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October 29, 2013

Regional Director
National Labor Relations Board (Region 3)
130 South Elmwood Avenue (Suite 630)
Buffalo, NY 14202-2465

BY NLRB E-FILE

Re: RECONFIRMATION OF OBJECTION NO. 1 TO ELECTION AND REQUEST FOR CONTINUANCE OF HEARING
Orchard Manor ALP, LLC
Case No. 03-RC-110739
Our Matter No. 549-13

Dear Regional Director:

This supplements our transmittal of October 17, 2013 which provided further support for our previously filed Objections to the Elections held on September 19, 2013. We hereby reconfirm that our Objection No. 1 has not been resolved and request that all further proceedings in this matter, including the hearing scheduled for November 7, 2013, be continued pending the final resolution of our Objection No. 1.

In our October 17, 2013 transmittal we provided additional argument with respect to our Objection No. 1 (relating to your authority to proceed in this matter), noting that the Regional Office had not provided us, at that time, with any further documentation of a subsequent appointment to your position as Regional Director by a Board with a proper statutory quorum after action was taken as to your appointment in 2009 when the Board lacked a proper statutory quorum to take any action, as determined by the Supreme Court of the United States in New Process Steel.

On October 18, 2013, Tom Miller at the Regional Office forwarded to us a copy of a Minute Order entered by a full Board on July 6, 2010, in which that Board stated:

> In *New Process Steel, L.P. v. NLRB,* S. Ct. -, 2010 WL 2400089 (U.S.) (June 17, 2010) the Supreme Court held that when the Board's membership fell to two members on January 1, 2008, the two remaining members could not continue to decide cases for the Board. During the time period from January 1, 2008 until April 5, 2010, when the Board returned to three Members, the two-Member Board acted on numerous personnel, administrative, and procurement matters including but not limited to appointments of Regional Directors, Administrative Law Judges, and Senior Executives.
>
> Although we believe that all the administrative, personnel and procurement matters the Board acted on during this time were valid and appropriate, in an abundance of caution, with a full complement of five Board Members, we now ratify all actions taken and/or approved by the two-Member Board between January 1, 2008 and April 5, 2010. This ratification is intended to remove any question that may arise regarding this period during which the Board was reduced to two Members.

Mr. Miller has inquired whether this Board Minute Order resolves our Objection; and, if so, whether we will withdraw our Objection No. 1 prior to the scheduled hearing on our Objections currently scheduled for November 7, 2013. Since Section 4(a) of the National Labor Relations Act authorizes the Board to appoint Regional Directors as it may from time to time find necessary for the proper performance of its duties, we submit that the 2010 Board could not ratify the action of the 2009 short-of-a- quorum members under the principles of agency stated by the Supreme Court of the United States in FEC v. NRA Political Victory Fund, 513 U.S. 88, 98 (1994) ("the question is at least presumptively governed by principles of agency law, and in particular the doctrine of ratification...but it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made.").

In this case, the 2010 Board was not appointed or authorized to make your appointment in 2009. Therefore, the 2010 Minute Order does not resolve our Objection No. 1; and, we continue our Objection that you lack authority to continue in this matter until and unless you are actually appointed by the full Board, including authority to continue with the scheduled hearing.

We submit that prior decisions travelling a different path, such as FEC v. Logi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996) and Doolin Sec. Sav. Bank, F.S.B. v. OTS, 139 F.3d 203 (D.C. Cir. 1998), rest on pillars that are undercut by the 2010 decision of the Supreme Court of the United States in New Process Steel that found the 2009 Board actions *void ab initio*. Here, unlike in the D.C. Circuit's prior analysis of different appointments at other agencies, the 2009 appointment was *void ab initio* as later indicated by that same Circuit, which precludes ratification under the principles discussed by that Circuit. *See:* Noel Canning v. NLRB, 705 F.3d 490, 493 (D.C. Cir. 2013) ("Because the Board must have a quorum in order to lawfully take action, if petitioner is correct in either of these assertions, then the order under review is *void ab initio*) (*citing* New Process Steel), *currently pending before the Supreme Court of the United States as* Case No. 12-1281, 133 S.Ct. 2861 (2013).

In New Process Steel, as opposed to the prior cases relied on in Logi-Tech and Doolin, the Supreme Court of the United States did not find any validity in the prior actions of the Board. Former Solicitor General, now Supreme Court Justice, Elena Kagan advised the New Process Steel Court (*see:* attached copy of her Letter Brief in that case, dated April 26, 2010, at page 2) that the authority of a new Board to "ratify *en masse*" such prior decisions is unclear.

Since the former Solicitor General of the United States has advised that the issue is unclear and the D.C. Circuit appears to have distinguished its prior analysis, we cannot agree that the Minute Order resolves our Objection. We continue our Objection No. 1 in this case and continue to submit that you must abstain from taking further action in this matter until and unless your authority is confirmed through an actual appointment by a duly constituted Board.

Since our Objection No. 1 goes to the authority of the Regional Office under Sections 3(b) and 4(a) of the National Labor Relations Act to conduct or order any further proceedings in this matter, we request that the hearing scheduled for November 7, 2013 be continued pending Board action on your appointment and the final determination of our Objection No. 1.

Respectfully submitted,

/s/ Bruce G. Baron
Bruce G. Baron
[Legal Representative for Orchard Manor]

Attachment:
Letter Brief from New Process Steel

cc: Orchard Manor ALP, LLC (by email)
Mike Ortiz, Esq. (Union Counsel) (by email)
Thomas A. Miller (NLRB Field Examiner – Region 3) (by email)

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Office of the Solicitor General

Supreme Court, U.S.
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APR 26 2010
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Washington, D.C. 20530

April 26, 2010

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

New Process Steel, L.P. v. National Labor Relations Board
S. Ct. No. 08-1457

Dear Mr. Suter:

This letter is in response to the Court's order of April 16, 2010, requesting letter briefs from the parties addressing "[w]hat should be the effect, if any * * * on the proper disposition of this case" of the President's March 27, 2010 appointments of Mr. Craig Becker and Mr. Mark Gaston Pearce to serve as members of the National Labor Relations Board. In brief, the appointments of Members Becker and Pearce should have no effect on the proper disposition of this case.

The terms of the December 20, 2007 delegation order at issue in this case provided that the delegation would automatically "be revoked when the Board returns to at least three [m]embers." Pet. Br. Add. 7a. With the recess appointments of Members Becker and Pearce, the Board has four members and the delegation is no longer in effect.

This factual development does not render *New Process Steel, L.P.* moot. The Question Presented is whether Section 3(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 153(b), authorized Members Wilma B. Liebman and Peter C. Schaumber to act as a two-member quorum of the delegee group in deciding *New Process Steel, L.P.* The appointments of Members Becker and Pearce do not alter the Board's decision challenged in this case, which was decided in September 2008 by Members Liebman and Schaumber when they were acting as a quorum of a three-member group to which the Board had delegated all of its powers.

Moreover, the March 27, 2010 appointments do not affect the nearly 600 other cases decided by the Board between January 1, 2008 and March 26, 2010. See NLRB Cert. Br. 15-17. Indeed, there are four other cases currently pending in this Court (*Narricot Indus., L.P.* v. *NLRB*, No. 09-1248, petition for cert. pending (filed Apr. 15, 2010); *NLRB* v. *Laurel Baye Healthcare of Lake Lanier, Inc.*, No. 09-377, petition for cert. pending (filed Sept. 29, 2009); *Snell Island SNF, LLC* v. *NLRB*, No. 09-328, petition for cert. pending (filed Sept. 11, 2009);

Northeastern Land Servs., Ltd. v. *NLRB*, No. 09-213, petition for cert. pending (filed Aug. 18, 2009))—and 76 additional cases currently pending in or decided within the last 90 days by the courts of appeals—in which litigants have challenged (or a court has sua sponte raised) the validity of the Board's decision because it was entered by the same two-member quorum of the delegee group.[1] All of these cases present live controversies because it remains the Board's position that the orders at issue are entitled to enforcement and that parties are obliged to comply with the judgments of the courts that have enforced such orders. Moreover, the Board no longer has jurisdiction over *New Process Steel, L.P.* or the other cases where jurisdiction was transferred to the relevant court of appeals or to this Court. See 29 U.S.C. 160(e) and (f) (providing that court of appeals obtains jurisdiction after party files a petition for review or enforcement and the record is filed in the court of appeals). The Board therefore lacks the ability to take any action—such as considering the cases anew by at least three members—that might render this case (or other cases pending in this Court and the courts of appeals) moot.

There are approximately 500 orders issued by Members Liebman and Schaumber in which no party has sought further review at the present time. But many of those Board decisions are in potential jeopardy as a result of the uncertainty regarding the meaning of Section 3(b)'s quorum and delegation provisions. An unusual feature of the NLRA is that no statutory provision or implementing regulation imposes a time limit for an aggrieved party to file a petition for review. See 29 U.S.C. 160(f). Moreover, because the Board's decisions are not self-enforcing, the Board must file a petition for enforcement with a court of appeals if a party to a case does not comply with a Board order. If an aggrieved party now petitions for review of a Board order or the Board seeks enforcement, the validity of the underlying order issued by the two-member Board is subject to challenge. Thus, an unknown but potentially large portion of those 500 orders could require reconsideration if this Court does not resolve the validity of the two-member decisions.

Absent further direction from this Court, it is unclear whether the Board has the authority to "ratify" the two-member decisions *en masse* without reconsidering each case individually. In any event, prudential considerations in these circumstances would weigh against the Board's exercising such authority in view of the high risk of potential challenges to a blanket ratification order. And individual reconsideration would impose a significant burden on the Board, whether acting through all four sitting members or through newly constituted groups of three members. Approximately 261 cases are currently pending before the Board, including 73 cases in which Members Liebman and Schaumber could not agree and 50 cases involving significant or novel issues that the two members chose to defer for decision. In addition, the Board decides between 300 and 400 cases annually in the normal

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[1] In addition, there are 22 cases pending in or recently decided by a court of appeals in which the two-member quorum issued the decision, but the litigants have not challenged the validity of the action on this basis.

course of business. Reconsidering a large number of additional cases would severely tax a still-short-handed Board.

Furthermore, such reconsideration could inject additional ambiguities (such as, for example, whether a particular Board order was effective on the date of the two-member decision or on the date of reconsideration) that parties might use to invite further litigation. The resulting uncertainty would impose a significant burden on employees, employers, and unions whose rights have been adjudicated by the Board or who have otherwise relied on the validity of a certification or order issued by the two-member quorum. For these reasons, a decision of this Court declining to decide whether the two-member decisions are valid would significantly burden the rights protected by the NLRA.

In addition to the retrospective harms engendered by continuing uncertainty over Section 3(b), the need for prospective guidance remains important. Although the recent period—which lasted nearly 27 months—is the longest the Board has ever been with only two sitting members since the Board was expanded to include five members in 1947, the Board has also had only two members on prior occasions. And given the complexities and potential length of the Senate confirmation process, multiple vacancies could arise again in the future. Although a President may fill such vacancies through the use of his recess appointment power, as the President did on March 27 of this year, the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period. For example, the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007. See Jim Rutenberg, *Bush, On His Way Out, Leads Others In*, New York Times, Dec. 7, 2008, at A39; Henry B. Hogue & Maureen Bearden, Congressional Research Service Report for Congress RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008*, at 6-7 (updated Nov. 3, 2008). Presidents have not in recent decades made recess appointments during intrasession recesses lasting fewer than three days. See Congressional Research Service, *Intrasession Recess Appointments* (Apr. 23, 2004).[2] The Board therefore may face the prospect of being

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[2] A 1905 report of the Senate Judiciary Committee discussing the Recess Appointments Clause emphasized that the term is "used in the constitutional provision in its common and popular sense" rather than a "technical" sense. S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905) (reprinted in 39 Cong. Rec. 3823 (1905)). The Committee concluded that "recess" refers to "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions*." *Id.* at 2. The Senate continues to view that report as authoritative. See *Riddick's Senate Procedure* 947 & n.46 (1992), http://www.gpoaccess.gov/riddick/index.html. To this day, official congressional documents define a "recess" as "any period of three or more complete days—excluding Sundays—when either the House of Representatives or the Senate is not in session." *2003-2004 Congressional Directory* 526 n.2 (Joint Comm. on Printing, 108th Cong., comp. 2003).

reduced to two members in the future, in which case it may again seek to do what Section 3(b)'s terms permit—delegate all of its powers to a group of three members, two of whom may thereafter act as a quorum.

Thus, the March 27 recess appointments of Members Becker and Pearce should have no effect on the proper disposition of this case.

Sincerely,

Elena Kagan
Solicitor General
SupremeCtBriefs@usdoj.gov

cc: See Attached Service List

08-1457
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Case Information
Case Number: 03-RC-110739
Case Name: Orchard Manor ALP, LLC d/b/a Orchard Manor Rehabilitation & Nursing Center
Role: Employer

Contact Information
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Motion Req for Continuance - Orchard Manor.pdf

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Cc:	Karen Fisher
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