No.

IN THE

Supreme Court of the United States

CSC HOLDINGS, LLC,
AND CABLEVISION SYSTEMS NEW YORK CITY CORP.,

Applicants,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

EMERGENCY APPLICATION FOR STAY OF AGENCY ACTION PENDING ADJUDICATION OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY PENDING RESOLUTION OF THE PETITION

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PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the court of appeals. Communications Workers of America, AFL-CIO, is the charging party in related unfair-labor-practice actions pending before the National Labor Relations Board but has not intervened in the court of appeals.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court, undersigned counsel state that Cablevision Systems New York City Corporation is a direct subsidiary of CSC Holdings, LLC, which is a direct subsidiary of Cablevision Systems Corporation. Cablevision Systems Corporation is a publicly held corporation organized in Delaware with headquarters in Bethpage, New York. Cablevision Systems Corporation has no parent corporation. The following publicly held companies own 10% or more of Cablevision Systems Corporation's common stock: ClearBridge Investments LLC and T. Rowe Price Associates, Inc.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Applicants CSC Holdings, LLC ("CSC"), and Cablevision Systems New York City Corp. ("Cablevision") respectfully apply for a stay of administrative proceedings concerning unfair-labor-practice charges before the National Labor Relations Board—which include a hearing scheduled to commence on July 8, 2013—pending the adjudication of CSC's and Cablevision's petition for a writ of mandamus or prohibition in the United States Court of Appeals for the D.C. Circuit. In the alternative, the Companies respectfully request that this application be treated as a petition for a writ of certiorari before judgment, that the Court stay the administrative proceedings pending its consideration of the petition for certiorari, and that the Court grant the petition, or at minimum hold it pending the Court's decision in *NLRB* v. *Noel Canning*, No. 12-1281 (cert. granted June 24, 2013).

INTRODUCTION

Three years ago, in *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (2010), this Court repudiated an attempt by the National Labor Relations Board to circumvent the quorum requirement that Congress imposed on the agency. Section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), forbids the Board to act unless it has three lawfully appointed members. The Board sought to sidestep that barrier by delegating all of the power three members may exercise to groups of only two. This Court saw through that scheme and ruled that the statute means just what it says: Absent three members, the Board is out of business.

Lacking a quorum once again, but unwilling to cease operations, the Board has sought new ways around Congress's and this Court's clear commands. For well over a year, it has carried on *without* three Senate-confirmed members, claiming that the Act's quorum requirement is satisfied by several recess appointments made by the President in January 2012—all during a three-day break in Senate business, and all to preexisting openings on the Board. The Board further maintains that, even if it cannot act in its own name, its various agents to whom the Board has delegated its statutory authority can do so nevertheless on the agency's behalf.

Both of the agency's strained arguments are baseless. Each, in fact, has been squarely rejected by the D.C. Circuit—which Congress empowered to review *all* Board rulings, *see* 29 U.S.C. § 160(f). In *Noel Canning* v. *NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, __ U.S. __, No. 12-1281 (June 24, 2013), that court held that the January 2012 appointments contravened the clear text of the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. (The Third Circuit recently reached the same conclusion regarding a prior appointment.) And even before *New Process Steel*, the D.C. Circuit had ruled that basic principles of agency law foreclose the Board's attempted end-run: An agent may not act if his principal's authority evaporates, and thus Board surrogates cannot act if the Board itself cannot. *See Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

Undeterred, the Board has brushed both of these rulings aside. *Without* seeking a stay of the D.C. Circuit's mandate in *Noel Canning* (unlike after it lost in *Laurel Baye*), the Board has boldly proclaimed that both it *and* its agents

nevertheless can *continue* wielding federal authority—as if it continued to have a quorum, and the D.C. Circuit's decisions did not exist (or *had* been stayed). The agency's open defiance of Congress and a federal court is at war with the rule of law. Its ultra vires action threatens to undermine public respect for the law and the courts who are its expositors. The casualties of this conflict, however, are much more than theoretical. Caught in the crossfire are the private parties whom the Board continues to compel to defend themselves against unauthorized agency proceedings. Left unchecked, the Board's flouting of both legislative and judicial authority will subject those parties and the public to severe and immediate harm.

This case is a paradigmatic example. In April 2013—months after the D.C. Circuit made clear that the Board's quorum had long since disappeared—the Board, acting through two of its agents, issued unfair-labor-practice complaints against CSC and Cablevision (collectively, the "Companies"). Disregarding *Noel Canning* and *Laurel Baye*, the Board has haled the Companies to appear to face groundless allegations of unlawful conduct—first in a trial scheduled to begin July 8, 2013, and then inevitably in further litigation in one or more appeals to the Board, a court of appeals, and potentially this Court. The Board also is now considering heaping on additional litigation seeking injunctive relief. The burdens that these unauthorized proceedings will foist on the Companies are immense, including the massive time and resources needed to prepare for the proceedings. The costs will spill over to many others, including the judges that must adjudicate the ultra vires complaints, and ultimately to the taxpayers, who must underwrite this spectacle.

To protect themselves from these unlawful abuses, the Companies have sought a writ of mandamus or prohibition in the D.C. Circuit directing the Board to cease prosecuting the litigation. But although the Companies are very likely to prevail in that request, the merits will not matter unless the agency's unlawful proceedings—slated to begin in seven days—are suspended. No court can remedy the injuries the Companies and the public will suffer if the litigation goes forward. Without a stay, the harms caused by the Board's actions will be irreparable.

Despite its own controlling precedent clearly establishing the Companies' entitlement to judicial relief and the obvious injuries they will face if forced to litigate, the D.C. Circuit denied the Companies' request for an emergency stay. Worse, that court has put the Companies' case on hold while it decides another case challenging the Board's and its agents' authority to act—a case that will not even be argued, much less decided, until long after the trial here begins in one week's time. Only relief from this Court can prevent the out-of-control agency from running roughshod over the Companies' rights before the damage cannot be undone.

A stay of the Board's action pending the court of appeals' consideration of the merits is plainly warranted. The Companies have a strong likelihood of succeeding in the D.C. Circuit—*if* that court rules in this case before it is too late—where binding precedent directly supports the Companies' entitlement to relief. And even if the Companies do not succeed below, they are likely to succeed in this Court. There is no question that the issue presented by the Companies' challenge merits certiorari: This Court already has determined (in *Noel Canning*) that the legality of

the January 2012 appointments merits plenary review. And the Board's claim that its agents may act even when *it* cannot implicates a separate circuit split that holds immense practical significance for countless private parties regulated by the Board. There also is no question that the Companies at minimum have a fair prospect of prevailing in this Court; the D.C. Circuit's rigorous analyses in *Noel Canning* and *Laurel Baye* standing alone establish that the Companies' arguments are substantial. Nor is there any doubt that the equities support suspending the Board's lawless campaign. Allowing the litigation to continue will thrust unfair and irremediable burdens on the Companies at the public's expense—whereas putting the proceedings on hold will save the Board from *wasting* scarce resources.

In the alternative, the Companies request that the Court construe their application as a petition for certiorari before judgment, stay the agency proceedings pending the Court's disposition of the petition, and grant the petition. This Court's immediate, plenary review of the Companies' challenge is plainly warranted.

OPINIONS BELOW

The court of appeals' order denying the Companies' motion for a stay (App. 1a) is unpublished. The letter of the Board's Acting General Counsel denying the Companies' request to suspend the proceedings (App. 2a) also is unpublished.

JURISDICTION

The court of appeals denied the Companies' emergency motion for a stay on June 28, 2013. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

All pertinent constitutional, statutory, and regulatory provisions are reprinted in the Appendix at 5a.

STATEMENT

1. The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, authorizes the National Labor Relations Board to investigate allegations of "unfair labor practices" (*id.* § 158) by employers and labor unions. *Id.* § 160(b)-(c). When it receives formal allegations charging an employer or union with such practices, the Board may issue a complaint against the offending party; issuance of a complaint initiates litigation conducted before the agency to determine whether the allegations have merit. *See id.* § 160(b). A hearing on the complaint is then held—typically before an administrative law judge ("ALJ"), who issues a recommended decision. *See* 29 C.F.R. §§ 102.34, .45. The aggrieved party may appeal that decision to the Board, which then issues a final ruling on the merits. *See id.* §§ 102.46, .48. Either side may then petition for review of the Board's decision in a federal court of appeals—either the D.C. Circuit, or any circuit where the unfair labor practice allegedly occurred or where the party seeking review "resides or transacts business," 29 U.S.C. § 160(f). The Board also may seek enforcement of its decisions. *Id.* § 160(e).

2. The Act's grant of authority to the Board to initiate unfair-labor-practice proceedings comes with an important caveat: The Board, which when fully staffed has five Senate-confirmed members, *see* 29 U.S.C. § 153(a), must have a quorum of three members to exercise its statutory authority, *see id.* § 153(b); *New Process*

Steel, 130 S. Ct. at 2642-45 & n.4. This quorum requirement—which has created difficulties for the Board before, *see New Process Steel*, 130 S. Ct. at 2639, 2644-45 (invalidating one of nearly 600 decisions issued during 27-month period when Board had only two members)—became critical most recently on January 3, 2012, when the Board's membership undisputedly had again fallen to just two members.[1]

The next day, January 4, 2012, the President purported to restore the Board's quorum by naming three new members without Senate confirmation via "recess" appointments, pursuant to the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. *See Noel Canning*, 705 F.3d at 498. The legality of those appointments is disputed: The D.C. Circuit held them unconstitutional, *see id.* at 499-514, and the Third Circuit recently invalidated a prior Board appointment on grounds equally applicable to the January 2012 appointments, *see New Vista*, 2013 WL 2099742, at *11-30. The Board disagrees, and it sought review in this Court. Just one week ago, this Court granted certiorari to decide the legality of those appointments. *NLRB* v. *Noel Canning*, __ U.S. __, No. 12-1281 (June 24, 2013).

3. The legality of the January 2012 appointments is of central importance in this case, which arises from several unfair-labor-practice cases the Board has

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[1] *See Noel Canning*, 705 F.3d at 498-99; Pet. for Cert. 3-4, *NLRB* v. *Noel Canning*, No. 12-1281 (Apr. 25, 2013); NLRB, Members of the NLRB since 1935, http://www.nlrb.gov/members-nlrb-1935 (all Internet materials last visited July 1, 2013). In fact, as the Third Circuit recently held, the lack of a quorum dates back even earlier: The recess appointment of Craig Becker in March 2010, which putatively expired January 3, 2012, was itself invalid because it was made during an intrasession Senate adjournment. The Board thus has lacked a quorum since August 2011, when Wilma Liebman resigned. *See NLRB* v. *New Vista Nursing & Rehab.*, __ F.3d __, 2013 WL 2099742, at *2, *6, *11-30 (3d Cir. May 16, 2013).

recently brought against CSC and Cablevision. CSC provides telecommunications and media services to millions of customers in the New York metropolitan area and currently employs more than 15,000 employees. Cablevision, a CSC subsidiary, manages field operations in Brooklyn and the Bronx.

In February 2012, the Board certified the Communication Workers of America, AFL-CIO (the "Union") as the exclusive bargaining representative for 277 technician employees of Cablevision in Brooklyn. Since then, Cablevision has negotiated extensively with the Union to reach a comprehensive initial collective-bargaining agreement with respect to wages, hours, and other terms and conditions of employment. As part of those negotiations, Cablevision has held over 25 bargaining sessions with the Union, reached 43 tentative agreements, produced numerous relevant documents, and spent seven days bargaining at the Federal Mediation and Conciliation Service in Washington, D.C. The parties have not yet reached a comprehensive agreement, but negotiations continue.

4. Despite Cablevision's good-faith bargaining efforts, the Union filed a series of unfair-labor-practice charges against Cablevision and CSC in the Board's regional offices covering Brooklyn and the Bronx. In Case Nos. 02-CA-085811 and 02-CA-090823 (the "Bronx Case"), the Union alleged that both Cablevision and CSC violated Sections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3), by purportedly discouraging non-covered employees in the Bronx and elsewhere from selecting the

Union as their bargaining representative.[2] Similarly, in Case Nos. 29-CA-097013, 29-CA-097557, and 29-CA-100175 (the "Brooklyn Case"), the Union alleged that Cablevision violated Sections 8(a)(1), (3), and (5) of the Act, *id.* § 158(a)(1), (3), (5), by engaging in "surface bargaining," retaliatory measures, and other acts that interfered with covered employee's exercise of their rights under the Act.

On behalf of the Board, Karen Fernbach, Regional Director for Region 2 of the Board, issued an unfair-labor-practice complaint in the Bronx Case on April 17, 2013. *See* App. 13a. The Regional Director for Region 29, James Paulsen, did the same in the Brooklyn Case on April 29, 2013. *See id.* at 25a.[3] On May 24, Paulsen issued an order further consolidating the Bronx and Brooklyn Cases. *Id.* at 46a.

A joint hearing in the Bronx and Brooklyn Cases has been scheduled before an ALJ to begin on July 8, 2013. *See* App. 41a. That hearing, if allowed to proceed, could last several weeks, only to be followed by an appeal to the quorum-less Board, then to the court of appeals, *see* 29 U.S.C. § 160(f), and, potentially, this Court.

The Companies also face the prospect of defending against a claim in federal court for injunctive relief pending a decision by the Board on the merits, pursuant to Section 10(j) of the Act. *See* 29 U.S.C. § 160(j). Indeed, Regional Director Paulsen has requested authorization from the Board and Acting General Counsel to file such an action after the trial before the ALJ. *See* C.A. Stay Opp. 2, 18. If it

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[2] The complaint in the Bronx Case names CSC as well as Cablevision because it alleges that the Companies are a "single employer" under the Act. App. 14a-15a.

[3] As explained below, *see infra* at 24 n.17, Ms. Fernbach and Mr. Paulsen do not lawfully hold the position of Regional Director. For simplicity and clarity, however, this motion refers to them as "Regional Directors" throughout.

proceeds, that Section 10(j) action would further burden the Companies and consume more scarce judicial resources. And it could result in onerous preliminary relief against the Companies, which may persist indefinitely: Because the quorum-less Board cannot issue a valid final order necessary to terminate the preliminary injunction, such interim relief could perversely become effectively *permanent*.

5. On May 22, 2013, the Companies sent a letter to the Acting General Counsel of the Board, requesting that he direct all Board personnel putatively subject to his supervision to suspend proceedings against the Companies unless and until the Board regains a quorum of three validly appointed members. App. 42a. On May 28, 2013, the Acting General Counsel denied that request. *Id.* at 2a.

6. On May 30, 2013, the Companies filed a petition for mandamus or prohibition in the D.C. Circuit to prevent the Board from prosecuting unfair-labor-practice complaints and any related proceedings against the Companies, including requests for injunctive relief under Section 10(j). *See* C.A. Pet. for Mandamus 3.[4] The court has not yet ruled on or ordered briefing regarding the petition. With their petition, the Companies also filed an emergency motion seeking a stay of the agency proceedings pending the D.C. Circuit's consideration of the petition. *See* C.A. Stay Mot. 1. The court of appeals denied the motion on June 28, 2013. App. 1a.

The D.C. Circuit further ordered that the Companies' mandamus petition be held in abeyance pending the court's disposition in another case seeking mandamus

[4] Because the standards for writs of mandamus and prohibition are "'virtually identical,'" *In re Sealed Case*, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (citation omitted), and the Companies are entitled to the relief under either label, for simplicity and clarity they refer hereafter only to mandamus.

to prevent further action by the Board or its agents, *In re Geary*, No. 13-1029 (D.C. Cir. filed Feb. 11, 2013). App. 1a. Any eventual ruling in that case, however, will come too late to provide the Companies relief; briefing in *Geary* will not be complete until after the hearing in this case begins on July 8, and oral argument will not be heard until September.[5] Without a stay from this Court, the Companies thus will be forced to litigate the Bronx and Brooklyn Cases before the ALJ and the Board.

REASONS FOR GRANTING THE APPLICATION

This Court unquestionably has authority under 28 U.S.C. § 1651(a) to stay action by a lower court or federal agency pending review in a court of appeals,[6] or to treat such an application as a petition for a writ of certiorari before judgment under 28 U.S.C. § 1254(1).[7] "The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief" likewise "are well settled." *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). "In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must 'try to predict whether four Justices would vote to grant certiorari'" if the court below ultimately rules against the applicant, *San Diegans for the Mt. Soledad*

[5] *See In re Geary*, No. 13-1029 (D.C. Cir. May 7, 2013).

[6] *See*, *e.g.*, *INS* v. *Legalization Assistance Project of L.A. Cnty. Fed'n of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers); *U.S. Dep't of Def.* v. *Meinhold*, 510 U.S. 939 (1993); *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (Rehnquist, J., in chambers), *motion to vacate stay denied*, 464 U.S. 879 (1983); *Atiyeh* v. *Capps*, 449 U.S. 1312, 1313-14 (1981) (Rehnquist, J., in chambers); *Lynn* v. *Pennsylvania*, 414 U.S. 809 (1973); *Republican State Cent. Comm.* v. *Ripon Soc'y*, 409 U.S. 1222, 1227 (1972) (Rehnquist, J., in chambers); *see also* Eugene Gressman et al., *Supreme Court Practice* 855-56 (9th ed. 2007).

[7] *See*, *e.g.*, *Nken* v. *Mukasey*, 555 U.S. 1042 (2008) (treating application for stay as petition for certiorari and granting petition); *Purcell* v. *Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam) (same); *see also* Gressman, *supra*, at 418-19.

Nat'l War Memorial v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); he must "'try to predict whether the Court would then set the order aside,'" *ibid.*, that is, whether there is at least a "fair prospect" that the party seeking a stay will prevail, *Lucas*, 486 U.S. at 1304; and he must "balance the so-called stay equities," *San Diegans*, 548 U.S. at 1302 (internal quotation marks omitted), which entails "determin[ing] whether the injury asserted by the applicant outweighs the harm to other parties or to the public," *Lucas*, 486 U.S. at 1304; *see also Hollingsworth* v. *Perry*, 130 S. Ct. 705, 709-10, 713 (2010) (stay standard).

Those considerations strongly support issuance of a stay here. The issue raised in the Companies' underlying mandamus petition below—whether the Board may lawfully prosecute the agency proceedings against the Companies—plainly warrants this Court's review. The issue turns on the legality of the January 2012 recess appointments to the Board, which only a week ago this Court agreed to decide. And the question whether the Board's agents may exercise the agency's statutory authority if the Board itself cannot implicates a separate circuit split regarding the meaning of a federal statute and this Court's decision in *New Process Steel*. The Companies have a strong probability, and certainly a "fair prospect," *Lucas*, 486 U.S. at 1304, of prevailing on those issues.

The equities also overwhelmingly justify a stay. If the agency proceedings go forward, the Companies will be forced to take part in illegal but costly agency litigation. Suspending that litigation will not harm the public, but rather will spare it the expense of unlawful and pointless administrative proceedings. Neither the

Board nor any other party, moreover, will suffer any cognizable injury if the litigation is stayed while its legality is determined.

I. THE COMPANIES ARE LIKELY TO SUCCEED ON THE MERITS.

A. There Is A Strong Probability That The Court Would Grant Certiorari To Review The Companies' Claims.

The Companies' challenge to the Board's proceedings in the Bronx and Brooklyn Cases raises a substantial federal question of far-reaching significance. At stake is whether the Board may continue to act through its agents—here, by commencing, conducting, and adjudicating unfair-labor-practice cases against private employers—when two of the Board's three current members hold office by dint of recess appointments made during a three-day, intrasession Senate break to vacancies predating the adjournment. That issue implicates multiple circuit splits—two of which this Court has just granted review to resolve—and concerns the correct interpretation of an Act of Congress and a recent ruling of this Court. The immense practical consequences cement the case for plenary review.

1. The central premise of the Companies' claim for mandamus is that the January 2012 recess appointments to the Board were unlawful, which, if true—given the quorum requirement of Section 3(b), 29 U.S.C. § 153(b), as construed by this Court in *New Process Steel*, 130 S. Ct. at 2644-45—would bar further action by the Board. *See* C.A. Pet. for Mandamus 11-14. The validity of those appointments implicates two important and acknowledged circuit splits concerning the recess-appointments power; indeed, only last week this Court granted certiorari to decide

their legality. *See NLRB* v. *Noel Canning*, __ U.S. __, No. 12-1281 (June 24, 2013).[8] This case, which raises the same issue, equally warrants this Court's review.[9]

2. The Companies' challenge here not only raises the same recess-appointments issue as *Noel Canning*, but it also implicates a *separate* circuit split concerning the scope and effect of one of this Court's recent decisions. In ruling that the Act's quorum requirement forbids the Board to act when it lacks a quorum of three members, this Court in *New Process Steel* expressly reserved judgment on whether the same conclusion applies to Board agents to whom it has delegated authority. *See* 130 S. Ct. at 2642-45 & n.4. That issue has since divided the circuits. Before *New Process Steel*, the D.C. Circuit held in *Laurel Baye* that under basic tenets of agency law, the Board's agents *cannot* exercise authority on the Board's behalf, which the Board itself had delegated to them, when the Board itself, lacking a quorum, cannot do so. *See* 564 F.3d at 472-76. The D.C. Circuit has not retreated from that position. Three other circuits, however, have since held the opposite—concluding (erroneously) that *New Process Steel*, despite explicitly leaving the issue open, actually *resolved* it and rejected the D.C. Circuit's well-reasoned view. *See Frankl* v. *HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821 (2012); *Osthus* v. *Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011);

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[8] *Compare Noel Canning*, 705 F.3d at 499-506 (recess appointments limited to intersession recesses), *and New Vista*, 2013 WL 2099742, at *11-30 (same), *with Evans* v. *Stephens*, 387 F.3d 1220, 1224-26 (11th Cir. 2004) (en banc) (contra); *compare Noel Canning*, 705 F.3d at 507-12 (recess appointments permitted only to vacancies that arise during the same recess), *with Evans*, 387 F.3d at 1226-27 (contra), *United States* v. *Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc) (same), *and United States* v. *Allocco*, 305 F.2d 704, 705-06 (2d Cir. 1962) (same).

[9] At minimum, the Court should hold this case pending *Noel Canning*.

Overstreet v. *El Paso Disposal, L.P.*, 625 F.3d 844, 852-54 (5th Cir. 2010); *see also* C.A. Stay Opp. 12-13 (noting circuit split). That undisputed split regarding the meaning of *New Process Steel* is central here, and suffices by itself to merit review.

3. The stakes of the dispute over the Board's ability to end-run the quorum requirement by acting through its agents are massive. Indeed, much of the practical significance of both *New Process Steel* and *Noel Canning* for the Board and parties it regulates lies in whether the Board can continue business as usual when its membership falls below the statutory minimum. If the headless agency may continue acting through its subordinates when it lacks a quorum, then the Board's legal inability to act in its own name in many cases will prove academic. By the Board's lights, even though the agency itself is powerless to render a ruling on the merits or take any other action, its delegees nevertheless may hale parties into an agency courtroom to defend against unfair-labor-practice charges, forcing them to expend massive resources litigating the merits. On the agency's view, it may even seek injunctive relief while the case is litigated—which, since the quorum-less Board cannot decide the case and end the litigation, may become permanent—and may pressure parties into skewed settlements that the Board could never impose without the threat of costly, unlawful litigation and ersatz 'interim' relief.

* * *

The issue in this case, in short, is a corollary of not one, but *two* other issues that this Court has concluded merited certiorari, and the issue has independently

driven a wedge between circuits. Both the stakes of that question and the lower-court conflict it has generated leave no doubt that this Court's review is warranted.

B. The Companies Have A Strong Likelihood Of Prevailing On Their Claim For Mandamus To Stop The Unlawful Proceedings.

The Companies are likely to succeed on the merits—either in the D.C. Circuit, ruling on the Companies' petition for mandamus in the first instance, or in this Court, reviewing on certiorari whether the court of appeals should grant the writ. Mandamus is warranted when (1) there is "no other adequate means to attain the relief [the petitioner] desires"; (2) the petitioner's "right to issuance of the writ is clear and indisputable"; and (3) "the issuing court, in the exercise of its discretion, [is] satisfied that the writ is appropriate under the circumstances." *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004) (internal quotation marks omitted); *see Perry*, 130 S. Ct. at 710. Those criteria are readily satisfied here. The Companies have no alternative means to obtain the relief they request: being freed from the immense burdens of the Board's harmful and illegitimate proceedings. They also are clearly entitled to that relief. Neither the Board nor its agents may lawfully act when the Board lacks a quorum—which it currently does not have because the January 2012 appointments were unlawful. Mandamus is plainly appropriate to halt the Board's defiance of a federal court of appeals' commands and its attempt to evade the court of appeals' prospective jurisdiction over Board actions under 29 U.S.C. § 160(f). The Board's unlawful proceedings, if left unchecked, not only would irreparably injure the Companies, but also would seriously undermine the rule of law.

1. The Companies Have No Other Adequate Means To Obtain The Requested Relief.

The Companies plainly have "no other adequate means" besides mandamus "to attain the relief [they] desir[e]." *Cheney*, 542 U.S. at 380 (internal quotation marks omitted). The relief they request is cessation of the illegitimate agency proceedings in the Bronx and Brooklyn Cases, and any related litigation stemming from them. There is no other avenue to obtain that relief besides mandamus. As the Board itself has stressed, parties cannot petition for review directly from non-final actions by the Board or its agents, including the issuance of a complaint.[10]

The Board contended below that the Companies nevertheless do have an adequate remedy because they may litigate their cases before the Board, and *then* seek judicial review of the Board's ruling under 29 U.S.C. § 160(f). C.A. Stay Opp. 6. But that alternative deprives the Companies of the very relief they seek: It would require them to expend massive resources litigating before the agency—first in a costly hearing before an ALJ, and then in an appeal to the Board—which is exactly what they seek to avoid. The Board's demand that litigants challenge the agency's authority to act before the agency itself is also disingenuous, since the Board has steadfastly refused even to *entertain* such challenges. Before the D.C. Circuit decided *Noel Canning*, 705 F.3d 490, the Board explicitly "declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act," including regarding the

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[10] *See* Respondent's Opp. to Pet. for Mandamus 9, *In re SFTC LLC*, No. 13-1048 (D.C. Cir. Apr. 10, 2013) ("*SFTC* Opp."). *SFTC* has since been consolidated with *Geary*. *See In re Geary*, No. 13-1029 (D.C. Cir. May 7, 2013).

January 2012 appointments. *Ctr. for Soc. Change, Inc.*, 358 NLRB No. 24, 2012 WL 1064641, at *1 (2012). And since *Noel Canning*, the Board has cavalierly rejected the D.C. Circuit's ruling, claiming that the Board and its agents can continue acting because those appointments' validity "remains in litigation," and other courts take different views regarding recess appointments. *Bloomingdale's, Inc.*, 359 NLRB No. 113, 2013 WL 1901335, at *1 (2013). Forcing litigants to press their claims before the agency thus would be futile.[11] The Board's claim that judicial review only after the litigation is *complete* offers an adequate remedy is therefore plainly incorrect.[12]

2. The Companies Are Clearly Entitled To Judicial Relief.

Congress and this Court have made clear that the Board itself may not act when it lacks a quorum. The Board, however, has lacked a quorum for well over a year because the January 2012 recess appointments were null and void. That alone forecloses further administrative proceedings; the Board cannot fairly compel private parties to appear to defend against charges that the agency itself cannot lawfully adjudicate. Moreover, what is true of the Board's own ability to exercise authority absent a quorum is true also of agents exercising the Board's authority on

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[11] It also would be entirely unnecessary: The D.C. Circuit has held, and the Board did not dispute below in this case, that parties may assail the Board's authority to act, including based on the January 2012 appointments' invalidity, *whether or not* they raised such claims before the Board. *See Noel Canning*, 705 F.3d at 496-98.

[12] The same is true of litigation that the Board or its agents might commence under Section 10(j) of the Act, 29 U.S.C. § 160(j), seeking preliminary-injunctive relief against the Companies, which Board agents already have sought authorization to pursue. *See supra* at 9-10. Although the Companies could seek review of a Section 10(j) injunction, 28 U.S.C. § 1292(a)(1), they could do so only by engaging in *further* burdensome litigation that the quorum-less agency has no authority to initiate or prosecute.

the agency's behalf. The Board's subordinates lacked any legal basis to commence the administrative proceedings, and they have no authority to conduct the litigation now, because their principal—the Board—is powerless to do so itself.

a. It is blackletter law that the Board cannot exercise its authority under the National Labor Relations Act without a quorum. Section 3(b) of the Act, 29 U.S.C. § 153(b), establishes that "three members of the Board shall, at all times, constitute a quorum." *Ibid.* That provision, this Court has held, means exactly what it says, and "requires three participating members '*at all times*' for the Board to act." *New Process Steel*, 130 S. Ct. at 2640 (emphasis added) (quoting 29 U.S.C. § 153(b)). When the Board's membership falls below three lawfully appointed members, the Board cannot legally take action under the statute. *See id.* at 2644-45. Unless the Board has a quorum, the administrative proceedings here must cease. Further litigation of unfair-labor-practice charges is not only pointless, but unjust, if the agency charged with adjudicating them cannot lawfully render any decision.

That is dispositive here because the Board does not currently have a quorum. All agree that, as of January 3, 2012, the Board had only two members.[13] It lacks a quorum today unless the January 4, 2012, appointments were valid. As the D.C. Circuit correctly held, they were not. *Noel Canning*, 705 F.3d at 499-514. Article II permits the President to appoint principal officers, including Board members, only with the Senate's consent, *see* U.S. Const. art. II, § 2, cl. 2—subject to just one

[13] *See Noel Canning*, 705 F.3d at 498-99; Pet. for Cert. 3-4, *Noel Canning*, No. 12-1281; NLRB, Members of the NLRB since 1935, http://www.nlrb.gov/members-nlrb-1935. As noted, the lack of a quorum dates back even earlier. *Supra* at 7 n.1.

exception that does not save the January 2012 appointments. The Recess Appointments Clause, *id.* art. II, § 2, cl. 3, allows him "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Ibid.* As the D.C. Circuit held in *Noel Canning*, and the Third Circuit has since echoed, that Clause permits appointments *only* during "intersession" recesses—*i.e.*, *sine die* adjournments between numbered Senate "Sessions," not breaks *within* a Senate session. 705 F.3d at 499-506; *see New Vista*, 2013 WL 2099742, at *11-30. The Board has conceded that the January 4, 2012, appointments were not made in an intersession recess. *See Noel Canning*, 705 F.3d at 506-07; Pet. for Cert. 4-5, *Noel Canning*, No. 12-1281. Moreover, the Clause allows appointments only to fill vacancies that "*happen* during the Recess of the Senate" in which the appointment is made. U.S. Const. art. II, § 2, cl. 3 (emphasis added); *see Noel Canning*, 705 F.3d at 507-12. But the offices filled by the January 4, 2012, appointments all were vacant *before* the Senate's adjournment that began on January 3 (one for more than a year). *See* 705 F.3d at 512-14.

The January 4 appointments also were unlawful because the Senate was not in "Recess" that day even by the Executive's *own* longstanding definition. Since the Executive first claimed power to make intrasession recess appointments, it has conceded that the Senate cannot be deemed in "Recess" unless it breaks for more than three days.[14] The Senate, however, held sessions on both January 3 and 6,

[14] *See* Pet. for Cert. 21, *Noel Canning*, No. 12-1281; Respondent's Letter Brief 3, *New Process Steel*, 130 S. Ct. 2635; *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 24-25 (1921).

2012. S. Journal, 112th Cong., 2d Sess. 1-2 (2012); 158 Cong. Rec. S1 (Jan. 3, 2012); 158 Cong. Rec. S3 (Jan. 6, 2012). And, as the Third Circuit correctly determined, *see New Vista*, 2013 WL 2099742, at *19-20, those sessions cannot be discounted merely because the Senate described them as "pro forma . . . with no business conducted," 157 Cong. Rec. S8783 (Dec. 17, 2011). The Senate's determination that it was in session is dispositive. In any case, it plainly was "available" to act on appointments at those sessions, just as it did during identical "pro forma" sessions in the past, when it passed legislation. *New Vista*, 2013 WL 2099742, at *12, *19.

Because the January 2012 appointments were unlawful, so too is the Board's conduct of the litigation in the Bronx and Brooklyn Cases. Without a quorum, the Board unquestionably cannot render a final decision on the unfair-labor-practice charges. *See New Process Steel*, 130 S. Ct. at 2644-45. It would be senseless to allow litigation to *begin* that the agency is powerless to bring to an *end*. But even long before the case comes before the Board for a final ruling on the merits, the Board cannot perform its supervisory function over the litigation. Congress gave the Board authority to seek enforcement in federal court of subpoenas that it issues. *See* 29 U.S.C. § 161(1)-(2). And the Board's own rules enable it to hear interlocutory appeals of an ALJ's rulings on motions and objections. *See* 29 C.F.R. § 102.26. Without three lawfully appointed members, the Board cannot do either. If the tribunal itself not only cannot decide the case, but cannot even legitimately resolve day-to-day issues in the interim, it should not be permitted to compel litigants to participate in the litigation.

The Board's primary response below was that, notwithstanding *Noel Canning* and *New Vista*, the Companies' right to relief is not clear because other circuits have previously rejected the D.C. and Third Circuits' reasoning regarding the scope of the Recess Appointments Clause.[15] But the views of other circuits have no bearing on the Companies' likelihood of success, either in the D.C. Circuit now or ultimately in this Court. The question before the court of appeals is only whether the Companies' entitlement to a writ is clear under the law to be applied by that court. It is. No D.C. Circuit panel can depart from *Noel Canning*. *See LaShawn A.* v. *Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). And there is at minimum a reasonable probability that this Court will affirm in *Noel Canning*. *Lucas*, 486 U.S. at 1304. The "considered analysis" of both the D.C. and Third Circuits by itself supplies a "fair prospect" that the Companies' position will be vindicated. *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). And should this Court conclude that the January 2012 appointments were unlawful, the law supporting the Companies' claim undoubtedly then will be clear and indisputable *everywhere*.

b. Even if the Board's own lack of authority to act—to issue final or interlocutory decisions, or even to oversee discovery disputes—were not dispositive by itself, the inability of the Board's *agents* to act while their principal cannot do so proves that the Companies cannot be compelled to litigate before the agency.

i. As the D.C. Circuit explained in *Laurel Baye*, "basic tenets of agency and corporation law" teach that "an agent's delegated authority terminates when the

[15] C.A. Stay Opp. 4-5 (citing *Evans*, 387 F.3d at 1226, *Woodley*, 751 F.2d 1012-13, and *Allocco*, 305 F.2d at 709-15).

powers belonging to the entity that bestowed the authority are suspended" or "upon the resignation or termination of the delegating authority." 564 F.3d at 473. It follows that no agent to whom the Board has delegated authority may exercise it when the Board loses its own ability to act. *See ibid.* The Board, in short, "cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied." *Ibid.*

The Board resists this unremarkable application of rudimentary agency-law principles, but its objections lack merit. It suggested below that this Court's decision in *New Process Steel* cast doubt on the D.C. Circuit's analysis in *Laurel Baye* or the court of appeals' conclusion that Board agents may not act when the Board lacks a quorum. C.A. Stay Opp. 11-12. But *New Process Steel* did no such thing. Although this Court did not adopt *Laurel Baye*'s reasoning in reaching its conclusion, it did *not* decide the issue whether delegations of Board authority survive the Board's loss of a quorum. Quite the opposite, the Court expressly *declined to decide* that issue, which "implicates a separate question that [its] decision *does not address*." 130 S. Ct. at 2642-43 n.4 (emphases added).[16]

ii. The Board's lack of a quorum thus forecloses any Board agent from conducting the litigation. Issuing unfair-labor-practice complaints is an exercise of

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[16] As with *Noel Canning*, the Board similarly argued that *Laurel Baye*'s holding is not clearly controlling because other circuits have rejected it. C.A. Stay Opp. 12-13. But, again, whatever the views of other circuits, the law in the D.C. Circuit—including published panel decisions like *Laurel Baye*—is both clear and controlling on the court of appeals here. And there is a strong likelihood—and certainly a "fair prospect," *Lucas*, 486 U.S. at 1304—that this Court would agree, in which case the law would be clear everywhere.

Board authority subject to the quorum requirement: Congress conferred the "power to issue" them on "the Board, or any agent or agency designated by the Board for such purposes," 29 U.S.C. § 160(b), and the Board has delegated that authority to Regional Directors, *see* 29 C.F.R. § 102.15. The Bronx and Brooklyn complaints—issued by the Regional Directors of Regions 2 and 29, respectively, App. 19a, 34a—explicitly invoke this delegated authority. *See id.* at 13a, 25a. These exercises of delegated Board authority by its agents were nullities; if the Board itself could not legally issue the complaints, its agents could not do so on its behalf.[17]

The Board asserted below that the complaints were lawful nonetheless because the General Counsel has independent authority under Section 3(d) of the Act, 29 U.S.C. § 153(d), over issuance and prosecution of such complaints. C.A. Stay Opp. 8-10. That is incorrect, and ultimately irrelevant. The Board's argument is wrong because it contravenes two provisions of the Act. Section 10(b), as noted, expressly confers power to issue complaints on "*the Board*" and those to whom it delegates such power. 29 U.S.C. § 160(b) (emphasis added). The Board fails to account for this provision. Moreover, the very sentence of Section 3(d) the Board invokes confirms that even when exercising his claimed authority over complaints,

[17] The complaints in the Bronx and Brooklyn Cases, and all subsequent actions by the Regional Directors of Regions 2 and 29, are independently invalid because both of those Regional Directors were themselves invalidly appointed by a quorum-less Board. When the Board announced the appointments to those posts of Karen Fernbach and James Paulsen, respectively, on January 6, 2012, it *already* lacked a quorum. NLRB, Karen Fernbach named Regional Director in Manhattan (Jan. 6, 2012), http://www.nlrb.gov/news-outreach/announcements/karen-fernbach-named-regional-director-manhattan; NLRB, Jim Paulsen named Regional Director in Brooklyn (Jan. 6, 2012), http://www.nlrb.gov/news-outreach/announcements/jim-paulsen-named-regional-director-brooklyn.

the General Counsel is acting *not* for himself, but "*on behalf of the Board*"—and that such authority pertains only to "issuance of complaints *under section 160*," *i.e.*, complaints issued pursuant to *the Board's* power. *Id.* § 153(d) (emphasis added).

In any event, whether the General Counsel *could* have issued the complaints in the Bronx and Brooklyn Cases is immaterial. To begin with, he *did not issue them*. As noted, two of the Board's Regional Directors did so. *See supra* at 24.[18]

Moreover, even if the complaints were lawfully issued, the litigation still is unlawful because the Board and its agents lack authority to oversee it. As noted above, the Board itself cannot do so. Nor can the ALJ: He too is the Board's "agent," 29 C.F.R. § 102.6, and any authority he wields over the proceedings is power the Board delegated to him.[19] He cannot exercise any such authority—to rule on motions and objections, recommend a merits decision, or exercise any other power delegated by the Board—if the Board, his principal, remains unable to act.[20]

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[18] The Board's suggestion below (C.A. Stay Opp. 10) that the Acting General Counsel "effectively ratified" issuance of the complaints is baseless. Not only does the Board's argument incorrectly assume that the Acting General Counsel had authority to issue or ratify complaints—which he does not—but it is also factually false: Unlike the cases it cited to support its ratification theory, the Board could not identify any action by the Acting General Counsel here actually ratifying the Regional Directors' actions. *See* C.A. Stay Reply 5-6. It cited only a letter from the Acting General Counsel refusing to suspend the litigation pending resolution of the mandamus petition, *see* C.A. Stay Opp. 10, but that letter merely recites the Board's legal argument that the Acting General Counsel *could* issue complaints on his own authority; it says nothing approving the specific complaints here, *see* App. 2a-4a.

[19] *See*, *e.g.*, 29 C.F.R. §§ 102.17, .23, .25, .29, .30, .31, .33, .34, .45.

[20] For the same reasons that the Board's agents lacked authority to begin or conduct the agency proceedings, the Board's agents also cannot lawfully seek interim injunctive relief under Section 10(j) of the Act. The Act confers authority to seek such injunctions explicitly on the Board, *see* 29 U.S.C. § 160(j), and thus neither the Board nor its agents may exercise that authority without a quorum.

3. Mandamus Relief Is Appropriate In The Circumstances.

Mandamus is manifestly "appropriate under the circumstances," *Cheney*, 542 U.S. at 381, to end the Board's unabashed "usurpation of power," *Will* v. *United States*, 389 U.S. 90, 95 (1967) (internal quotation marks omitted), and its open defiance of the D.C. Circuit's directives. A writ also is appropriate to prevent the Board's efforts to evade the court of appeals' jurisdiction and avert imminent, irreparable harm to the Companies and others whom the Board continues to assail with a club it lacks authority to wield.

a. The relief sought here falls well within the writ's "traditional use . . . in aid of appellate jurisdiction" of "confin[ing]" an entity "to a lawful exercise of its prescribed jurisdiction." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

i. The array of ultra vires actions the writ can remedy is wide-ranging, but at the core are "actions [that] would threaten the separation of powers." *Cheney*, 542 U.S. at 381. As lower courts have recognized, "[a] federal court's power to utilize mandamus to enforce its prior mandate against an administrative agency is firmly established." *Iowa Utils. Bd.* v. *FCC*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999). "A federal court of appeals can use mandamus to preclude an agency from taking steps to evade the effect of its mandate, even if those steps were not expressly contemplated by the prior decision." *Id*. at 542. That power enables a court to halt agency action that is "clearly inconsistent" even "with

the basic *themes* of [a] decision,"[21] or to "rectify any deviation" from "'either the *letter or spirit* of [the court's prior] mandate construed in the light of the opinion of the court deciding the case.'"[22] Having resolved an issue once, a court may issue a writ "to prevent relitigation of issues already decided." *Yablonski*, 454 F.2d at 1038.

The Board's unapologetic refusal to obey the court of appeals' clear directives exemplifies the contumacy that the writ exists to police. D.C. Circuit precedent leaves no doubt about the Board's lack of a quorum and the consequent inability of the Board or its agents to exercise any authority under the Act. *See supra* at 19-20, 22-23. By issuing and prosecuting complaints in the *absence* of a quorum (and threatening additional burdensome litigation), the agency thus is acting "manifestly in the teeth of the definitive rulings" of a federal court of appeals. *Yablonski*, 454 F.2d at 1042. That disobedience poses a severe "threa[t] [to] the separation of powers" that amply justifies mandamus. *Cheney*, 542 U.S. at 381.[23]

ii. The Board has argued in opposing mandamus in other cases that a writ is inappropriate because the agency is entitled to disregard the D.C. Circuit's decision in *Noel Canning* unless and until this Court resolves the merits of the issue against

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[21] *MCI Telecomms. Corp.* v. *FCC*, 580 F.2d 590, 597 (D.C. Cir.) (emphasis added), *cert. denied*, 439 U.S. 980 (1978).

[22] *City of Cleveland* v. *Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (emphasis added) (quoting *Yablonski* v. *United Mine Workers of Am.*, 454 F.2d 1036, 1038 (D.C. Cir. 1971)).

[23] Indeed, the Board's action flouts not only federal courts' authority and Congress's prescription of the quorum requirement, but also the Senate's constitutional role in appointments: Allowing invalidly appointed Board members to wield federal authority "wholly defeat[s] the purpose of the Framers in the careful separation of powers structure reflected in the Appointments Clause." *Noel Canning*, 705 F.3d at 503.

the Board. Though it did not seek a stay in that case pending further appeal, the Board nevertheless claims the right to disregard the ruling simply "[b]ecause the question of the validity of the President's recess appointments remains in litigation," and other courts (addressing other appointments) have arrived at different answers.[24] And it contends that even though Congress vested review as of right of Board rulings in the D.C. Circuit, 29 U.S.C. § 160(f), the Board can continue acting because it can seek enforcement of its orders *elsewhere*, *see id.* § 160(e); *SFTC* Opp. 7, 19-21, 27. The Board's claim that its "disagree[ment]" (*SFTC* Opp. 4) with a federal court of appeals' ruling authorizes the Board to refuse to comply with the ruling is antithetical to the rule of law. No precedent even remotely supports it.

The Board has invoked *United States* v. *Mendoza*, 464 U.S. 154 (1984), and cases reciting its holding, as authority for its novel theory. *See* C.A. Stay Opp. 7-8; *see also SFTC* Opp. 21 & n.20. But *Mendoza* has no relevance here. It merely recognized a limited exception to *issue preclusion* to ensure the "development of important questions of law" that otherwise would be hindered "by freezing the first final decision rendered on a particular legal issue." 464 U.S. at 160. On any reading, *Mendoza* does not give agencies proceeding by adjudication a license to flout controlling federal-court *precedent*.[25] The Board's reliance on other courts'

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[24] *See SFTC* Opp. 20-21; *cf. Bloomingdale's*, 2013 WL 1901335, at *1.

[25] In any event, the exception to issue preclusion that *Mendoza* recognized exists primarily for *this* Court's benefit, to enable "several courts of appeals to explore a difficult question before [the Court] grants certiorari." 464 U.S. at 160. This rationale has no application here. The premise of the agency's disregard of the D.C. Circuit's decisions is that a split *already exists*. *See Bloomingdale's*, 2013 WL 1901335, at *1; Pet. for Cert. 11-12, 23-24, 31, *Noel Canning*, No. 12-1281.

recess-appointments rulings—none of which involved the Board, or indeed *any* executive agency, *see Evans*, 387 F.3d at 1222 (challenge to recess appointment of federal judge); *Woodley*, 751 F.2d at 1009 (same); *Allocco*, 305 F.2d at 705-06 (same)—to evade a ruling to which it *was* a party is badly misplaced.

iii. By claiming that it may ignore this Court's rulings until a higher court decides them, the Board asserts an unprecedented authority to stay judicial decisions *unilaterally*. It is well-settled that "all orders and judgments of courts must be complied with promptly," and that "[i]f a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal." *Maness* v. *Meyers*, 419 U.S. 449, 458 (1975). Litigants who wish not to obey a court of appeals' decision while they pursue further review must seek and obtain a stay, either from the court of appeals itself, *see* Fed. R. App. P. 41, or from this Court, *see* Sup. Ct. R. 23.

This is not news to the Board, which has sought stays pending appeal before. Indeed, it did so just four years ago in a strikingly similar circumstance. When it lost in *Laurel Baye*—which invalidated a single Board ruling, but on grounds (lack of a quorum) applicable to many others—it *did not* continue business as usual and pretend that the court's ruling did not affect other cases. Instead, it sought (and obtained) a stay from the D.C. Circuit pending its petition for a writ of certiorari. Stay Mot., *Laurel Baye*, 564 F.3d 469 (D.C. Cir. July 8, 2009) (No. 08-1162).

The Board, however, did not obtain a stay of *Noel Canning*. It did not even ask for one, from the court of appeals or this Court—let alone establish that a stay

was warranted. It must live with its choice, and must obey the decision of the D.C. Circuit, to which all Board rulings are appealable, 29 U.S.C. § 160(f), unless and until that ruling is overturned. Yet the Board has claimed that it may disregard the ruling "[b]ecause the question of the validity of the President's recess appointments remains in litigation"—that is, because the Board is still appealing—and because other courts have arrived at different answers, C.A. Stay Opp. 4-5, 11-13; *see also Bloomingdale's*, 2013 WL 1901335, at *1. And on that basis, the Board has rendered more than *two hundred* new decisions just in the three months *since* the D.C. Circuit's mandate.[26] In doing so, the Board effectively has arrogated a stay of *Noel Canning* to itself, claiming power that belongs exclusively to the federal courts. This usurpation of power is further reason why the agency's ongoing self-aggrandizement must be stopped. Left unchecked, the agency's power-grab will severely undermine the rule of law and public trust in government at large.

b. Mandamus also is appropriate to aid, and prevent evasion of, the court of appeals' (and ultimately this Court's) prospective jurisdiction and avoid irreparable harm to the Companies. While permitting the agency litigation to proceed would not preclude either court from voiding the Board's final decision, *see* 29 U.S.C. § 160(f), as a practical matter it would disable both from preventing the severe immediate consequences of the Board's illegal actions. As discussed below, *see* Part II.A, *infra*, continued litigation of the Bronx and Brooklyn Cases would subject the

[26] *See* Docket, *Noel Canning* v. *NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (No. 12-1115) (noting issuance of mandate to Board on March 20, 2013); NLRB, Board Decisions, http://www.nlrb.gov/cases-decisions/board-decisions; NLRB, Unpublished Board Decisions, http://www.nlrb.gov/cases-decisions/unpublished-board-decisions.

Companies to immediate injuries that even a final ruling from this Court could not remedy. Waiting until the agency proceedings are *complete*, and the Board issues a final ruling, would preclude the court of appeals or even this Court from preventing the severe and unjustified consequences of the Board's actions on unwilling litigants, and the attendant abuse of the public fisc. And until the agency's ability to act is definitively adjudicated by an authority it is willing to recognize, the Companies will have no repose, at risk of facing future complaints without a resolution of the Board's authority to bring them.

II. THE EQUITIES STRONGLY SUPPORT STAYING THE BOARD PROCEEDINGS.

The balance of equities also strongly favors a stay of the Board's unlawful actions pending the D.C. Circuit's or this Court's review of the merits. Suspending the Board's prosecution of the Bronx and Brooklyn Cases, and its efforts to pursue additional litigation seeking onerous injunctive relief, is essential to protect the Companies from suffering severe injuries that no subsequent judicial ruling can undo. The court below, and even this Court, would be powerless to issue meaningful relief, as the Companies already will have been forced to litigate the very cases they have asked the court of appeals to enjoin. Allowing the Board to continue, in defiance of the D.C. Circuit's controlling precedent in *Noel Canning*, to conduct costly litigation that it had no authority to bring in the first place also would deeply undermine the public interest, wasting scarce taxpayer resources on litigation that ultimately will be adjudged a nullity, and needlessly but irreversibly eroding public confidence in the agency and the government in general.

A stay pending the D.C. Circuit's prompt review of the petition for mandamus, or pending this Court's consideration of this application as a petition for a writ of certiorari, also would cause no cognizable harm to either the Board or other parties. To the contrary, they too would be spared the needless burdens of preparing for an illegal trial and litigating an appeal to the Board on which it cannot rule. Tellingly, although the Board plainly is capable of requesting a stay of unfavorable rulings it does not wish to obey pending its pursuit of review in this Court—as it did after losing in *Laurel Baye*—the Board, as noted, did not even *ask* for a stay in *Noel Canning*. Its decision now to carry on with its enforcement activities in spite of that ruling is patently inequitable.

A. A Stay Is Necessary To Avert Irreparable Harm To The Companies.

1. The Companies Will Be Irreparably Injured If Forced To Litigate The Unlawful Proceedings.

Absent a stay, the Companies will suffer severe and irreparable injuries, as they are forced to defend themselves at great cost against unfair-labor-practice proceedings the Board and its agents lack legal authority to initiate or prosecute. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills* v. *Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). And, because the appointments of the Board members on which the agency's claimed power to conduct the administrative proceedings is predicated are unconstitutional—as the court of appeals correctly

held in *Noel Canning*, 705 F.3d at 499-514—continued prosecution of the proceedings directly infringes the Companies' constitutional rights. "The structural principles secured by the separation of powers protect the individual" no less than other constitutional guarantees. *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011). "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury," which plainly includes private parties forced to litigate unwillingly, "may object." *Ibid.*

Moreover, if the scheduled hearing in the Bronx and Brooklyn Cases goes forward, the Companies also will be forced to expend massive resources preparing and conducting their defense. Documentary and other evidence must be gathered and reviewed. Potential witnesses must be identified and interviewed. And the Companies' counsel must prepare for a trial that could span weeks, reviewing the extensive record, preparing legal and evidentiary arguments for issues that may arise at the hearing, and engaging in time-consuming motions practice and, potentially, interlocutory appeals to the Board. Worse, once the proceedings in the Bronx and Brooklyn Cases are ruled illegal, the Companies may have to bear all of these burdens *again* if required to litigate the cases a second time.

None of these injuries can be remedied after the fact if the administrative proceedings are allowed to go forward. Violations of the Companies' constitutional rights safeguarded by the separation of powers cannot be undone, even by an order from this Court. And once the immense costs of litigating the illegal proceedings are expended, they cannot be recouped.

Indeed, because the crux of the Companies' argument is that the Board cannot lawfully prosecute the pending unfair-labor-practice charges (or any related Section 10(j) proceedings), a stay is essential to preserve the courts' ability to grant the Companies *any* meaningful relief. A writ of mandamus in favor of the Companies, or any other judicial remedy, would be largely meaningless if the Companies already have been forced to litigate the very ultra vires cases they have sought federal-court intervention to prevent. A stay of litigation therefore is necessary to "maintain the *status quo* . . . pending review of [the] agency's action."[27]

2. The Board's Attempts To Minimize The Companies' Injuries Are Meritless.

The Board argued below that these immediate and irreparable injuries do not warrant a stay, C.A. Stay Opp. 13-16, but its arguments are baseless. The Board did not deny that, *if* the January 2012 recess appointments were unlawful and the complaints and proceedings in this case were therefore ultra vires, continued prosecution of the Bronx and Brooklyn Cases would infringe the Companies' constitutional rights. *See id.* at 14-15. Nor did it dispute that such infringement would constitute per se irreparable harm. *See ibid.* It contended only that the Companies' rights were not actually infringed—primarily because "courts are presently divided on the question whether *Noel Canning* was correctly decided." *Id.* at 14. That claim is incorrect for the reasons explained above, *see supra* at 18-25,

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[27] *FTC* v. *Dean Foods*, 384 U.S. 597, 604 (1966) (internal quotation marks omitted); *see also Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 954 (D.C. Cir. 2005); *FTC* v. *Weyerhaeuser Co.*, 665 F.2d 1072, 1090 (D.C. Cir. 1981); *Maas* v. *United States*, 371 F.2d 348, 352 (D.C. Cir. 1966).

but more fundamentally it misconceives the stay analysis. In assessing the injuries that an applicant will suffer without a stay, the Court "*assum[es]* the applicant's position on the merits is correct." *Phillip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers) (emphasis added); *accord Planned Parenthood of Se. Pa.* v. *Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers). The Board's bootstrapped argument improperly conflates the equities with likelihood of success, and would reduce the *multi*-factor stay test to a single, merits-only inquiry.

The Board did not dispute the concrete burdens that forcing the Companies to litigate the agency proceedings would foist upon them. Instead, it sought to belittle those burdens. Its central claim that the costs of litigation categorically do not constitute irreparable harm (C.A. Stay Opp. 13-16), however, is meritless and distorts the authorities on which it relies. The Board asserted that *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and later cases that rely upon it, hold that litigation burdens can never constitute irreparable harm.[28] According to the Board, these cases establish that the costs of being prosecuted before illegally constituted tribunals are simply "'inherent in society.'" C.A. Stay Opp. 15 (citation omitted). But the cases it cites lend no support to that counterintuitive claim.

Myers did *not* question the commonsense fact that litigation before an agency imposes serious burdens on affected parties that cannot be recouped. It held only

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[28] C.A. Stay Opp. 14-15 (citing *Myers*, 303 U.S. at 51-52, *Renegotiation Bd.* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974), and *Sears, Roebuck & Co.* v. *NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972)); *see also* Respondent's Opp. to Pet. 10 n.4, *In re Geary*, No. 13-1029 (D.C. Cir. Mar. 25, 2013) (citing *Bannercraft*, 415 U.S. at 24, and *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980)).

that the existence of such burdens cannot excuse exhaustion of administrative remedies simply because the challenging party "assert[s] that the charge on which the complaint rests is groundless," since "no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." 303 U.S. at 51-52. *Myers* and later cases reciting its conclusion thus stand only for the unremarkable proposition that litigation burdens do not constitute irreparable harm *when litigation is necessary to ascertain whether the underlying claims have merit*. A party named in a Board complaint, in short, cannot avoid litigation by claiming that the charges are baseless because litigation is needed to determine that very issue.

The same is *not* true, however, where—as in this case—the challenge is to the agency's authority to assert or litigate such claims *at all*. This Court has never hinted, much less held, that otherwise severe and irreparable injuries that flow from being compelled to participate in proceedings before a government agency that lacks legal authority to conduct them are irrelevant in deciding whether a stay of such proceedings is appropriate. *Myers* itself had no occasion to decide that issue; as the Court noted, the challenging party did *not* dispute the legality of the agency procedures themselves. *See* 303 U.S. at 48. And this Court has since expressly declined to address whether the *Myers* principle extends to cases where a party claims that the agency's proceedings exceed its authority. *See Bannercraft*, 415 U.S. at 24 n.22 ("In this litigation there is no allegation or evidence that the Board was negotiating in bad faith or acting ultra vires. We therefore are not now concerned with the situation where allegations or evidence of that kind is present.").

As an original matter, moreover, expanding *Myers*'s conclusion to cases like this where the agency's authority to act is itself in dispute would make no sense. The Companies' claim is that the litigation *itself* is unlawful; allowing that very litigation to proceed cannot conceivably aid in resolving that issue. There is no need for, and nothing to be gained from, a trial or any other agency proceedings concerning the unfair-labor-practice charges to determine whether the Board can conduct such litigation in the first place. No evidentiary record is necessary to make that determination. Nor does the agency have any relevant expertise to bring to bear; indeed, as noted, before *Noel Canning* the Board refused even to pass on the issue when parties presented it to the agency. *See supra* at 17-18.

B. A Stay Of The Proceedings Would Advance The Public Interest.

Staying the Board's proceedings also is vital to safeguarding the public interest. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres* v. *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted); *accord Bays* v. *City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012). And allowing Board members holding office by dint of invalid recess appointments to wield authority that Congress conferred on a federal agency "would wholly defeat the purpose of the Framers in the careful separation of powers structure reflected in the Appointments Clause." *Noel Canning*, 705 F.3d at 503.

In reality, moreover, it is the public—not the Board or its agents personally—who foots the bill for the Board's proceedings, whether lawfully initiated or (as here) not. Pressing on with the Bronx and Brooklyn Cases and potential Section 10(j)

proceedings, as the Board appears bent on doing, will cost taxpayers a significant sum. Indeed, since agency personnel serve as both prosecutor *and* adjudicator, the public's burden is essentially doubled: The Board's agents will attempt to amass their own evidence substantiating the complaint's specious allegations, which they will present to an ALJ (also an "agent of the Board," 29 C.F.R. § 102.6), who must sift through the submissions and draft a recommended decision. Agency officials and employees then almost certainly will both litigate and adjudicate an appeal to the Board (whether defending or challenging the ALJ's ruling). *See id.* § 101.12. And unless all sides are happy with the Board's ruling and voluntarily comply with it, the Board will incur the expense of *another* costly appeal, *see* 29 U.S.C. § 160(f), an action by the Board to enforce its decision, *see id.* § 160(e), or both—forcing taxpayers (who also fund the federal courts) to pay double yet again.

The prospect of squandering vast resources on litigation that cannot yield even a valid agency ruling would deter any rational litigant paying its own way. The Board is not bothered, of course, since it is spending someone *else's* money. But the public whose hard-earned income is wasted would justifiably feel ill-used.

C. A Stay Will Not Injure The Board Or Other Parties.

A stay of the Board's illegal proceedings not only would avoid these pointless yet permanent injuries, but would do so without any cognizable injury to the Board or others. The Board will actually *save* time and resources if litigation in the Bronx and Brooklyn Cases is suspended. The Union too will face no relevant injury; it too will be spared the expense of proceedings that cannot result in a binding decision.

A stay would mean, to be sure, that the Board cannot complete its consideration of the Bronx and Brooklyn Cases and issue a final order, and that the Union will not receive a ruling on its charges. But neither can fairly complain that a stay itself would be the source of their grievance. It is Congress's establishment of the quorum requirement in Section 3(b) of the Act, 29 U.S.C. § 153(b), that prevents the agency from issuing decisions without three lawfully appointed members, *see New Process Steel*, 130 S. Ct. at 2644-45—which the Board currently does not have. It is already the case, in short, that the Board cannot issue a final decision on the merits; any ruling it renders could be challenged in the D.C. Circuit, *see* 29 U.S.C. § 160(f), where it would be dead on arrival, and summarily vacated as "void." *Noel Canning*, 705 F.3d at 514. A stay would merely require the agency to obey the law.

The Board, in short, cannot point to any cognizable injury that it will suffer if it is not allowed to proceed unlawfully prosecuting and deciding this and other cases. And even if it could, the proper recourse, as discussed above, *see supra* at 29, would have been for the Board to seek a stay of the D.C. Circuit's ruling in *Noel Canning*, either from the court of appeals, *see* Fed. R. App. P. 41(d)—as the Board did after losing in *Laurel Baye*, *see supra* at 29—or else in this Court, *see* Sup. Ct. R. 23. But the Board did not do so. It has never even asserted, let alone demonstrated to the satisfaction of a federal court, that it has met the stringent requirements of a stay pending disposition of a petition for a writ of certiorari—including "irreparable harm," *King*, 133 S. Ct at 2. Yet it has carried on as if a stay had been granted in *Noel Canning*, simply sidestepping its obligation to demonstrate irreparable harm

and the other stay factors. Indeed, the Board has not only sought to shirk its own burden of proof, but has perversely and improperly sought to *shift* that burden onto the private parties whom it is compelling to litigate—and who must seek emergency judicial relief from the Board's illegal actions.

CONCLUSION

For the foregoing reasons, the Court should stay the administrative proceedings before the National Labor Relations Board pending the D.C. Circuit's adjudication of the Companies' petition for a writ of mandamus or prohibition. In the alternative, the Court should treat this application as a petition for a writ of certiorari, stay the proceedings before the National Labor Relations Board pending the Court's review of the petition for a writ of certiorari, and grant the petition, or at minimum hold it pending the Court's decision in *Noel Canning*, No. 12-1281.

Respectfully submitted.

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Counsel for Applicants CSC Holdings, LLC, and Cablevision New York City Corp.

July 1, 2013

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1191 **September Term, 2012**

Filed On: June 28, 2013

In re: CSC Holdings, LLC and Cablevision Systems New York City Corp.,

Petitioners

BEFORE: Rogers and Tatel, Circuit Judges; Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus or prohibition; and the emergency motion for stay, the response thereto, and the reply, it is

ORDERED that the emergency motion for stay be denied. Petitioners have not satisfied the stringent requirements for a stay pending consideration of the petition for a writ of mandamus. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011). It is

FURTHER ORDERED, on the court's own motion, that this case be held in abeyance pending the court's disposition of In re Geary, et al., No. 13-1029, et al. Petitioners are directed to file a motion to govern further proceedings within 30 days of the court's decision in In re Geary.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570
www.nlrb.gov

May 28, 2013

Eugene Scalia, Esq.
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1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Re: CSC Holdings, LLC & Cablevision Systems
New York City Corp.
Cases 2-CA-085811, et al.
Cablevision Systems New York City Corp.
Cases 29-CA-097013, et al.

Dear Mr. Scalia:

I write in response to your May 22, 2013 letter requesting that I direct the suspension of proceedings in the above matter. For the reasons below, I am denying your request.

As an initial matter, the authority to issue complaint lies with me as Acting General Counsel—an independent officer appointed by the President and confirmed by the Senate to whom staffs engaged in prosecution and enforcement are directly accountable. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) ("*UFCW*"); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). Thus, the authority of the Acting General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any "power delegated" by the Board, but rather directly from the text of the NLRA. Section 3(d) of the NLRA states, among other things, that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d) (2011). In enacting this provision, "Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints." *UFCW*, 484 U.S. at 127. It does not detract from the General Counsel's independence that Congress included in Section 3(d) language "on behalf of the Board" to make it clear that the General Counsel acts within the agency. As the Supreme Court has found, the legislative history of the NLRA shows that the acts of the General Counsel were not to be considered acts of the Board. *UFCW*, 484 U.S. at 128-129.

Moreover, Regional Directors, who are members of the General Counsel's staffs engaged in prosecution of unfair labor practices, derive their authority to issue complaints from the authority of the General Counsel. *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965) ("[t]he General Counsel has delegated authority to the Regional Directors for issuing [ ] complaints."). Thus, regardless of any issue regarding the composition of the Board, the Regional Directors' authority to issue the complaint, derived from my independent authority as Acting General Counsel, is unaffected.

In any event, the D.C. Circuit's decision in *Noel Canning v. NLRB*, __ F.3d ___, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013) (petition for certiorari filed April 25, 2013) does not warrant suspending proceedings in this matter. It is correct that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were appointed during an intrasession recess. However, as you also note, the Board has filed a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."[1] The Board's conclusion in *Belgrove* is equally applicable to me fulfilling my responsibilities under the Act.[2]

Finally, the Board's most recent experience in continuing to process cases during the analogous dispute leading to *New Process Steel*, 130 S. Ct. 2635 (2010) (holding that a two-member Board lacks the authority to decide cases), provides support for the Board's judgment that continuing to adjudicate pending cases while the challenges to its authority are being adjudicated contributes to the resolution of industrial disputes. Of some 550 decisions issued by the two-member Board prior to *New Process*, only about 100 were impacted by that decision. Nearly all of the remaining matters decided by the two-member Board have been closed under the Board's processes with no review required. *See* Background Materials on Two-Member Board Decisions, http://www.nlrb.gov/news-outreach/backgrounders/background-materials-two-member-board-decisions (last visited March 25, 2013). This experience supports the Board's present determination to continue

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[1] The Third Circuit's decision in *NLRB v. New Vista Nursing and Rehabilitation*, -- F.3d --, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

[2] The Board's appointments of Regional Directors Paulsen and Fernbach are also in accord with this conclusion. *See Bloomingdale's*, 359 NLRB No. 113 (2013).

to decide cases until the Supreme Court resolves the recess appointments issue. As it was then, the Board's present determination to continue to decide cases is hardly "manifestly unfair, inefficient, and incompatible with core principles of equity," as you claim.

Accordingly, I deny your request to suspend proceedings in this matter.

Sincerely,

Lafe E. Solomon
Acting General Counsel

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The United States Constitution, article II, section 2, clause 2, provides:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The United States Constitution, article II, section 2, clause 3, provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

28 U.S.C. § 1651 provides, in pertinent part:

> **(a)** The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> . . .

29 U.S.C. § 153 provides, in pertinent part:

> **§ 153. National Labor Relations Board**
>
> . . .
>
> **(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal**
>
> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also

authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

. . .

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act

(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.

29 U.S.C. § 154 provides, in pertinent part:

> **§ 154. National Labor Relations Board; eligibility for reappointment; officers and employees; payment of expenses**
>
> **(a)** Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.
>
> . . .

29 U.S.C. § 160 provides, in pertinent part:

> **§ 160. Prevention of unfair labor practices**
>
> . . .
>
> **(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable**
>
> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days

after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

. . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence

and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

. . .

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is

engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

. . .

29 U.S.C. § 161 provides, in pertinent part:

§ 161. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title--

(1) Documentary evidence; summoning witnesses and taking testimony The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of

any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

. . .

29 C.F.R. § 102.6 provides:

§ **102.6 – Administrative law judge; hearing officer.**

The term administrative law judge as used herein shall mean the agent of the Board conducting the hearing in an unfair labor practice or Telegraph Merger Act proceeding. The term hearing officer as used herein shall mean the agent of the Board conducting the hearing in a proceeding under section 9 or in a dispute proceeding under section 10(k) of the Act.

29 C.F.R. § 102.15 provides:

§ **102.15 – When and by whom issued; contents; service.**

After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 14 days after the service of the complaint. The complaint shall contain:

(a) A clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and

(b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

29 C.F.R. § 102.19 provides:

> **§ 102.19 – Appeal to the general counsel from refusal to issue or reissue.**
>
> **(a)** If, after the charge has been filed, the Regional Director declines to issue a complaint or, having withdrawn a complaint pursuant to § 102.18, refuses to reissue it, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing the "Appeal Form" with the General Counsel in Washington, DC, and filing a copy of the "Appeal Form" with the Regional Director, within 14 days from the service of the notice of such refusal to issue or reissue by the Regional Director, except as a shorter period is provided by § 102.81. If an appeal is taken the person doing so should notify all other parties of his action, but any failure to give such notice shall not affect the validity of the appeal. The person may also file a statement setting forth the facts and reasons upon which the appeal is based. If such a statement is timely filed, the separate "Appeal Form" need not be served. A request for extension of time to file an appeal shall be in writing and be received by the office of General Counsel, and a copy of such request filed with the Regional Director, prior to the expiration of the filing period. Copies of the acknowledgement of the filing of an appeal and of any ruling on a request for an extension of time for filing the appeal shall be served on all parties. Consideration of an appeal untimely filed is within the discretion of the General Counsel upon good cause shown.
>
> **(b)** Oral presentation in Washington, DC, of the appeal issues may be permitted a party on written request made within 4 days after service of acknowledgment of the filing of an appeal. In the event such request is granted, the other parties shall be notified and afforded, without additional request, a like opportunity at another appropriate time.
>
> **(c)** The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties. A motion for reconsideration of the decision must be filed within 14 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

CSC HOLDINGS, LLC and
CABLEVISION SYSTEMS
NEW YORK CITY CORP., as a
single employer

Respondent **Case Nos. 02-CA-085811**
02-CA-090823

and

COMMUNICATION WORKERS OF AMERICA,
AFL-CIO

Charging Party

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Cases 02-CA-085811 and Case 02-CA-090823, which are based on charges filed by Communication Workers of America, AFL-CIO, herein called the Union, against CSC Holdings, LLC and Cablevision Systems New York City Corp., as a single employer, herein called Respondent, are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act) and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below:

1. (a) The charge in Case No. 02-CA-085811 was filed by the Union on July 23, 2012, and a copy was served by regular mail on Respondent on July 24, 2012.

(b) The charge in Case No. 02-CA-090823 was filed by the Union on October 5, 2012, and a copy was served by regular mail on Respondent on October 10, 2012.

(c) An amended charge in Case No. 02-CA-090823 was filed by the Union on November 16, 2012, and a copy was served by regular mail on Respondent on November 19, 2012.

(d) A second amended charge in this matter was filed by the Union on November 29, 2012, and a copy was served by regular mail on Respondent on December 4, 2012.

2. (a) At material times CSC Holdings LLC, herein individually called CSC Holdings, has been a domestic corporation with an office and headquarters located at 1111 Stewart Avenue, Bethpage, New York, engaged in various business enterprises, including the provision of cable television and communications services in various parts of the United States.

(b) At material times Cablevision Systems New York City Corp., herein called Cablevision New York City, has been a domestic corporation with an office and place of business at 500 Brush Avenue, Bronx New York, herein called the Bronx facility, engaged in providing broadband cable communication services to residential and commercial customers in the Bronx and other locations in New York, New York.

(c) At all material times, CSC Holdings and Cablevision Systems New York City Corp have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have (formulated and) administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have interrelated operations with common management and have held themselves out to the public as a single-integrated business enterprise.

(d) Based on its operations described above in subparagraph (c), CSC

Holdings and Cablevision New York City constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(e) Annually, in course and conduct of their business operations CSC Holdings and Cablevision New York City separately and collectively derive revenues in excess of $500,000.

(f) Annually, in course and conduct of their business operations CSC Holdings and Cablevision New York City separately and collectively purchase and receive at their facilities in New York State goods and services valued in excess of $5,000 directly from suppliers located outside the State of New York.

3. At material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. At material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act):

James L. Dolan	Chief Executive Officer
Barry Monopoli	Vice President Field Operations
Richard House	Construction Manager
John Lynn	Construction Manager
Andre Diaz	Fiber Department Supervisor
Ewan Isaacs	Plant Maintenance Supervisor
Randy Reed	Construction Supervisor

Winston McIntosh Construction Supervisor

6. In or about April, 2012, the precise date being unknown to General Counsel, but within the knowledge of Respondent, the Employer, by Dolan, at a meeting of employees at the Bronx facility:

a. Promised its employees improved wages and benefits;

b. Promised its employees an improved system for registering their complaints, without fear of retaliation;

c. By soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment.

d. Respondent engaged in the conduct described above in subparagraphs a through c in order to discourage employees from selecting the Union as their collective bargaining representative.

7. (a) On or about April 15, 2012, the Employer, by various methods, including a power point presentation shown to employees at the Bronx facility and other locations not presently known to General Counsel, but within the knowledge of Respondent, announced the implementation of wage and benefit improvements.

(b) In or about May 2012, the exact date not presently known to General Counsel, but within the knowledge of Respondent, Respondent implemented the first phase of its wage and benefit improvements.

(c) Respondent engaged in the conduct described above in subparagraphs (a) and (b) because certain employees of Respondent joined or supported the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

8. On or about June 26, 2012, Respondent by Dolan, at a meeting of employees at the Bronx facility impliedly threatened employees with the loss of opportunities for training, and advancement and loss of work if they selected the Union as their collective-bargaining representative.

9. By the conduct described above in paragraphs 6 through 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

10. By the conduct described above in paragraph 7, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

11. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE as part of the remedy for the unfair labor practices alleged above in paragraphs 6 through 8, the General Counsel seeks an Order requiring that the Notice be read to employees during working time by James L. Dolan.

Wherefore as part of the remedy for the unfair labor practices alleged above in paragraphs 6 through 8 General Counsel seeks an Order requiring that the notice be read at Respondent's facilities in the Bronx, New York, Shelton, Connecticut, White Plains, New York, Newark, New Jersey and at its facilities in Nassau and Suffolk Counties, New York .

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the (consolidated) complaint. The answer must be **received by this office on or before May 1, 2013, or postmarked on or before April 30, 2013**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the

Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the (consolidated) complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **May 29, 2013, at 9:30 a.m. at the Mary Walker Taylor Hearing Room on the 36th Floor of 26 Federal Plaza, New York, New York,** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this (consolidated) complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated this 17th day of April
At New York, New York

Karen P. Fernbach, Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza
Room 3614
New York, NY 10278

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 02-CA-085811

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

ERIC CHANG, Director of Human Resources
CABLEVISION SYSTEMS OF NEW YORK
CITY CORPORATION
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BRONX, NY 10465-1803

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GABRIELLE SEMEL, District Counsel
COMMUNICATION WORKERS OF AMERICA, DISTRICT 1 - LEGAL DEPARTMENT
350 7TH AVE
FL 18
NEW YORK, NY 10001-5013

NOTICE

The Complaint attached hereto alleges that the Respondent has violated certain sections of the National labor Relations Act and a formal hearing has been scheduled with respect thereto. By this notice I wish to call the attention of all parties to the policy of this Agency favoring a settlement of cases notwithstanding that a Complaint has issued. It is the position of the Agency that an early settlement will be an advantage to all parties because it eliminates, among other things, the time and expense involved in formal litigation of a matter. In furtherance of this policy the Board agent with whom you have dealt or the attorney to whom the matter has been assigned for trial, will contact the representatives of the Respondent and the Charging Party within a matter of days for the purpose of engaging in intensive discussions to determine whether or not a settlement can be achieved. All of the facilities of this office are available to the parties in furthering the .achievement of a satisfactory disposition of the matter which will be consistent with the purposes and policies of the National Labor Relations Act.

Karen P. Fernbach

Regional Director
National labor Relations Board
Region 2

Form NLRB-4668
(4-05)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8 1/2 by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board: No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CABLEVISION SYSTEMS NEW YORK CITY CORPORATION

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Case Nos. 29-CA-097013
29-CA-097557
29-CA-100175

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Cases 29-CA-097013, 29-CA-097557, and 29-CA-100175 which are based on charges filed by COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO (Charging Party) against CABLEVISION SYSTEMS NEW YORK CITY CORPORATION (Respondent) are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act) and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below:

1(a). The charge in Case 29-CA-097013 was filed by the Charging Party on January 24, 2013, and a copy was served by regular mail on Respondent on January 25, 2013.

(b). The first amended charge in Case 29-CA-097013 was filed by the Charging Party on January 28, 2013, and a copy was served by regular mail on Respondent on January 28, 2013.

(c). The second amended charge in Case 29-CA-097013 was filed by the Charging Party on April 26, 2013, and was served by regular mail on Respondent on April 26, 2013.

(d). The charge in Case 29-CA-097557 was filed by the Charging Party on January 31, 2013, and a copy was served by regular mail on Respondent on February 4, 2013.

(e). The first amended charge in Case 29-CA-097557 was filed by the Charging Party on February 19, 2013, and a copy was served by regular mail on Respondent on February 21, 2013.

(f). The second amended charge in Case 29-CA- 097557 was filed by Charging Party on April 25, 2013, and was served by regular mail on Respondent on April 26, 2013.

(g). The charge in Case 29-CA-100175 was filed by the Charging Party on March 12, 2013, and a copy was served by regular mail on Respondent on March 13, 2013.

2(a). At all material times, Respondent a domestic corporation with its corporate office located at 1111 Stewart Avenue, Bethpage, New York, and with facilities located in Brooklyn, New York, has been engaged in the business of providing broadband cable and communication services to residential and commercial customers in Brooklyn.

(b). Annually, in the course and conduct of its business operation described above in paragraph 2(a), the Employer has derived gross revenues excess of $500,000, and has purchased goods, products and materials valued in excess of $5,000 directly from points located outside the State of New York.

(c). At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time field service technicians, outside plant technicians, audit technicians, inside plant technicians, construction technicians, network fiber technicians, logistics associates, regional control center (RCC) representatives and coordinators employed by the Employer at its Brooklyn, New York facilities; excluding all other employees, including customer service employees, human resource department employees, professional employees, guards, and supervisors as defined in Section 2(11) of the Act.

5. On February 7, 2012, following the conduct of an election in Case No. 29-RC-070897, the Board certified the Charging Party as the exclusive collective-bargaining representative of the Unit.

6. At all times since February 7, 2012, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the Unit.

7(a). At various times from about May 30, 2012, through March 4, 2013, Respondent and the Charging Party met for the purposes of negotiating an initial collective-bargaining agreement with respect to wages, hours, and other terms and conditions of employment.

(b). During the period described above in paragraph 7(a), Respondent engaged in surface bargaining with no intent of reaching agreement by: (1) refusing to meet at reasonable times; (2) refusing to discuss economic issues until non-economic issues were resolved; (3) insisting on changing the scope of the certified bargaining unit; (4) rigidly adhering to proposals that are predictably unacceptable to the Charging Party; (5) refusing to discuss a union security clause and then raising philosophical objections to such clause; (6) submitting regressive proposals to the Charging Party; (7) withdrawing from a tentative agreement; (8) refusing to

discuss mandatory subjects of bargaining; and (9) by significantly delaying the provision of relevant wage information to the Charging Party.

(c). By its overall conduct, including the conduct described above in paragraph 7(b), Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

8(a). Since about August 23, 2012, the Charging Party has requested, in writing, that Respondent furnish it with the following information: Documents related to changes made during the period April 1, 2012, to the present, with respect to the wages and benefits, Career Progression Plan, and Salary Matrix of all non-Brooklyn Cablevision employees, employed in the same or similar job classifications as the Brooklyn CWA bargaining unit employees.

(b). The information requested by the Charging Party, as described above in paragraph 8(a) is necessary for, and relevant to, the Charging Party's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c). From about September 5, 2012, to about March 6, 2013, Respondent unreasonably delayed in furnishing the Union with the information requested by it as described above in paragraphs 8(a) and (b).

9. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Daryl Gaines	Area Operations Manager
Rick LaVesque	Vice President

10. At all material times, Harry Hughes held the position of Respondent's Corporate Investigator for Respondent's Security Department and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

11. About January 24, 2013, Respondent, through Daryl Gaines, instructed employees not to engage in activities in support of the Charging Party.

12. About February 7, 2013, Respondent, by Harry Hughes, in front of the Madison Square Garden Arena in New York City, engaged in surveillance of employees engaged in union activities.

13. About the first week of February 2013, Respondent, by Rick LaVesque, in his office at Respondent's 96th Street facility, informed a Unit employee that it was futile for the employee to support the Charging Party because bargaining for a contract with Respondent was futile.

14(a). About January 30, 2013, certain employees of Respondent ceased work concertedly and engaged in a strike.

(b). The strike described above in paragraph 13(a) was caused by Respondent's unfair labor practices described above in paragraphs 7(a) through (c).

15(a). About January 30, 2013, Respondent, by Rick LaVesque, informed the following employees engaged in the unfair labor practice strike described above in paragraphs 14(a) and (b), that they had been permanently replaced:

Clarence Adams	Eric Ocasio
David Gifford	Malik Coleman
La'kesia Johnson	Andre Riggs
Courtney Graham	Raymond Reid
Miles Watson	Borris H. Reid

Andre Bellato	Steven Ashurst
Jerome Thompson	Shaun Morgan
Trevor Mitchell	Stanley Galloway
Ray Meyers	Brent Randein
Marlon Gayle	Corey Williams
Richard Wilcher	Raymond Williams

(b). About January 30, 2013, Respondent directed the employees described above in paragraph 15(a) to, among other things, turn in their identification badges, keys, and radios, and had these employees escorted out of the facility by NYPD officers.

(c). By the conduct described above in paragraphs 15(a) and (b), Respondent discharged the named employees on January 30, 2013.

(d). On various dates beginning on February 6, 2013, and ending on March 20, 2013, Respondent reinstated the named employees to their former positions of employment without back pay.

(e). Respondent engaged in the conduct described above in paragraphs 15(a) through (d) because the named employees of Respondent assisted the Charging Party and engaged in concerted activities, and to discourage employees from engaging in these activities.

16. By the conduct described above in paragraphs 7 and 8, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

17. By the conduct described above in paragraphs 11 through 13, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act

18. By the conduct described above in paragraph 15, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

19. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above, the Acting General Counsel seeks an Order requiring that the Notice be read to employees during working time by a high level official of Respondent.

As part of the remedy for the unfair labor practices alleged above in paragraphs 7 and 8, the General Counsel seeks an Order requiring Respondent to: (1) bargain on request within 15 days of a Board Order; (2) bargain on request for a minimum of 15 hours a week until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining; (3) prepare written bargaining progress reports every 15 days and submit them to the Regional Director and also serve the reports on the Charging Party to provide the Charging Party with an opportunity to reply; and (4) make whole employee negotiators for any earnings lost while attending bargaining sessions.

As part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 7 and 8, the Acting General Counsel seeks an Order requiring Respondent to bargain in good faith with the Charging Party, on request, for an additional period of 12 months as provided for by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

As part of the remedy for the unfair labor practices alleged above in paragraphs 15(a) through (e), the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. The Acting General Counsel further seeks that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. The Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Consolidated complaint. The answer must be **received by this office on or before May 13, 2013, or postmarked on or before May 11, 2013**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's

website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Consolidated complaint are true.

Any request for an extension of time to file an answer must, pursuant to Section 102.111(b) of the Board's Rule and Regulations, be filed by the close of business on May 10, 2013. The request should be in writing and addressed to the Regional Director of Region 29.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **May 29, 2013, at 9:30 a.m.** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Consolidated complaint. The procedures to be followed at the hearing are described in the

attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: April 29, 2013

/s/

JAMES PAULSEN
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 29
TWO METRO TECH CENTER STE 5100
FL 5
BROOKLYN, NY 11201-3838

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CABLEVISION SYSTEMS NEW YORK CITY CORPORATION and CABLEVISION SYSTEMS OF NEW YORK CITY CORPORATION

Case 29-CA-097013; 29-CA-097557; 29-CA-100175

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on , I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

PAUL HILBNER , Vice President, Human Resources for Field Operations CABLEVISION SYSTEMS NEW YORK CITY CORPORATION 9502 AVENUE D BROOKLYN, NY 11236-1811	**CERTIFIED MAIL, RETURN RECEIPT REQUESTED**
G. PETER CLARK , ESQ. 950 3RD AVE 14TH FLOOR NEW YORK, NY 10022-2705	**REGULAR MAIL**
RICK LEVESQUE CABLEVISION SYSTEMS OF NEW YORK CITY CORPORATION 9502 AVENUE D BROOKLYN, NY 11236-1811	**CERTIFIED MAIL, RETURN RECEIPT REQUESTED**
PETER CLARK , Attorney KAUFF MCGUIRE & MARGOLIS LLP 950 3RD AVE FL 14 NEW YORK, NY 10022-2773	**REGULAR MAIL**

GABRIELLE SEMEL , District Counsel COMMUNICATION WORKERS OF AMERICA, DISTRICT 1 - LEGAL DEPARTMENT 350 7TH AVE FL 18 NEW YORK, NY 10001-5013	**REGULAR MAIL**
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO 80 PINE ST FL 37 NEW YORK, NY 10005-1728	**CERTIFIED MAIL**
DANIEL E. CLIFTON , ESQ. LEWIS, CLIFTON & NIKOLAIDIS, P.C. 350 7TH AVE STE 1800 NEW YORK, NY 10001-5013	**REGULAR MAIL**

Date	Enter NAME, Designated Agent of NLRB Name
	Signature

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Case 29-CA-097013

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

PAUL HILBNER, Vice President, Human
Resources for Field Operations
CABLEVISION SYSTEMS NEW YORK
CITY CORPORATION
9502 AVENUE D
BROOKLYN, NY 11236-1811

G. PETER CLARK, ESQ.
950 3RD AVE
14TH FLOOR
NEW YORK, NY 10022-2705

GABRIELLE SEMEL, District Counsel
COMMUNICATION WORKERS OF
AMERICA, DISTRICT 1 - LEGAL
DEPARTMENT
350 7TH AVE
FL 18
NEW YORK, NY 10001-5013

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO
80 PINE ST
FL 37
NEW YORK, NY 10005-1728

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8 1/2 by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board: No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CABLEVISION SYSTEMS NEW YORK CITY CORPORATION

Case Nos. 29-CA-97103
29-CA-97557
29-CA-100175

and

COMMUNICATION WORKERS OF AMERICA, AFL-CIO

CSC HOLDINGS, LLC and CABLEVISION SYSTEMS NEW YORK CITY CORP., as a single employer

Case Nos. 2-CA-85811
2-CA-90823

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

ORDER

On May 14, 2012, Respondent's counsel requests that these cases, scheduled for hearings on May 29, 2013, be postponed to July 10, 2013. On May 16, 2013, I granted the request of counsel to postpone these cases, but only until June 25, 2013. Counsel for the Respondent, by letter dated May 17, 2013, requests reconsideration of my Order and to have these cases postponed to July 10, 2013.

Counsel for the Acting General Counsel opposes the July 10 date because counsel is considering seeking injunctive relief pursuant to Section 10(j) of the Act. Counsel for the Respondent states that having the hearings scheduled for June 25, 2013 is no longer as urgent inasmuch as the discriminatees have returned to work.

After due review, the reconsideration request of counsel for the Respondent is partially granted. The hearing(s) herein shall commence on July 8, 2013, at 9:30 a.m., at a hearing room on the 14th Floor at the New York Judges' Office, 120 West 45th Street, New York, NY.

Dated: May 21, 2013
New York, NY

Kenneth W. Chu
Acting Associate Chief,
Administrative Law Judge

GIBSON DUNN

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May 22, 2013

BY UPS NEXT DAY AIR

Lafe E. Solomon, Esq.
Acting General Counsel
National Labor Relations Board
1099 14th St., N.W.
Washington, D.C. 20570-0001

Re: *CSC Holdings, LLC & Cablevision Systems New York City Corp.*, Nos. 02-CA-085811, 02-CA-090823; *Cablevision Systems New York City Corp.*, Nos. 29-CA-097013, 29-CA-097557, 29-CA-100175

Dear Mr. Solomon:

I represent CSC Holdings, LLC ("CSC"), a Respondent in Case Nos. 02-CA-085811 and 02-CA-090823 (the "Bronx Case"), and Cablevision Systems New York City Corp. ("Cablevision"), also a Respondent in the Bronx Case and the sole Respondent in Case Nos. 29-CA-097013, 29-CA-097557, and 29-CA-100175 (the "Brooklyn Case"). The Regional Director for Region 2, Karen Fernbach, issued an unfair-labor-practice complaint in the Bronx Case on April 17, 2013, and the Regional Director for Region 29, James Paulsen, did the same in the Brooklyn Case on April 29, 2013. I write on behalf of CSC and Cablevision to respectfully request that, pursuant to section 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d), you direct the two Regional Directors, their staffs, and all other attorneys or other personnel under your supervision to suspend prosecution of the Bronx and Brooklyn Cases and any related proceedings until such time as the Board regains a lawful quorum of three validly appointed Members as required by 29 U.S.C. § 153(b) and *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010) and the Regional Directors are properly appointed.

Continued prosecution of the Bronx and Brooklyn Cases is inappropriate, and a suspension of the litigation is warranted, for several reasons. As an initial matter, the complaints in both cases are nullities because the Regional Directors had no authority to issue them. The Act makes clear that issuance of a complaint is an exercise of the Board's authority. 29 U.S.C. § 160(b) (complaint may be issued only by "the Board, or any agent or agency designated by the Board for such purposes"). The Board itself cannot exercise any of the authority conferred by the Act, however, unless it possesses a quorum of three validly appointed members. *See id.* § 153(b); *New Process Steel*, 130 S. Ct. at 2644-45. And as the

D.C. Circuit recently held, the Board has lacked a quorum since at least January 3, 2012: Although the President purported to name three additional members to the Board on January 4, 2012, without the Senate's advice or consent, those appointments were not and are not valid under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, because they were not made "during the Recess of the Senate," *id.*, and because the vacancies that they allegedly filled did not "happen" during such a recess, *id.*; *see Noel Canning v. NLRB*, 705 F.3d 490, 499-514 (D.C. Cir. 2013), *petition for cert. filed*, No. 12-1281 (Apr. 25, 2013). Last week, the Third Circuit similarly held that the President's purported appointment of Craig Becker in 2010 was invalid because the Clause permits appointments only during intersession recesses of the Senate. *See NLRB v. New Vista Nursing & Rehabilitation*, __ F.3d __, 2013 WL 2099742, at *11-30 (3d Cir. May 17, 2013). Because the Board lacked and continues to lack a quorum, not only are its own putative actions "void," *Noel Canning*, 705 F.3d at 514, but any allegedly delegated authority also no longer may be exercised, *see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-76 (D.C. Cir. 2009). Although the Board may delegate many of its statutory powers to certain persons and entities, *see, e.g.*, 29 U.S.C. §§ 153(b), 160(b), it "cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied," *Laurel Baye*, 564 F.3d at 473. Neither the Board nor any delegee, therefore, could lawfully issue the complaints in the Bronx or Brooklyn Cases.[1]

---

[1] The Board and its Regional Directors would have even less basis to assert authority to seek a preliminary injunction or other judicial action under section 10(j) of the Act. The "power" to seek such remedies is conferred exclusively on "the Board." 29 U.S.C. § 160(j). Because the Board lacks a quorum, it cannot wield that power. Although Regional Directors have claimed in other litigation that they may exercise that power on the Board's behalf pursuant to a delegation by the Board in November 2011, when it still supposedly possessed a quorum, *see* 76 Fed. Reg. 69,768 (Nov. 9, 2011), that assertion is meritless for numerous reasons, including that: Under *Laurel Baye*, such a delegation is irrelevant, as no authority delegated by the Board may be exercised once the Board lost a quorum, *see* 564 F.3d at 473; that *particular* delegation was itself unlawful, moreover, because the Board lacked a quorum even *at that time*, *see New Vista*, 2013 WL 2099742, at *11-30, and because by its own terms it sprang into effect only *after* the Board lost a quorum and thereby became powerless to act or to delegate authority; and that delegation (unlawfully) purports to confer authority to seek section 10(j) relief on the General Counsel, not on the Regional Directors—who in any case cannot act because their own appointments were unlawful. Section 10(j) proceedings also would needlessly consume the scarce time and resources of federal courts and unjustifiably seek to impose injunctions pending final rulings by the Board that it *cannot issue*.

Even if the complaints were validly issued, the Regional Directors of Regions 2 and 29 cannot lawfully prosecute them because they themselves were not validly appointed. The Act and longstanding Board policy establish that appointment of Regional Directors requires Board approval. *See* 29 U.S.C. § 154(a); 20 Fed. Reg. 2175, 2176 (Apr. 6, 1955). When both Ms. Fernbach and Mr. Paulsen received their appointments, however, the Board lacked a quorum (and indeed has been without one since August 2011) and thus had no power to act. Their appointments therefore likewise were "void," and accordingly they could not and cannot act for the Board.[2] It would make no sense to continue litigation of these actions when neither the Board nor any of its delegees have any power to conduct further proceedings, and the Board cannot issue a final order.

We recognize that the Board has expressed the view that, despite the D.C. Circuit's *Noel Canning* decision, the Board may continue to take action under the Act. *See, e.g.*, *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013). Notwithstanding that erroneous position, there is no reason why Regional Directors and other Board staff should be permitted to continue expending public resources in pursuing litigation that, under the law of the D.C. Circuit—in which CSC and Cablevision are entitled to seek review of any final Board ruling, *see* 29 U.S.C. § 160(f)—is ultra vires and will ultimately be adjudged a nullity. Subjecting private litigants to the massive, unjustified burdens of litigating these and many other cases nonetheless—which the Regional Directors had no valid authority to initiate, and in which the Board cannot issue a final order—is manifestly unfair, inefficient, and incompatible with core principles of equity.

We therefore request that, pursuant to section 3(d) of the Act, 29 U.S.C. § 153(d), you direct the Regional Directors of Regions 2 and 29, and any and all other Board personnel subject to your supervision, to suspend the prosecution of the Bronx and Brooklyn Cases and any related proceedings until such time as the Board regains a valid quorum of three constitutionally appointed Members. At minimum, we request that you direct all such personnel to suspend such litigation until the D.C. Circuit resolves already pending petitions for writs of mandamus to prevent prosecution of similar actions, *In re Geary*, No. 13-1029 (D.C. Cir.); *In re SFTC, LLC*, 13-1048 (D.C. Cir.), and the court's resolution of a petition for similar relief to be filed, if necessary, by CSC and Cablevision.

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[2] Accordingly, while for simplicity and clarity this letter uses the term "Regional Director" to refer to Ms. Fernbach and Mr. Paulsen, they do not, with all respect, properly hold those positions. We thus respectfully also request that Ms. Fernbach and Mr. Paulsen cease exercising the powers of Regional Director with respect to CSC and Cablevision, and that they and the attorneys and other personnel subject to their supervision refrain from taking any further steps to prosecute or otherwise process the Brooklyn and Bronx Cases.

We respectfully ask for a decision on this request by May 28, 2013, so that CSC and Cablevision may proceed expeditiously to the courts for relief if necessary.

Respectfully submitted,

Eugene Scalia

cc: Karen Fernbach, National Labor Relations Board Regional Director, Region 2
James Paulsen, National Labor Relations Board Regional Director, Region 29
Gabrielle Semel, District Counsel, Legal Department, CWA District 1
Steven Weissman, Esq.
Doreen S. Davis, Esq.
Jerome B. Kauff, Esq.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CSC HOLDINGS, LLC and **CABLEVISION SYSTEMS NEW YORK CITY CORP.**, a Single Employer,

Respondent	Case Nos.	02-CA-085811
		02-CA-090823
and		29-CA-097013
		29-CA-097577
COMMUNICATION WORKERS OF AMERICA, AFL-CIO,		29-CA-100175

Charging Party.

ORDER FURTHER CONSOLIDATING CASES, SECOND CONSOLIDATED COMPLAINTAND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board), and to avoid unnecessary costs or delay, IT IS ORDERED THAT the Consolidated Complaint and Notice of Hearing issued on April 17, 2013, in Case Nos. 02-CA-085811 and 02-CA-090823 alleging that CSC Holdings, LLC (CSC Holdings) and Cablevision Systems New York City Corp. (Cablevision Systems), a single employer (Respondent) violated the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), by engaging in unfair labor practices, is further consolidated with Case Nos. 29-CA-097013, 29-CA-097577, and 29-CA-100175, a Consolidated Complaint and Notice of Hearing which issued on April 29, 2013, alleging that Respondent has engaged in further unfair labor practices within the meaning of the Act.

This Second Consolidated Complaint and Notice of Hearing, issued pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, is based on these consolidated cases and alleges that Respondent has violated the Act as described below:

1. The charges in the above cases were filed by the Communication Workers of America, AFL-CIO (Union) as set forth in the following table, and a copy was served by regular mail upon the Respondent(s) on the dates indicated:

Case No.	*Amendment*	*Respondent*	*Date Filed*	*Date Served*
02–CA–085811		***Cablevision Systems New York City Corp.***	***07/23/12***	***07/23/12***
02–CA–090823		***Cablevision Systems New York City Corp.***	***10/05/12***	***10/10/12***
02–CA–090823	***Amended***	***Cablevision Systems New York City Corp.***	***11/16/12***	***11/19/12***
02–CA–090823	***Second Amended***	***Cablevision Systems New York City Corp.***	***11/29/12***	***12/04/12***
02-CA-090823	***Third Amended***	***Cablevision Systems New York City Corp. and its parent co. CSC Holdings, LLC, a single employer***	***4/12/13***	***4/12/13***
29–CA–097013		***Cablevision Systems New York City Corp.***	***01/24/13***	***01/25/13***
29–CA–097013	***Amended***	***Cablevision Systems New York City Corp.***	***01/28/13***	***01/28/13***
29–CA–097013	***Second Amended***	***Cablevision Systems New York City Corp.***	***04/26/13***	***04/26/13***
29-CA-097013	***Third Amended***	***Cablevision Systems of New York City Corp. and CSC Holdings, LLC, as a single employer***	***05/16/13***	***05/22/13***

29–CA–097557		*Cablevision Systems New York City Corp.*	*01/31/13*	*02/04/13*
29-CA-097557	*Amended*	*Cablevision Systems New York City Corp.*	*02/19/13*	*02/21/13*
29-CA-097557	*Second Amended*	*Cablevision Systems New York City Corp.*	*04/25/13*	*04/26/13*
29-CA-100175		*Cablevision Systems New York City Corp.*	*03/12/13*	*03/13/13*

2. (a) At all material times, CSC Holdings, has been a domestic corporation with an office and headquarters located at 1111 Stewart Avenue, Bethpage, New York, engaged in various business enterprises, including the provision of cable television and communications services in various parts of the United States.

(b) At all material times, Cablevision Systems New York City Corp., a domestic corporation with its corporate office located at 1111 Stewart Avenue, Bethpage, New York; with a facility at 500 Brush Avenue, Bronx, New York (Bronx facility); and facilities located in Brooklyn, New York, has been engaged in the business of providing broadband cable communication services to residential and commercial customers in the Bronx, Brooklyn, and other locations in New York, New York.

(c) At all material times, CSC Holdings and Cablevision Systems have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have interrelated operations with common management and have held themselves out to the public as a single-integrated business enterprise.

(d) Based on its operations described above in subparagraph (c), CSC

Holdings and Cablevision Systems constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(e) Annually, in the course and conduct of their business operations CSC Holdings and Cablevision Systems separately and collectively derive revenues in excess of $500,000.

(f) Annually, in the course and conduct of their business operations CSC Holdings and Cablevision Systems separately and collectively purchase and receive at their facilities in New York State, goods and services valued in excess of $5,000 directly from suppliers located outside the State of New York.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. (a) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act):

James L. Dolan	Chief Executive Officer
Barry Monopoli	Vice President Field Operations
Richard House	Construction Manager
John Lynn	Construction Manager
Andre Diaz	Fiber Department Supervisor

Ewan Isaacs	Plant Maintenance Supervisor
Randy Reed	Construction Supervisor
Winston McIntosh	Construction Supervisor
Daryl Gaines	Area Operations Manager
Rick LaVesque	Vice President

(b) At all material times, Harry Hughes held the position of Respondent's Corporate Investigator for Respondent's Security Department and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

6. In or about April, 2012, the precise date being unknown, Respondent, by James L. Dolan (Dolan), at a meeting of employees at the Bronx facility:

(a) Promised its employees improved wages and benefits;

(b) Promised its employees an improved system for registering their complaints, without fear of retaliation;

(c) By soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment.

(d) Respondent engaged in the conduct described above in subparagraphs 6(a) through 6(c) in order to discourage employees from selecting the Union as their collective bargaining representative.

7. (a) On or about April 15, 2012 the Employer, by various methods, including a PowerPoint presentation shown to employees at the Bronx facility and other locations, announced the implementation of wage and benefit improvements.

(b) In or about May 2012, Respondent implemented the first phase of its wage and benefit improvements.

(c) Respondent engaged in the conduct described above in subparagraphs 7(a) and 7(b) because certain employees of Respondent joined or supported the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

8. (a) On or about June 26, 2012, Respondent, by Dolan, at a meeting of employees at the Bronx facility impliedly threatened employees with the loss of opportunities for training, and advancement and loss of work if they selected the Union as their collective-bargaining representative.

(b) On or about June 26, 2012, Respondent, by Dolan, at a meeting of employees at the Bronx facility threatened employees with reduced benefits and more onerous working conditions if they selected the Union as their collective-bargaining representative.

9. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> **Included:** All full-time and regular part-time field service technicians, outside plant technicians, audit technicians, inside plant technicians, construction technicians, network fiber technicians, logistics associates, regional control center (RCC) representatives and coordinators employed by the Employer at its Brooklyn, New York facilities
>
> **Excluded:** All other employees, including customer service employees, human resource department employees, professional employees, guards, and supervisors as defined in Section 2(11) of the Act.

10. On February 7, 2012, following the conduct of an election in Case No. 29-RC-070897, the Board certified the Union as the exclusive collective-bargaining representative of the Unit.

11. At all times since February 7, 2012, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

12. (a) At various times from about May 30, 2012, through March 4, 2013, Respondent and the Charging Party met for the purposes of negotiating an initial collective-bargaining agreement with respect to wages, hours, and other terms and conditions of employment.

(b) During the period described above in paragraph 12(a), Respondent engaged in surface bargaining with no intent of reaching agreement by: (1) refusing to meet at reasonable times; (2) refusing to discuss economic issues until non-economic issues were resolved; (3) insisting on changing the scope of the certified bargaining unit; (4) rigidly adhering to proposals that are predictably unacceptable to the Union; (5) refusing to discuss a union security clause and then raising philosophical objections to such clause; (6) submitting regressive proposals to the Union; (7) withdrawing from a tentative agreement; (8) refusing to discuss mandatory subjects of bargaining; and (9) by significantly delaying the provision of relevant wage information to the Union.

(c) By its overall conduct, including the conduct described above in paragraph 12(b), Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

13. (a) Since about August 23, 2012, the Union has requested, in writing, that Respondent furnish it with the following information regarding employees at the Bronx facility: (1) documents related to changes made during the period April 1, 2012, to the present, with respect to wages and benefits; a Career Progression Plan; and a salary matrix of all employees, employed in the same or similar job classifications as the Unit.

(b) During bargaining, as described above in paragraph 12(a), the Union demonstrated to the Employer that the information requested in paragraph 13(a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) From about August 23, 2012 to about March 6, 2013, the Respondent delayed in furnishing the Union with the information requested by it as described above in paragraph 13(a).

14. About January 24, 2013 Respondent, through Daryl Gains, instructed employees not to engage in activities in support of the Union.

15. About February 7, 2013, Respondent, by Harry Hughes, in front of the Madison Square Garden Arena in New York City, New York, engaged in surveillance of employees engaged in union activities.

16. About the first week of February 2013, Respondent, by Rick LaVesque, in his office at Respondent's 96th Street facility, informed a Unit employee that it was futile for the employee to support the Union because bargaining for a contract with Respondent was futile.

17. (a) On January 30, 2013, certain Unit employees of Respondent ceased work concertedly and engaged in a strike.

(b) The strike described above in paragraph 17(a) was caused by Respondent's unfair labor practices described above in paragraphs 12(a) through (c).

18. (a) On January 30, 2013, Respondent, by Rick LaVesque, informed the following employees engaged in the unfair labor practice strike described above in paragraph 17, that they had been permanently replaced:

Clarence Adams	Eric Ocasio
David Gifford	Malik Coleman
La'kesia Johnson	Andre Riggs
Courtney Graham	Raymond Reid
Miles Watson	Borris H. Reid
Andre Bellato	Steven Ashurst
Jerome Thompson	Shaun Morgan
Trevor Mitchell	Stanley Galloway
Ray Meyers	Brent Randein
Marlon Gayle	Corey Williams
Richard Wilcher	Raymond Williams

(b) On January 30, 2013, Respondent directed the employees described above in paragraph 18(a) to turn in their identification badges, keys, and radios, and had these employees escorted out of the facility by NYPD officers.

(c) By the conduct described above in paragraphs 18(a) and (b), Respondent discharged the named employees on January 30, 2013.

(d) On various dates beginning on February 6, 2013, and ending on March 20, 2013, Respondent reinstated the named employees to their former positions of employment.

(e) The reinstatement of the employees as described in paragraph 18(d) was without backpay.

(f) Respondent engaged in the conduct described above in paragraphs 18(a) through (e) because the named employees of Respondent assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

19. (a) In the alternative, if the strike described above in paragraph 17(a) was not caused and/or prolonged by the unfair labor practices, the work stoppage described in paragraph 17(a) was an economic strike.

(b) On January 30, 2013, by indicating that they would return to their work duties, the following employees, who engaged in the strike described above in paragraph 19(a) made an unconditional offer to return to their former positions of employment:

Clarence Adams	Eric Ocasio
David Gifford	Malik Coleman
La'kesia Johnson	Andre Riggs
Courtney Graham	Raymond Reid
Miles Watson	Borris H. Reid
Andre Bellato	Steven Ashurst
Jerome Thompson	Shaun Morgan
Trevor Mitchell	Stanley Galloway
Ray Meyers	Brent Randein
Marlon Gayle	Corey Williams
Richard Wilcher	Raymond Williams

(c) The Respondent refused to reinstate the employees described above in paragraph 19(a) upon their unconditional offer to return to work.

(d) Respondent engaged in the conduct described above in paragraphs 19 (a) through (c) because the named employees of Respondent assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

20. By the conduct described above in paragraphs 6 through 8 and 14 through 16, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

21. By the conduct described above in paragraphs 7, 18 and 19, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

22. By the conduct described above in paragraphs 12 and 13, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

23. The unfair labor practices of Respondent, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE As part of the remedy for the unfair labor practices alleged above, the Acting General Counsel seeks an Order requiring that the Notice be read to employees during working time by a high level official of Respondent at its facilities in the Bronx, New York; Shelton, Connecticut; White Plains, New York; Newark, New Jersey; and in Nassau and Suffolk Counties, New York.

As part of the remedy for the unfair labor practices alleged above in paragraphs 12 and 13, the Acting General Counsel seeks an Order requiring Respondent to: (1) bargain on request within fifteen (15) days of a Board Order; (2) bargain on request for a minimum of fifteen (15) hours a week until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining; and (3) prepare written bargaining progress reports every fifteen (15) days and submit them to the Regional Director of Region 29 and also serve the reports on the Charging Party to provide the Charging Party with an opportunity to reply.

As part of the remedy the unfair labor practices alleged above in paragraphs 12 and 13, the Acting General Counsel seeks an Order requiring Respondent to bargain in good faith with

Charging Party, on request, for an additional period of twelve (12) months as provided for by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

As part of the remedy for the unfair labor practices alleged above in paragraphs 18, and in the alternative paragraph 19, the Acting General Counsel seeks an Order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination in accordance with *Latino Express*, 359 NLRB No. 44 (2012). The Acting General Counsel further seeks that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Finally, the Acting General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations; it must file an answer to the Consolidated Complaint. The answer must be **received by this office on or before June 7, 2013, or postmarked on or before June 6, 2013.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website

informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the bases that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer by signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of that answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-Filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Consolidated Complaint are true.

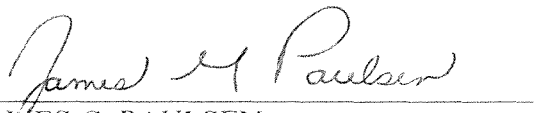
Any request for an extension of time to file an answer must, pursuant to Section 102.111(b) of the Board's Rules and Regulations, be filed by the close of business on June 7, 2013. The request should be in writing and addressed to the Regional Director of Region 29.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **July 8, 2013, at 9:30 a.m.** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board at a hearing room on the 14th floor at the New York Judge's

Office, 120 West 45th Street, New York, NY. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Consolidated Complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: May 24, 2013
Brooklyn, New York



JAMES G. PAULSEN
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Attachments