UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES-SAN FRANCISCO

PRIME HEALTHCARE CENTINELA, LLC dba CENTINELA HOSPITAL MEDICAL CENTER, **Respondent,** **v.** **SEIU-UNITED HEALTHCARE WORKERS - WEST,** **Charging Party.**	**Cases 31-CA-030055** **31-CA-030091** **31-CA-068109** **31-CA-072675**

MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE TO STAY ALL PROCEEDINGS AND VACATE PRIOR PROCEEDINGS DUE TO LACK OF BOARD AUTHORITY TO ACT

In accordance with *Noel Canning v. NLRB,* 705 F.3d 490, 2013 U.S. App. LEXIS 1659 (D.C. Cir 2013), and *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Board has not been legally authorized to take any action on any matters since at least August 28, 2011, the last date on which the Board had a lawful quorum of Members. The Board most certainly has not been legally authorized to take any action since January 4, 2012, the first date following the expiration of the "recess" appointment of Craig Becker. Accordingly, the Board has had no authority to appoint any agents to act on behalf of the Board at any of the times relevant to this Motion, and the purported appointment of Mori Pam Rubin as Regional Director for Region 31 on or about May 23, 2012 was and is invalid. The Board also has had no authority during the relevant period to issue unfair labor practice complaints or to conduct any proceedings thereon. For all of these reasons the Consolidated Complaint in this matter, issued on April 27, 2012 by Ms. Rubin, is and was invalid *ab initio.* The Consolidated Complaint should therefore be

immediately dismissed. Alternatively, all proceedings in this matter should be stayed pending the lawful appointment of a quorum of Board Members and the issuance of a lawful complaint, and all proceedings on the Consolidated Complaint to date should be vacated.

ARGUMENT

A. The Board As Currently Constituted May Not Act Because There Is No Lawful Quorum

In *New Process Steel,* the U.S. Supreme Court determined that the Board may not lawfully act at any time there are not at least three Members who are serving on the Board. Respondent contends that the Board has not had a lawful quorum at any time since August 27, 2011, when Member Liebman's appointment expired, because none of the individuals purportedly serving as Members of the Board since that time who were the subject of "recess" appointments were validly appointed to the Board. Respondent further contends that, at the very least and as relevant to the instant matter, the Board has not had a lawful quorum since at least January 3, 2012 because the recess appointments of Sharon Block and Richard Griffin were void *ab initio*.

Between December 17, 2011 and January 23, 2012, the U.S. Senate held a series of "pro forma" sessions to break the intervening period into three-day adjournments so that the Senate could comply with its obligation under the Constitution not to adjourn for more than three days during a congressional session without the consent of the U.S. House of Representatives. See, i.e., Statement of Charles J. Cooper before the House Committee on Education and Workforce concerning "The NLRB Recess Appointments: Implications for America's Workers and Respondents (Feb. 7, 2012) (hereinafter "Cooper Statement"), § 1.[1] At one of these pro

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

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 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, i.e., 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" (Feb. 1, 2012) ("Lee Statement"), p. 1.[2] The following day, January 4, 2012, the President made three "recess" appointments (Sharon Block, Terence F. Flynn, and Richard Griffin) to fill three vacant seats on the Board ("January 4 Appointments"). Without the January 4 Appointments, the Board would only have had two members (Mark G. Pearce and Brian Hayes) on that date and thereafter, and would therefore have lacked the quorum needed to take action pursuant to *New Process Steel*.[3]

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

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[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/.

[3] 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.

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.

The Senate was not in recess when the January 4 Appointments were made. 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*, 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 50:3-5.

There is an even more fundamental reason for finding that the Senate was not in recess on January 4, 2012 – the Senate says that it was not in recess. 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 Statement at § IV. The Rulemaking Clause

commits to the Senate judgments about the meaning of its own rules. 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). Accordingly, it is not the province of the Executive Branch to dictate the Senate's rules of proceedings or 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 should be determinative.

In sum, then, the January 4 Appointments violated the Constitution because they did not occur during a recess, were therefore void *ab initio,* and the Board has lacked the necessary quorum to lawfully take action at all relevant times.

Alternatively, the January 4 Appointments were void *ab initio* because the vacancies at issue did not "happen" during a "Recess" within the meaning of the recess appointments clause of the Constitution (U.S. Constitution, Art. II, § 2, cl. 3). 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 January 4 Appointments were unconstitutional. *Noel Canning*, 2013 U.S. App. LEXIS 1659, at *45-68.

Further in the alternative, in the event that that the January 4 Appointments were valid at the time they were made, the January 4 Appointments expired on January 3, 2013, at the "End" of the Senate's "next Session." U.S. Constitution, Art. II, § 2, cl. 3; *The Federalist No. 67* (Alexander Hamilton).[4]

B. The Consolidated Complaint Was Void *Ab Initio*

Section 10(b) and (c) of the Act confer upon the Board the authority to issue unfair labor practice complaints, to conduct hearings on those complaints, and to issue decisions finding that one or more unfair labor practices have been committed or dismissing the allegations in the complaints. Section 10(b) and (c) also permit the Board to designate one or more agents to issue unfair labor practice complaints, to conduct hearings on those complaints and to make recommended decisions on the allegations of the complaints. However, and as shown, the Board has had no authority to take any actions since at least January 4, 2012. It therefore follows that the Board's agents, including its Regional Directors and Administrative Law Judges, have had no authority to take any actions since that time inasmuch as an agent can only exercise authority that resides in the agent's "master." Accordingly, the Board's purported appointment of Ms.

[4] 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, available at http://thomas.loc.gov/home/ds/s1122.html.

Rubin to be the Regional Director for Region 31 on May 23, 2012 (see, i.e., http://www.nlrb.gov/news-outreach/announcements/mori-pam-rubin-appointed-regional-director-nlrb-los-angeles-ca-regional-, last visited 03/20/2013), and the Consolidated Complaint issued in this matter, were both void *ab initio*. Similarly, the Administrative Law Judge was without authority to conduct a hearing on the allegations of the Consolidated Complaint or to make any rulings relating to the Consolidated Complaint.

Respondent is aware of the Board's decision in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), in which the Board essentially side-stepped the employer's challenge to the Board's authority to act based on *New Process Steel* and the asserted invalidity of the January 4 Appointments by relying on a presumption of regularity of the official acts of public officials. Respondent is also aware of Chairman Pearce's statements following the D.C. Circuit's *Noel Canning* decision questioning the outcome reached in that case and stating that the Board would continue to process cases pending before it notwithstanding the D.C. Circuit's decision. Respondent respectfully submits that the undisputable facts set forth above fully rebut the presumption relied on in *Center for Social Change* and that continued processing of this matter at this time will only result in an additional waste of time and resources for the Board, Respondent and the Charging Party.

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CONCLUSION

Wherefore, it is respectfully requested that the Administrative Law Judge dismiss the Consolidated Complaint. Alternatively, the Administrative Law Judge should vacate all prior proceedings on the Consolidated Complaint and stay this matter until such time as the Board has a validly constituted quorum and a valid complaint has been issued on the underlying unfair labor practice charges.

Dated: March 20, 2013

Respectfully submitted,

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31-CA-068109, 31-CA-072675

PROOF OF SERVICE BY E-MAIL

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On March 20, 2013, I served a true and correct copy of the within document(s):

MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE TO STAY ALL PROCEEDINGS AND VACATE PRIOR PROCEEDINGS DUE TO LACK OF BOARD AUTHORITY TO ACT

by e-mailing the document(s) to the following person(s) at the e-mail address(es) listed below:

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I declare under penalty of perjury that the above is true and correct.

Executed on March 20, 2013, at San Diego, California.

Theodore R. Scott