

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

**Care One at Madison Avenue, LLC d/b/a
Care One at Madison Avenue,**

Employer,

Case No. 22-RC-072946

and

**1199 SEIU, UNITED HEALTHCARE
WORKERS EAST,**

Petitioner

**EMPLOYER’S MOTION TO VACATE DECISION
AND DIRECTION OF SECOND ELECTION**

In *Noel Canning v. NLRB*, ___ F.3d ___, No. 12-1115, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), the United States Court of Appeals for the District of Columbia Circuit held that the Board was without a quorum to issue a decision and, therefore, did so in excess of its power. Accordingly, the D.C. Circuit held that the Board issued the Decision and Order at issue there unconstitutionally and the Board’s Order was void. For the reasons set forth in the D.C. Circuit’s decision in *Noel Canning*, Respondent Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue (“Madison Avenue” or “Employer”) moves to vacate the Decision and Direction of Second Election, dated September 13, 2012, herein (“Decision”). Indeed, *Noel Canning* specifically found that two of the three Members that not only comprised the Board at the time of the instant Decision but participated in its issuance were unconstitutionally appointed to their seats as Members of the Board. It necessarily follows that the Decision here is void *ab initio*. The Employer submits that given that the Decision was unconstitutionally issued and is

void *ab initio*, the Board is able to and should engage in the ministerial act of vacating or withdrawing it.

The Employer is aware that following issuance of the D.C. Circuit's *Noel Canning* decision, the Board issued a public statement in which it advised that it had no intention of complying with the D.C. Circuit's decision or interpretation of Article II, Section 2 of the United States Constitution. However, as noted, since the Board was without power to issue the Decision herein, the Board and its constituent parts, including Region 22, should treat the Decision as void *ab initio*.

CONCLUSION

For the reasons set forth above, the Employer respectfully submits that the Decision herein is void *ab initio*. The Board should engage in the ministerial act of vacating or withdrawing the Decision.

Respectfully submitted,

LITTLER MENDELSON, P.C.

By: s/ Jedd Mendelson
Jedd Mendelson
One Newark Center
Newark, NJ 07102
jmendelson@littler.com
973/848-4758

Attorneys for Care One at Madison Avenue
d/b/a Care One at Madison Avenue

Dated: March 25, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the aforesaid Employer's Motion to Vacate Decision and Direction of Second Election were served on March 25, 2013, in the manner set forth below:

J. Michael Lightner, Regional Director
NLRB - Region 22
20 Washington Place – 5th Floor
Newark, New Jersey 07102

E-filing on Agency Website, E-mail and regular mail

Eric Sposito, Esq.
NLRB – Region 22
20 Washington Place – 5th Floor
Newark, New Jersey 07102

E-Mail and regular mail

Katherine H. Hansen, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th Floor
New York, New York 10003

E-Mail and regular mail

s/ Jedd Mendelson

Jedd Mendelson