

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

**CASINO ONE CORPORATION d/b/a  
LUMIÈRE PLACE CASINO & HOTELS  
AND PNK (ES), LLC D/B/A  
HOTELUMIERE, A SINGLE EMPLOYER**

**and**

**UNITE HERE, LOCAL 74**

**Cases 14-CA-090353  
14-CA-093279  
14-CA-095776  
and 14-CA-099773**

**RESPONDENTS' MOTION TO STAY**

Respondents Casino One Corporation d/b/a Lumière Place Casino & Hotels (“Lumiere”) and PNK (ES), LLC d/b/a HoteLumiere (“HoteLumiere”) [collectively “Respondents”], by and through their attorneys, move to stay these cases. Respondents request that the Board stay these matters pending a final determination on the issue of the Board’s authority to act when it lacks a lawful quorum.

**I. STATEMENT OF THE CASE**

The Regional Director of Region 14 of the National Labor Relations Board (“Board”) issued the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in these matters on May 10, 2013. Respondents filed their Answer on May 28, 2013 and their Amended Answer on June 4, 2013. Respondents also filed a Motion to Dismiss Consolidated Complaint (“Motion to Dismiss”) on May 28, 2013, which was denied on June 4, 2013. The case was originally set for hearing on June 3, 2013. Respondents filed a motion to postpone the hearing, which was granted. The case is currently set for hearing on June 17, 2013.

## II. ARGUMENT

The Board has repeatedly recognized that the issue of whether it lacks a quorum because of the unconstitutionality of the President's recess appointments to the Board "remains in litigation." *Corinthian Contractors, Inc.*, 05-CA-095938 (June 3, 2013); *Bloomingtondale's Inc.*, 31-CA-071281 (April 30, 2013); *Bloomingtondale's Inc.*, 359 NLRB No. 113 (April 30, 2013). In these cases, the Board has acknowledged that the Court of Appeals for the District of Columbia, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), held that the President's recess appointments were not valid and that the Board, therefore, lacked a lawful quorum. *See also NLRB v. New Vista Nursing & Rehab.*, \_\_\_ F.3d \_\_\_, 2013 WL 2099742 (3d Cir. May 16, 2013) (recess appointments unconstitutional). Pursuant to the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Board **must** have a quorum of three validly-appointed members in order to lawfully take action. Lacking a quorum, neither the Board nor its agents – including Regional Directors and Administrative Law Judges – are empowered to act and any actions they take are void *ab initio*. *See Noel Canning*, 705 F.3d at 514; *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3498 (2010).

That the issue "remains in litigation" is also evidenced by the fact that the Board has filed a petition for writ of certiorari in the Supreme Court in *Noel Canning*. 81 USLW 3629 (Apr. 25, 2013) (No. 12-1281). Nonetheless, despite the fact that it neither requested nor obtained a stay of the appellate court's order in *Noel Canning*, the Board has declared that it will continue to issue and prosecute unfair labor practice complaints, just as it has in these cases. *See Bloomingtondale's*, 359 NLRB No. 113, at 1.

In response to the Board's disregard for the federal appellate court's ruling in *Noel Canning*, several employers have filed petitions for extraordinary writs in the Court of Appeals for the District of Columbia Circuit, seeking to have the court compel compliance with its decision in *Noel Canning*. *In re CSC Holdings, LLC*, No. 13-1191 (May 30, 2013); *In re Ozburn-Hessey Logistics, LLC*, No. 13-1170 (May 13, 2013). In *CSC Holdings*, the employer has petitioned the Court of Appeals for a writ of mandamus or prohibition "to halt the Board's illegal actions" in issuing and prosecuting unfair labor practice complaints. *In re CSC Holdings, LLC*, No. 13-1191 (May 30, 2013). The hearing in *CSC Holdings* is set for July 8, 2013, and, presumably, the writ petition will be decided prior to that time.

The issues raised by the writ petitions in *CSC Holdings* and *Ozburn-Hessey* are the same as those raised in this case by Respondents' Motion to Dismiss: whether the Board may continue to prosecute unfair labor practice charges when, because of the unconstitutionality of the President's recess appointments, it lacks a lawful quorum. Similarly, the issue raised by the Board's petition for certiorari in *Noel Canning* addresses the same issue: the constitutionality of the recess appointments. Decisions in those cases will, therefore, necessarily affect the proceedings in these cases. If, for example, the D.C. Court of Appeals issues an extraordinary writ in *CSC Holdings*, and prohibits the Board from prosecuting unfair labor practice cases, the prosecution of the unfair labor practice cases here will also be prohibited and neither the Regional Director nor the Administrative Law Judge will be authorized to proceed with the hearing in these matters. Should the hearing proceed in this matter prior to the issuance of an order on the writ petition, it would result in considerable expenditure of time and resources of the Board's agents, as well as the parties, which may well prove to be futile.

A stay of the proceedings in these cases is, therefore, necessary. Here, absent a stay, Respondents will be forced to expend considerable resources preparing for and defending at hearing the claims raised in the Consolidated Complaint. That complaint was void *ab initio*, pursuant to the decision in *Noel Canning*, 750 F.3d at 493, a decision that is **binding** on the Board, and which it may not ignore. Should Respondents be required to proceed with defending these matters, they will be wholly unable to recover the time and expenses incurred should the Board lose in the District of Columbia Court of Appeals. Moreover, should the hearing proceed and the actions of the Board be later declared void, Respondents may be required to incur litigation costs a second time if the Board elects to recommence the matters once it has a lawful quorum. Consequently, the harm Respondents will suffer without a stay is irreparable. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C. Cir. 1977) (if no “adequate compensatory or other corrective relief will be available at a later date,” economic harm may be irreparable).

Moreover, because the Board’s action in issuing and prosecuting the Consolidated Complaint is based on appointments that the *Noel Canning* court found unconstitutional, Respondents’ constitutional rights will be impaired without a stay. “It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Mills v. Dist. Of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009).

The Board’s and the Regional Director’s contention that its lack of a quorum does not bar the prosecution of unfair labor practice complaints because the Act gives General Counsel “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under [29 U.S.C. § 160], and in respect of the prosecution of such complaints before

the Board,” 29 U.S.C. § 153(d), deliberately ignores the plain language of the Act itself, and does not provide a reasonable basis for denying a stay. The Act specifically confers the authority to issue complaints only on “the Board,” and permits the Board to delegate that responsibility to its agents. 29 U.S.C. § 160(b). The Board has assigned the task of issuing complaints to Regional Directors. 29 C.F.R. § 102.15. Section 3(d) of the Act makes clear that the authority of the General Counsel to prosecute complaints is exercised only “**on behalf of the Board.**” 29 U.S.C. § 153(d) (emphasis added). General Counsel’s authority, therefore, is not independent of the Board’s and its lack of quorum does not entitle General Counsel to prosecute complaints when the Board lacks authority to adjudicate them.

Moreover, in this case, the Consolidated Complaint was *not* issued by the General Counsel, but by the Regional Director, explicitly invoking the authority delegated exclusively to regional directors under 29 C.F.R. § 102.15. When the Board lacks a quorum, it lacks the legal authority to act, as do its agents, including the regional directors. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3498 (2010). Thus, the Regional Director’s action in issuing the Consolidated Complaint, like all the actions of the quorumless Board, was void *ab initio*. The General Counsel may not prosecute a complaint that was void when it was issued. Nor may other Board agents, including an administrative law judge, adjudicate such complaints.

Consequently, proceeding with the prosecution of the Consolidated Complaint in these matters would seriously harm the constitutional rights of Respondents, as well as require them to incur considerable expenses, in a hearing which may be rendered a nullity within a short period of time. Should the D.C. Court of Appeals rule against the Board on the *CSC Holdings* petition for extraordinary writ, the Board would be prohibited from prosecuting this action and any

hearing prior to that time would simply be a waste of time and money. Similarly, if the Supreme Court denies certiorari in the *Noel Canning* case or affirms the Court of Appeals' ruling, the issue will be finally adjudicated, and any adjudication of the merits of the Consolidated Complaint would be rendered a nullity.<sup>1</sup> It is clear that, balancing the harm done by proceeding with the prosecution of the matter with the benefits, it would be in the best interests of administrative economy and the parties to issue a stay in this matter until the issue is no longer "in litigation," or, at the least, until a decision is made on the pending writ petitions by the Court of Appeals.

WHEREFORE, for these reasons, Respondents Casino One Corporation d/b/a Lumière Place Casino & Hotels and PNK (ES), LLC d/b/a HoteLumiere respectfully request these matters be stayed until such time as the United States Supreme Court issues a decision on the petition for writ of certiorari in the case *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *petition for writ of certiorari filed*, 81 USLW 3629 (Apr. 25, 2013) (No. 12-1281) or, at the least, until the Court of Appeals for the District of Columbia denies or grants the employer's Petition for Writ of Mandamus or Prohibition in the case of *In re CSC Holdings, LLC*, No. 13-1191 (May 30, 2019).

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<sup>1</sup> The holding of the Court of Appeals on the *CSC Holdings* writ petition should be issued within a short period of time and staying the matter until at least then would thus not unduly delay the prosecution of the case should the writ petition be denied.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ James N. Foster, Jr.

James N. Foster, Jr.

John J. Marino, Jr.

2730 North Ballas Road, Suite 200

St. Louis, MO 63131-3039

(314) 567-7350

(314) 567-5968 – fax

Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of June, 2013, a true and correct copy of the above document was filed via electronically on the Board's website with the following individuals:

Gary Shinnars, Executive Secretary  
NLRB Office of the Executive Secretary  
1099 14th St., N.W.  
Room 11602  
Washington, D.C. 20570

Daniel L. Hubbel, Regional Director  
National Labor Relations Board  
Region 14  
1222 Spruce Street, Room 8.302  
St. Louis, MO 63103-2829

/s/ James N. Foster, Jr.

I further certify that on the 5<sup>th</sup> day of June, 2013, a true and correct copy of the above document was served via e-mail and via United States first class mail, postage prepaid, upon:

Dave Morton, Director of Organization  
UNITE HERE, LOCAL 74  
4433 Woodson Road., Suite 103  
St. Louis, MO 63134-3713

Gregory A. Campbell, Attorney  
Hammond and Shinnars, P.C.  
7730 Carondelet Ave., Suite 200  
St. Louis, MO 63105-3326

/s/ James N. Foster, Jr.