UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

AMERICAN FEDERATION OF
TELEVISION AND RADIO
ARTISTS (AFTRA) KANSAS
CITY LOCAL,

Charging Party,

AND

Case No.: 17-CA-077657

MEREDITH CORPORATION,

Respondent.

MASUD LABOR LAW GROUP
By: Kraig M. Schutter (P45339)
Attorneys for the Respondent
4449 Fashion Square Boulevard, Suite 1
Saginaw, MI 48603-5217
(989) 792-4499

RESPONSE OF MEREDITH CORPORATION (KCTV) TO ACTING GENERAL COUNSEL'S MOTION TO TRANSFER PROCEEDINGS TO THE BOARD AND FOR SUMMARY JUDGMENT

Respondent, Meredith Corporation, KCTV, in answer to the Acting General Counsel's Motion for Transfer of Proceedings to the Board and for Summary Judgment, respectfully responds that this case may not properly be transferred to the Board for judgment on the pleadings because the Board lacked a quorum of board members at the time it issued its Order denying Respondent's Request for Review of the Regional Director's Decision and Direction of Election ("Request for Review") and because the Board currently lacks a properly constituted quorum of board members by which it might be able to decide this present matter. New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). Respondent provides the following as its answer to the specific paragraphs of the Acting General Counsel's Motion as follows:

1. Admitted.

2. Admitted.

3. Admitted, however, Respondent denies that the Board's underlying decision was correct under legal precedent and, further, affirmatively contends that the Board lacked a quorum of board members to issue its February 13, 2012, Order.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted, except that Respondent contends the underlying certification referenced at subsection (d) was ineffective as a matter of law due to a lack of quorum of the Board to issue its Order dated February 13, 2012, denying Respondent's Request for Review.

MASUD LABOR LAW GROUP
4449 Fashion Square Boulevard, Suite 1 | Saginaw, Michigan 48603 | p (989) 792-4499 | f (989) 792-7725 | www.masudlaborlaw.com

11. Admitted.

12. Admitted.

13. Admitted, however, Respondent contends that the Board's prior decision in Center for Social Change, Inc., 358 NLRB No. 24 (issued March 29, 2012) was wrongly decided.

14. Admitted.

15. Respondent admits that no genuine issues of fact exist, but denies that the Board has the power to provide the relief sought by the Acting General Counsel because the Board lacks a quorum to act.

Respectfully submitted,

MASUD LABOR LAW GROUP

Dated: May 16, 2012

By: _____

Kraig M. Schutter (P45339)
Attorneys for the Respondent
4449 Fashion Square Boulevard, Suite 1
Saginaw, MI 48603-5217
(989) 792-4499

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(989) 792-4499

RESPONDENT'S BRIEF IN SUPPORT OF ITS OPPOSITION TO THE ACTING GENERAL COUNSEL'S MOTION TO TRANSFER PROCEEDINGS TO THE BOARD AND FOR SUMMARY JUDGMENT

INTRODUCTION

The United States Supreme Court has ruled that the National Labor Relations Board ("NLRB" or "Board") lacks a quorum to act whenever it has fewer than three properly appointed members at any given time. New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). The Board has had only two properly appointed members since the departure of Member Craig Becker on January 3, 2012. Therefore, the NLRB lacked a quorum to issue its February 13, 2012, Order Denying Review of the Regional Director's Decision and Direction of Election upon which this unfair labor practice case rests, and it continues to lack a quorum to decide the legal issues currently. Because a valid quorum does not exist, the Board should not act on this case.

STATEMENT OF FACTS

On November 2, 2011, the American Federation of Television and Radio Artists, Kansas City Local ("AFTRA" or "Union"), filed a petition for election seeking to represent the news producers at Meredith Corporation's Kansas City news station, KCTV ("Meredith" or "Employer"). An election was held by Region 17 of the NLRB on December 28, 2011, but the ballots were impounded pending Meredith's challenge to the Regional Director's previous decision holding that the news producers were not statutory supervisors and were properly includable in the existing unit represented by the Union. The Employer sought a Request for Review by the Board on December 29, 2011, which the Board rejected by way of Order dated February 13, 2012. Region 17 promptly certified AFTRA as the representative of the Employer's news producers but Meredith has refused to recognize the certification, thus prompting this unfair labor practice case.

Meredith's position throughout this matter and before the NLRB on December 29, 2011, has been that its news producers are statutory supervisors and are, thus, not eligible for inclusion

in any bargaining unit. However, after the Employer's Request for Review was filed with the Board, Mr. Becker's term expired. Thereafter, President Barack Obama appointed Richard Griffin, Terrance Flynn and Sharon Block to serve as board members and his Administration has taken the position that such appointments were properly made as recess appointments. Meredith asserts that the Senate was not on recess at the time of the appointments, thus rendering the appointments ineffective as a matter of law. Since only two Board members were properly appointed as of the date of the NLRB's February 12, 2012 Order, it is Meredith's position that the Board lacked a quorum to act at that time and that it continues to lack a quorum to act currently.

ARGUMENT

The Board has recently reviewed the issue of whether or not it has possessed a quorum of Board members since the time President Obama appointed putative members Griffin, Flynn and Block. In Center for Social Change, Inc. and Service Employees International Union, Local 500, Case 05-CA-072211, the NLRB essentially ruled that it must presume the regularity of official acts of the Executive Branch unless clear evidence to the contrary exists. Meredith asserts that such clear evidence to the contrary exists in regard to President Obama's "recess" appointments of members Griffin, Flynn, and Block and that the NLRB, therefore, has had only two valid members since at least February 12, 2012 (when it issued its Order in this case). Since a quorum necessary to act does not exist, the Board should not process this case.

An appointment by the President to fill a government post ordinarily requiring advice and consent of the Senate may be made by the Executive Branch without such consent when the Legislative Branch is in recess. The fundamental rationale for these "recess appointments" is that the President is unable to communicate with, and thus potentially obtain consent from, the

Senate when it is not in session. 33 Op. Att'y Gen. 20, 24 (1921). President Obama signaled his intent to nominate at least two new members to the NLRB on December 15, 2011, two days before the Senate was planning to adjourn for the year. However, in order to block these and other potential recess appointments, the Senate announced two days later by unanimous consent that it would "adjourn and convene for *pro forma* sessions only" twice a week between December 20, 2011 and January 23, 2012. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The fact that it adopted this procedure specifically to prevent recess appointments in keeping with past practice is abundantly clear.[1] Thus, the Senate, rather than not being able to advise and consent, merely took the position that it was refusing to advise and consent during its holiday break, an action that it is constitutionally empowered to take.

The fact that the Senate was not in recess during this time of *pro forma* sessions is clear from the facts and circumstances. Each House of Congress "may determine the Rules of its Proceedings." USCS Const. Art. II, § 5, Cl 2. The Senate was obviously operating under guidance from its own previously adopted rules which define a "recess" as "any period of three of more complete days—excluding Sundays—when either the House of Representatives or the Senate is not in session." *2003-2004 Congressional Directory* 526 n2 (Joint Comm. On Printing, 108th Cong. Comp. 2003). Hence, the Senate followed through with its *pro forma* sessions, gaveling in every Tuesday and Friday thereafter such that there were no three consecutive days where the Senate was not in session. Since the Senate was in session, albeit in *pro forma*

[1] Senate Majority Leader Harry Reid has stated that such pro forma sessions break a long recess into shorter adjournments, each of which might ordinarily be deemed too short to be considered a "recess" within the meaning of the Recess Appointments Clause, thus preventing the President from exercising his constitutional power to make recess appointments. *See* 154 Cong. Rec. S7558 (daily ed. July 28, 2008) (statement of Sen. Reid); *see also* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (statement of Sen. Reid) ("[T]he Senate will be coming in for pro forma sessions…to prevent recess appointments.").

MASUD LABOR LAW GROUP
4449 Fashion Square Boulevard, Suite 1 | Saginaw, Michigan 48603 | p (989) 792-4499 | f (989) 792-7725 | www.masudlaborlaw.com

manner, no recess appointments could be made.[2] Thus, the recess appointments of members Griffin, Flynn, and Block were ineffective.

Beyond the Senate explicitly stating that it was in session and the Senate actually passing legislation, the fact that there was no recess is further evidenced by the House of Representatives not consenting to the Senate adjourning, as is required by Article I, § 5, Cl 4 of the Constitution. In order for either house of Congress to adjourn for more than three days, it must first get the consent of the other house. USCS Const. Art. I, §, Cl 4 ("[Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days ..."). There is no record of the House ever providing such consent. Indeed, it is common knowledge that the House never had any intention of consenting to the Senate adjourning for more than three days.[3] Therefore, the Senate was precluded from taking a recess under Congressional rules in any event.

Even the Obama Administration's previous position in New Process Steel, *supra,* foreshadowed that the appointments of members Griffin, Flynn, and Block were not effective recess appointments. In response to inquiry from the Supreme Court in that case, Solicitor General Elena Kagan (now Supreme Court Justice Kagan), citing a 1905 Senate Judiciary Committee report, argued in support of a two-person Board quorum that the Senate could continually frustrate the Executive Branch by blocking recess appointments through *pro forma* sessions of the type that have become commonplace since 2007. She wrote:

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[2] Further evidence that the Senate was in session, is the fact that it passed legislation between December 20, 2011, and January 23, 2012. On December 23, 2011, the Senate passed the payroll tax cut extension. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). It could not have done so if it were in recess.

[3] On May 25, 2011, twenty Senators noted the Senate's use of pro forma sessions in 2007 and "urge[d] [the Speaker of the House] to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the [P]resident's term." Press Release, Senator David Vitter, *Vitter, DeMint Urge House to Block Controversial Recess Appointments* (May 25, 2011), *available at* http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.

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4449 Fashion Square Boulevard, Suite 1 | Saginaw, Michigan 48603 | p (989) 792-4499 | f (989) 792-7725 | www.masudlaborlaw.com

> *Although a President may fill such vacancies through the use of his recess appointment power, as the president did on March 27 of this year, the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period.* ***For example, the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007.*** (Citations omitted). Presidents have not in recent decades made recess appointments during intrasession recesses lasting fewer than three days. See Congressional Research Service, *Intrasession Recess Appointments* (Apr. 23, 2004). The Board therefore may face the prospect of being reduced to two members in the future, in which case it may again seek to do what Section 3(b)'s terms permit – delegate all of its powers to a group of three members, two of whom may thereafter act as a quorum.

(Emphasis added). Letter from Elena Kagan to William K. Suter, Clerk of the Supreme Court (April 26, 2010) (attached). Since the Obama Administration has acknowledged use of Senatorial *pro forma* sessions as being a valid tool for blocking recess appointments, the Board should follow suit with respect to the lack of a proper NLRB quorum in this case.

CONCLUSION

The Board should recognize that it had only two properly appointed members at the time it issued its February 13, 2012, Order, thus rendering that decision invalid for lack of a quorum. The Board should also recognize that it continues to lack a properly constituted quorum sufficient to act at this time. Accordingly, Meredith respectfully requests that the NLRB take no action with respect to the Acting General Counsel's Motion to Transfer Proceedings to the Board and for Summary Judgment.

Respectfully submitted,

MASUD LABOR LAW GROUP

Dated: May 16, 2012

By: _____

Kraig M. Schutter (P45339)
Attorneys for Respondent
4449 Fashion Square Boulevard, Suite 1
Saginaw, MI 48603-5217
(989) 792-4499

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

April 26, 2010

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

New Process Steel, L.P. v. National Labor Relations Board
S. Ct. No. 08-1457

Dear Mr. Suter:

This letter is in response to the Court's order of April 16, 2010, requesting letter briefs from the parties addressing "[w]hat should be the effect, if any * * * on the proper disposition of this case" of the President's March 27, 2010 appointments of Mr. Craig Becker and Mr. Mark Gaston Pearce to serve as members of the National Labor Relations Board. In brief, the appointments of Members Becker and Pearce should have no effect on the proper disposition of this case.

The terms of the December 20, 2007 delegation order at issue in this case provided that the delegation would automatically "be revoked when the Board returns to at least three [m]embers." Pet. Br. Add. 7a. With the recess appointments of Members Becker and Pearce, the Board has four members and the delegation is no longer in effect.

This factual development does not render *New Process Steel, L.P.* moot. The Question Presented is whether Section 3(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 153(b), authorized Members Wilma B. Liebman and Peter C. Schaumber to act as a two-member quorum of the delegee group in deciding *New Process Steel, L.P.* The appointments of Members Becker and Pearce do not alter the Board's decision challenged in this case, which was decided in September 2008 by Members Liebman and Schaumber when they were acting as a quorum of a three-member group to which the Board had delegated all of its powers.

Moreover, the March 27, 2010 appointments do not affect the nearly 600 other cases decided by the Board between January 1, 2008 and March 26, 2010. See NLRB Cert. Br. 15-17. Indeed, there are four other cases currently pending in this Court (*Narricot Indus., L.P.* v. *NLRB*, No. 09-1248, petition for cert. pending (filed Apr. 15, 2010); *NLRB* v. *Laurel Baye Healthcare of Lake Lanier, Inc.*, No. 09-377, petition for cert. pending (filed Sept. 29, 2009); *Snell Island SNF, LLC* v. *NLRB*, No. 09-328, petition for cert. pending (filed Sept. 11, 2009);

Attachment

Northeastern Land Servs., Ltd. v. *NLRB*, No. 09-213, petition for cert. pending (filed Aug. 18, 2009))—and 76 additional cases currently pending in or decided within the last 90 days by the courts of appeals—in which litigants have challenged (or a court has sua sponte raised) the validity of the Board's decision because it was entered by the same two-member quorum of the delegee group.[1] All of these cases present live controversies because it remains the Board's position that the orders at issue are entitled to enforcement and that parties are obliged to comply with the judgments of the courts that have enforced such orders. Moreover, the Board no longer has jurisdiction over *New Process Steel, L.P.* or the other cases where jurisdiction was transferred to the relevant court of appeals or to this Court. See 29 U.S.C. 160(e) and (f) (providing that court of appeals obtains jurisdiction after party files a petition for review or enforcement and the record is filed in the court of appeals). The Board therefore lacks the ability to take any action—such as considering the cases anew by at least three members—that might render this case (or other cases pending in this Court and the courts of appeals) moot.

There are approximately 500 orders issued by Members Liebman and Schaumber in which no party has sought further review at the present time. But many of those Board decisions are in potential jeopardy as a result of the uncertainty regarding the meaning of Section 3(b)'s quorum and delegation provisions. An unusual feature of the NLRA is that no statutory provision or implementing regulation imposes a time limit for an aggrieved party to file a petition for review. See 29 U.S.C. 160(f). Moreover, because the Board's decisions are not self-enforcing, the Board must file a petition for enforcement with a court of appeals if a party to a case does not comply with a Board order. If an aggrieved party now petitions for review of a Board order or the Board seeks enforcement, the validity of the underlying order issued by the two-member Board is subject to challenge. Thus, an unknown but potentially large portion of those 500 orders could require reconsideration if this Court does not resolve the validity of the two-member decisions.

Absent further direction from this Court, it is unclear whether the Board has the authority to "ratify" the two-member decisions *en masse* without reconsidering each case individually. In any event, prudential considerations in these circumstances would weigh against the Board's exercising such authority in view of the high risk of potential challenges to a blanket ratification order. And individual reconsideration would impose a significant burden on the Board, whether acting through all four sitting members or through newly constituted groups of three members. Approximately 261 cases are currently pending before the Board, including 73 cases in which Members Liebman and Schaumber could not agree and 50 cases involving significant or novel issues that the two members chose to defer for decision. In addition, the Board decides between 300 and 400 cases annually in the normal

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[1] In addition, there are 22 cases pending in or recently decided by a court of appeals in which the two-member quorum issued the decision, but the litigants have not challenged the validity of the action on this basis.

course of business. Reconsidering a large number of additional cases would severely tax a still-short-handed Board.

Furthermore, such reconsideration could inject additional ambiguities (such as, for example, whether a particular Board order was effective on the date of the two-member decision or on the date of reconsideration) that parties might use to invite further litigation. The resulting uncertainty would impose a significant burden on employees, employers, and unions whose rights have been adjudicated by the Board or who have otherwise relied on the validity of a certification or order issued by the two-member quorum. For these reasons, a decision of this Court declining to decide whether the two-member decisions are valid would significantly burden the rights protected by the NLRA.

In addition to the retrospective harms engendered by continuing uncertainty over Section 3(b), the need for prospective guidance remains important. Although the recent period—which lasted nearly 27 months—is the longest the Board has ever been with only two sitting members since the Board was expanded to include five members in 1947, the Board has also had only two members on prior occasions. And given the complexities and potential length of the Senate confirmation process, multiple vacancies could arise again in the future. Although a President may fill such vacancies through the use of his recess appointment power, as the President did on March 27 of this year, the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period. For example, the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007. See Jim Rutenberg, *Bush, On His Way Out, Leads Others In*, New York Times, Dec. 7, 2008, at A39; Henry B. Hogue & Maureen Bearden, Congressional Research Service Report for Congress RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008*, at 6-7 (updated Nov. 3, 2008). Presidents have not in recent decades made recess appointments during intrasession recesses lasting fewer than three days. See Congressional Research Service, *Intrasession Recess Appointments* (Apr. 23, 2004).[2] The Board therefore may face the prospect of being

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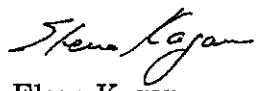
[2] A 1905 report of the Senate Judiciary Committee discussing the Recess Appointments Clause emphasized that the term is "used in the constitutional provision in its common and popular sense" rather than a "technical" sense. S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905) (reprinted in 39 Cong. Rec. 3823 (1905)). The Committee concluded that "recess" refers to "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions.*" *Id.* at 2. The Senate continues to view that report as authoritative. See *Riddick's Senate Procedure* 947 & n.46 (1992), http://www.gpoaccess.gov/riddick/index.html. To this day, official congressional documents define a "recess" as "any period of three or more complete days—excluding Sundays—when either the House of Representatives or the Senate is not in session." *2003-2004 Congressional Directory* 526 n.2 (Joint Comm. on Printing, 108th Cong., comp. 2003).

reduced to two members in the future, in which case it may again seek to do what Section 3(b)'s terms permit—delegate all of its powers to a group of three members, two of whom may thereafter act as a quorum.

Thus, the March 27 recess appointments of Members Becker and Pearce should have no effect on the proper disposition of this case.

Sincerely,



Elena Kagan
Solicitor General
SupremeCtBriefs@usdoj.gov

cc: See Attached Service List

08-1457
NEW PROCESS STEEL, L.P.
NATIONAL LABOR RELATIONS BOARD

JOSEPH W. AMBASH
GREENBERG TRAURIG, LLP
ONE INTERNATIONAL PLACE
BOSTON , MA 02110
617-310-6091

MARSHALL B. BABSON
HUGHES HUBBARD & REED LLP
ONE BATTERY PARK PLAZA
NEW YORK, NY 10004-1482
212-837-6000
BABSON@HUGHESHUBBARD.COM

MARSHALL B. BABSON
HUGHES HUBBARD & REED LLP
ONE BATTERY PARK PLAZA
NEW YORK, NY 10004-1482
212-837-6000

JAMES B. COPPESS
ASSOCIATE GENERAL COUNSEL
AFL-CIO
815 SIXTEENTH ST., N.W.
WASHINGTON, DC 20006

DENNIS M. DEVANEY, ESQ.
DEVANEY JACOB WILSON, PLLC
3001 W. BIG BEAVER RD.
SUITE 624
TROY, MI 48084
248-649-0990
DENNIS@DJWLAWFIRM.COM
248-649-7155 (Fax)

BARRY RICHARD
GREENBERG TRAURIG, P.A.
101 EAST COLLEGE AVENUE
TALLAHASSEE , FL 32301

08-1457
NEW PROCESS STEEL, L.P.
NATIONAL LABOR RELATIONS BOARD

SHELDON E. RICHIE
RICHIE & GUERINGER, P.C.
100 CONGRESS AVENUE,
SUITE 1750
AUSTIN , TX 78701
512-236-9220
DRICHIE@RG-AUSTIN.COM

MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L ST., N.W.
STE. 1000
WASHINGTON, DC 20037
202-331-3100

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PROOF OF SERVICE

The undersigned certifies that the Response of Meredith Corporation (KCTV) to Acting General Counsel's Motion to Transfer Proceedings to the Board and for Summary Judgment and Respondent's Brief in Support of Its Opposition to the Acting General Counsel's Motion to Transfer Proceedings to the Board and for Summary Judgment was served upon Charging Party's counsel, Christopher Repole, by mailing same to his address as disclosed by the pleadings of record, with postage fully prepaid and deposited in a government mail receptacle in the County of Saginaw, State of Michigan on the 16th day of May, 2012, and by e-mail.

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

Lisa M. Reagan

Lisa M. Reagan