UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN BAPTIST HOMES OF THE WEST d/b/a PIEDMONT GARDENS	Cases:	32-CA-25247 32-CA-25248
and		32-CA-25266 32-CA-25271 through
SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS - WEST		32-CA-25308 32-CA-25498

RESPONDENT'S SUPPLEMENT TO MOTION TO DISMISS

Per Sections 102.24 and 102.47 of the Board's Rules and Regulations, American Baptist Homes of the West d/b/a Piedmont Gardens ("Employer" and "Respondent") hereby supplements its August 12, 2015 Motion ("Motion") for the Consolidated Complaint ("Complaint") in the above-captioned cases to be immediately dismissed and to vacate the decision of the ALJ based thereon.

On September 28, 2015, NLRB General Counsel Richard Griffin filed a "Notice of Ratification" of the Complaint. Therein, Mr. Griffin attempted to "ratify" (*1,649 days later*) the Complaint which was invalidly issued by Mr. Lafe Solomon, the former Acting General Counsel of the NLRB. At the time of the Complaint's issuance, Mr. Solomon was serving in violation of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq. SW General, Inc. v. NLRB*, __ F.3d __, 2015 WL 4666487 (D.C. Cir., Aug. 7, 2015). Accordingly, the Complaint is void *ab initio* despite Mr. Griffin's noble effort to now craft a "practical" solution. R. Griffin, Notice of Ratification in re 32-CA-025247 *et al*, p. 1 (Sept. 28, 2015).

Congress enacted the FVRA "to create a clear and exclusive process to govern the performance of the duties of the offices in the Executive branch that are filled through presidential appointment by and with the consent of the Senate when a Senate confirmed official has died, resigned, or is otherwise unable to perform the functions and duties of the office." S. Rep. No. 105-250 at 1 (1998). More precisely, to reclaim Congress's Appointments Clause power. 144 Cong. Rec. S6413 (Daily ed. June 16, 1998) ("This legislation is needed to preserve one of the Senate's most important powers: the duty to advise and consent on presidential nominees.")

The Office of General Counsel is empowered with some discretion but it is not so "broad and unreviewable" as Mr. Griffin claims to empower him to trump constitutional separation of power principles or the FVRA where a Complaint was issued by an unlawfully serving General Counsel – and one which the Senate refused to confirm. *See* U.S. Const. art. II, § 2, cl. 2; 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013). The FVRA violation that led to the Complaint being issued in the first place was a structural error and thus "subject to automatic reversal" *Neder v. US*, 527 U.S. 1, 8 (1999). To hold otherwise, would be to permit the Office of the General Counsel to violate any other express congressional mandate and thereafter insulate itself from judicial review by issuing *post facto* 'notice of ratifications' or other such edicts.

General Counsel relies on 5 U.S.C. Sec. 3348(e)(1) as support for this ratification, but this argument is misplaced as that portion of the statute does not give the President *carte blanch* to sidestep the requirements of the FVRA. Since the NLRA requires a separation of the prosecutorial role of the General Counsel from the adjudicatory role of the Board, the provisions of the law requiring the Office of the Head of the Executive Agency (*i.e.*, the Board) to perform the functions of the General Counsel do not apply here. But that section was never intended to exempt unlawful General Counsel appointments from the "no-ratification" and "void-ab-initio" provisions of 5 U.S.C. § 3348(d).

Even if, *arguendo*, harmless error inquiry were warranted here, under the Administrative Procedure Act or otherwise, the error at issue would be found indelible and permanently prejudicial. *See* 5 U.S.C. § 707 (directing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law ... [or] without observance of procedure required by law"); *see also, AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 89 (D.D.C. 2007) ("Neither a showing of actual prejudice nor proof that the agency would have reached a different result is required to establish prejudicial error.")

It is unknowable whether a validly-appointed General Counsel would have taken any of the actions as did Mr. Solomon, or otherwise refrained from same under different policies or prioritizations. A valid General Counsel might have ordered the underlying unfair labor practice charges dismissed, adopted a different legal strategy, or even pursued and obtained settlement. The possibilities are endless. But in any case, the Complaint was unlawfully issued, and everything flowing from it (including the derivatively tainted attempted "ratification" by the current General Counsel now) is unlawful as well. Simply put: the current General Counsel cannot now un-ring and then re-ring a bell that was unlawfully rung back in 2011.

Thus, despite the General Counsel's "Notice of Ratification," the Employer still objects to continued prosecution of the above matter, and the Board must still dismiss the Complaint and vacate the decision of the ALJ issued thereon.

Dated: October 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Supplement to Motion to Dismiss was electronically served on October 8, 2015 on the following:

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DATED this 8th day of October 2015

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