UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

1621 ROUTE 22 WEST OPERATING COMPANY, LLC d/b/a SOMERSET VALLEY REHABILITATION & NURSING CENTER

And **Case Nos. 22-CA-69152**
22-CA-74665

1199 SEIU UNITED HEALTHCARE WORKERS EAST, NEW JERSEY REGION

RESPONDENT'S MOTION TO STAY PROCEEDINGS

Submitted by:

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Respondent 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center ("Somerset" or "Respondent") moves for an indefinite stay of these proceedings. Respondent submits that the National Labor Relations Board ("NLRB" or "Board") presently lacks a constitutionally valid quorum and, as such, does not have authority to take action in this matter. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010); *Noel Canning v. NLRB*, 2013 U.S. App. LEXIS 1659 (D.C. Cir. Jan. 25, 2013). As grounds for this Motion, Respondent states:

I. Introduction

Between December 17, 2011, and January 23, 2012, the United States Senate held a series of "pro forma" sessions to break the intervening period into three-day adjournments so as to comply with its obligation under the Constitution, Art I, § 5, cl. 4, not to adjourn for more than three days during a congressional session without the consent of the United States House of Representatives. *See* Statement of Charles J. Cooper before the House Committee on Education and Workforce concerning "The NLRB Recess Appointments: Implications for America's Workers and Employers," § I (Feb. 7, 2012) (hereinafter "Cooper at __").[1] At one of these pro forma sessions, the Senate passed a two-month extension of the payroll tax cut, as requested by the President. 157 Cong. Rec. S8749 (daily ed. Dec. 17, 2011). Furthermore, on January 3, 2012, the Senate met in pro forma session to convene the second session of the 112th Congress and to comply with the requirement of the Twentieth Amendment to the Constitution that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint

[1] This Statement is available on the Committee's website: http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=277173

a different day." The Senate did not go into recess at the conclusion of that day's assembly. Rather, the Senate was scheduled to meet in pro forma session again on January 6, 2012. *See* Testimony of Sen. Michael S. Lee before the House Committee on Oversight and Government Reform concerning "Unchartered Territory: What are the Consequences of the President's Unprecedented 'Recess' Appointments" at 1 (Feb. 1, 2012) (hereafter "Lee at ___").[2] The following day, January 4, 2012, the President made four "recess" appointments, including Sharon Block, Terence F. Flynn, and Richard Griffin to fill three vacant seats on the Board. Without these three members, the Board would only have had two members (Mark G. Pearce and Brian Hayes) and lacked the quorum needed to take action. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Terence F. Flynn resigned on July 24, 2012. He has not been replaced. Additionally, Member Hayes's term expired on December 16, 2012, and he has not been replaced.

II. Law and Argument

Respondent respectfully submits that the "recess" appointments of Sharon Block and Richard Griffin to the Board violated the Constitution and are void *ab initio*. These appointments were not confirmed by the Senate and were not made during the Senate's Recess. Accordingly, with only one validly appointed member, the Board presently lacks authority to act in this matter.

[2] This testimony is available on the Committee's webpage: http://oversight.house.gov/hearing/uncharted-territory-what-are-the-consequences-of-president-obamas-unprecedented-recess-appointments/

The Appointments Clause gives the President power "by and with the Advice and Consent of the Senate to … appoint … Officers of the United States." U.S. Constitution, Art. II, § 2, cl. 2. As a supplement to this procedure, the Recess Appointments Clause authorizes the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Constitution, Art. II, § 2, cl. 3. *See The Federalist No. 67* (Alexander Hamilton). The Framers gave the President this "auxiliary" authority, which allows the President to bypass the Senate only in a limited circumstance, because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and yet "vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay." *See The Federalist* No. 67 (emphasis in original). The need for recess appointments, and consequently the power to make recess appointments, however, does not exist during periods when the Senate is not in recess.

With respect to the President's three appointments to the NLRB on January 4, 2012, the Senate was not in recess, nor was the Senate in its Recess at the time. The President made these appointments the day after the Senate met and in the midst of a period when the Senate adjourned for no more than three days between pro forma sessions. As early as 1921, it has been recognized that "an adjournment of 5 or even 10 days [does not] constitute the recess intended by the Constitution." Opinion of U.S. Attorney Harry M. Daugherty, 33 U.S. Op. Att'y Gen. 20, 24-25 (1921). Most recently, Deputy Solicitor General Neal Katyal, during oral argument before the Supreme Court in *New Process Steel, L.P.*, stated that the "recess appointment power can work in – in a

recess. I think our office has opined the recess has to be longer than 3 days." (*New Process Steel, L.P. v. NLRB*, Case No. 08-1457, Transcript of Oral Argument, Mar. 23, 2010, at 50, lines 3-5).

Nevertheless, an even more fundamental reason for asserting that the Senate was not in recess on January 4, 2012, exists – the Senate says that it was not in recess. *See* Lee at 1. The Constitution vests in each House of Congress the power to "determine the Rules of its Proceedings." U.S. Constitution, Art. I, § 5, cl. 2. Rules "governing how and when the Senate meets and adjourns are quintessential rules of proceedings." Cooper at § IV. The Rulemaking Clause commits to the Senate judgments about the meaning of its own rules. Indeed, as the Supreme Court held in *United States v. Balin*, 144 U.S. 1 (1892):

> Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. *The power to make rules is* not one which once exercised is exhausted. It is a continuous power, *always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal*.

Id. at 5 (emphasis added).

Pursuant to the separation of powers constitutionally engrafted into our system of government, therefore, it is not the province of the Executive Branch to dictate the Senate's rules of proceedings or authoritatively determine the meaning of those rules.

The Senate's determination that it was repeatedly in session, and not in recess, between December 17, 2011, and January 23, 2012, therefore, should be determinative.

Accordingly, the appointments of Block and Griffin to the Board during a period when the Senate was not in recess violated the Constitution and are void *ab initio*; therefore, the Board currently lacks a quorum to lawfully take action. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010); *Noel Canning v. NLRB*, 2013 U.S. App. LEXIS 1659, at *23-45 (D.C. Cir. Jan. 25, 2013) (holding that the term "the Recess" is limited to intersession recesses and finding the appointments on January 4, 2012 invalid and that the Board lacked a quorum when it issued the decision in that case, vacating the Board's decision).

Alternatively, the "Vacancies" to which Block and Griffin were appointed did not "happen" during the Recess of the Senate. U.S. Constitution, Art. II, § 2, cl. 3 (authorizing President to "fill up all Vacancies that may happen during the Recess of the Senate . . .."). Instead, they arose during the session, at a time when the President lacked the authority to make recess appointments. The Board seats at issue here became vacant on August 27, 2010, August 27, 2011, and January 3, 2012. *Noel Canning*, 2013 U.S. App. LEXIS 1659, at *20, 61, citing 158 Cong. Rec. S582-83 (daily ed. Feb. 13, 2012); 152 Cong. Rec. 17,077 (2006). On August 27, 2010 and August 27, 2011, the Senate was in an *intra*session recess, not an *inter*session recess. *Id*. at *61. Additionally, the seat formerly held by Member Becker became vacant at the "End" of the Senate's session on January 3, 2012, not during any recess. *Id*. at *61-68. Accordingly, for this alternative reason, the appointments of Block and Griffin were

unconstitutional and the Board cannot lawfully take action because it lacks a quorum. *Noel Canning*, 2013 U.S. App. LEXIS 1659, at *45-68.

Further in the alternative, in the event that that the President's January 4, 2012 "recess" appointments are valid, the terms of Block's and Griffin's recess appointments expired at the "End" of Senate's "next Session." *See* U.S. Constitution, Art. II, § 2, cl. 3; *The Federalist No. 67* (Alexander Hamilton). The last day of the 112th Congress's second session was January 3, 2013.[3] Accordingly, even if Block and Griffin were constitutionally appointed, their terms have now expired and the Board lacks a quorum.

Additionally, pending final action of the Board in this matter, the Regional Director sought injunctive relief against Somerset in the U.S. District Court for the District of New Jersey under Section 10(j) of the Act in *Lightner v. 1621 Route 22 West Operating Co., LLC*, Civil Action No. 3:12-cv-04696-MLC-LHG. In a telephone conference with counsel on February 25, 2013, the Magistrate Judge advised that the Court had "grave concerns" about its jurisdiction in light of the decision in *Noel Canning v. NLRB* and would enter an order to administratively stay the 10(j) matter and terminate the case. The District Court subsequently entered its order on March 1, 2013. The Board similarly should refuse to take action at this point in time.

Respondent is aware of the Board's decision on this issue in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), in which the Board essentially side-stepped these issues and relied upon a presumption of regularity of the official acts of public officials. Notwithstanding the evidence and arguments that may or may not have been presented to the Board in that case, Respondent submits that the evidence set forth

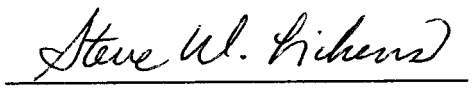
[3] See the Days in Session Calendar for 112th Congress second session for the days on which the Senate was in session for that session of Congress:
http://thomas.loc.gov/home/ds/s1122.html

above constitutes clear evidence to the contrary that such a presumption is not only unwarranted, but overcome. To the extent the Board continues to adhere to its position on this issue in *Center for Social Change, Inc.*, Respondent files this motion to preserve the issue for any proceedings for review or enforcement that may take place in the Circuit Court of Appeals.

III. Conclusion

For the reasons set forth above, the Board should stay these proceedings until a constitutionally valid quorum has been appointed and the Board again has the requisite number of members to act.

Respectfully submitted,



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The undersigned hereby certifies that copies of the foregoing pleading were served on March 5, 2013, in the manner set forth below:

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