

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

In the Matter of:

**SUB ACUTE REHABILITATION CENTER
AT KEARNY, LLC D/B/A BELGROVE
POST-ACUTE CARE CENTER,**

Employer

Case No.: 22-CA-093626

AND

**DISTRICT 1199J, NUHHCE, AFSCME,
AFL-CIO,**

Petitioner,

**SUB ACUTE REHABILITATION CENTER AT KEARNY, LLC D/B/A BELGROVE
POST-ACUTE CARE CENTER' S RESPONSE AND OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Counsel for General Counsel for Acting General Counsel has submitted a motion for summary judgment alleging that Sub-Acute Rehabilitation Center at Kearny, LLC, d/b/a Belgrove Post-Acute Care Center (“Belgrove” or “Company”) has refused to bargain with District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO (“District 1199J” or “Union”) in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5) for a bargaining unit consisting of licensed practical nurses. Belgrove asserts that the motion for summary judgment must be denied.

The Company asserts that there must be a hearing on the service of the charge. The charge was improperly served.

In addition, General Counsel’s request for summary judgment must also be denied because the National Labor Relations Board (“Board”) lacked a quorum and authority to issue its decision on August 24, 2012 denying Belgrove’s Request for Review of the Regional Director’s Decision and Direction of Election in 22-RC-80916. (Exhibit 8 of General Counsel’s Motion for Summary Judgment) Further, General Counsel’s request must be denied because the Board’s determination that licensed practical nurses were not supervisors is not supported by the record and by applicable law and is invalid.

STATEMENT OF THE FACTS

District 1199J filed a petition to represent licensed practical nurses (“LPNs”) working at Belgrove, a skilled nursing facility. Belgrove asserted that the petition must be dismissed because the LPNs are supervisors under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (hereinafter referred to as “Section 2(11)”).

A hearing was held on May 30, 2012 and June 1, 2012. The Company asserted that the LPNs were supervisors because they assign work, direct work, discipline employees or have the authority to discipline, suspend employees or have the authority to suspend, adjust grievances, and transfer employees. Belgrove asserted also that the LPNs were supervisors because they act as unit managers or house supervisors, positions which are supervisory positions under Section 2(11). The Regional Director issued a Decision and Direction of Election on June 26, 2012 that the LPNs were not supervisors. (Exhibit 6 of General Counsel's Motion for Summary Judgment) The Regional Director found that the appropriate unit consisted of all full-time, regular part-time and per-diem LPNs. (Id.) An election was then held in this unit.

The Company filed a Request for Review with the Board. (A copy of its Request for Review is annexed to General Counsel's Motion for Summary Judgment as Exhibit "7" and Belgrove's Request for Review is incorporated herein.) In its Request for Review, Belgrove again asserted that the LPNs were supervisors because they assign work, direct work, discipline employees or have the authority to discipline, suspend employees or have the authority to suspend, adjust grievances, and transfer employees. (Id.) Belgrove again asserted that the LPNs were supervisors because they acted as unit managers or house supervisors, positions which are supervisory positions under Section 2(11). (Id.)

On August 24, 2012, the Board issued an Order denying the Request for Review. (Exhibit 8 of General Counsel's Motion for Summary Judgment) In denying the Company's Request for Review, the Board, in particular, held in footnote 1 that even if the LPNs assign work or adjust grievances, the LPNs do not exercise independent judgment in making the assignments or adjusting grievances.

When the Board decided the case on August 24, 2012, two of the members of the Board (Ms. Block and Mr. Griffen) were appointed by President Obama as recess appointments. Ms. Block was part of the panel of three Board members who decided the case.

Subsequently the Board issued a Certification of Representation. (Exhibit 10 of General Counsel Motion for Summary Judgment) District 1199J was certified as the bargaining representative. (Id.)

On November 23, 2012, the Union filed a charge in the case at bar alleging that the Company had refused to bargain with the Union. (Exhibit "1" of General Counsel's Motion for Summary Judgment) The charge was served upon Respondent's counsel. (Exhibit "2" of General Counsel's Motion for Summary Judgment)

After receiving the charge by mail, Respondent's counsel e-mailed Ms. Mary Lou Rivas, the agent assigned to the case, that counsel was not authorized to receive service of the charge, that he would have to ascertain if he could accept service, and that the Region should serve Belgrove. (Exhibit "A" annexed to Weinberger Declaration In Opposition to Motion for Summary Judgment) Rivas then informed counsel that the charge had been served. The charge was not mailed to the Company. It was faxed to Belgrove on November 27, 2012. (Exhibit "A" attached to the Baumrind Declaration in Opposition to Motion for Summary Judgment)

On December 4, 2012, the Regional Director issued a complaint alleging that Belgrove had refused to bargain with the Union in violation of Section 8(a)(1) and (5). (Exhibit "4" of General Counsel's Motion for Summary Judgment) The Company filed an answer alleging that there was improper service of the charge, that the Board lacked a quorum and authority to issue the decision denying the Request for Review, and that the Board had incorrectly found that the

LPNs were not supervisors and that a unit of LPNs was an appropriate unit. (Exhibit “5” of General Counsel’s Motion for Summary Judgment)

ARGUMENT

POINT I: THERE WAS IMPROPER SERVICE OF THE CHARGE

The Board’s Rules and Regulations set forth how a charge is to be served upon a party. The Region failed to serve the charge upon the Company in accordance with the Board’s Rules and Regulations.

Under Section 102.14 of the Board’s Rules and Regulations, service of a charge is made as follows:

Sec. 102.14 *Service of charge.*— (a) Charging party's obligation to serve; methods of service. Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. Service may be made personally, or by registered mail, certified mail, regular mail, or private delivery service. With the permission of the person receiving the charge, service may be made by facsimile transmission or by any other agreed-upon method.

(b) Service as courtesy by Regional Director. The Regional Director will, as a matter of courtesy, cause a copy of such charge to be served by regular mail on the person against whom the charge is made. Such charges may, with the permission of the person receiving the charge, be served by the Regional Director by facsimile transmission. In this event the receipt printed upon the Agency's copy by the Agency's own facsimile machine, showing the phone number to which the charge was transmitted and the date and time of receipt shall be proof of service of the same. However, whether serving by facsimile, by regular mail, or otherwise, the Regional Director shall not be deemed to assume responsibility for such service.

The complaint in the case at bar was served upon Respondent’s counsel. The reason that this happened was that the Union incorrectly listed the Respondent’s counsel address in New York as the location of Belgrove, which is located in New Jersey.

After Respondent’s counsel received the charge, Respondent’s counsel informed the Board agent, Ms. Mary Lou Rivas, by e-mail that he was not authorized to receive service. (See Exhibit “A” to Weinberger’s Declaration in Opposition to the Motion for Summary Judgment)

The Respondent's counsel informed the Region that it had to serve Belgrove. The e-mail from Respondent's counsel to Rivas stated:

Dear Ms. Rivas:

First, as I said when the last charge was filed, I do not have the authority to accept service of the charge without permission of the Company. Was the charge served on the Company?

.....

The first matter for you to tell me if the charge was served on the Company. If not, I will have to ask for permission to accept service.

The next day, Rivas informed Respondent's counsel that the charge was served upon the Company. However, instead of following the Board's Rules and Regulations by serving the charge by mail, the Region faxed the charge to Belgrove. (See Exhibit "A" to Baumrind's Declaration in Opposition to the Motion for Summary Judgment) This was an obvious effort by the Region to shortcut the rules and to ignore the Board's Rules and Regulations.

The only affidavit of service attached to General Counsel's Motion for Summary Judgment is an affidavit that the charge was served on the Company's counsel. (See Exhibit "2" attached to the Motion for Summary Judgment) There is not even a claim that the charge was served directly on Belgrove.

Moreover, despite the Respondent's counsel telling the Region to serve the Company with the charge, General Counsel alleges that Belgrove's claim that it has not been served is "disingenuous." (Page 5 of General Counsel's Memorandum In Support of the Motion for Summary Judgment) General Counsel asserts that at no time did Respondent's counsel assert that he was not representing Belgrove. Instead of casting aspersions to hide the fact that the Region failed to follow the Board's Rules and Regulations, General Counsel should follow the

Board's Rules and Regulations and serve Belgrove, particularly when it was told by the Respondent's counsel that it should follow the rules. General Counsel continues to ignore that the rules require service on a party even if they are represented by counsel, particularly where the Region is told that the attorney may not be authorized to accept service of a charge. Section 102.113(f) General Counsel cannot provide any justification for General Counsel's failure to follow the rules. Clearly, rules regarding service of a charge must be followed. By simply following the rules, General Counsel can avoid issues regarding service. Thus, the Board must dismiss the complaint because the charge was not served upon Belgrove. If the Board does not dismiss the charge, then there should be a hearing on whether there was service of the charge in accordance with the Board's Rules and Regulations.

**POINT II: THE BOARD HAD NO AUTHORITY TO DECIDE BELGROVE'S
REQUEST FOR REVIEW AND TO DECIDE THIS MOTION FOR SUMMARY
JUDGMENT**

In order for the Board to decide a case, the Board must have at least three members. New Process Steel, L.P. v. NLRB, -U.S.-, 130 S.Ct. 2635, 177 L.Ed. 4162 (2010). At the time the Board decided the Company's Request for Review, the Board did not have three lawfully designated members. In addition, there are not three lawfully designated members presently. Thus, the Board's decision on the Request for Review is invalid and any decision made by the Board as presently constituted will be invalid.

Further, the Acting General Counsel lacks authority to prosecute this case. The Acting General Counsel was improperly appointed. The Acting General Counsel lacks authority to issue the complaint.

- A. The Board Had No Authority To Decide The Company's Request for Review and Does Not Have Authority to Decide this Motion for Summary Judgment.

On January 3, 2012, former member Craig Becker's term on the Board expired, leaving only

two members of the Board. The next day, January 4, 2012, President Barack Obama made three recess appointments to the Board. The President appointed Members Richard Griffin, Terence Flynn and Sharon Block to the Board. Belgrove asserts that these appointments were not lawfully made by the President. The United States Senate was still in session when these recess appointments were made by the President, precluding the President from making recess appointments. When the Senate is in session the President needs the advice and consent of the Senate to appoint members to the Board.

The Company asserts that the Senate was still in session when the President made the recess appointments. The Senate convened pro forma sessions every three business days. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011); U.S. Senate Daily Summary, Senate Floor Schedule for Pro Formas and Monday January 23, 2012 (December 17, 2011). <http://democrats.senate.gov/2011/12/17/senate-floor-schedule-pro-formas-and-monday-january-23-2012>; 158 Cong. Rec.S3, S5, S7, and S9 (daily ed. Jan. 23, 2012)

Under the Constitution's Appointment clause, the President shall nominate Board members to be approved by the Senate. U.S. Const. art II, §2, cl.2. If the Senate is in recess, the President has the power to make recess appointments which expire at the end of the next Congress. U.S. Const. art II, §2, cl.3. In addition, under art I, §5, cl.4 of the Constitution, neither the Senate nor the House of Representatives shall adjourn for more than three days without the consent of the other.

The pro forma sessions count as days that the Senate is in session. Some examples of how the Senate remains in session during these pro forma sessions are that (1) committees can meet during the pro forma sessions. 154 Cong. Rec. 8907-01, (2) the Presiding Officer can be authorized to sign bills and joint resolutions, and (3) Senate schedules can be altered. 127 Cong.

Rec. 263 (1981). Legislation can also be passed. On December 23, 2011, in a pro forma session, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011, 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765). The Senate could also have acted on the nomination of the three Board members.

Further, under the Constitution, it must be the Senate, not the President, to determine when the Senate is in recess. U.S. Const. art I, §5, cl.2. The House of Representative also never stated that the Senate was adjourned.

In interpreting these provisions in the Constitution, courts have held that it was for Congress to determine its own rules of governance. Marshall Field & Co. v. Clark, 143 U.S. 649, 672, 12 S.Ct. 495 (1892); Public Citizen v. U.S. Dist. Court for the Dist. Of Columbia, 486 F.3d 1342, 1351 (D.C. Cir. 2007). In United States v. Ballin, 144 U.S. 112 S.Ct. 507 (1892), the Court upheld the passage of legislation finding that “[t]he constitution empowers each house to determine its rules of proceedings.” Id. at 144 U.S. at 5.

Until President Obama made these appointments, the Executive Branch also had indicated that there must be a recess of more than three days in order to make lawful recess appointments. In 1921, then Attorney General Daugherty stated that there must be a recess of more than three days before the President can make a recess appointment. 33 Op. Att’y General 20, 24 (1921). This argument was repeated by the Solicitor General in the New Process Steel case before the Supreme Court.

Based upon the foregoing, Belgrove asserts that the President could not have made the recess appointments. There must be a recess in order for there to be a legitimate appointment. Evans v. Stephens, 387 F.3d 1220, 1224 (11th Cir. 1994) (holding that there must be a Senate

recess for an appointment to be lawful). The Senate was not adjourned and it was not adjourned for more than three days.

In Center for Social Change, Inc., 358 NLRB No. 24 (2012), the Board “declined” to address these arguments to “determine the merits of the claim attacking the validity of Presidential appointments.” Id. Instead of addressing these arguments, the Board held that there is a “well settled presumption of regularity of the official of acts of public officers. [citations omitted]” Id. The Board rejected the claims that it lacked a quorum.

General Counsel also fails to address, in the case at bar, the arguments about the validity of the Presidential appointments. Citing Lutheran Home at Moorestown, 334 NLRB 340 (2001), General Counsel relies also on the “presumption of regularity” supporting the acts of an official public officer to claim that the Board should not address the validity of the Presidential appointments. (Page 5 of General Counsel’s Memorandum in Support of its Motion)

Whether the Board declines to address the merits of the Presidential appointments either because of its policy of presuming the appointments to be valid or because it does not have jurisdiction to determine these claims, the merits of the Presidential appointments will be determined. The validity of the appointments will be addressed by the Courts, including potentially the United States Supreme Court. Several cases are pending in various U.S. Court of Appeals, including Canning v. NLRB, Case Nos. 12-1115 and 12-1153 (D.C. Cir.), where a involving the issue of the appointments.

Belgrove asserts that the appointments were invalid and the Board did not and does not have a quorum to act. The Board did not have a lawful quorum when it denied Belgrove’s Request for Review and it does not have a lawful quorum now. Based upon the Board not having a lawful quorum, General Counsel’s Motion for Summary Judgment must be denied.

B. The Complaint Is Ultra Vires

Belgrove asserts that the Acting General Counsel is not lawfully holding office. Acting General Counsel could not lawfully have issued the complaint.

Under Section 3(d) of the National Labor Relations Act, 29 U.S.C. §153(d), the President appoints the individual as General Counsel during a vacancy. However, it is further provided that “no person or persons designated shall so act... for more than forty days when Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate...”

Id.

In the case at bar, the President designated the current Acting General Counsel on June 21, 2010. The President never submitted a nomination to the Senate to fill the vacancy within forty days of the designation.

The President appointed the Acting General Counsel under the Federal Vacancies Reform Act, 5 U.S.C. §3345(a). This is an alternate procedure for appointments to fill vacancies.

Belgrove asserts that the procedure under the Federal Vacancies Reform Act does not apply because there is a specific procedure under the National Labor Relations Act for filling the vacancy. The National Labor Relations Act must govern in filling the vacancy.

In Lutheran Home at Moorestown, supra, the Board found that the Acting General Counsel at that time was lawfully appointed in accordance Federal Vacancies Reform Act. Belgrove asserts that the Board’s decision is inconsistent with the provisions under National Labor Relations, which govern the appointment of General Counsel and not the Federal Vacancies Reform Act. The Company preserves its right to challenge this issue to the

appropriate Court of Appeals should the Board grant General Counsel's Motion for Summary Judgment.

POINT III: BELGROVE HAS NOT REFUSED TO BARGAIN IN VIOLATION OF SECTION 8(a)(1) and (5)

The Company asserts it has not violated section 8(a)(1) and (5) of the Act by refusing to bargain. As set forth in Belgrove's answer to the Complaint, the Certification of Representation (Exhibit "10" of General Counsel's Motion for Summary Judgment) issued by the Board is invalid because the unit consists of supervisors as defined under Section 2(11) of the Act. Belgrove is not obligated to bargain in the unit that the Board certified of LPNs because all the LPNs in that unit are supervisors under Section 2(11) of the Act. The unit is inappropriate. General Counsel's Motion for Summary Judgment should be denied.

Belgrove asserts that it does not have to bargain because the certification is invalid. In contesting the certification and in opposition to this Motion for Summary Judgment, Belgrove incorporates herein the record in the representation proceeding in 22-RC-080916. Belgrove repeats and re-alleges all the arguments put forward by Belgrove in the representation proceeding, including that the Company incorporates by this reference, as though fully set forth herein, all the arguments in the Company's Request for Review to the Board (Exhibit "7" of General Counsel's Motion for Summary Judgment), in its opposition to the Motion for Summary Judgment. In its opposition to the Motion for Summary Judgment, Belgrove further desires to preserve all the arguments for review by the courts that were raised by Belgrove before as to why the LPNs are supervisors and the unit is inappropriate in 22-RC-080916 and which are incorporated herein in this Response and Opposition to General Counsel's Motion for Summary Judgment, specifically including the arguments raised in the Request for Review.

The Company is aware that the Board's policy is not to review the issues that were raised in representation proceeding unless there is newly discovered evidence that was unavailable or special circumstances that would require the Board to re-examine its decision. Lifesource, 359 NLRB No. 45 (2012). The Board's policy is to find that the employer cannot raise representation issues that are properly litigable in unfair labor practice cases, usually citing Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Id.

In the case at bar, the Company acknowledges that the Board is unlikely to review the issues raised in the representation proceeding based upon prior Board decisions. However, if the Board were to overrule these cases or to consider this case a special circumstance because the nature of the supervisory issues involving nurses requires a close scrutiny as suggested by the dissent in Leisure Chateau Care Center, 340 NLRB 346 (2000), the Board must find that the LPNs are supervisors. The Board's holding that the LPNs are not supervisors is inconsistent with prior Board decisions, including Oakwood Healthcare, Inc., 348 NLRB 686 (2006), and court decisions, including NLRB v. Attleboro Associates, LTD, 176 F.3d 154 (3rd Cir. 1999). The LPNs are supervisors because:

- (a) they assign work. (See Point A (1) under VI Argument in the Request for Review in Exhibit "7" of General Counsel's Motion for Summary Judgment which is in incorporated herein.)
- (b) they direct work. (See Point A (2) under VI Argument in the Request for Review in Exhibit "7" of General Counsel's Motion for Summary Judgment which is in incorporated herein.)
- (c) they discipline employees or have authority to discipline employees. (See Point B under VI Argument in the Request for Review in Exhibit "7" of

General Counsel's Motion for Summary Judgment which is incorporated herein.)

(d) they have authority to suspend employees. (See Point B under VI Argument in the Request for Review in Exhibit "7" of General Counsel's Motion for Summary Judgment which is incorporated herein.)

(e) they adjust grievances. (See Point C under VI Argument in the Request for Review in Exhibit "7" of General Counsel's Motion for Summary Judgment which is incorporated herein.)

(f) they transfer employees. (See Point D under VI Argument in the Request for Review in Exhibit "7" of General Counsel's Motion for Summary Judgment which is incorporated herein.)

The LPNs exercise independent judgment in performing these functions. In addition, they are supervisors because they act as unit managers and house supervisors, who are supervisors. (See Point E under VI Argument in the Request for Review in Exhibit "7" of General Counsel's Motion for Summary Judgment which is incorporated herein.) The Board must review this response and opposition to the Motion for Summary Judgment as well as the Request for Review (Exhibit "7" of General Counsel's Motion for Summary Judgment) and deny the Board's Motion for Summary Judgment because the LPNs are supervisors. The certification is invalid because the unit consists of supervisors.

Moreover, while the Board should find that LPNs are supervisors for the foregoing reasons and review the Request for Review (Exhibit "7" of General Counsel's Motion for Summary Judgment), the Board should also include in its review its findings in footnote 1 of its Order where it denied the Company's Request for Review (Exhibit 8 of General Counsel's

Motion for Summary Judgment) that LPNs are not supervisors because they do not exercise independent judgment. The Board in footnote 1 found that even if the LPNs assign work, they are not supervisors because they did not exercise independent judgment. As indicated in Point A (1) under VI Argument in the Request for Review, the LPNs clearly assign work to certified nurses aides (“CNAs”). This includes, but is not limited to, assigning CNAs to patients, moving CNAs, and determining which CNAs are assigned to patients as they enter the facility. Moreover, the record clearly and unequivocally states that these assignments by LPNs are made using their independent judgment. The finding is inconsistent with the record, applicable law and requires a re-examination.

Further, the Board’s finding in footnote 1 of its decision that it does not have to determine whether the LPN adjustment of grievances is for only minor disputes because the LPNs do not exercise independent judgment. However, it is beyond peradventure in the record that LPNs exercise independent judgment in adjusting the grievances. (See Point C under VI Argument in the Request for Review in Exhibit “7” of General Counsel’s Motion for Summary Judgment which is incorporated herein.) Thus, if a CNA has a problem with a resident, the LPN can re-assign the CNA to another resident.

Regardless of whether the Board re-examines the record and its determination that LPNs are supervisors because it will not review issues that were raised in representation proceedings, Belgrove again reiterates, refers to and incorporates by this reference all the arguments that it has made in 22-RC- 080916, including Belgrove’s Request for Review, and that it makes now to the Board as to why the LPN are supervisors and why the General Counsel’s Motion for Summary Judgment should be denied. Should General Counsel’s Motion for Summary Judgment motion be granted by the Board, Belgrove wishes to preserve for review by the courts its arguments that

the unit is not appropriate, that the LPNs are supervisors under Section 2(11), and that the Certification of Representation is invalid.

In sum, Belgrove has not violated the Act by refusing to bargain with the union because the unit is inappropriate. The LPNs are supervisors under Section 2(11).

CONCLUSION

The Board must deny General Counsel's Motion for Summary Judgment. General Counsel has failed to serve the unfair labor practice upon Belgrove. Without proper service, there can be no finding by the Board against Belgrove. In addition, the Motion for Summary Judgment must be denied because the Board did not have a lawful quorum when it issued an Order on denying the Request for Review and does not have a lawful quorum now.

The General Counsel's Motion for Summary Judgment must also be denied because the unit is inappropriate and the Certification of Representation is invalid. The LPNs are supervisors.

Dated: January 15, 2013
New York, New York

Respectfully submitted,

/s/ Stuart Weinberger
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**NATIONAL LABOR RELATIONS BOARD
REGION 22**

In the Matter of:

**SUB ACUTE REHABILITATION CENTER
AT KEARNY, LLC D/B/A BELGROVE
POST-ACUTE CARE CENTER,**

Employer

Case No.: 22-CA-093626

AND

AFFIRMATION OF SERVICE

**DISTRICT 1199J, NUHHCE, AFSCME,
AFL-CIO,**

Petitioner,

STUART WEINBERGER, declares pursuant to 28 U.S.C. Section 1746, as follows:

I am not a party to this action and reside in Westchester, New York. On January 15, 2013, I served the Response and Opposition to the Motion for Summary Judgment in this matter by e-mailing the post-hearing brief to Arnold Cohen, Esq. of Oxfeld Cohen, P.C., 60 Park Place, 6th Floor, Newark, New Jersey 07102 at the e-mail address of asc@oxfeldcohen.com, which is the address designated by him, and Joshua Mendelsohn, Esq, counsel for Acting General Counsel, at the e-mail address of joshua.mendelsohn@nlr.gov, the address designated by him.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on the 15th day of January, 2013.

/s/ Stuart Weinberger
Stuart Weinberger