

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

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<b>In the Matter of:</b>	:	
	:	<b>CASE #22-RC-087792</b>
<b>Benjamin H. Realty Corp.</b>	:	
	:	
<b>Employer,</b>	:	
	:	
<b>And</b>	:	
	:	<b><u>MOTION FOR RECONSIDERATION</u></b>
<b>Residential Construction and General Service Workers, Laborers, Local 55,</b>	:	
	:	
<b>Petitioner.</b>	<b>X</b>	
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COMES NOW, Benjamin H. Realty, the Employer/Movant herein, and pursuant to Section 102.48(d) of the National Labor Relations Board’s Rules and Regulations, files its Request for Reconsideration of this Board’s Decision, Certification of Representative, and Notice to Show Cause dated November 13, 2014.

Specifically, this Motion is based on the fact that in the period between the September 11, 2013 Board Order transferring the Acting General Counsel’s Motion for Summary Judgment, and the NLRB’s Decision of November 13, 2014, the Employer filed a “Motion to Reopen the Record” on October 15, 2014. This pending Motion set forth that the deciding “challenged” vote in the underlying Election held on November 8, 2012, should be set aside based on the fact that that individual, Pastor Perea, had recently filed a lawsuit at the Superior Court of Union County, State of New Jersey, in which he admits that at the time of the Election, he was still acting as a Section 2(11) Supervisor. This allegation completely contradicts his testimony provided at the hearing conducted in November of 2012 that he was **not** a supervisor at the time of the Election.

The Employer also asked in said intervening Motion that contempt and/or perjury allegations be brought against Mr. Perea for providing false and misleading testimony during the hearing which was conducted on December 18, 2012 and December 27, 2012. This Board issued its November 13, 2014 Decision without the benefit of having the knowledge of the existence of the Employer's Intervening Motion before it, and the substantial intervening and recently acquired facts as contained therein.

A copy of the Employer's Motion to Reopen the Record and Reply to the Union's Opposition to same has been attached hereto as Exhibits "1" and "2" respectively.

**STATEMENT OF THE CASE**

A Petition was filed by the Residential Construction and General Service Workers, Laborers Local 55 on August 21, 2012. The Regional Director issued a Decision and Direction of Election on October 2, 2012.

An Election by secret ballot was conducted on November 8, 2012, among all full time and regular part time superintendents, maintenance employees, porters and painters employed by the Employer at its sixteen (16) apartment facilities in Orange and East Orange, New Jersey. The tally of ballots at the end of the voting showed that of the seventeen (17) eligible voters, thirteen (13) employees voted, with six (6) votes being cast for Petitioner and six (6) votes being cast against the Petitioner. There was one (1) challenged ballot as it relates to Justo Pastor Perea, which became determinative. The ballot was challenged by the Region in that Mr. Perea was not on the Excelsior List, due to the Employer's belief that, at the time of the Election, Mr. Perea was a Section 2(11) Supervisor as defined by the Act.

Subsequently, a Hearing was conducted before Hearing Officer Joseph Calafut on December 19 and 27, 2012. The Hearing Officer issued his report on January 25, 2013, finding

that the Employer did not meet its burden of showing that Pastor Perea had supervisory authority, and recommending that his ballot be opened and counted. The Employer filed its Exceptions to the Hearing Officer's Report on the Challenged Ballot on February 15, 2013 which was denied on June 19, 2013 by Chairman Pearce and Member Block. The ballot of Perea was counted thereafter, in which he had checked "yes," giving the Union a majority of the voters. The Union was certified on July 2, 2013.

During the testimony of Mr. Perea at the Hearing at Region 22 in December of 2012, he testified that he performed work as the Property Manager/Supervisor up until approximately May of 2012, at which time he was demoted to that of a regular Superintendent due to the hiring of Moshe Weiss, which had previously occurred in March of 2012. (All Exhibits are attached to the Employer's original moving papers in the Motion to Reopen the Record) In fact, Counsel for the Union admitted that Perea acted as a Supervisor up until this May of 2012 date. It was based on this testimony that led the Hearing Officer (and the Board itself) to hold that Mr. Perea was not a Section 2(11) Supervisor at the time of the Election.

Notwithstanding the prior testimony of Mr. Perea, on June 30, 2014, Mr. Perea, through his personal attorney, George R. Szymanski, Esq., filed a lawsuit in the Essex County Superior Court, docket number ESX-L-4606-14. The Complaint was served on the Employer at some point in early September. The factual allegations in the Complaint are as follows:

- “3. The Plaintiff, Justo Pastor Perea, had been the general property manager for the defendant at several rental properties, which were owned by the defendant, since March 1, 2000.
4. However, in September, 2012, the plaintiff experienced some back problems and was unable to work from September, 2012 to December, 2012.

5. After the plaintiff resumed working for the defendant in January, 2013, the defendant demoted plaintiff, Justo Pastor Perea, to the position of superintendent for three of the defendants' buildings." (emphasis added).

As the Employer's pending Motion to Reopen makes clear, this Complaint now makes the claim that Mr. Perea did in fact act as a Section 2(11) "Property Manager/Supervisor" for Benjamin H. Realty Corp. for the period of March 1, 2000 through January of 2013, which is inclusive of the Election, and was therefore not eligible to vote in the November 8<sup>th</sup> Election.

The pending Motion also asserts that Perea has either perjured himself in his testimony that was conducted on December 27, 2012, or has intentionally filed a false and misleading statement in his recent Essex County Superior Court filing for purposes of enhancing his new claims. In either event, this Board should have concern that the ruling upon which Mr. Perea's ballot was allowed to be counted could be based on false and misleading testimony. An explanation needs to be provided by Mr. Perea as it relates to this inconsistency, as the Election hinged solely on his contested ballot.

**I. THE NLRB DECISION OF NOVEMBER 13, 2014, WAS DECIDED WHILE THE EMPLOYER'S MOTION TO REOPEN THE RECORD WAS PENDING, AND WITHOUT THE BOARD HAVING KNOWLEDGE OF THE MISREPRESENTATION BY THE ONE DETERMINATIVE VOTER.**

Section 102.48(d)(1), states as follows:

"A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board Decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error."

Section 102.48(d)(2), goes on to state that:

"Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's

decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.”

Clearly, the inconsistencies between the statements made in the NJ Complaint and the testimony of Perea at the Region 22 Hearing are “extraordinary circumstances” and are a “material error” in the Conclusions of this Board, requiring a reexamination of the facts of this matter. The alleged error here can be briefly stated as follows: Mr. Perea lied in his earlier testimony at Region 22 proffered in December of 2012 relative to his supervisory status at the time of the Election, in that he was actually still employed as a supervisor, and his vote should not have been counted in the Election, thereby resulting in a tie. The entire results of the Election hinge on this one issue.

The prejudice to the Employer is equally obvious: as the case is currently decided, the Employer has a bargaining obligation with the Union, wherein it should not be required to so bargain based on the fact that Perea’s vote should not be counted, and the Election should be certified as a tie. Should this new Complaint of Pastor Perea be credited, the result would be an “admission against interest” by Mr. Perea, which would at a minimum, shed serious light on his lack of credibility.

In its opposition papers to the Employer’s pending Motion to Reopen the Record, counsel for the Union believes that the NJ case filing was a “simple mistake,” which somehow ameliorates the perjured testimony of Mr. Perea. This is because Mr. Perea and his attorney claim that they did not know of this mistake in dates in advance of the drafting of the Complaint.

To controvert this, the Employer’s counsel forwarded correspondence directly to Perea’s State Court attorney via facsimile on December 12, 2013, almost seven (7) months prior to his NJ case filing, and over nine (9) months prior to the service of the instant Complaint which forms the

basis of the Employer's Motion (the correspondence to Mr. Szymanski is attached to the Employer's Reply to the Union's Opposition papers). As this Board will note, on December 12, 2013, the Employer's counsel directly brought to the attention of Perea's attorney that the dates as being related to him by Mr. Perea were in error and not accurate and suggested that they review the testimony in the Region 22 case. Both Mr. Szymanski (the State Court attorney for Perea) and Mr. Perea ignored this alert, and proceeded nonetheless with the filing of the instant Complaint in the Superior Court of New Jersey. Thus, it is disingenuous for the Union and/or Perea to claim that it was a "simple mistake," as both the attorney and Mr. Perea were put on notice at a minimum of six (6) months before the filing of their Complaint that their facts were in error. The fact that Mr. Perea and Mr. Szymanski proceeded with this law suit is indicative of the fact that they both knew at the time of filing that the new date of Mr. Perea's demotion was subsequent to the election in this matter. Mr. Szymanski and Mr. Perea can hardly feign surprise at the position of my client, as they both had prior knowledge by the Employer's attorney having pointed out to them their inaccurate dates.

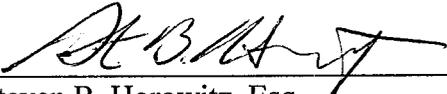
Therefore, the fact that Perea proceeded to litigation in New Jersey with the knowledge of him being a supervisor on the day of the election is what makes the pending Motion to Reopen all the more "extraordinary" as it contains a "material error" as to Perea's supervisory status.

**CONCLUSION**

The testimony of Perea should not be a fluid/evolving set of circumstances. Either he was a supervisor at the time of the Election, or he was not. These facts should not be manipulated to achieve a desired goal on the part of Mr. Perea depending on which Hearing he is testifying. This Board should reconsider its Decision of November 13, 2014, pending the outcome of the Employer's Motion to Reopen.

Respectfully submitted this 10<sup>th</sup> day of December, 2014.

**HOROWITZ LAW GROUP, LLC**

By:   
Steven B. Horowitz, Esq.  
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Roseland, New Jersey 07068  
973-226-1500  
973-226-6888 (Facsimile)  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I certify that this day I served the foregoing MOTION FOR RECONSIDERATION on the following persons by electronic mail:

Raymond G. Heineman, Jr.  
Kroll Heineman, LLC  
99 Wood Avenue South  
Iselin, New Jersey 08830  
(via overnight mail)

David E. Leach, III, Regional Director  
National Labor Relations Board  
Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102-3127  
(via Regular U.S. Mail)

Dated this 10 day of December 2014.

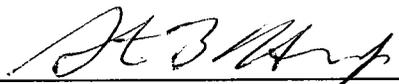
By:   
\_\_\_\_\_  
Steven B. Horowitz, Esq.

Exhibit “1”

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

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<b>In the Matter of:</b>	X	
	:	<b>CASE #22-RC-087792</b>
<b>Benjamin H. Realty Corp.</b>	:	
	:	
<b>Employer,</b>	:	
	:	
<b>And</b>	:	
	:	
<b>Residential Construction and General Service Workers, Laborers, Local 55,</b>	:	
	:	
<b>Petitioner.</b>	X	
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**MOTION TO REOPEN THE RECORD**

COMES NOW, Benjamin H. Realty, the Employer/Movant herein, and files its Request for Reconsideration, Rehearing, and/or to Reopen the Record, in light of extraordinary circumstances that were just recently discovered. Specifically, this Motion is based on the fact that the deciding “challenged” vote in the underlying Election held on November 8, 2012, should be set aside based on the fact that that individual, Pastor Perea, has recently filed a lawsuit at the Superior Court of Union County, State of New Jersey, in which he admits that at the time of the Election, he acted as a Section 2(11) Supervisor. This allegation completely contradicts his testimony provided at the hearing conducted in November of 2012 that he was **not** a supervisor at the time of the Election. The Employer would also ask that contempt and/or perjury allegations be brought against Mr. Perea for providing false and misleading testimony during the hearing which was conducted on December 18, 2012 and December 27, 2012.

## STATEMENT OF THE CASE

A Petition was filed by the Residential Construction and General Service Workers, Laborers Local 55 on August 21, 2012. At the hearing in this matter, Benjamin H. Realty Corp. (hereinafter referred to as "Employer") asserted that the Election Petition should be dismissed as untimely based on the Employer's "fluctuating workforce." The fluctuating workforce of the employer was in turn based on the failure of any of the Employer's ten (10) current Superintendents (as well as other miscellaneous employees) at the time to obtain a valid Superintendent License from the cities of either Orange or East Orange, New Jersey, where their respective facilities are located. Of these ten (10) superintendents, it was uncontroverted that approximately seven (7) would definitively be unable to obtain the proper licensing due to immigration issues, and therefore a significant reduction in the Employer's compliment of total employees (7 employees out of 18 total) would be forth coming.

The Regional Director issued a Decision and Direction of Election on October 2, 2012. Specifically, the Regional Director rejected the Employer's position of a fluctuating/declining/expanding workforce, and found that the Petition for unit was appropriate. Moreover, the Regional Director found that, notwithstanding the unrebutted and unchallenged changes that the Employer proposed to the workforce based on the superintendent's (and other employees) immigration problems, that the employee compliment of the Employer who remain substantially representative of the appropriate unit. Therefore, an election was directed. An Election by secret ballot was conducted on November 8, 2012, among all full time and regular part time superintendents, maintenance employees, porters and painters employed by the Employer at its sixteen (16) apartment facilities in Orange and East Orange, New Jersey. The

tally of ballots at the end of the voting showed that of the seventeen (17) eligible voters, thirteen (13) employees voted, with six (6) votes being cast for Petitioner and six (6) votes being cast against the Petitioner. There was one (1) challenged ballot as it relates to Justo Pastor Perea, which became determinative. The ballot was challenged by the Region in that Mr. Perea was not on the Excelsior List due to the Employer's belief that, at the time of the Election, Mr. Perea was a Section 2(11) Supervisor as defined by the Act.

Subsequently, a Hearing was conducted before Hearing Officer Joseph Calafut on December 19 and 27, 2012. The Hearing Officer issued his report on January 25, 2013, finding that the Employer did not meet its burden of showing that Pastor Perea had supervisory authority, and recommending that his ballot be opened and counted. The Employer filed its Exceptions to the Hearing Officer's Report on the Challenged Ballot on February 15, 2013 (including a Noel Canning Exception as it relates to any issue raised), which was denied on June 19, 2013 by Chairman Pearce and Member Block. The ballot of Perea was counted thereafter, in which he had checked "yes," giving the Union a majority of the voters. The Union was certified on July 2, 2013.

In June of 2014, the United States Supreme Court issued its unanimous decision in Noel Canning that the Obama NLRB Recess Appointees who issued each of the decisions issued above, were invalid. See *Noel Canning v. NLRB*, 570 U.S. \_\_\_\_\_ (2014).

During the testimony of Mr. Perea at the Hearing at Region 22 in December of 2012, he clearly and unequivocally testified that he performed work as the Property Manager/Supervisor up until approximately May of 2012, at which time he was demoted to that of a regular Superintendent due to the hiring of Moshe Weiss, which had previously occurred in March of 2012. (TR-258 through 261, 274 through 276, 288 through 290 attached hereto as collective

Exhibit 1). In fact, Counsel for the Union admitted that Perea acted as a Supervisor up until that time (TR-17, 18 see Exhibit 2). Pursuant to all of these transcript citations, Mr. Perea stated with absolute certainty that he lost his “managerial/supervisory” status at some point in May of 2012, almost 6 months prior to the Election. It was based on this testimony that led the Hearing Officer (and the Board itself) to hold that Mr. Perea was not a Section 2(11) Supervisor at the time of the Election.

Notwithstanding this testimony, on June 30, 2014, Mr. Perea, through his personal attorney, George R. Szymanski, Esq., filed a lawsuit in the Essex County Superior Court, docket number ESX-L-4606-14. A copy of the Complaint has been attached hereto as Exhibit “3.” The Complaint was served on the Employer at some point in early September. As this Board will note from a reading of the Complaint, the factual allegations are as follows:

- “3. The Plaintiff, Justo Pastor Perea, had been the general property manager for the defendant at several rental properties, which were owned by the defendant, since March 1, 2000.
4. However, in September, 2012, the plaintiff experienced some back problems and was unable to work from September, 2012 to December, 2012.
5. After the plaintiff resumed working for the defendant in January, 2013, the defendant demoted plaintiff, Justo Pastor Perea, to the position of superintendent for three of the defendants’ buildings.” (emphasis added).

Clearly, this Complaint now makes the claim that Mr. Perea did in fact act as the “Property Manager/Supervisor” for Benjamin H. Realty Corp. for the period of March 1, 2000 through January of 2013, when he was “demoted . . . to the position of superintendent . . .” Therefore, by Perea’s own Complaint filed in the State Court of New Jersey, he still was acting in the position of the “Property Manager/Supervisor,” at the time of the Election (November 8 of 2012), which by extension is a Section 2(11) Supervisor.

Taken one step further, Perea has either perjured himself in his testimony that was conducted on December 27, 2012, or has intentionally filed a false and misleading statement in his recent Essex County Superior Court filing for purposes of enhancing his new claims. In either event, this Board should have concern that the ruling upon which Mr. Perea's ballot was allowed to be counted could be based on false and misleading testimony. An explanation needs to be provided by Mr. Perea as it relates to this inconsistency, as the Election hinged solely on his contested ballot.

### ARGUMENT

**I. THE EMPLOYER HAS SATISFIED THE ELEMENT OF SECTION 102.65(e)(1) FOR THE REOPENING OF THIS RECORD, BASED ON THE INCONSISTENT AND INAPPOSITE STATEMENTS MADE IN PASTOR PEREA'S COMPLAINT, WHICH WAS NOT SERVED ON THE EMPLOYER UNTIL THE BEGINNING OF SEPTEMBER 2014.**

Section 102.65(e)(1), states as follows:

“A party to a proceeding may, because of extraordinary circumstances, . . . move after the Decision or Report for Reconsideration, for Rehearing, or to Reopen the Record . . . no Motion for Reconsideration, for Rehearing, or to Open the Record will be entertained by the Board . . . with respect to any matter which could have been but not raised pursuant to any other Section of these Rules . . . a Motion for Rehearing and the A Motion for Rehearing or to Reopen the Record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the Movant alleged to result from such error, the additional evidence sought to be induced, while it was not presented previously, and what result it would require if induced and credited. Only newly discovered evidence – evidence which has become available only since the close of the hearing - . . . will be taken at any further hearing.”

Section 102.65(e)(2), goes on to state that:

“A Motion to Reopen the Record shall be filed promptly on discovery of the evidence sought to be induced.”

Clearly, the inconsistencies between the statements made in the Complaint are “extraordinary circumstances” requiring a reexamination of the facts of this matter. The alleged error here can

be briefly stated as follows: Mr. Perea lied in his earlier testimony at Region 22 proffered in December of 2012 relative to his supervisory status at the time of the Election, in that he was actually still employed as a supervisor, and his vote should not have been counted in the Election, thereby resulting in a tie. The entire results of the Election hinge on this one issue. The prejudice to the Employer is equally obvious: as the case is currently decided, the Employer has a bargaining obligation with the Union, wherein it should not be required to so bargain based on the fact that Perea's vote should not be counted, and the Election should be certified as a tie. Should this new Complaint of Pastor Perea be credited, the result would be an "admission against interest" by Mr. Perea, which would at a minimum, shred serious light on his lack of credibility. Finally, this new evidence can only be considered as "newly discovered" inasmuch as it did not come to light until the service of the Complaint, which occurred in early September 2014. A mere four (4) weeks prior to the instant filing of this Motion to Reopen.

The testimony of Perea should not be a fluid/evolving set of circumstances. Either he was a supervisor at the time of the Election, or he was not. These facts should not be manipulated to achieve a desired goal on the part of Mr. Perea: he was either a supervisor at the time of the Election as per his instant Complaint, or he was not as per his testimony on December 27, 2012.

Therefore, based on the foregoing, this Board should reopen the record and allow the Employer to explore the reasons for this change in Mr. Perea's recollection as to his supervisory status at the time of the Election. In the alternative, this Board should simply rule that Mr. Perea's ballot should not be counted, thereby resulting in a tie at the Election between votes for the Employer and the Union, and issue a new certification that a majority of the votes have not been cast for the Union/Petitioner, *sua sponta*.

**II. THE HOLDING IN NLRB VERSUS NOEL CANNING, 573 U.S. \_\_\_\_\_ (2014) MANDATES THAT ANY AND ALL DECISIONS RELATIVE TO THIS PETITION, INCLUDING THE PRE—ELECTION REQUEST FOR REVIEW, AS WELL AS THE POST ELECTION EXCEPTIONS FILED, REQUIRE A RECONSIDERATION OF ALL ISSUES RAISED BY THE EMPLOYER, INCLUDING THE SUPERVISORY STATUS OF PASTOR PEREA.**

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 573 U.S. \_\_\_\_\_ 2014, WL 2882090 (June 26, 2014), unanimously holding that the recess appointments of Members Richard Griffin and Sharon Block were unconstitutional, as the Senate was not in recess at the time. Here, at the time that the Petition was filed and the Election was conducted, the Board consisted of Richard Griffin, Sharon Block and Chairman Mark Pearce.

The Employer requests that the Board reconsider both the Pre-Election Decision of October 18, 2012 regarding the Employer’s “Fluctuating Workforce” argument, as well as its certification of the Union in light of the Supreme Court’s decision in *Noel Canning*. It is clear from that Decision that the Board lacked a quorum at all relevant times in this proceeding, starting with the Board’s Decision dated October 19, 2014 from the Employer’s Request for Review of the Regional Director’s Decision and Direction of Election, to the Board’s Decision of June 19, 2013 that stemmed from the Employer’s Exceptions to the Hearing Officer’s Report. This includes November 8, 2012, when the underlying Representation Election was conducted. The Board, of course, has wide authority under Section 9 of the Act to conduct secret ballot elections, issue a tally of ballots, and to certify the outcome. But this authority can only be exercised by a Board that is properly constituted and has a valid quorum. The Board’s prior decisions in this matter and subsequent certification of the Union is thus fatally tainted and cannot stand. The only conceivable way in which this fatal failure can be cured is for the currently properly constituted Board to set aside the November 8, 2012 Election, rule on the

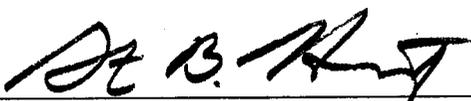
Employer's "Fluctuating Workforce" argument, and/or re-open the record on the issue of Pastor Perea's Section 2(ii) Supervisory Status. Alternatively, this Board should direct a new Election in which employees can determine whether or not they want the Union to represent them. The Employer requests that this Board could reconsider and uphold all of the Employer's prior arguments, including the decisions stated herein, and reverse the certification of the Union.

**CONCLUSION**

Because the Board lacked a quorum at all phases of this Petition, including the time of the filing of the Representation Petition, the holding of the November 8, 2012 Election, and all Requests for Review and Exceptions' Decisions, the Board did not have the power to conduct an Election or take a tally of ballots. The Election should be considered null and void and the Board's subsequent certification of the Union is inherently invalid. The Employer requests that the Board grant this Motion and either direct a new Election to be conducted by the Regional Director at an appropriate time, or dismiss the certification based on the subsequent recanting by Pastor Perea of his earlier testimony.

Respectfully submitted this 15<sup>th</sup> day of October, 2014.

**HOROWITZ LAW GROUP, LLC**

By:   
Steven B. Horowitz, Esq.  
101 Eisenhower Parkway, 4<sup>th</sup> Floor  
Roseland, New Jersey 07068  
973-226-1500  
973-226-6888 (Facsimile)  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I certify that this day I served the foregoing MOTION TO REOPEN THE RECORD on the following persons by electronic mail:

Raymond G. Heineman, Jr.  
Kroll Heineman, LLC  
99 Wood Avenue South  
Iselin, New Jersey 08830  
(via overnight mail)

David E. Leach, III, Regional Director  
National Labor Relations Board  
Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102-3127  
(via Regular U.S. Mail)

George R. Szymanski, Esq.  
Law Offices of George R. Szymanski  
1370 Chews Landing Road  
Laurel Springs, New Jersey 08021

Dated this 15<sup>th</sup> day of October 2014.

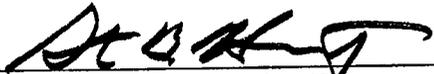
By:   
Steven B. Horowitz, Esq.

Exhibit “2”



**HOROWITZ**  
**LAW GROUP, LLC**

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ROSELAND, NEW JERSEY 07068  
TEL: 973-226-1500 • FAX: 973-226-6888

STEVEN B. HOROWITZ • N.J. G.A.  
RAE T. HOROWITZ • N.J. G.A.

OF COUNSEL  
HOWARD S. GREENBERG • N.J., NY  
CHAD B. FRIEDMAN • N.J., NY  
JAIMIE A. SLOSBERG • N.J., NY

November 21, 2014

**VIA NLRB E-FILING ONLY**

Gary Shinnars, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570

Re: Employer's Reply to the Union's  
Opposition to the Motion to Reopen the Record  
Benjamin H. Realty and Local 55, Laborers  
NLRB Docket #22-RC-087792

Dear Mr. Shinnars:

As your files should reflect, the undersigned represents Benjamin H. Realty as it concerns the above referenced matter. Please accept this correspondence as my client's Reply to the Union's Opposition to the pending Motion to Reopen this Record.

The Union relies on four (4) arguments that they believe require the pending Motion to be denied:

1. There are no extraordinary circumstances present;
2. Justo Perea has admitted a mistake;
3. The fact that the underlying Petition was filed by August 21, 2012; and
4. That the Employer has failed to should "immediate action."

I will address each of their arguments seriatim:

1. Extraordinary circumstances - I find it hard to believe that a State Court Complaint, being filed by the very individual who was the tie breaking vote in an election, where that person completely changes his position as to the date he ceased to become a supervisor, as being anything less than "extraordinary." To the contrary, this set of circumstances is "new," it is certainly "unique," and it is absolutely "extraordinary." While the fact that Mr. Perea was not the "Petitioner" is certainly accurate, as has been stated, his vote was the tie breaker in a highly disputed contest. There is no rule put forth by this Board, nor any case law, that requires an "extraordinary circumstance" to be emanating from the actions of the Petitioner. Indeed, the fact that this flip flop in testimony as to the date Perea lost his supervisory status is emanating from the tie breaking vote himself is what makes this situation so unique and extraordinary.

Gary Shinnars, Executive Secretary

November 21, 2014

Page 2

The fact that a pleading filed with the Superior Court of New Jersey is stating something completely inapposite to the testimony of Mr. Perea that occurred in December of 2012, shows that there is an actual abuse of the testimony that was put forth in Region 22.

Therefore, the Employer has satisfied the requisite showing of there being extraordinary circumstances in this matter.

2. Justo Perea has supposedly admitted his mistake – counsel for the Union believes that the letter written by Pastor Perea’s attorney, George R. Szymanski, Esq., on October 23, 2014, admitting his “simple mistake,” somehow emulates the perjured testimony of Mr. Perea. This is supposedly because Mr. Perea and Mr. Szymanski did not know of this mistake in dates in advance of the drafting of the Complaint.

Attached hereto as Exhibit “1” is correspondence that was forwarded by the undersigned directly to Mr. Szymanski via facsimile on December 12, 2013, almost seven (7) months prior to his filing of the State Court Complaint, and over nine (9) months prior to the service of same which forms the basis of the Employer’s Motion. As this Board will note, on December 12, 2013, I directly brought to the attention of Mr. Szymanski that the dates as being related to him by Mr. Perea were in error and not accurate. Both Mr. Szymanski and Mr. Perea ignored my alert, and proceeded nonetheless with the filing of the instant Complaint in the Superior Court of New Jersey. Thus, it is disingenuous for Mr. Szymanski to claim that it was a “simple mistake,” as both he and Mr. Perea were put on notice at a minimum of six (6) months before the filing of their Complaint that their facts were in error. The fact that Mr. Perea and Mr. Szymanski proceeded with this law suit is indicative of the fact that they both knew at the time of filing that the new date of Mr. Perea’s demotion was subsequent to the election in this matter. Mr. Szymanski and Mr. Perea can hardly feign surprise at the position of my client, as they both had prior knowledge by my having pointed it out to them of their inaccurate dates.

Therefore, the fact that they proceeded to litigation with this knowledge of Perea being a supervisor on the day of the election is what makes the pending Motion to Reopen all the more “extraordinary.”

3. Two year old case – it cannot be disputed that the Petition in this matter was filed on August 21, 2012. However, there have been no allegations whatsoever of any abuse of process by my client. In fact, the Employer has availed itself of all lawful Exceptions/Requests for Review that are granted to it under the Board’s process. This Board cannot use as a reason for denying the pending good faith Motion the fact that the Employer availed itself of its rights that the National Labor Relations Act has granted to it. This is especially true when the very issue that my client seeks review of in this Motion may have been the subject of perjured testimony. Additionally, the fact that the case of Noel Canning was decided in the interim, thereby further extending any time lag in question, can also not be held against my client. Indeed, to do so, is to deny my client Due Process in the pending Motion by holding against them the rights that they lawfully pursued in the handling of this matter.

Therefore, again, counsel for the Union has raised an argument that is simply irrelevant and unjustified on its face.

4. The purported lack of “immediate action” – here is where the misrepresentations of counsel for the Union are the most egregious. Counsel for the Union would have this Board believe that there was an intentional three and a half month delay in filing the instant Motion. But

Gary Shinnars, Executive Secretary

November 21, 2014

Page 3

as this Board should be mindful of, there is an enormous distinction between the filing of a Complaint, and its service upon a party. While the Complaint may have been filed in June, it was not served until September, 2014. As such, there was no three and a half month long delay in filing the instant Motion. Rather, there was, at most, a three to four week lag time (with, ironically enough, the Labor Day Holiday occurring in this time period). Additionally, this Board should be mindful of the fact that, unlike the Federal system, New Jersey has no computer database to log into or to provide prompts upon the filing of a Complaint. Whereas the Federal Court system has PACER, and New York has a similar computer base filing system that is tracked by Bloomberg, New Jersey has no such service. Thus, there is no way for my client to have known that a case was filed in June of 2014 until it is actually delivered by service of process to them. As stated in the Motion, this occurred sometime in the first week of September, 2014. In addition to the Labor Day Holiday (for which I was away), the Jewish Holidays were being observed on the night of September 24<sup>th</sup> and all day on the 25<sup>th</sup> and 26<sup>th</sup>. The time in reviewing the prior testimony, drafting, and filing a Motion that meets the standards and requirements of this Board, the totality of which equaled no more than three to four weeks, can hardly be seen as anything less than satisfying the "immediate action" requisite of the Board's regulations.

Finally, counsel for the Union asks "why not provide proof of the date of service?". That is because there is no "receipt" that is provided with a Complaint that is served upon a Defendant. Rather, that receipt is returned to the serving party. Be that as it may, attached hereto as Exhibit "2" is the Affidavit of Benjamin Herbst, the principal of Benjamin H. Realty, which affirms the foregoing. It is respectfully submitted that the three to four week time frame to file the instant Motion satisfies this pleading requirement.

Conclusion – based upon the above, and most importantly, the correspondence that was sent to George Szymanski almost seven (7) months prior to his filing the instant Complaint, it is the Union that cannot dispute that there are "extraordinary circumstances" that require that this matter either be reopened, or for the supervisory status of Mr. Perea to be re-examined, or a new election to be held, and/or a ruling that the ballot of Mr. Perea should not be counted. The fact that this was "previously litigated" is of no moment if Mr. Perea did not provide truthful testimony, as is now apparent from the instant filing in the Superior Court of New Jersey. Therefore, it is respectfully requested that the Employer's Motion be considered, and that the relief set forth in said Motion be granted.

Very truly yours,

**HOROWITZ LAW GROUP, LLC**



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SBH:pls

Enclosures

- c: Curtiss T. Jameson, Esq. (via facsimile only, w/enclosure)  
George R. Szymanski, Esq. (via facsimile only, w/enclosure)  
Benjamin H. Realty (via email only, w/enclosure)  
David Leach, Regional Director (via facsimile only, w/enclosure)