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June 20, 2011

Lester A. Heltzer, Executive Secretary  
National Labor Relations Board  
Washington, D.C.  
**By electronic mail only**

**Re:NEW VISTA NURSING AND REHAB 22-CA-29988**

May it Please the Board:

Please be advised that the undersigned represents the Respondent in the above referenced matter.

The crux of this case is whether the respondent's Licensed Practical Nurses ("LPNs") are its "supervisors" or not. After a hearing, the Regional Director determined that they were not and the Board, by a 2-1 vote (Hayes dissenting) , affirmed. The Board also denied the Respondent's motion that Member Becker recuse himself. Member Becker was part of the above noted 2-1 majority.

After the Regional Director's decision, but *before the* Board's decision affirming the Regional Director, the Respondent, on March 25, 2011, allegedly "...altered the duties of its licensed practical nurses by requiring them to monitor the performance of, and to discipline CNAs." (See complaint in case number 22-CA-29845 dated April 28, 2011.)

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The complaint in case number 22-CA-29845 therefore asserts that there has been a factual change in the duties of the LPNs since March 25, 2011. It asserts an unlawful motivation in the Respondent's doing on March 25<sup>th</sup>, 2011, what it could indisputably do; run its business with its LPNs being supervisors.

The request for review in the representation case was dated March 23, 2011, *before* the change alleged took place. It, therefore, dealt only with the facts extant at that time. The events of March 25, 2011, however, could, and likely did, change the finding that the LPNs were not supervisors. .

Surely an employer, where there is no allegation of improper motive, may structure their company as they see fit. In this case the facility *after a Regional Director's decision that the LPNs were not supervisors* that it had appealed, decided to make certain that its business model and will; that its LPNs be supervisors, be effected. After all, a company cannot be expected to permanently run its company without its LPN supervisors merely because at some point in the past, they were found to be wanting in supervisory indicia. The employer clearly could then make clear beyond peradventure that the LPNs *are* supervisors by specifically assuring that they have supervisory indicia thereafter. So long as they have statutory supervisory authority, they would be statutory supervisors.

These factual changes, however, make summary judgement improper in the case. There are changed facts in the case, the facts are in dispute and the impact of these factual changes are not capable of being resolved by summary judgement.

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Accordingly the motion for summary judgement should be denied. Moreover, for availability of appellate court review purposes, the Respondent reasserts all the issues raised before the Board in the representation case.

Very truly yours,

A handwritten signature in black ink, appearing to read 'MT', with a stylized flourish extending from the bottom right.

MORRIS TUCHMAN

MT:pf

cc: Lisa Pollack, Esq. (By electronic mail)

William Massey, Esq. (By electronic mail)

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