NATIONAL LABOR RELATIONS BOARD

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UNITED FEDERATION OF SPECIAL POLICE & SECURITY OFFICERS, INC.

Petitioner,

-and-

FORDHAM HILL OWNERS CORPORATION

Employer.

----------X

AFFIRMATION IN SUPPORT OF OBJECTIONS

Case N0. 02-RC-098661

DONALD E. MAHER, ESQ., an attorney admitted to practice in the Courts of the State of New York, hereby affirms under the penalty of perjury that the following statements are true to the best of my knowledge:

Introduction

1. I am an attorney at the law offices of Maher & Brown, which represents the Employer in the above entitled action, and as such I am familiar with the facts and circumstances contained herein.

2. On behalf of the Employer, I submit this "Affirmation In Support of Objections" following the April 9, 2013 election in this matter. These OBJECTIONS are to the conduct of the election or to conduct effecting the results of the election. These OBJECTIONS are enumerated as follows:

a. The Board agent's misconduct in conducting an election at a time when the Board could not legally act without a constitutionally appointed quorum of at least three members;

b. The Board agent's misconduct in issuing a Tally of Ballots following the election at a time when the Board could not legally act without a constitutionally appointed quorum of at least three members;

c. The Board's misconduct in failing to render a decision as indicated in its April 9, 2013 ORDER;

d. The Board's failure and refusal to hold the election in abeyance or dismiss the underlying petition until it could legally act with a constitutionally appointed quorum of at least three members;

e. The Board's misconduct in issuing its April 9, 2013 ORDER denying the Employer's Request for Review, at a time when the NLRB could not legally act without a constitutionally appointed quorum of at least three members;

f. The Board's misconduct in delegating this matter to the Regional Director and the Regional Director's misconduct in issuing a Decision and Direction of Election, both occurring at a time when the NLRB could not legally act without a constitutionally appointed quorum of at least three members.

Board Agent Misconduct

3. On April 9, 2013 a Board Agent conducted an election in this matter. Following that

election, a Board Agent issued a Tally of Ballots. (See Exhibit A attached to this Affirmation).

4. This conduct by the Board Agent is misconduct to the conduct of this election and to conduct effecting the results of this election, as it has occurred at a time when the Board itself could not legally act as it was without a constitutionally appointed quorum of at least three members.

5. This conclusion is supported by the *Petition For a Writ of Certiorari* that the Board provided to the United States Supreme Court subsequent to this election. In that *Petition* the Board twice advised the High Court that the decision in *Noel Canning* calls into question every order issued by the National Labor Relations Board since January 4, 2012. Id. at pages 11 and 30.

Board's Misconduct

6. On April 9, 2013, the Board issued an ORDER. (See Exhibit B attached to this affirmation). In it, the Board advised that it would render a decision on this Employer's Request for Review. To date the Board has failed to render that decision.

7. In that April 9, 2013 ORDER, the Board also failed and refused to hold the election in this matter in abeyance until it could legally act with a constitutionally appointed quorum of at least three members. In that same ORDER, the Board additionally failed and refused to dismiss the underlying petition until it could legally act with a constitutionally appointed quorum of at least three members.

8. Moreover, in that April 9, 2013 ORDER, the Board denied this Employer's Request for Review, apparently rejecting the Employer's view that such review should be granted as

compelling reasons exist in this matter based upon one or more of the following grounds:

a. That a substantial question of law or policy is raised because of the absence of officially reported Board precedent.

b. That the Regional Decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affect the rights of a party.

c. That there are compelling reasons for reconsideration of an important Board rule or policy at a time when the NLRB could not legally act without a constitutionally appointed quorum of at least three members;

9. A little more than 2 weeks after rejecting this Employer's compelling reasons and conducting the election in this matter, the Board in essence presented those very same reasons in its Petition *For a Writ of Certiorari* provided to the United States Supreme Court. In that *Petition* the Board twice advised the High Court that the decision in *Noel Canning* calls into question every order issued by the National labor Relations Board since January 4, 2012. Id. at pages 11 and 30.

10. Additionally, the Board's issued its April 9, 2013 ORDER at a time when the NLRB could not legally act without a constitutionally appointed quorum of at least three members;

11. This conduct by the Board is misconduct to the conduct of this election and to conduct effecting the results of this election, as it has occurred at a time when the Board itself could not legally act as it was without a constitutionally appointed quorum of at least three members;

12. This conclusion is similarly supported by the *Petition For a Writ of Certiorari* that the Board provided to the United States Supreme Court subsequent to this election. In that *Petition*

the Board twice advised the High Court that the decision in *Noel Canning* calls into question every order issued by the National labor Relations Board since January 4, 2012. Id. at pages 11 and 30.

Regional Director Misconduct

13. On March 12, 2013, the Regional Director issued a Decision and Direction of Election in this matter. (See Exhibit C attached to this Affirmation). In doing the Regional Director found that "pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2."

14. Following this Decision and Direction of Election, the election in this matter was held on April 9, 2013.

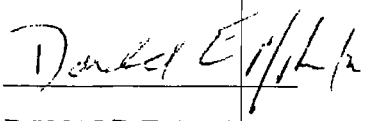
15. This conduct by the Regional Director is misconduct to the conduct of this election and to conduct effecting the results of this election, as it has occurred at a time when the Board itself could not legally delegate or otherwise act as it was without a constitutionally appointed quorum of at least three members;

16. This conclusion is also supported by the *Petition For a Writ of Certiorari* that the Board provided to the United States Supreme Court subsequent to this election. In that *Petition* the Board twice advised the High Court that the decision in *Noel Canning* calls into question every order issued by the National Labor Relations Board since January 4, 2012. Id. at pages 11 and 30.

Dated: New York, New York

April 30, 2013

Respectfully submitted,



DONALD E. MAHER

EXHIBIT "A"

FORDHAM HILL OWNERS CORPORATION Employer and UNITED FEDERATION OF SPECIAL POLICE AND SECURITY OFFICERS, INC. Petitioner	Case No. 02-RC-098661 Date Filed 2/20/13 Date Issued April 9, 2013 **TYPE OF ELECTION** *(Check one:)* ☐ STIPULATED ☐ BOARD DIRECTED ☐ CONSENT ☒ **RD DIRECTED** *(Check if applicable:)* ☐ 8(b)(7) ☐ Mail Ballot ☐ Mixed Manual-Mail Election

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters ---------- 21
2. Number of Void ballots ---------- 0
3. Number of Votes cast for **UNITED FEDERATION OF SPECIAL POLICE AND SECURITY OFFICERS, INC.** ---------- 20
4. ~~Number of Votes cast for the~~ ---
5. ~~Number of Votes cast for the~~ ---
6. Number of Votes cast against participating labor organization(s) ---------- 0
7. Number of Valid votes counted (sum of 3, 4, 5, and 6) ---------- 20
8. Number of Challenged ballots ---------- 0
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) ---------- 20
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (item 9) has (~~not~~) been cast for -------- _____

UNITED FEDERATION OF SPECIAL POLICE AND SECURITY OFFICERS, INC.

For the Regional Director
Region 2

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this Tally.

[illegible] REFUSED TO SIGN

For **FORDHAM HILL OWNERS CORPORATION**

For **UNITED FEDERATION OF SPECIAL POLICE AND SECURITY OFFICERS, INC.**

EXHIBIT "B"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FORDHAM HILL OWNERS CORPORATION
Employer

and

Case 02-RC-098661

UNITED FEDERATION OF SPECIAL POLICE
and SECURITY OFFICERS, INC.
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied. The Employer's request to hold this proceeding in abeyance is also denied. A decision in this case will follow.

MARK GASTON PEARCE,	CHAIRMAN
RICHARD F. GRIFFIN, JR.,	MEMBER
SHARON BLOCK,	MEMBER

Dated, Washington, D.C., April 9, 2013.

EXHIBIT "C"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FORDHAM HILL OWNERS CORPORATION

EMPLOYER

And CASE NO: 02-RC-098661

UNITED FEDERATION OF SPECIAL POLICE
and SECURITY OFFICERS, INC.

PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding, it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated, and I find, that Fordham Hill Owners Corporation ("the Employer"), a New York Corporation, is a residential housing development. Annually in the course and conduct of its operations, the Employer derives gross revenues in excess of $500,000, and purchases and receives at 1 Fordham Hill Oval, the only facility involved herein, goods valued in excess of $5,000, directly from points located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that United Federation of Special Police and Security Officers, Inc. ("the Petitioner"), is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

In that regard, the Employer contends that based on both *Noel Canning v. NLRB*, ---F.3d--, 2013 WL 276024 (D.C. Cir. January 25, 2013), and the Supreme Court's decision in *New*

Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010), the NLRB does not currently have a properly appointed quorum and therefore, it cannot render a decision in this matter and the instant petition must be dismissed. Further, the Employer argues that any case decided now would be invalid and could only lawfully be decided by the NLRB when a quorum is properly appointed

I have carefully considered the Employer's arguments and conclude, based on valid precedent, that the petition should be processed. It is not appropriate for the Board, or the Board's appointed agents, to suspend its activities in response to a claim that the Board is not acting with a valid quorum, and/or that Presidential appointments to the Board are not valid.

Although the Employer correctly points out that on January 25, 2013, the D.C. Circuit, in *Noel Canning*, held that the President's recess appointments to the Board were not valid, I note that in *Noel Canning*, the D.C. Circuit court itself noted that its conclusions concerning the disputed Presidential appointments have been rejected by the other circuit courts that have addressed the issues. *Compare, Noel Canning v. NLRB, supra at,* *14-15, 19, *with, Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley,* 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*); and, *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962).

Even in the absence of a circuit conflict, the Board's longstanding practice is not to acquiesce in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties. *See,* Letter of Acting Solicitor, National Labor Relations Board, *Industrial Turnaround Corp. v. NLRB*, 118 F.3d 248 (4th Cir. 1997) (Nos. 96-1783 & 96-1926) (explaining that "the Board, for more than 50 years, has taken the position that it is not obliged to follow decisions of a particular court of appeals in subsequent proceedings not involving the same parties," and discussing the grounds for that position).

Finally, a strong public interest favors addressing representation disputes - of concern to both employees and employers alike – in an expeditious manner. Most representation disputes have long been resolved administratively without the necessity of court litigation. Even where, as here, there is a challenge to the authority of the Board to act, our experience in continuing to process cases during the analogous dispute leading to *New Process Steel, L.P. v. NLRB,* was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board's decision or settled the dispute.

Based on the above considerations, I reject the Employer's argument that the petition in this matter must be dismissed.

5. The parties stipulated, and I find, that the following unit is an appropriate unit within the meaning of Section 9(b)(3) of the Act:

> INCLUDED: All full-time and regular part-time Security Officers and Squad Leaders employed by the Employer at the Fordham Hill Owners Corporation located at One Fordham Hill Oval, Bronx, NY 10468.
>
> EXCLUDED: all sergeants, office clerical employees, and professional employees and supervisors, as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the United Federation of Special Police and Security Officers, Inc. or by no labor organization.

NOTICE OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the <u>full</u> names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 2's Office, 26 Federal Plaza, Room 3614, New York, New York 07728, on or before **March 19, 2013**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be ground for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington DC 20570. This request must be received by the Board in Washington by **March 26, 2013**.

In the Regional Office's initial correspondence the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may not be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the E-Gov[1] tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at New York, New York
this 12th day of March 2013

Karen P. Fernbach

Karen P. Fernbach
Regional Director
National Labor Relation Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 07728

[1] To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

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ORDER SECTION