

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

In the Matter of

KANAWHA HOSPICECARE, INC.

and

Case 9-CA-063109

KEIRA RANSON, AN INDIVIDUAL

MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A STAY

Kanawha Hospicecare, Inc., (“Hospice”) by counsel, respectfully moves the National Labor Relations Board (“Board”) pursuant to 29 CFR § 102.24 to enter an Order dismissing the Acting General Counsel’s Complaint or, in the alternative, to stay the instant proceedings pending the appointment, via Constitutional and lawful recess appointments or otherwise, of a sufficient number of Board members to establish a quorum.¹ In support of this Motion, Hospice states as follows:

1. On January 27, 2012, the Board issued a Complaint in this matter alleging that Hospice violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) and noticed the matter for hearing beginning on March 6, 2012; the Complaint is utterly without so much as a scintilla of merit, but Hospice will take up that issue when the Board has a quorum and is able to lawfully issue a complaint. Hospice received a copy of the Complaint on January 30, 2012.

2. At the time the Board issued the Complaint, it was not comprised of enough lawfully appointed members to constitute a quorum as required by 29 U.S.C. § 153(b).

¹ The procedural awkwardness of requesting a Board who, by virtue of lacking a quorum of duly appointed members, is Constitutionally unable to act, to pass on a motion, is not lost on Hospice. However, for all intents and purposes, Hospice is simply asking the Board to return to *status quo* and dismiss a complaint that the Board was not able to issue in the first place.

3. The United States Supreme Court has held that the Board lacks authority to conduct business in the absence of a quorum of at least three members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

4. There currently are only two validly serving members of the Board, Chairman Pearce and Member Hayes.

5. While the President purported to appoint three new members to the Board (purported Members Block, Griffin, and Flynn) on January 4, 2012, such appointments were null and void as they were made without the advice or consent of the Senate as required by Article II, Section 2, Clause 2 of the United States Constitution.

6. The President improperly styled these three individuals as “recess appointments,” even though the Senate was not in recess at the time.²

7. Because the “recess appointments” were not made lawfully, the Board presently lacks the requisite quorum to conduct business under *New Process Steel* and, as such, the issuing of the Complaint in the instant action is an *ultra vires* action by the Board and it must be dismissed.

8. In the event the Board does not grant Hospice’s Motion to Dismiss, it should nonetheless stay the instant action (including all proceedings and the March 6, 2012 hearing) pending resolution of the matter styled *National Association of Manufacturers, et al., v. National Labor Relations Board, et al.*, Case No. 1:11-cv-01629-ABJ (Judge Amy Berman Jackson)

² While the President may contend that the Senate was “effectively in recess,” such contention is without merit. See *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 1994) (requiring a “legitimate Senate recess” to exist in order to uphold a recess appointment). See also *Wright v. United States*, 302 U.S. 583 (1938); and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as recesses of the Senate sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages). Moreover, by unanimous consent, the Senate voted to remain in session for the period of December 20, 2011 through January 23, 2012. Sen Ron Wyden, “Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012,” remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784).

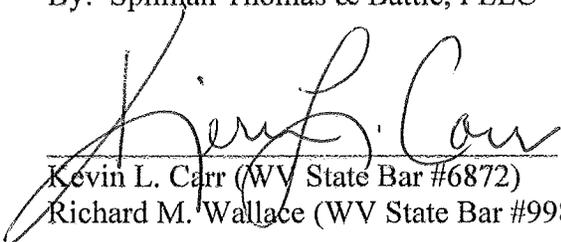
pending before the United States District Court for the District of Columbia. On January 13, 2012, Plaintiffs in that civil action requested that the Court deem the recess [sic] appointments null and void. Such a stay would be consistent with the Board's actions taken in connection with its proposed Notification of Employee Rights under the National Labor Relations Act rule.³ The case at bar, if not dismissed, should be stayed pending resolution of the case before the US District Court for the District of Columbia.

9. Finally, judicial economy and fairness dictate that the Board not proceed in light of the very real possibility that this case, if prosecuted, could later resemble one of the 600 post-*New Process Steel* cases in which unlawful decisions were invalidated. Hospice, a non-profit organization dedicated to providing end-of-life care to terminally ill patients, should not be forced to litigate, then re-litigate the unfounded allegations in the unlawfully issued Complaint. Instead, the Board should stay all further proceedings in this matter until the issue of the Board's failure to establish a quorum and the President's unconstitutional recess appointments is decided in the DC District Court action.

Respectfully submitted,

KANAWHA HOSPICECARE, INC.

By: Spilman Thomas & Battle, PLLC



Kevin L. Carr (WV State Bar #6872)
Richard M. Wallace (WV State Bar #9980)

³ Specifically, the Board postponed the rules January 31, 2012 implementation date barely more than a week after Judge Jackson suggested that it do so.

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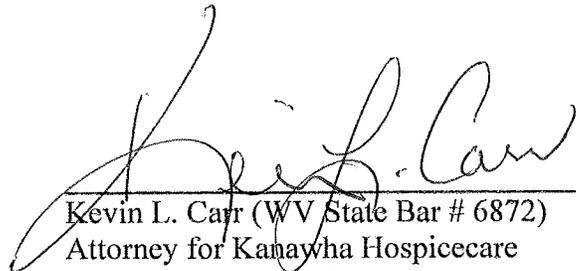
KEIRA RANSON, AN INDIVIDUAL

CERTIFICATE OF SERVICE

I, Kevin L. Carr, being duly sworn, do hereby certify that I have served a true and exact copy of the “**Motion to Dismiss or, in the Alternative, for a Stay**” by regular United States Mail this 30th day of January, 2012, addressed as follows:

Ms. Keira D. Ranson
2510 Lincoln Ave
St. Albans, WV 25177-3244

Service was made upon Counsel for the Acting General Counsel via e-mail at Kevin.luken@nlrb.gov.



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Subscribed and sworn to before me this 30th day of January 2012.

Rose A. Fisher

