispersed management structure." (*Ibid*.) That is consistent with our conclusion here. At the time of the events in question, ECH officials filled two key slots: SVMD President and Vice President of Human Resources. While we mainly analyze the arrangements in place when the disputed issues arose, we note that, even as of the close of the record in this case, SVMD's President reported to ECH's CEO and SVMD's Board of Managers remained responsible to ECH.[28]

[28] We place little weight on ASA provisions that state in a conclusory fashion that SVMD and ECH are independent entities with no management authority over one another's affairs and that neither entity is the other's agent. Rather, we look at the reality of the situation. (*Ventura*, *supra*, PERB Decision No. 2600-M, pp. 25-26.) In this case, that reality shows common management. Indeed, when the facts of this case arose, SVMD's President was an agent of ECH. Liability may thus extend to ECH under both a

D. Common Ownership or Financial Control

The above facts also show common ownership or financial control. To begin, the District owns ECH, which owns SVMD. Moreover, ECH has provided SVMD with substantial funding, without which it would not exist, much less have acquired the former Verity clinics. While SVMD develops and administers its own proposed budget, ECH has full authority whether to approve that budget. Similarly, while the two budgets are not comingled, meaning that separate records exist, SVMD's profits and losses are allocated to ECH and SVMD's financial performance appears as a specific line item in ECH's reports. Moreover, ECH requires SVMD to elect to be a disregarded entity for tax purposes and to refrain from "any activity that would jeopardize [ECH's] status as a tax-exempt organization."[29]

As in *Ventura*, *supra*, PERB Decision No. 2600-M, the facts at issue here do not "resemble an arm's length business agreement in which one entity contracts with another for services at a negotiated price, and then each side lives with that deal until the first point at which renegotiation or termination becomes possible." (*Id*. at p. 28.) In

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single-employer theory and pursuant to standard agency principles. (Civ. Code, § 2304 et seq. [setting forth agency principles]; *City of San Diego* (2015) PERB Decision No. 2464-M, adopting proposed decision at p. 39, affd. *sub nom. Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898 ["Agency is employed to impose liability on the charged party for the unlawful acts of its employees or representatives even when the principal is not at fault and takes no active part in the action"].)

[29] ECH also retains veto power over any transfer or sale of SVMD assets, as well as mergers, consolidations, reorganization, or dissolutions involving SVMD. This constitutes further indicia of common ownership or financial control. (*El Camino I*, *supra*, PERB Decision No. 2033-M, p. 22.)

that sense, the facts differ sharply from those in *Fresno Unified School District* (1979) PERB Decision No. 82. There,

> "we declined to find a single employer relationship between a school district and a privately held bus company (Abbey). The district contracted with Abbey to provide transportation services for a set price, Abbey could either profit from or lose money on the deal, and Abbey had discretion to control both labor relations and all its other affairs to help it maximize profits and avoid losses. Moreover, no more than half of Abbey's total business operations involved providing services to the district. The district's sole relevant influence over Abbey was in reserving the right to change the pickup routes and hours based on student needs. There was no evidence of common ownership, common management, or centralized control of labor relations, and very little operational integration, since bus services were ancillary to the district's primary educational services. Even so, we were careful not to speculate as to whether we would have reached a contrary result if the union had proven that the school district involved itself in training bus drivers or holding meetings with them."

(*Ventura*, *supra*, PERB Decision No. 2600-M, p. 28, fn. 33, internal citations omitted.)

The single-employer doctrine is not a formulaic test of how many factors point in each direction. Rather, as noted above, we consider not only how many of the factors are present, but also to what extent they are present, and ultimately the factors are mainly intended to assess whether requiring bargaining on a single-employer basis will foster fair and effective collective bargaining by bringing to the table the parties who are able to work out difficult issues and foster harmonious labor relations.

Here, balancing the above factors, we conclude that Respondents are parties to a single-employer relationship. Indeed, because the District not only owns ECH but exclusively relies on ECH to carry out the District's entire mission, it would substantially impair collective bargaining for the District to be excluded from the single-employer

relationship at issue here. However, the District may choose to delegate its bargaining authority to ECH or SVMD, depending on circumstances.

As noted above, we do not issue a remedial order against the District given that SEIU has only shown that it asked ECH to join the SVMD negotiations. Although a union's failure to demand bargaining does not necessarily immunize entities in a single-employer relationship from all categories of unfair practice liability, this case involves unique circumstances that arose after ECH authorized SVMD to purchase the former Verity clinics and SEIU explicitly put ECH but not the District on notice as to their respective obligations. The Legislature vested PERB with broad discretion to effectuate the MMBA's purposes (MMBA, § 3509(b)), and in this instance, it is sufficient to consolidate all remedial obligations in a single, unified directive to SVMD and ECH rather than issuing a more complex order that includes the District as to certain unfair practices but not others.

Finally, we address Respondents' contention that if a single-employer relationship existed vis-à-vis employees at SVMD clinics, SEIU would have made such an assertion during the first decade SVMD existed, prior to the acquisition of the former Verity clinics. That argument fails for multiple reasons, including because there is no evidence of any past union organizing among employees at SVMD's first six clinics. Accordingly, until now, neither SEIU nor any other union has had cause to take a position as to whether the MMBA covers employees at SVMD clinics or whether Respondents are all part of a single-employer relationship. While today's decision resolves those questions, it leaves employees unrepresented at all SVMD clinics other than the former Verity clinics, unless and until they become exclusively represented through a lawfully recognized mechanism.

III. Alleged Unfair Labor Practices

On the merits of the specific unfair practices alleged in the complaint, Respondents have presented little in the way of evidence or argument. Nonetheless, we hold SEIU to its burden of proof and sustain only those allegations that the law supports based on either the evidence before us, admissions in Respondents' answers to the complaint, or any combination thereof.

In analyzing the complaint's allegations, successorship principles delineate the parties' rights and obligations. PERB applies a modified version of the successorship doctrine developed by federal courts and the NLRB under the NLRA. (*County of Santa Clara*, *supra*, PERB Decision No. 2670-M, p. 20.) An employer is a legal successor to a predecessor entity, and must therefore recognize and bargain with a union that exclusively represented employees of the predecessor entity, if: (1) more than half of the putative successor's employees in a relevant bargaining unit previously worked for the predecessor; (2) there is substantial continuity of operations between the putative successor and the predecessor; and (3) the unit at issue is or can be an appropriate unit within the successor employer's unit structure. (*Id*. at pp. 20-32.) While this test is akin to that which the NLRB applies, PERB does not necessarily apply each element in the same manner as the NLRB. (See, e.g., *id*. at pp. 27-32 [deviating from NLRB precedent as to the third successorship element where successor proved that the predecessor's bargaining unit should properly be merged into successor's existing, larger, exclusively represented unit, and the union representing the successor's larger unit was willing to augment it with the newly merged employees].)

In this case, there can be no serious dispute that all three successorship elements are present.[30] Accordingly, Respondents, as parties to a single-employer relationship, had a duty to bargain with SEIU, upon request, vis-à-vis terms and conditions of employment at the former Verity clinics. (*County of Santa Clara*, *supra*, PERB Decision No. 2670-M, p. 14.)

The circumstances in which a successor employer takes over determines whether the employer has the right to set initial terms and conditions of employment that differ from those that previously applied (in which case the updated terms become the status quo pending negotiations). Specifically, a successor employer has the right to set new initial terms unless it is already "perfectly clear" that the employer plans to hire enough of the predecessor's employees to make it evident that the union's majority status will continue. (See *First Student, Inc. v. National Labor Relations Bd.* (D.C. Cir. 2019) 935 F.3d 604, 608-610 [discussing the "perfectly clear" rule as applied in the private sector].) In today's holding, we emphasize one clarification of this rule for employers under PERB jurisdiction: While an entity taking over a predecessor's

[30] The complaint and the answers thereto align in implicitly conceding each element, including that the former Verity bargaining unit remains an appropriate unit. While SEIU's unfair practice charge and post-hearing briefs argue that employees at the former Verity clinics belong in the existing unit of ECH hospital and clinic employees, OGC neither dismissed that allegation nor included it in the complaint. SEIU was therefore within its rights to move to amend the complaint to add such an allegation, but it did not do so. We express no opinion on this allegation, as it does not meet PERB's standard for unalleged violations. (*Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 192-193 [to pursue unalleged claim, charging party must show the claim falls within the limitations period and relates to the same course of conduct at issue in the complaint, and that respondent had adequate notice and opportunity to defend against the claim, including an opportunity to examine witnesses and present documents] (*Superior Court v. PERB*).)

operation can lawfully announce new initial terms if it is not in the "perfectly clear" category, by the same token if the overall circumstances thereafter shift sufficiently that the employer becomes a "perfectly clear" successor, at that point it has a duty to bargain in good faith to impasse or agreement before making any further changes.

Based on the record before us, we are unable to determine that SVMD was a perfectly clear employer before Monday, April 1, 2019. On that date, however, it became perfectly clear that SEIU's majority status would continue, as the clinics continued operations under new ownership using employees from the former Verity bargaining unit without any replacements or other employees from other sources. All the allegedly unlawful unilateral changes occurred well after April 1, 2019, meaning they occurred after successorship was perfectly clear.

Respondents make no cognizable argument to the contrary, and they therefore have waived any defense to this determination. In the alternative, however, even generously reading Respondents' submissions to argue that SEIU's majority status was not clear on April 1, 2019, we reject that argument. For instance, we are unpersuaded by the fact that SVMD initially used former Verity employees as indirect employees, hired through third party placement firms, and SVMD did not hire them as direct employees until a month or more later. This does not muddy the "perfectly clear" finding as of April 1, given there is no evidence SVMD recruited from any source other than former Verity bargaining unit employees. Moreover, even had SVMD been actively recruiting from multiple sources, and even had such hypothetical outside recruitment been significant enough to cause temporary uncertainty as to SEIU's status, such uncertainty would have ended on April 5, when SVMD acknowledged its duty to bargain with SEIU. Because all changes at issue occurred after April 5, it cannot matter whether

the earliest date on which SEIU's majority status became "perfectly clear" was April 5, April 1, or an earlier date.[31]

Accordingly, throughout the period relevant to the complaint allegations analyzed below, Respondents had a duty to bargain over material changes to terms and conditions of employment.

A. ECH's Outright Refusal to Bargain

ECH's answer to the complaint admits that it refused SEIU's April 10 request to bargain over terms and conditions of employment at the former Verity clinics. Given that ECH had a bargaining obligation because of its single-employer relationship with SVMD, ECH violated the MMBA when it refused SEIU's bargaining request. In contrast, we dismiss the comparable claim against the District since there is no evidence or admission showing that SEIU sought to bargain with the District or that the District refused to do so.

B. Change in Dress Code

To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and

[31] It is unclear from the record whether SVMD implemented any updated terms on or before April 1, or between April 1 and April 4. If SVMD made any changes in those time periods, the complaint makes no mention of them.

bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9.) Regarding the first element, there are three primary means of establishing that an employer changed or deviated from the status quo: (1) a deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Id.* at p. 10.)

It is undisputed that dress codes are a mandatory subject of bargaining. (*Trustees of the California State University* (2001) PERB Decision No. 1451-H, p. 8.) Nor is there any dispute as to the other unilateral change elements. On April 11, SEIU asked to bargain about a rumored change in the PSR dress code at the former Verity clinics. SEIU then reiterated this request twice more, on April 15 and April 22. When SEIU requested to bargain over potential dress code changes, PSRs could wear scrubs or business casual attire. On May 8, more than one month after SVMD acknowledged its duty to bargain with SEIU, SVMD implemented a new "Dress Code/Personal Appearance" policy that required PSRs at the former Verity clinics "to dress as business professionals" and prohibited them from wearing scrubs. SVMD admits that it changed the dress code policy at the former Verity clinics without having afforded SEIU adequate notice and an opportunity to meet and confer.

Thus, SEIU has established that SVMD unilaterally changed the PSR dress code policy in violation of the MMBA. ECH is similarly liable for this violation because of its single-employer relationship with SVMD and its refusal to bargain over terms and conditions of employment at the former Verity clinics. Moreover, it was an ECH

employee, Young, who received SEIU's requests to bargain over dress code changes, as she was on loan to SVMD, serving as SVMD's Vice President of Human Resources.

C. Discipline

The complaint alleges that on or around April 24, SVMD terminated two SEIU-represented employees pursuant to a "discretionary disciplinary policy," without providing SEIU prior notice and the opportunity to bargain, in violation of the MMBA. SVMD admits that it terminated the two employees and failed to bargain with SEIU before doing so but denies any violation.

The complaint's theory of violation is based on *Total Security Management* (2016) 364 NLRB 1532 (*Total Security*), which the Board cited with approval, in passing, in *Contra Costa Community College District* (2019) PERB Decision No. 2652, p. 9. In *Total Security*, the NLRB held that an employer has a duty to bargain with a union before unilaterally disciplining an employee, where the employer is imposing the discipline based on an exercise of discretion rather than pursuant to preexisting standards of conduct. (*Total Security*, *supra*, 364 NLRB at p. 1532.) Such an issue, the NLRB explained, typically arises after a union is first certified or recognized, but before a contract is in place. (*Ibid*.) The NLRB concluded that an employer must provide its employees' bargaining representative notice and the opportunity to bargain before exercising its discretion to impose serious discipline on individual employees, absent an agreement with the union providing for a process, such as a grievance-arbitration system, to address such disputes. (*Ibid*.)

OGC rightly issued a complaint on this theory, as it may apply equally when a successor employer takes over for a predecessor. (*County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 2 [complaint should issue if legal theory is colorable].) But

SEIU neither argued that point of law nor introduced critical predicate facts. First, SEIU failed to cite *Total Security*, instead citing *Care One at New Milford* (2020) 369 NLRB No. 109, which overruled *Total Security*. The NLRB's General Counsel has since urged, in one or more currently pending cases, that *Care One at New Milford* be overruled and *Total Security* reinstated. Although we need not follow such shifts in federal law (*Napa*, *supra*, PERB Decision No. 2563, p. 13), here the record is insufficient for us to consider such questions, including whether *Total Security* might apply in a successorship context. For instance, the record leaves unclear whether the former Verity clinics had any existing disciplinary policies or practices before the terminations, and, if so, what they were. For these reasons, we dismiss this allegation.

D. New Solicitation and Distribution Policy

The complaint alleges that on June 11, SVMD implemented a new solicitation and distribution policy without providing SEIU notice and the opportunity to bargain. No party disputes that such rules are a mandatory subject of bargaining. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, pp. 20-27.) Nor is there any dispute as to the other unilateral change elements. When SVMD recognized and agreed to bargain with SEIU, it did not have a solicitation and distribution policy applicable to the former Verity clinics. On June 11, SVMD implemented a new solicitation and distribution policy applicable to represented SVMD clinic employees and to non-employee union representatives. SVMD admits that it implemented the new policy without providing SEIU notice and the opportunity to bargain. ECH is similarly liable for this violation because of its single-employer relationship with SVMD and its refusal to bargain over terms and conditions of employment at the former Verity clinics.

The complaint further alleges that the new solicitation and distribution policy interferes with protected union and employee rights. These allegations are independent of any other claim. (*State of California (State Water Resources Control Board)* (2022) PERB Decision No. 2830-S, p. 10 & fn. 10.)

An access rule is unlawful if, on either a facial or as applied basis, it singles out protected conduct or speech, as compared to non-protected activities or speech. (*County of Tulare* (2020) PERB Decision No. 2697-M, pp. 18-19 (*Tulare*).) Even if a rule is nondiscriminatory, it must allow an exclusive representative reasonable access to employer property to communicate with bargaining unit employees, distribute literature, investigate workplace conditions, and assess contractual and statutory compliance. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, pp. 26-39 (*San Joaquin*).) The employer bears the burden of proving that a restriction on access to its premises is: (1) necessary for safe or efficient operations; and (2) narrowly drawn to avoid overbroad, unnecessary interference with protected rights. (*Id*. at pp. 26-27.) These principles apply irrespective of whether the person seeking access is a bargaining unit member or a union representative who does not work for the employer. (*Id*. at p. 27.)

An employer typically does not afford reasonable access if it infringes on an employee's ability to engage in protected activity either in a nonwork area or during a nonwork time. (*Tulare*, *supra*, PERB Decision No. 2697-M, p. 20.) For this reason, any employer rule must clearly allow protected activity in nonwork areas and nonwork time. (*Ibid*. [employers must refrain from overbroad restrictions such as those that apply "during the workday," without differentiating between times an employee is working and times an employee is taking a break]; see also *Superior Court v. PERB*, *supra*, 30 Cal.App.5th 158, 195-197 [rule prohibiting protected activities in "working areas" was

unlawfully overbroad because it could be interpreted as categorical ban on all such activities anywhere on employer's premises].)

Even if a workplace includes sensitive areas focused on acute patient care, the employer must narrowly tailor its rules and afford access to the fullest degree possible given its unique constraints. (*San Joaquin*, *supra*, PERB Decision No. 2775-M, pp. 28, 33-34, 38-39; *County of Riverside* (2012) PERB Decision No. 2233-M, p. 9 (*Riverside*); *Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H, p. 10 (*UCLA*).) A hospital's non-discriminatory restriction on non-business solicitation and distribution is presumptively valid if it covers only immediate patient care areas. (*Regents of the University of California* (2018) PERB Decision No. 2616-H, p. 11; *Riverside*, *supra*, PERB Decision No. 2233-M, p. 9.) But a hospital must normally allow both employee and non-employee union representatives to traverse patient care areas if necessary to reach areas where PERB precedent allows non-business activities. (*Riverside*, *supra*, PERB Decision No. 2233-M, pp. 9 & 11; *UCLA*, *supra*, PERB Decision No. 329-H, pp. 9-10, 14, 16-17.)

Here, SVMD's policy prohibits "[t]he solicitation of employees by employee union representatives and non-employee union organizers during an employee's work time and/or in patient care areas at any time." The policy also broadly prohibits non-employees from soliciting "membership in, or participation on behalf of any social, fraternal, political, religious or other organization" and distributing literature on SVMD premises at any time.

These policies are overbroad and therefore unlawful. First, the restriction against non-employee access is so broad that it could reasonably be interpreted to encompass SEIU staff. Second, the rule's categorical prohibition against distributing literature on

SVMD premises at any time is incompatible with the MMBA, as it extends to distribution in non-patient care areas during non-work time. The policy may also be unnecessarily restrictive in other respects, or may be discriminatory, but there is no cause to reach such issues given that we order Respondents to withdraw the rule entirely for its overbreadth and because of Respondents' failure to bargain.

E. Change in Work Location

The complaint alleges that, approximately four months after SVMD began operating the former Verity clinics, Respondents unilaterally transferred CCRs from those clinics to a central location, without notice to SEIU. An employer typically need not bargain over its decision to change employees' reporting location but must provide adequate notice and opportunity to bargain over the decision's effects. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 18-19.) On this basis, we dismiss the complaint allegation to the extent it asserts a failure to engage in decision bargaining. However, as explained below, SEIU established a failure to bargain over effects of the decision.

Even when an employer has no obligation to bargain over a decision, it must provide notice and an opportunity to meet and confer over any reasonably foreseeable effects the decision may have on matters within the scope of representation. (*County of Santa Clara* (2021) PERB Decision No. 2799-M, pp. 24-25.) An employer normally may not implement the decision while effects bargaining continues and instead must wait until the parties have reached agreement or impasse over the negotiable effects of the decision. (*Id*. at p. 25.) The employer violates its duty to bargain if it fails to provide adequate advance notice, and in such circumstances the union need not ask to bargain effects as a prerequisite to filing an unfair practice charge. (*Ibid*.) However, where an

employer does provide adequate notice, the union must request to bargain any reasonably foreseeable effects on negotiable matters. (*Ibid*.) The union's request to bargain need not be formalistic or burdensome, nor anticipate every imaginable effect a proposed change may have, but rather must only identify negotiable areas of impact, thereby placing the employer on notice that it believes the employer's proposed decision would affect one or more negotiable topics. (*Ibid*.)

On August 2, SEIU e-mailed Young about SVMD's direction that CCRs at the former Verity clinics move to a centralized facility. SEIU demanded that SVMD cease and desist from this change and bargain over the decision and its effects. SVMD admits making this change and further admits that it did not bargain with SEIU concerning the decision or the effects thereof. Drawing reasonable inferences from the record, it is more likely than not that SVMD responded to SEIU's August 2 e-mail by simply confirming the CCRs' relocation. SVMD therefore violated its duty to bargain effects. (See *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 39-40 [when the exclusive representative first learns of a unilateral change after its implementation, "the 'notice' is nothing more than 'notice' of a fait accompli and the question of waiver never arises"].) ECH is similarly liable for this violation because of its single-employer relationship with SVMD and its refusal to bargain over terms and conditions of employment at the former Verity clinics. Moreover, it was an ECH employee, Young, who received SEIU's August 2 e-mail, as she was at that time on loan to SVMD, serving as SVMD's Vice President of Human Resources.

F. Mass Communications

The PEDD governs an employer's obligations before disseminating a mass communication concerning exclusively represented employees' right to join or support

an employee organization or to refrain from doing so. (PEDD, § 3553(b).) Specifically, before doing so the employer must meet and confer with the exclusive representative on the content of the communication. (*Ibid*.) If the parties do not reach agreement and the employer still chooses to disseminate the communication, then the exclusive representative has the right to draft its own communication and have the employer disseminate the two communications together. (*Id*., § 3553(c).) We broadly construe ambiguous terms in the PEDD. (*Regents of the University of California* (2022) PERB Decision No. 2835-H, pp. 14-15.) For instance, the word "support," as used in section 3553(b), refers to any form of support, whether financial or non-financial. (*Id*. at p. 17, fn. 10.)

SEIU has proven the complaint's allegation that Young's mass e-mail dated June 20, as well as the flyers disseminated on June 27, violated PEDD section 3553. First, the e-mail messages and flyers were certainly mass communications, as they were targeted at all SEIU-represented employees at the former Verity clinics.

Furthermore, the communications concerned employees' right to join or support an employee organization, or to refrain from doing so. (*Regents of the University of California*, *supra*, PERB Decision No. 2835-H, p. 13.) Multiple parts of the e-mail fall within this broad category, including the statement that SVMD was required to provide SEIU with personal contact information for all bargaining unit employees, and that employees have the right to decide whether to participate in union activities and talk with union organizers, including the right to "ask them to leave you alone." Multiple parts of the flyers also fall within PEDD section 3553, including the statement as to SVMD's preference for "a direct working relationship" with employees.

Finally, it is undisputed that Respondents did not provide SEIU with an opportunity to meet and confer before issuing the mass communications.

Because of ECH's single-employer relationship with SVMD and its refusal to bargain over terms and conditions of employment at the former Verity clinics, ECH is liable, along with SVMD, for the PEDD violation. Moreover, the June 20 e-mail forming part of the predicate for the PEDD violation was from an ECH employee, Young, who was on loan to SVMD, serving as SVMD's Vice President of Human Resources.[32]

ORDER

Based on the foregoing, the Public Employment Relations Board (PERB) finds as follows: First, El Camino Hospital (ECH) violated the Meyers-Milias-Brown Act, Government Code section 3500 et seq. (MMBA) by entirely refusing to bargain with Service Employees International Union, United Healthcare Workers West (SEIU) regarding terms and conditions of employment at the five clinics that Silicon Valley Medical Development, LLC (SVMD) began operating on April 1, 2019 (hereafter, acquired clinics).

Second, ECH and SVMD violated the MMBA by: (a) failing and refusing to bargain in good faith about a new dress code for Patient Service Representatives at the acquired clinics, a new solicitation and distribution policy at the acquired clinics, and the effects of relocating Call Center Representatives (CCRs) from the acquired clinics to a centralized work location; and (b) interfering with protected union and employee rights

[32] The complaint did not allege that Young's e-mail or the two flyers violated PEDD section 3550 by deterring or discouraging employee free choice. Nor did the parties litigate that issue. We therefore express no opinion on it.

by applying an unlawfully overbroad restriction on solicitation and distribution at the acquired clinics.

Third, SVMD and ECH violated the Prohibition on Public Employers Deterring or Discouraging Union Membership, Government Code section 3553 (PEDD), by failing to meet and confer with SEIU prior to disseminating mass communications concerning employees' right to join or support an employee organization or to refrain from doing so.

All other allegations are hereby DISMISSED.

Pursuant to Government Code sections 3509, 3551, and 3541.3, it hereby is ORDERED that SVMD, ECH, and their governing boards and representatives shall:

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and confer in good faith with SEIU regarding terms and conditions of employment at the acquired clinics.

2. Interfering with union and employee solicitation and distribution rights that the MMBA protects.

3. Disseminating mass communications concerning SEIU-represented employees' right to join or support an employee organization, or to refrain from doing so, without complying with PEDD section 3553.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF THE MMBA AND THE PEDD:

1. Rescind the Dress Code/Personal Appearance Policy implemented on May 8, 2019, as applied to SEIU-represented employees at the acquired clinics.

2. Rescind the solicitation and distribution policy implemented on or about June 11, 2019, as applied to SEIU-represented employees at the acquired clinics.

3. Rescind any discipline, counseling, or evaluation against any SEIU-represented employee at the acquired clinics that is to any extent based on violation of policies referenced in paragraphs B(1) and B(2) above.

4. Make whole all SEIU-represented employees at the acquired clinics to the extent, at compliance hearings, SEIU establishes by a preponderance of the evidence that they have incurred harm from any of the violations found in this decision, plus seven percent annual interest. Make-whole relief shall include, but not be limited to, reimbursement for extra costs CCRs at the acquired clinics incurred in material part because of their new reporting location, as well as reimbursement for any compensation that SEIU-represented employees at the acquired clinics lost by virtue of violating the policies referenced in paragraphs B(1) and B(2) above. All forms of make-whole relief shall be retroactive to the first date of harm. In the case of reimbursing extra costs incurred in material part because of the new reporting location for CCRs, make-whole relief shall continue until the earliest of: (a) the date the parties reach an agreement on the effects of the work relocation; (b) the date the parties reach a good faith impasse as to such effects, including exhaustion in good faith any impasse resolution procedures that may be required or agreed upon; or (c) the date SEIU waives its right to bargain by failing to request negotiations, or fails to bargain in good faith.

5. Take one or both of the following actions if SEIU so requests:

a. E-mail SEIU-represented employees at the acquired clinics a communication of reasonable length provided by SEIU; and/or

b. Post at the acquired clinics, in locations near the posting described in paragraph 6 below, a communication of reasonable length provided by SEIU.

6. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to SEIU-represented employees at the acquired clinics are posted, copies of the Notice attached hereto as an Appendix. Authorized agents of SVMD and ECH must sign the Notice. Once posted, the Notice shall remain in place for a period of 30 consecutive workdays. SVMD and ECH shall take reasonable steps to prevent alteration or defacement, as well as to prevent other materials from covering it. SVMD and ECH must also ensure that employees at the acquired clinics receive the Notice by electronic message, intranet, internet site, and other electronic means to the full extent such employees receive work-related communications via those means.[33]

7. Notify OGC of all actions taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on SEIU.

Chair Banks and Member Paulson joined in this Decision.

[33] Any party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1698-M, *Service Employees International Union, United Healthcare Workers West v. El Camino Healthcare District, El Camino Hospital, and Silicon Valley Medical Development LLC,* in which all parties had the right to participate, the Public Employment Relations Board (PERB) found:

First, El Camino Hospital (ECH) violated the Meyers-Milias-Brown Act, Government Code section 3500 et seq. (MMBA) by entirely refusing to bargain with Service Employees International Union, United Healthcare Workers West (SEIU) regarding terms and conditions of employment at the five clinics that Silicon Valley Medical Development, LLC (SVMD) began operating on April 1, 2019 (hereafter, "acquired clinics").

Second, ECH and SVMD violated the MMBA by: (a) failing and refusing to bargain in good faith about a new dress code for Patient Service Representatives at the acquired clinics, a new solicitation and distribution policy at the acquired clinics, and the effects of relocating Call Center Representatives from the acquired clinics to a centralized work location; and (b) interfering with protected union and employee rights by applying an unlawfully overbroad restriction on solicitation and distribution at the acquired clinics.

Third, SVMD and ECH violated the Prohibition on Public Employers Deterring or Discouraging Union Membership, Government Code section 3553 (PEDD), by failing to meet and confer with SEIU prior to disseminating mass communications concerning employees' right to join or support an employee organization or to refrain from doing so.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and confer in good faith with SEIU regarding terms and conditions of employment at the acquired clinics.

2. Interfering with union and employee solicitation and distribution rights that the MMBA protects.

3. Disseminating mass communications concerning SEIU-represented employees' right to join or support an employee organization, or to refrain from doing so, without complying with PEDD section 3553.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF THE MMBA AND THE PEDD:

1. Rescind the Dress Code/Personal Appearance Policy implemented on May 8, 2019, as applied to SEIU-represented employees at the acquired clinics.

2. Rescind the solicitation and distribution policy implemented on or about June 11, 2019, as applied to SEIU-represented employees at the acquired clinics.

3. Rescind any discipline, counseling, or evaluation against any SEIU-represented employee at the acquired clinics that is to any extent based on violation of policies referenced in paragraphs B(1) and B(2) above.

4. Make whole all SEIU-represented employees at the acquired clinics in conformance with PERB's decision.

5. If SEIU so requests, disseminate a communication provided by SEIU in conformance with PERB's decision.

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Dated: _____

By: _____

Authorized Agent for El Camino Hospital

Dated: _____

By: _____

Authorized agent for Silicon Valley Medical Development, LLC

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.