

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

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**UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 400, CLC, Respondent,**

**and**

**Case No. 06-CB-222829**

**SHELBY KROCKER, Charging Party.**

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**CHARGING PARTY’S OPPOSITION TO THE JOINT MOTION TO REMAND**

Charging Party Shelby Krocker (“Krocker”) opposes the Acting General Counsel’s and the United Food and Commercial Workers Union, Local 400’s (“Union”) (collectively, “Settling Parties”) Joint Motion to Remand Case to the Region (“Motion”). This eleventh-hour maneuver is an attempt by the Settling Parties to thwart the National Labor Relations Board’s (“Board”) decision-making authority and make the indefensible ALJ opinion the law of the case on several important legal issues. In doing so, the Settling Parties have proposed saddling Charging Party and her entire bargaining unit with an impermissible informal settlement, which provides an insufficient remedy.

The Motion should be denied for at least three reasons: (1) the Settling Parties’ informal settlement agreement is impermissible at this late stage in the proceedings; (2) the proposed settlement does not satisfy the *Independent Stave* analysis; and (3) the Acting General Counsel has no authority to ask the Board to remand this case.

**A. The Board’s Rules & Regulations do not permit the Settling Parties to enter into an informal settlement and seek remand at this stage of the proceeding.**

The Settling Parties’ Motion is an impermissible attempt to remand the case for enforcement of an informal settlement agreement long after the ALJ issued his decision and the parties’ exceptions have been fully briefed before the Board. Such a request is contrary to the

Board's Rules and Regulations and the Board should reject the settlement and deny the Motion to Remand.

It is well-established that the General Counsel loses final authority over a complaint once the merits of the case are before an ALJ or the Board itself. *See, e.g., Sheet Metal Workers, Local 28*, 306 NLRB 981, 982 (1992) (citations omitted) (General Counsel cannot unilaterally withdraw a complaint after evidence has been presented to an ALJ). Consistent with this principle, Section 101.9(b)(1) of the Board's Rules and Regulations states that, after issuance of a complaint, the Board favors a formal settlement agreement. NLRB Rules & Reg. § 101.9(b)(1). Here, the Settling Parties make no attempt to justify their agreement to an *informal* settlement at this late stage in the proceedings (including a non-admissions clause), and indeed, the Board's procedures regarding post-hearing informal settlements foreclose their ability to do so.

Section 101.9 provides avenues for the General Counsel to proceed with an informal settlement at various times after the issuance of a complaint. As a case progresses, the informal settlement process becomes more formal. After the issuance of a complaint but before a hearing, the Regional Director can enter into an informal settlement withdrawing the complaint, with only an appeal to the General Counsel available. *Id.* at § 101.9(c). After the hearing begins, the ALJ must approve the settlement (including the withdrawal of the complaint) and the aggrieved party can ask the Board for leave to appeal. *Id.* at 101.9(d). Specifically, at this final stage, resolution of the case by an informal settlement not signed by all parties requires: (1) the settling parties to request to the ALJ that the complaint be withdrawn; (2) the ability of the objecting party to state on the record or in writing to the ALJ its reasons for opposing the settlement; (3) the approval of the ALJ; and (4) the ability to ask for leave to appeal to the Board pursuant to Section 102.26. *Id.* The Board is not involved in the approval process in the first instance in any of these informal

settlements. *See id.* at §§ 101.9(c)(3), (d)(2); *see also, e.g., McDonald's USA, LLC*, 368 NLRB No. 134, 2019 WL 6838007, at \*5 (Dec. 12, 2019) (appeal of ALJ's disapproval of informal settlement).

These Board procedures compel the conclusion that an informal settlement agreement is impermissible at this stage of the proceeding for two reasons. First, the definition of informal settlement includes the fact that it is not approved by the Board—it is specifically contrasted with a formal settlement that *is* approved by the Board. *See* NLRB Rules & Reg. §§ 101.7, 101.9(b)(2). The Board therefore is not in a position to approve of an informal settlement agreement. Second, Section 101.9(d) specifically contemplates the Board's *review* of an ALJ's approval of an informal settlement agreement, not the Board's initial *approval* of an informal settlement. Thus, the last time period for entering into an informal settlement is after the opening of the hearing, but before the ALJ issues his decision. *Id.* at § 101.9(d). This case is well beyond that point, something ignored by the Settling Parties' Motion.

In contrast, formal settlements are subject to Board approval. *Id.* at § 101.9(b)(1). Taken together, both the informal and formal settlement agreement rules require approval by the ALJ or the Board of a settlement after a hearing begins, and for an appeals process of said approval. Approval of a settlement can be appealed as a final order of the Board—either as an affirmance of the ALJ's informal settlement approval,<sup>1</sup> or as a Board order specifically approving the settlement.<sup>2</sup> Here, the Settling Parties do not ask the Board to approve the settlement or seek permission to

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<sup>1</sup> *See, e.g., George Ryan Co. v. NLRB*, 609 F.2d 1249, 1250–52 (7th Cir. 1979) (petition for review of the Board's review of ALJ's decision on informal settlement).

<sup>2</sup> *See, e.g., Concrete Materials of Ga., Inc. v. NLRB*, 440 F.2d 61, 68 (5th Cir. 1971) (recognizing the right of a charging party to petition for review of a Board order approving a formal settlement).

withdraw the Complaint, both of which are required even at the earlier, ALJ stage of the proceeding.<sup>3</sup>

In reality, the Settling Parties are attempting to avoid an adjudication on the merits and ram the informal settlement through without approval by any adjudicatory body (either by the Board or an ALJ). Such an action is prohibited by the Board's Rules after a hearing has started and before the ALJ issues his decision—and is even more egregious now that the exceptions are fully briefed before the Board. In so doing, the Settling Parties are trying to: (1) avoid a finding of Union liability through a non-admissions clause, as formal settlements generally include agreement to a Board order and consent to entry of judgment in a circuit court of appeals enforcing the order, see Section 101.9(b)(1); and (2) avoid the federal court appellate process by seeking a remand, which may well be interpreted as a non-final order of the Board, see *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239–41 (D.C. Cir. 1980) (discussing the “final order” doctrine in agency litigation); *Peterson v. NLRB*, No. 97-1667, 1998 WL 315595, at \* 1 (D.C. Cir. 1998) (dismissing petition for review for lack of final order where Board remanded a portion of the case to the ALJ).

The Settling Parties' Motion is an end-run around the Board's Rules and Regulations and is an affront to its authority. The Settling Parties' Motion should be denied because an informal settlement is impermissible at this stage of the proceedings. Even if the Board attempts to apply Section 101.9 to this Motion, it should be denied because the Motion does not seek approval of the settlement, nor does it seek to withdraw the Complaint.

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<sup>3</sup> So, even if the Board attempts to shoehorn the Settling Parties' Motion into Section 101.9(d), the Motion is insufficient and should be denied.

**B. The *Independent Stave* factors favor rejection of the settlement agreement.**

Even if the Board decides to read into the Settling Parties' Motion a request for approval of the settlement agreement (which it should not) the Board should reject the settlement. Under *Independent Stave*, the Board "evaluate[s] the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement." *UPMC*, 365 NLRB No. 153, 2017 WL 6350171, at \*5 (Dec. 11, 2017) (quotations and citation omitted). *Independent Stave* outlines some (but not all) of the factors the Board considers in determining whether it should approve a settlement:

(1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

*Id.* (quoting *Indep. Stave*, 287 NLRB 740, 743 (1987)). In this case, there is an additional, fifth factor that is relevant and must be considered, namely, that the Settling Parties colluded to enter into this settlement at the eleventh hour to achieve a political end.

The first *Independent Stave* factor, whether all the parties agreed to be bound, is neutral, given the Settling Parties' agreement and Krockner's opposition. See *McDonald's*, 368 NLRB No. 134 at \*5. In *McDonald's*, the Board found that the General Counsel's position was of particular importance "when he yields on prosecuting an aspect of the complaint to vindicate other public rights." *Id.* Here, the Acting General Counsel is *abdicating* his role of protector of bargaining

unit rights in order to protect the Union, and it is Krocker who has taken up the mantle to fight for a remedy for her co-workers.<sup>4</sup>

The second and fifth *Independent Stave* factors, which are discussed in detail below, compel a rejection of the settlement agreement.

**1. Factor Two: The settlement is not reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation.**

**a. The proposed settlement is not reasonable in light of the allegations in the Complaint.**

The Motion asserts: “[t]he settlement fully remedies the allegations contained in the complaint and comports with the remedial provisions of Board orders in cases involving such violations.” Mot. at ¶ 9. This is false. As outlined in Krocker’s objections to the settlement agreement, the proposed agreement does *not* fully remedy the unfair labor practices alleged in the Complaint and as shown by the stipulated factual record. *See* Mot. Exs. 2, 4. The main violation challenged by the original complaint—the Union’s maintenance of a clearly unlawful and coercive checkoff against an entire bargaining unit—remains unremedied by the proposed agreement.

The Union coerced an entire bargaining unit of employees by using checkoff cards that prominently stated “MUST BE SIGNED” in large print on all of them. Stipulation, Ex. 3.<sup>5</sup> As discussed in great detail in Krocker’s Brief in Support of Exceptions, these facially false and coercive checkoffs blatantly violate the well-established law that all checkoffs must be signed *voluntarily*. Krocker Br. in Supp. Exceptions at. 3–9; *see also, e.g., IUE, Local 601 (Westinghouse*

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<sup>4</sup> Regardless of the Board’s substantive determinations of the third and fourth factors, these factors should be given little weight given the issues at stake in this case and the fact that the General Counsel is settling to *avoid* a favorable decision.

<sup>5</sup> The Union’s checkoff is flawed in several other respects, including unlawfully restricting employees’ revocations to a window period prior to contract expiration, containing confusing language, and containing an unlawful portability requirement. These defects are discussed in Krocker’s Brief in Support of Exceptions, at 9–18.

*Elec. Corp.*), 180 NLRB 1062, 1062 (1970); *Brown Transp. Corp.*, 239 NLRB 711, 711 (1978). Despite the Union’s extraordinary and blatant violation of the law, the agreement fails to explicitly require the Union to cease giving effect to *all* unlawful checkoffs currently in use in this bargaining unit. Without such an explicit statement, employees who have dues deducted pursuant to the unlawful checkoffs will not be afforded anything close to a full remedy. This omission is compounded by the settlement’s requirement that the Union provide notice to employees that they can revoke the checkoffs upon contract expiration *only in response to a request for window period dates*. Mot. Ex. 1 at 4. This limitation imposes no additional burdens on the Union because it is already required by Board law,<sup>6</sup> and does nothing to address the fact that employees’ checkoffs contain false and coercive information. The only way to properly address the defects in the checkoff is to require the Union to stop dues deductions for all employees who signed those faulty and unlawful “MUST BE SIGNED” forms.

Such a unit-wide remedy is consistent with Board precedent, something the settlement agreement ignores. In *IUE, Local 601*, the Board required the union to affirmatively stop giving effect to all checkoffs “obtained through coercion.” 180 NLRB at 1067. This remedy covered *all* unit employees. In *Brown Transport Corp.*, the Board held that where checkoffs in a bargaining unit were obtained through coercion, the proper remedy is to cease giving all of them any effect whatsoever. 239 NLRB at 715. As in *Westinghouse* and *Brown*, the Union’s coercive “MUST BE SIGNED” checkoff was sent to all bargaining unit employees, and the burden must be on the

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<sup>6</sup> See, e.g., *U.S. Postal Serv.*, 362 NLRB 865, 869 (2015) (quoting *Local 307, Nat’l Postal Mail Handlers Union (U.S. Postal Serv.)*, 339 NLRB 93 (2003)) (“[W]here a requesting employee has a legitimate interest in the information, whether expressed or obvious, and where the union has ‘raised no substantial countervailing interest’ in refusing to provide the information, it must be provided.”).

Union to fully remedy the violations for each employee, by ceasing to give effect to all of these checkoffs.

The agreement also fails to provide a *nunc pro tunc* remedy to all unit employees, which would give each person the ability to retroactively resign, revoke their checkoff, and get a refund of all dues deducted pursuant to the unlawful checkoff. As currently written, the agreement does not even provide a retroactive remedy to bargaining unit employees who revoked their checkoffs during the Section 10(b) period. This failure is contrary to the Board's practice of constructing remedies to put employees in the position they would have been but for the violation of the Act. For example, in *Rochester Manufacturing Co.*, 323 NLRB 260, 263 (1997), a union failed to provide employees with their *Beck* and *General Motors* rights. The Board ordered the union to provide employees with a *Beck* notice and allow the employees the ability to object *nunc pro tunc*, given that they were not able to object previously because of the union's unlawful actions. *See also Newspaper & Mail Deliverers Union (NYP Holdings, Inc.)*, 361 NLRB 245, 250 & n. 17 (2014) (mandating a *nunc pro tunc* remedy where employees "testified without contradiction that the [Union] never informed them of the[ir] rights").

The same is true here, given the "MUST BE SIGNED" checkoffs' significant and facially coercive defects. The checkoff itself cannot be said to be voluntary (and is therefore void on its face) because it "MUST BE SIGNED." A reasonable employee would have signed this checkoff believing she was required to do so. *Tamosiunas v. NLRB*, 892 F.3d 422, 429–30 (D.C. Cir. 2018) (the test is what *any* reasonable employee would believe, and such employees can be coerced by even "implied threats"). Further, the Union's checkoffs contain other significant restrictions on an employee's ability to revoke, i.e., limiting revocation to two short fifteen-day window periods: (1) a yearly window tied to the anniversary date of the checkoff, and (2) a window period tied to

the expiration of the collective bargaining agreement. *See* Stipulation, Ex. 3.<sup>7</sup> An employee who signed the void and unlawful “MUST BE SIGNED” checkoff will likely be chilled from revoking it based on these additional restrictions. Thus, in order to provide a proper remedy the settlement should require the Union to cease giving effect to all such cards, or at least to accept resignations and revocations of employees retroactively, *nunc pro tunc*, to the start of the Section 10(b) period.

In *Flint Iceland Arenas*, 325 NLRB 318, 319 (1998), the Board found the failure to remedy unit-wide violations sufficient to overturn a settlement agreement. Here, when Krockler’s objections about the lack of a unit-wide remedy were conveyed to Region 7, the Regional Director’s rebuttal was that “the Complaint does not contain a remedial provision requiring the Union to reimburse the dues of the entire bargaining unit” and that such a remedy reaches beyond her investigation. Mot. Ex. 3 at 1. But the Regional Director ignored the fact that *no remedies are specifically requested in the Complaint*. *See* Stipulation, Ex. 1(g). Applying her flawed logic, no remedies could be or should be issued by the Board. Moreover, the Regional Director’s rebuttal conveniently forgets that *the Board* fashions its own remedies for violations fairly alleged in the Complaint, and is never bound by the remedies sought in the Complaint or within the scope of the Region’s investigation. *See e.g., Local 58, Int’l Bhd. of Elec. Workers (Paramount Indus., Inc.)*, 365 NLRB No. 30, 2017 WL 680502, at \*5 n.17 (Feb. 10, 2017); *Kaumagraph Corp.*, 313 NLRB 624, 625 (1994). The Complaint alleges the Union violated the Act because it maintained unlawful provisions in the checkoff that restrained and coerced *employees* in the exercise of their Section 7 rights. A remedy for all affected employees is the best and only way to cure the unit-wide violations that are clear on the face of the unlawful checkoff form that was disseminated to all unit employees.

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<sup>7</sup> The checkoff has other defects, see *supra* note 5.

In addition, the settlement fails to make Krocker whole because it does not require the Union to pay her interest on the dues it unlawfully collected from her. The stipulation provides that, in September 2018—months after Krocker filed her charge—the Union paid her “the total amount of dues collected from her paycheck since her March 5, 2018 letter.” Stipulation at ¶ 17(c). However, the harm she suffered was not only the amounts deducted, but interest on the amounts deducted for the time the amounts were unlawfully withheld. As such, Krocker is entitled to reimbursement for any interest accumulated on these amounts. *See, e.g., Teamsters Local 385, 366 NLRB No. 96, slip op. at 3 (June 20, 2018) (requiring interest payments despite the union already refunding the amounts deducted).*

Finally, the settlement’s notice posting remedy is flawed because it fails to require the Union to adequately publish a notice to all unit employees, as mandated by *J. Picini Flooring, 356 NLRB 11 (2010)*. “[N]otices must be adequately communicated to the employees or members affected by the unfair labor practices found. The Board’s standard notice posting provision therefore requires respondents to post a remedial notice for a period of 60 days ‘in conspicuous places including all places where notices to employees [and members] are customarily posted.’” *Id.* at 12 & n.6. This is particularly true given the current pandemic. The settlement does not require the Union to post the notice on its publicly accessible webpage. Mot. Ex. 1 (requiring the Union to post on its Member Services page and provide intranet or website access to the Board upon request). From its website, it is unclear where such a notice would be posted and whether or not it would be publicly available. Nonmembers may not necessarily have access to an internal site, and the Union communicates important information, including inviting its members to report issues at work, on its public website. *See Report a Problem at Work, UFCW Local 400,*

<http://www.ufcw400.org/member-services/report/>. Thus, to comply with *J.Picini*, the Union must be explicitly required to post the notice on its public website.

All of these failures, taken together, compel the conclusion that the proposed settlement is inadequate and unreasonable under the circumstances.

**b. The settlement is not reasonable in light of the risks of litigation and the stage of litigation.**

This settlement was concocted at the eleventh hour, and indeed, it is a thinly veiled effort to avoid the Board’s adjudicatory jurisdiction. This case presents the odd circumstance where a suddenly-appointed Acting General Counsel is settling the case precisely because he suspects that *he is going to win*. Not only does the settlement prevent the Board from issuing a proper remedy to the bargaining unit, it presents no risk to the Union or the Acting General Counsel. Indeed, the settlement merely requires the Union to amend its checkoff for future employees to comply with the law<sup>8</sup> and to post a notice, all of which are minimally burdensome. The former is required for the Union to comply with the Act, irrespective of any settlement agreement, and the latter, as discussed, *supra*, is essentially meaningless because it is doubtful the notice will be seen by employees.

Just as the Supreme Court decries “postcertiorari maneuvers designed to insulate a decision from review,” *Knox v. SEIU Local 1000*, 567 U.S. 298, 307 (2012), the Board should also focus a critical eye on the Settling Parties’ eleventh-hour machinations. *See also N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1533 (2020) (Kavanaugh, J., concurring) (“We have been particularly wary of attempts by parties to manufacture mootness in order to evade review.”). Justices Alito, Gorsuch, and Thomas have condemned just this sort of gamesmanship:

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<sup>8</sup> In response to this litigation, the Union previously removed its “MUST BE SIGNED” language from its checkoffs, see Stipulation, Ex. 6, but did not remove some of the other unlawful provisions.

One might have thought that the City, having convinced the lower courts that its law was consistent with *Heller*, would have been willing to defend its victory in this Court. But once we granted certiorari, both the City and the State of New York sprang into action to prevent us from deciding this case. Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance.

*N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1527–28 (Alito, J., dissenting).

Here, the Union had countless opportunities to settle this case, from the time the ULP charge was filed, to the time the stipulated record went before the ALJ, to the time the exceptions were filed. But at every stage the Union vigorously resisted settlement and adamantly defended its “MUST BE SIGNED” checkoff card. It is only now when, faced with an imminent Board decision, and with a new-found ally in the Acting General Counsel, does the Union have a slight change of heart.

Further, a settlement at this late date saves no litigation expenses, as the exceptions are already fully briefed. Unlike other situations where approval of the unilateral informal settlement might take into account the “risks of litigation” and “costs of litigation,” the only risk the parties face here is a Board decision on the merits—one that will likely vindicate Krockner’s position and General Counsel Robb’s complaint. *Cf. McDonald’s*, 368 NLRB No. 134 at n.15 (noting the settlement will save significant litigation expense). The Settling Parties well know the ALJ’s decision is indefensible because it upholds a checkoff card that, in its own words, “MUST BE SIGNED,” and their actions seek to entrench that faulty decision. In this way, the Union is attempting to have its cake and eat it too. It agreed to a settlement that limits the nature of the remedy, disadvantages the entire unit, and contains a non-admissions clause, while simultaneously preventing the Board from issuing a decision (the result of which will likely require it to make unit-wide affirmative remedies) and preserving a flawed ALJ opinion in its favor. It’s a neat trick.

As with the Supreme Court in *Knox*, the Board should view such post-briefing maneuvers “with a critical eye.” *Knox*, 567 U.S. at 307.

The informal settlement provides a veneer of remedial relief without requiring the Union to provide an effective unit-wide remedy. The Union has to do little more than provide a notice posting to unit employees, with no other affirmative relief to the unit. It does not even require the Union to admit that it violated the Act, despite its lengthy defense of its practices and its prior refusal to settle. In *K & W Electric, Inc.*, 327 NLRB 70 (1998), the Board approved a settlement over a charging party’s objections, but largely because the respondent consented to the entry of a Board Order and a court judgment enforcing the Order. There is nothing of the sort here. This flawed informal settlement, with its non-admissions clause, does not provide the same finality as the Board found persuasive in *K & W Electric*.

In *McDonald’s*, the Board specifically noted that one of the ALJ’s reasons for disapproving of the settlement was the General Counsel’s commitment to vindicating the public’s right to clarity on the joint-employer standard. 368 NLRB No. 134. But, in that case, by the time the Board’s decision issued, the Board’s clarifying regulations had answered that public interest. *Id.* at n.15. Here, we have a similar statement by the General Counsel recognizing the importance of the issues, but no intervening Board regulation or precedent to settle the legal questions presented. *See* G.C. Br. to ALJ at 5. (“[T]his case presents solely issues of law, which the General Counsel firmly believes need to be explicitly clarified to ensure that unions meet their obligation to provide employees with a clear and unambiguous understanding regarding their rights about union membership.”).

For all these reasons, it would be factually wrong and legally inappropriate for the Board to suddenly truncate this case and refuse to decide the merits, based solely upon the political

machinations of the Settling Parties. The case was presented to the Board by all parties on a simple, stipulated factual record, and only unsettled legal issues remain to be decided. The public is entitled to the Board's authoritative guidance, and it is simply too late for the Union to abandon its vigorous defense of its challenged practices without providing a unit-wide remedy.

Thus, the second factor strongly supports rejection of the settlement.

**2. Factor Five: The proposed settlement is a political maneuver aimed at undermining the Board's authority.**

The Motion and proposed settlement are bare political attempts to strip the Board of its ability to hear the important issues raised in this case. The only intervening factor between the ALJ's decision and the Motion is the unprecedented firing of General Counsel Robb and the installation of a hyper-partisan Acting General Counsel who appears determined to erase any vestige of General Counsel Robb's tenure at all costs, including preventing employees in Krockner's bargaining unit from receiving a proper remedy.

The Acting General Counsel's intentions are demonstrated by his unprecedented act of revoking ten General Counsel Guidance Memos, see General Counsel Memo. 21-02 (Feb. 1, 2021), and by seeking to withdraw cases pending before the Board by any means, see, e.g., *Nat'l Nurses Org. Comm.*, Case No. 16-CB-225123 (Acting General Counsel filed a motion to remand a complaint for dismissal, despite being fully briefed for Board consideration); NLRB Acting GC Pulled Project-Labor Pact, Beck Rights Cases, Law 360, <https://www.law360.com/employment-authority/articles/1363596/nlr-acting-gc-pulled-project-labor-pact-beck-rights-cases>, (March 10, 2021). The public has a right to expect some consistency, and some semblance of non-partisanship from federal agencies, especially quasi-adjudicative agencies that function like courts. The public is rightfully suspicious of political gamesmanship that occurs in the adjudicatory context, and that is precisely what the Acting General Counsel is proposing here.

Given this unprecedented circumstance, this factor weighs strongly in favor of denying the Settling Parties' eleventh hour machinations and their belated Motion.

**C. The Acting General Counsel has no authority to seek remand.**

The firing of General Counsel Robb and the appointment of Acting General Counsel Ohr was unlawful, therefore the Acting General Counsel has no authority to enter into the settlement agreement or to seek remand of this case.

**1. The President had no authority to fire General Counsel Robb.**

**a. The General Counsel's term is fixed.**

The General Counsel's four-year term is fixed by statute. According to the Supreme Court, insulating officers of an agency, like the Board, with fixed terms is permissible when the agency consists of "a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions . . ." with "staggered" terms, and where the agency's senior officials were expected to be "non-partisan" and "act with entire impartiality." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 (2020) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)).<sup>9</sup>

Supreme Court precedent further supports the conclusion that for-cause removal applies to term-limited political appointees at quasi-judicial agencies, like the General Counsel. *See Humphrey's Ex'r*, 295 U.S. at 629. In *Wiener v. United States*, 357 U.S. 349, 356 (1958), the Court rejected "the claim that the President could remove a member of an adjudicatory body . . . merely because he wanted his own appointees on such a Commission" where the statute specified

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<sup>9</sup> When describing this permissible structure, the Supreme Court in *Seila Law* was referring specifically to the Federal Trade Commission, but the Court's description is equally applicable to the NLRB, which includes the role of the General Counsel. In fact, Justice Kagan in *Seila Law* specifically named the NLRB as an example of agencies whose structure the Court had "repeatedly approved" under Article II. *Id.* at 2224–25 (Kagan, J., dissenting in part).

a fixed term of service. The Court was not deterred by the fact that the statute prescribing the term did not explicitly provide for for-cause removal: “we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.” *Id.* *Humphrey’s Executor* and *Wiener* severely limit President’s Biden’s power to unilaterally create a vacancy by terminating the General Counsel.<sup>10</sup>

Pursuant to the text of the NLRA, the position of General Counsel has a fixed term of four years. 29 U.S.C. § 153(d). Section 3(d) permits the President to name an “acting” General Counsel, but this is only authorized when the position of General Counsel is vacant. *Id.* Section 3(d)’s creation of a four-year term and the absence of language providing that the position serves at the pleasure of the President shows the existence of a “for cause” termination requirement. *Weiner*, 357 U.S. at 356. General Counsel Robb’s term is scheduled to end on November 15, 2021. Given that General Counsel Robb declined to resign and was terminated by President Biden, the position of General Counsel does not become “vacant” until on or about November 15, 2021.

The General Counsel also falls within a separate exception—recognized in *Seila Law* as passing constitutional muster under Article II—which renders permissible fixed terms assigned to “officers with limited duties and no policymaking or administrative authority.” *Seila Law*, 140 S. Ct. at 2200. The General Counsel is such an officer. He cannot promulgate regulations, 29 U.S.C. § 156; initiate or decide cases, 29 U.S.C. § 10(b); unilaterally settle cases, reject settlements or

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<sup>10</sup> Claiming the Acting General Counsel was appointed pursuant to the Federal Vacancies Reform Act does not save his appointment. That statute only provides for appointments if the previous officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. § 3345(a). None of these situations is applicable here because General Counsel Robb did not resign and is able to perform his duties.

otherwise discontinue Board proceedings once the merits are pending before the Board or an ALJ, NLRB Rules & Reg. § 101.9; cannot control the remedies against violators; cannot seek injunctive relief without a Board vote, 29 U.S.C. § 160(j); and functions at the direction of the Board in appellate court proceedings, 29 U.S.C. §§ 160 (e), (f).

The conclusion that the General Counsel can only be removed for cause is further evidenced by seventy years of Presidential practice. Since Congress created the “modern” General Counsel, fourteen Presidents have taken office and partisan control of the White House has changed no less than ten times. Many incoming administrations have had vastly different labor policies from their predecessors, yet none ousted a General Counsel before the end of the prescribed term.

**b. The General Counsel’s independence is integral to the structure of the NLRB.**

Allowing the President to fire the General Counsel at will would do irreparable damage to the Board’s status as an independent quasi-judicial agency responsible for the neutral and even-handed resolution of unfair labor practice and representation cases.

Board decisions are not self-enforcing, which means that the General Counsel plays an essential role in *every* Board decision. If a respondent fails to voluntarily comply with a Board order, or if a party exercises its statutory right to appeal, the Board must enforce or defend its orders in the Courts of Appeals. In these instances, the General Counsel serves as the Board’s designated legal representative. Only when the General Counsel *succeeds* in that representation can parties be required to comply with the Board’s decisions and orders. Thus, the General Counsel is not wholly independent from the Board. Much of his role is enforcing and litigating orders of the Board, and even his “final” authority is derived from the powers delegated to the Board by Congress and is, at least in part, subject to Board review.

Treating the General Counsel as a political appointee who promotes and adheres to *the President's* policies and priorities, rather than upholding and defending *the Board's* decisions, would leave the Board's independent adjudicatory role in shambles. President Biden's termination of Peter Robb was unlawful because it undermines the ability of the Board to function as the independent quasi-judicial entity Congress designed it to be.

## **2. Acting General Counsel Ohr's appointment violates the Appointments Clause.**

If the General Counsel is a principal officer under the Constitution, the Acting General Counsel's appointment violates the Appointments Clause. The "Appointments Clause provides the exclusive process for appointing 'Officers of the United States.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas J., concurring). The Appointments Clause plainly requires that the President appoint such officers "by and with the Advice and Consent of the Senate," except that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone," or in "the Courts of Law" or "the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The Constitution does not recognize a power to designate a temporary principal officer, suggesting that the process of Senate confirmation must be followed barring true exigent circumstances. *United States v. Eaton*, 169 U.S. 331 (1898) confirms this interpretation, allowing a non-Senate confirmed individual to perform the duties of a Senate-confirmed officer only "for a limited time," and during "special and temporary conditions" where the Senate-confirmed official was unavailable. *Id.*

The elevation of the Acting General Counsel violated these principles. Without explanation, President Biden fired General Counsel Robb and appointed then-Regional Director Ohr to serve as Acting General Counsel. The President thereby designated a non-Senate confirmed officer to serve in a Senate-confirmed position, despite the fact that the President himself created this vacancy for no apparent purpose other than politics and ideology. Certainly, this self-imposed

circumstance is not a situation where the principal was unavailable under “special and temporary” conditions of the sort the Court contemplated in *Eaton*. Allowing a President to circumvent the Senate’s advice and consent responsibilities in this manner is inconsistent with the Appointments Clause and the separation of powers. The Acting General Counsel, therefore, was improperly appointed and has no authority to take the actions he has taken in this or in any other case.

### CONCLUSION

For the foregoing reasons, the Joint Motion to Remand should be denied.

Respectfully Submitted,

Date: March 15, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2021, a true and correct copy of Charging Party's Opposition to the Joint Motion to Remand was filed electronically with the Executive Secretary using the NLRB e-filing system, and copies were sent to the following parties via e-mail:

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