

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

Delaware Valley Floral Group, Inc. D/B/A:  
Delaware Valley Wholesale Florist :  
And : Case No. 05-CA-096037  
Paul T. Darmafall, An Individual :  
:

**MOTION FOR SUMMARY JUDGMENT**

Delaware Valley Floral Group, Inc. (Delaware Valley), by and through counsel, CARR MALONEY, P.C., pursuant to 29 CFR § 102.24(A) moves for summary judgment in this matter because the Board does not have the authority to pursue this investigation as a matter of law. The Board lacks authority for two reasons. First, the Board issued the complaint at a time when it had no general counsel. Second, the Board issued the complaint at a time when it had no quorum. Accordingly Delaware Valley requests that it be granted summary judgment and the complaint dismissed with prejudice.

(1) The Board Acted *Ultra Vires* When Issuing the Complaint Because it had no General Counsel on March 27, 2013.

The Board’s General Counsel is “responsible for the investigation and prosecution of unfair labor practice cases.”<sup>1</sup> He is not only responsible, but he has “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. § 153(d). But the Board acted *ultra vires* when issuing the complaint in this matter because it had no General Counsel or valid Acting General Counsel on March 27, 2013. Mr. Lafe Solomon purports to be the Acting

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<sup>1</sup> *The General Counsel*, National Labor Relations Board, <http://www.nlr.gov/who-we-are/general-counsel> (last visited June 5, 2013).

General Counsel but does not validly serve in this position under the law. The National Labor Relations Act specifically delineates the procedures for appointments of the Board's General Counsel and/or Acting General Counsel. *Id.* Under the Act, the President may appoint a General Counsel for a term of four years with the advice and consent of the Senate. *Id.* When the position becomes vacant, the President may designate an Acting General Counsel. *Id.* But that person may not serve in that position "(1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate; or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted." *Id.*

It is undisputed that Mr. Solomon was appointed the Acting General Counsel during the 111<sup>th</sup> Congress<sup>2</sup> on June 21, 2010.<sup>3</sup> President Obama then nominated Mr. Solomon to be the Board's General Counsel on January 5, 2011<sup>4</sup> during the first session of the 112<sup>th</sup> Congress.<sup>5</sup> The President has not nominated another General Counsel or Acting General Counsel since that date.<sup>6</sup> The Senate adjourned sine die for the 112<sup>th</sup> Congress on January 2, 2013.<sup>7</sup> Mr. Solomon, therefore, does not have valid authority to serve as the Acting General Counsel because the Senate has adjourned sine die since the session during which the President appointed him. Without authority to serve in this position, the Board could not have received the final authority

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<sup>2</sup> *Dates of Sessions of the Congress, present-1789*, United States Senate, <http://www.senate.gov/reference/Sessions/sessionDates.htm> (last visited June 5, 2013).

<sup>3</sup> *The General Counsel*, National Labor Relations Board, <http://www.nlr.gov/who-we-are/general-counsel> (last visited June 5, 2013).

<sup>4</sup> *Id.*

<sup>5</sup> *Dates of Sessions of the Congress, present-1789*, United States Senate, <http://www.senate.gov/reference/Sessions/sessionDates.htm> (last visited June 5, 2013).

<sup>6</sup> *Nominations & Appointments*, The White House, <http://www.whitehouse.gov/briefing-room/nominations-and-appointments> (last visited June 5, 2013).

<sup>7</sup> *Dates of Sessions of the Congress, present-1789*, United States Senate, <http://www.senate.gov/reference/Sessions/sessionDates.htm> (last visited June 5, 2013).

it needed from the Acting General Counsel to issue the Complaint in this matter on March 27, 2013. Therefore, Delaware Valley must be granted judgment as a matter of law.

(2) The Board Acted *Ultra Vires* When Issuing the Complaint on March 27, 2013 Because it did so Without A Quorum.

On January 25, 2013, the United States Court of Appeals for the District of Columbia Circuit issued a decision invalidating the President's unconstitutional recess appointments of three of the Board's current members. *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013). The National Labor Relations Act requires the Board to have at least three members to achieve a quorum. 29 U.S.C. § 153(b). Without the three members subject to the *Canning* decision, the Board has only two members and therefore lacks a quorum.<sup>8</sup> Under the Act, the Board's quorum requirement must be satisfied "at all times." *New Process Steel v. N.L.R.B.*, 130 S.Ct. 2635, 2645 (2010). Accordingly, no action that the Board has taken from at least January 25, 2013 through the present was taken with proper and valid legal authority. Because the complaint in this matter was issued after January 25, 2013, the Board acted *ultra vires* when issuing it.

For the foregoing reasons, Delaware Valley respectfully requests that the Division of Judges grant this Motion for Summary Judgment and dismiss the Complaint with prejudice.

Respectfully submitted,



Dated: June 11, 2013

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<sup>8</sup> *The Board*, National Labor Relations Board, <http://www.nlr.gov/who-we-are/board> (last visited June 5, 2013).

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**AFFIDAVIT OF SERVICE**

I HEREBY CERTIFY that on the 11th day of June, 2013, a copy of the foregoing Motion for Summary Judgment was electronically mailed to the following:

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