UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CREATIVE VISION RESOURCES, LLC

and CASE NO. 15-CA-020067

LOCAL 100, UNITED LABOR UNIONS

RESPONDENT'S REPLY BRIEF

COMES NOW, Creative Vision Resources, LLC and files this reply brief to Counsel for Acting General Counsel's answering brief to Respondent's Cross Exceptions to the Decision of the Administrative Law Judge. For a statement of the facts, please see Respondent's brief in support of exceptions.

Cross Exception No. 1 – The Quorum Issue

Counsel for Acting General Counsel (AGC) maintains there is a conflict within the circuit courts of appeal on the constitutional question of whether the current NLRB has a legally constituted quorum. Decisions from the Eleventh, Ninth, and Second Circuit Courts of Appeal are cited for the proposition that the current NLRB has a constitutionally appropriate quorum. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2nd Cir. 1962). These cases are presented to distinguish the decision by the D.C. Circuit Court in *Noel Canning v. NLRB*, No. 12-1115, 12-11-53, 2013 WL 27 6024 (D.C. Cir. Jan. 25, 2013), and to support the assertion of a conflict between the circuits. The three decisions, however, do not conflict with *Noel Canning* since they deal with a different Constitutional issue and are distinguishable in other ways.

Evans, Woodley, and *Allocco* involve the appointment of federal judges. This is a unique and distinguishable Constitutional issue involving the application of Article III judges and the unique tension between the requirements of an independent federal judiciary and the temporary appointment status of the recess appointment clause in Article II of the Constitution. The *Evans* case is also distinguishable since it did not consider the full structure of the recess appointment clause. It was premised on an incomplete statement of that clause's purpose that omitted the language dealing with the Senate being unable to render advice and consent. Further, the *Evans* court did not address the Constitution's use of the word "adjournment" and "recess" which rendered "recess" superfluous, thereby ignoring the Constitution's Framers' specific choice of words.

Cross Exception No. 2 – The ALJ's Crediting the Testimony of Hopper Eldridge Flagge and Counsel for AGC's Argument of Respondent's Hiring a Representative Complement of Hoppers by June 1 and Having a Duty to Bargain With the Union.

The Legal Standard

A duty to recognize and bargain with a union, before setting initial terms, attaches to a successor employer under the plans to retain test. *NLRB v. Burns International Security Services, Inc.*, 406 F.2d 272 (1972). Hiring a majority, representative complement of a predecessor's employees, as Counsel for AGC contends, however, is not the entire test. It is only one part of a two part test.

As Respondent pointed out in its brief in support of exceptions, a demand from the union to bargain must also be present. Until such a demand is made, successor employers are free to set their initial terms and conditions of employment. *NLRB v. Burns*, at 294-95; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, at 52 (1987); *Grico Corp., Aircraft Magnesium Division*, 265 NLRB 1344,45 (1982), enf'd 730 F.2d 767 (9th Cir. 1984). Under Counsel for

AGC's theory, a successor could have a bargaining obligation, and no right to set initial terms and conditions, in a circumstance where a union delays several months or more before making a demand or, remarkably, delays indefinitely. This is not the law.

In the instant case, the union demanded recognition by hand delivered letter on Monday, June 6, 2011. GCX-34. The record firmly establishes that by that date, Respondent had communicated its initial terms and conditions of employment throughout May, and before work began on June 2.

Facts

Counsel for AGC argues that Respondent did not seek hoppers from any source other than Berry III hoppers. This is patently wrong. The record establishes that after an inability to begin on May 20, Respondent had to make sure that it would have enough hoppers, building a pool of 70, 80 or more applicants. Tr. 466-67; GCX-55. The predecessor's payroll for June 1 shows 53 hoppers. RX-11. This establishes that there were hoppers solicited from other sources. It was important for Respondent had to ensure it had enough hoppers on June 2 for the job if some of Berry III's hoppers chose not to work. Tr. 428. Even the union acknowledges it was unable to ascertain that a majority had chosen to work for Respondent until the end of the week and over the weekend. GCX-34.

Eldridge Flagge was the principal witness for Counsel for AGC. He was not credible when he testified about not knowing and never discussing the initial terms. The record, by a preponderance of the evidence, supports his lack of credibility:

> Q. And when you gave them the application, did you tell them anything about pay?
>
> A. No, I didn't know nothing about pay.
>
> Q. Did any of the hoppers ask you about pay?

A. Not as far as my knowledge.

Tr. 104. It is established in the record, and accepted by the ALJ and Counsel for AGC, that Alvin Richard III communicated the initial terms and conditions to the hoppers he solicited. Counsel for AGC does not dispute this – only the number of hoppers solicited. Flagge's credibility should not have been accepted because his denial of Richard's explaining the pay to him is contradicted by the undisputed fact that Richard communicated it to about 20 other hoppers. Richard would not have communicated the terms to every other hopper and neglect to convey the terms to the one hopper he trusted to assist with the solicitations. Flagge knew the initial terms because Richard told him what they were.

This manifestly false denial by Flagge undermines the ALJ's finding that Flagge never discussed the initial terms with other hoppers. With the union receiving calls in May from hoppers about a new company and a new pay program, it is inconceivable that Flagge did not know about the change in pay or ever discuss it with other hoppers. Tr. 253-56. This was certainly a "hot" topic of conversation amongst the 50 hoppers, as hopper Anthony Taylor explained. Tr. 449. Flagge knew the initial terms because Richard told him what they were.

Respondent's Alleged Inaccurate Conclusions Regarding Certain Facts

Counsel for AGC has made a non-germane, irrelevant argument in its answering brief. He admits this. Pg. 10, IV. This is inappropriate, a waste of resources, and regrettably, is indicative of how this case has been litigated by Counsel for AGC – to win and not seek the truth. Further, his "non-germane" argument is not supported by the record.

The Region and Counsel for AGC know full well that Berry III, the predecessor, operated illegally under the NLRA, FLSA, and federal and state tax laws and treated the hoppers as independent contractors. The Region has taken Berry III to compliance proceedings and knows

how he operated illegally. Tr. 200-201.

The union's representative, Rosa Hines, testified during direct examination that Berry III was not paying overtime. Tr. 199-200; 261. The union filed charges on the overtime issue with the Region. Tr. 262. Eldridge Flagge, testified that at Berry III the work week was 6 days a week, 8 hours a day typically worked, at a day rate of $103. Tr. 95. This would mean a typical work week had overtime that Berry III did not pay to the hoppers.

On the issue of withholdings, Flagge testified that there were discussions amongst the hoppers about withholdings being taken out of employee paychecks. Tr. 119. This establishes that Berry III was not withholding any of the legally required tax and other funds from employee paychecks. The employee who had been the hopper supervisor for Berry III, and who came to work for Respondent in the same capacity, Karen Jackson, confirmed that Berry III did not pay overtime, only paid for one holiday in the time she worked for Berry III, and never deducted federal and state taxes, social security or any other required amounts. Tr. 532-33.

Conclusion

The NLRB currently lacks the Constitutionally required quorum to issue decisions. Respondent properly communicated its initial terms and conditions of employment before the union made its demand for recognition and bargaining on June 6, and Eldridge Flagge knew the initial terms and discussed them with the hoppers before Respondent began operations.

Respectfully submitted this 28th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of March, 2013 served a copy of the above and foregoing by email to the following:

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