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October 8, 2020

**Via Electronic Filing and Email <Lauren.Esposito@nlrb.gov>**

The Honorable Lauren Esposito  
Administrative Law Judge  
National Labor Relations Board, Division of Judges  
26 Federal Plaza, 41<sup>st</sup> Floor, Suite 41-120  
New York, New York 10278

**Re: Postponement Request**  
**NLRB Case No.: 29-CA-254799**  
**Our Client: New York Paving, Inc.**  
**Our File No.: 09676-00210**

Your Honor:

This firm represents New York Paving, Inc. (“Respondent” or “NY Paving”) in the above-referenced matter. We submit the instant correspondence in accordance with Your Honor’s emails, dated October 6 and 7, 2020, directing the parties to submit their position statements to request a postponement on or before October 8, 2020. For the reasons stated below and given the undue prejudice to NY Paving, Respondent respectfully requests the trial, which is currently scheduled to commence on October 13, 2020, be postponed.

By way of relevant background facts, on July 27, 2020, Your Honor issued an Order granting the Counsel for the General Counsel’s (“CGC”) opposed motion to conduct hearing by videoconference. On August 7, 2020, NY Paving requested Your Honor postpone the trial, which at the time was scheduled to commence on September 1, 2020, pending the Board’s decision on Respondent’s Request for Special Permission to Appeal Your Honor’s July 27<sup>th</sup> Order (“Special Appeal”). NY Paving further requested an Order directing any adjourned hearing date to be at least three (3) weeks *after* the Board’s decision on the Special Appeal. Respondent stated during the Zoom conference with Your Honor the foregoing three (3) week “gap” was necessary to permit the parties to adequately prepare for the hearing.

Respondent filed the Special Appeal on August 10, 2020. On August 13<sup>th</sup>, CGC stated even though he “[did] not oppose a further postponement if the Board has not ruled on the

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Special Appeal by [the postponed date],” he did not consent to the three (3) week “gap.” Respondent yet again reiterated it was unjust and inequitable to require Respondent to prepare for a trial for a particular date only to discover the Board has not decided the Special Appeal. On August 18, 2020, Your Honor issued an Order granting the request to adjourn the hearing to October 12<sup>th</sup> and denying Respondent’s request for an Order stating the hearing will not begin until three (3) weeks after the Board’s decision on the Special Appeal.

Despite CGC’s optimistic outlook on the Board’s decision on the Special Appeal, no such decision has been issued as of the date of this correspondence. At this juncture, even if the Board issues a decision denying the Special Appeal, NY Paving will be severely prejudiced should it be required to proceed on October 13, 2020. Most importantly, NY Paving has repeatedly objected to conducting the hearing by videoconference given the absence of the minimum due process safeguards required by Section 102.35(c)(2) of the Board’s Rules and Regulations. No such safeguards have been established in this matter. In fact, Respondent is at a severe disadvantage because while CGC presumably is familiar with the Zoom hearing procedures and guidelines related to the Board proceedings, Respondent has been given no direction whatsoever regarding same.

By way of example, NY Paving anticipates producing approximately Ten Thousand (10,000) pages of documents in response to the CGC’s *Subpoena Duces Tecum*. As of the date of this correspondence (merely one (1) full business day before the commencement of the scheduled trial date), Respondent has received no instructions whatsoever regarding the manner in which the foregoing production should occur. Furthermore and even though Respondent is expected to be fully prepared, there has been no guidance issued relative to the technical aspects of the Zoom hearing, including but not limited to software requirements, witness notification and preparedness for video trial, etc.

Should NY Paving be required to proceed on October 13<sup>th</sup> (regardless of whether the Board denies the Special Appeal or issues no decision at all), it will suffer paramount prejudice and inequity. Of the five (5) days remaining until the trial date, one (1) day is a federally recognized holiday, which is observed by NY Paving’s management. Additional two (2) days (October 10<sup>th</sup> and 11<sup>th</sup>) are Jewish Holidays (Shemini Atzeret and Simchat Torah), which Attorney Farrell (the lead counsel in this case) strictly observes. Additionally, Friday, October 9<sup>th</sup> is also a relatively “short” day for Attorney Farrell due to his observance of Shabbos. Even if Attorney Farrell wanted to work through the weekend for trial preparation, which he routinely does, he simply will not be able to do so due to his faith. Essentially and even if the procedural rules are issued, Attorney Farrell will have *less than two (2) days* to familiarize himself with said rules and prepare for a *Zoom trial*, if one is so ordered.

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CGC has stated in the past and will undoubtedly repeat again that NY Paving should have been preparing for the trial during the most recent extension period and should therefore be ready to proceed on a few days' notice. CGC's anticipated position is both erroneous and far removed from the realities associated with preparing for a *video trial*. Indeed, while CGC's case preparation may indeed take only a few days, Respondent and its counsels, as demonstrated by their prior successful record at the Region and the Board, prepare for the hearings in a fulsome manner. It is not CGC's prerogative to dictate Respondent's trial preparation length and efforts. For example, unlike NY Paving, CGC does not have to marshal thousands of pages of documents requested in a federal *Subpoena Duces Tecum* while not knowing how the anticipated production will occur.

Respondent's request for a postponement is not premised upon not having enough time to prepare for the trial because NY Paving has extensively prepared for the upcoming trial and is confident in its success. Rather, Respondent's postponement request is grounded upon the absence of the due process safeguards mandated by Section 102.35(c)(2) and lack of any procedures related to preparing for the technical aspects of a video trial, if one is so ordered.

Finally and to avoid a similar (confusing) situation, Respondent respectfully renews its request to postpone the hearing in this matter until three (3) weeks after the Board's decision on the Special Appeal.<sup>1</sup> This "gap" is requested to avoid the Respondent, once again, spending substantial time and resources to prepare for a trial in the absence of a timely decision by the Board. However and should the foregoing request be denied, from the dates proposed by the Charging Party counsel, Respondent is available during the week of November 9<sup>th</sup> with the exception of November 13<sup>th</sup> on which date Mr. Miceli has a court-ordered deposition.

We sincerely thank the Court for its time and consideration of the foregoing.

Respectfully submitted,



Ana Getiashvili

cc: John Mickley, Esq. (via email)  
Erin Schaefer, Esq. (via email)

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<sup>1</sup> Even though Respondent's postponement request is not premised upon the ongoing settlement discussions, we nevertheless join Attorney Chaikin's letter and affirmatively state the settlement discussions between Respondent and Charging Party Union are far more advanced than they have ever been before. Should the trial commence on October 13<sup>th</sup>, the adversarial nature of litigation will undoubtedly affect the ongoing settlement discussions, which most likely will be abrogated.

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