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September 26, 2013

Rhonda P. Ley, Regional Director  
Region 3  
National Labor Relations Board  
Niagara Center Building  
130 South Elmwood Avenue (Suite 630)  
Buffalo, NY 14202-2387

BY FAX TO: (716) 551-4972

Re: OBJECTIONS TO ELECTION HELD SEPTEMBER 19, 2013  
ORCHARD MANOR REHABILITATION AND NURSING CENTER  
CASE NO. O3-RC-110739  
Our Matter No. 448-13

Dear Regional Director:

Our Firm represents the Employer, Orchard Manor ALP, LLC d/b/a Orchard Manor Rehabilitation and Nursing Center. On behalf of the Employer and pursuant to Sections 11392.4 *et seq.* (relating to resolution of post-election objections) of the Board's Casehandling Manual, we are filing Objections to the Election and request that the Election be invalidated and rerun for reasons stated below. These Objections are being filed within seven (7) days of the vote count involved in this matter as required by Section 11392.2(a)(2) of the Casehandling Manual.

**OBJECTION NO. 1** - In light of the decisions in Hooks v. Kitsap Tenant Support Services, Case No. C13-5470, U.S. District Court for the Western District of Washington at Tacoma, entered August 13, 2013 (copy attached) (granting Motion to Dismiss Regional Director's petition for preliminary injunctive relief); Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S.Ct. 2861 (2013); NLRB v. New Vista Nursing and Rehabilitation, 719 F.3d 203 (3<sup>rd</sup> Cir. 2013); NLRB v. Enterprise Leasing Co. Southeast, LLC, 722 F.3d 609 (4<sup>th</sup> Cir. 2013), and New Process Steel, L.P. v. NLRB, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2635 (2010), the Employer concludes and avers that the Regional Director is without authority to determine or certify the results of the election held on September 19, 2013, pursuant to 29 U.S.C. § 153(b), because, when she was appointed in 2009, the NLRB did not have a lawfully constituted Quorum to take any action at all, including the appointment of Regional Directors, since it had only two (2) members during that entire year, and because her official biography on the Board's Website does not indicate that she was properly appointed thereafter.

Rhonda P. Ley, Regional Director

Region 3

National Labor Relations Board

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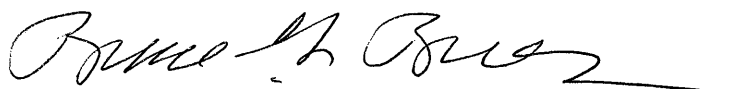
Page Two

**OBJECTION NO. 2** – The Board’s Website information titled “Conduct Elections,” indicates that the Board will set aside the results of an election if conduct by the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees’ freedom of choice. In this case, the union and its supporters had contacts during work hours, made calls on and telephone calls to fellow employees who were eligible to vote in the election at their homes, close to the election, threatening bodily injury and reprisals through work-related complaints to employees who did not support the union in the election. One of the union supporters advised a maintenance employee: “She said if I don’t get the union, she would kick my butt.” They also advised employees in a union Facebook post that: “Well if the union does NOT get voted in 30 people are losing their jobs.” The Facebook posting was untruthful, widely disseminated, and apparently widely believed by employees eligible to vote in the election. Every eligible union voter had access to the Facebook posting.

An employee who expressed her opposition to unionization reported that her car was “keyed” in the facility parking lot and she was threatened by union supporters. Such conduct has been proscribed by the Board and found sufficient to set aside an election. Another employee, who acted as an Observer, was threatened and followed home immediately after the election by union supporters who dispersed when the employee turned into a parking lot where there was a police car. The union’s conduct interfered with the absolute right of eligible voters to make a free choice in the election. See: 177 NLRB 942, 942-943 (1969); 234 NLRB 178 (1978); 342 NLRB No. 58 (2004). The Employer will be supplementing this Objection with documents, a list of witnesses, and a brief description of the testimony of each, pursuant to the requirements of Section 11392.6.

Wherefore, the Employer requests that the results of the election held on September 19, 2013 be set aside and not certified and that a rerun election be scheduled.

Respectfully submitted,



Bruce G. Baron.

[Attorney for Employer]

cc: Anna Falicove, Esquire (Union Counsel)  
Brian J. Cornelius (Union Representative)  
Orchard Manor ALP, LLC

1  
2  
3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 RONALD K. HOOKS, Regional Director  
7 of the Nineteenth Region of the National  
8 Labor Relations Board, for and on behalf  
9 of the NATIONAL LABOR RELATIONS  
10 BOARD,

Petitioner,

v.

11 KITSAP TENANT SUPPORT  
12 SERVICES, INC.,

Respondent.

CASE NO. C13-5470 BHS

ORDER GRANTING  
RESPONDENT'S MOTION  
TO DISMISS

13  
14 This matter comes before the Court on Respondent Kitsap Tenant Support  
15 Services, Inc.'s ("Kitsap") motion to dismiss (Dkt. 12). The Court has considered the  
16 pleadings filed in support of and in opposition to the motion and the remainder of the file  
17 and hereby grants the motion for the reasons stated herein.

18 **I. PROCEDURAL HISTORY**

19 On June 13, 2013, Petitioner Ronald K. Hooks ("Hooks"), Regional Director for  
20 Region 19 of the National Labor Relations Board (the "Board"), filed a petition for  
21 preliminary injunctive relief pursuant to § 10(j) of the National Labor Relations Act.

22 Dkt. 1.

1 On July 18, 2013, Kitsap filed a motion to dismiss. Dkt. 12. On August 5, 2013,  
2 the Board responded. Dkt. 14. On August 9, 2013, Kitsap responded. Dkt. 41.

## 3 II. FACTUAL BACKGROUND

4 The Board consists of five members who are appointed for five-year terms by the  
5 President with the advice and consent of the Senate. 29 U.S.C. § 153(a).

6 On January 4, 2013, President Obama appointed members Terence Flynn,  
7 Shannon Block (“Block”) and Richard Griffin, Jr. (“Griffin”) to the Board. Although the  
8 Senate was in session that day, President Obama chose not to nominate these individuals  
9 for confirmation by the Senate.

10 On February 28, 2013, Hooks issued an Amended Consolidated Complaint in the  
11 underlying administrative action. On March 27, 2013, Hooks subsequently issued a  
12 Second Amended Consolidated Complaint, which was then amended on April 16, 2013.  
13 On May 28, 2013, Hooks again amended the Complaint.

14 On July 16, 2013, the President submitted new nominations to the Board. On July  
15 30, 2013, the Senate confirmed all five positions on the Board.

## 16 III. DISCUSSION

17 The Recess Appointment clause provides that the President “shall have Power to  
18 fill up all Vacancies that may happen during the Recess of the Senate, by granting  
19 Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, §  
20 2, cl.3.

21 In this case, Kitsap contends that the Board is without power to act because it  
22 lacks a properly appointed quorum. Kitsap has provided numerous recent cases for the

1 proposition that “Recess” means the period of time between an adjournment *sine die* and  
2 the start of the Senate’s next session. *See* Dkt. 41 at 2–3 (listing cases). While none of  
3 these cases are binding, the Court has reviewed each case and finds the legal analysis  
4 persuasive. There is no need to add to what is thoroughly explained in *N.L.R.B. v.*  
5 *Enterprise Leasing Co. Southeast, LLC*, --- F.3d ----, 2013 WL 3722388 (4th Cir. 2013),  
6 and *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3rd Cir. 2013).  
7 Therefore, the Court adopts the reasoning in these cases and holds that “Recess” in the  
8 Recess Appointment Clause means the period of time between an adjournment *sine die*  
9 and the start of the Senate’s next session.

10 As applied to the facts of this case, Hooks was without power to file the  
11 complaints against Kitsap in the underlying administrative matter. A petition for  
12 injunctive relief brought under Section 10(j) may be brought only “upon issuance of a  
13 complaint as provided in [29 U.S.C. § 160(b)].” 29 U.S.C. § 160(j). Without a valid  
14 complaint, Hooks is precluded from filing a petition for preliminary relief. Therefore, the  
15 Court grants Kitsap’s motion to dismiss on this issue.

16 Hooks contends that, even if the Board lacks authorization, the actions of the  
17 Acting General Counsel Lafe E. Solomon (“Solomon”), including his delegation of  
18 authority to initiate legal action to Hooks, are still valid. First, Hooks asserts that  
19 President Obama validly appointed Solomon pursuant to the Federal Vacancies Reform  
20 Act (“FVRA”), 5 U.S.C. § 3345, *et seq.* Dkt. 13 at 14–21. The FVRA, however, only  
21 permits the appointment of a person under specific circumstances and the only  
22 circumstance that could apply to Hooks is appointing a person who, within the last 365

1 days, has served as a personal assistant to the departing officer. *Id.* § 3345(b). It is  
2 undisputed that Solomon has never served as a first assistant. Therefore, Hooks's  
3 argument is without merit.

4 Second, Hooks contends that the actions of Solomon are exempted from the  
5 penalty provisions of the FVRA and are, therefore, valid. Dkt. 13 at 17. Hooks is correct  
6 that the actions of Solomon are exempted from the penalty provision. This fact, however,  
7 does not grant him the authority to act pursuant to an improper appointment. Therefore,  
8 Hooks's argument is without merit.

9 **IV. ORDER**

10 Therefore, it is hereby **ORDERED** that Kitsap's motion to dismiss (Dkt. 12) is  
11 **GRANTED** and Hooks's petition is **DISMISSED**.

12 Dated this 13th day of August, 2013.

13  
14 

15 **BENJAMIN H. SETTLE**  
16 United States District Judge  
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22

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**Case Information**

**Case Number:** 03-RC-110739

**Case Name:** Orchard Manor ALP, LLC d/b/e Orchard Manor Rehabilitation & Nursing Center

**Role:** Employer

**Contact Information**

Bruce Baron  
Bruceb@capozziadler.com  
PO Box 5866  
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(717)233-4101

**Attached E-File(s)**

Objections to an Election  
Objections to Election 03-RC-110739.pdf

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*To  
BRIAN  
CORNELIUS*

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Employee Rights  
Employer/Union Rights & Obligations

**What We Do**  
Conduct Elections  
Investigate Charges  
Facilitate Settlements  
Decide Cases  
Enforce Orders



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**Case Name:** Orchard Manor ALP, LLC d/b/a Orchard Manor Rehabilitation & Nursing Center

**Role:** Employer

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