

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

VERITAS HEALTH SERVICES, INC.  
d/b/a CHINO VALLEY MEDICAL  
CENTER,

Respondent,

v.

UNITED NURSES ASSOCIATIONS OF  
CALIFORNIA/UNION OF  
HEALTHCARE PROFESSIONALS,  
NUHHCE, AFSCME, AFL-CIO,

Charging Party.

Case No. 31-CA-29713, 31-CA-29714,  
31-CA-29715; 31-CA-29716,  
31-CA-29717, 31-CA-29738,  
31-CA-29745, 31-CA-29749,  
31-CA-29768, 31-CA-29769,  
31-CA-29786, 31-CA-29936,  
31-CA-29965, 31-CA-29966

**RESPONDENT'S MOTION TO STAY ALL PROCEEDINGS PENDING PROPER  
APPOINTMENT OF NEW MEMBERS ESTABLISHING A VALID QUORUM**

**I.**  
**INTRODUCTION**

Respondent VERITAS HEALTH SERVICES, INC. d/b/a CHINO VALLEY MEDICAL CENTER ("Respondent") contends that the National Labor Relations Board ("NLRB" or "Board") presently lacks a constitutionally valid quorum and therefore does not have authority to take lawful action in this matter, or in any other matter. See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Respondent therefore moves for an order staying all proceedings in this matter until such time as the Board has a lawfully constituted quorum.

**II.**  
**STATEMENT OF THE CASE**

**A. The Case Before The Board**

1. On or about October 17, 2011 Administrative Law Judge William G. Kocol issued his decision in this matter ("ALJ Decision").

2. On or about December 29, 2011 Respondent, the Acting General Counsel and the Charging Party Union all filed exceptions to the ALJ Decision. All briefing relating to the parties' exceptions was completed on or about February 8, 2011.

**B. The Facts Relating To The Board's Membership**

3. On December 17, 2011 the Senate, by unanimous consent, approved a series of orders whereby the Senate would convene for pro forma sessions every three or four days during the period from December 20, 2011 through January 23, 2012. Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784); Statement of Charles J. Cooper before the House Committee on Education and Workforce concerning "The NLRB Recess Appointments: Implications for America's Workers and Employers," § 1 (Feb. 7, 2012) (hereinafter "Cooper Statement at \_\_\_\_").<sup>1</sup>

4. In accordance with the orders referenced immediately above, the Senate held pro forma sessions during the period between December 17, 2011 and January 23, 2012, including sessions held on January 3, 2012 and January 6, 2012. See, i.e., Congressional Record, vol. 158, part 1-2 (Jan. 3 and 6, 2012, pp. S0001, S0003); Cooper Statement at § 1.

5. At no time during the period from December 17, 2011 through January 23, 2012 did the House of Representatives ever give consent to the Senate to adjourn for more than three days.

6. On January 3, 2012 the recess appointment of Member Craig Becker expired, leaving the Board with only two members (Chairman Mark G. Pearce and Member Brian Hayes). See, i.e., <http://nlrb.gov/members-nlrb-1935> (last visited on April 6, 2012).

7. On January 4, 2012 the President purported to appoint Richard Griffin, Terrence F. Flynn and Sharon Block to the Board as recess appointments. See, i.e., <http://nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies> (last

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<sup>1</sup> The Cooper Statement is available on the Committee's website at <http://edworkforce.house.gov/Calendar/EventsSingle.aspx?eventID=277123> (last visited on April 10, 2012).

visited on April 10, 2012). However, because the Senate was not in recess on that date, the appointments of Mr. Griffin, Mr. Flynn and Ms. Block (collectively “January 4 Appointments”) are invalid.

8. No new members have been validly appointed to the Board or confirmed by the Senate at any time since January 3, 2012 through the date of the filing of this motion.

### **III. ARGUMENT**

Respondent respectfully submits that the January 4 Appointments violated the Constitution and are void *ab initio*. The Appointments were not confirmed by the Senate and were not made during a Senate recess. Accordingly, with only two validly appointed members, the Board presently lacks authority to act in this matter.

The Appointments Clause gives the President power “by and with the Advice and Consent of the Senate to ... appoint ... Officers of the United States.” U.S. Constitution, Art. II, § 2, cl. 2. As a supplement to this procedure, the Recess Appointments Clause authorizes the President 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.” U.S. Constitution, Art. II, § 2, cl. 3. See *The Federalist No. 67* (Alexander Hamilton). The Framers gave the President this “auxiliary” authority, which allows the President to bypass the Senate only in a limited circumstance, because “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers,” and yet “vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay.” See *The Federalist No. 67* (emphasis in original). The need for recess appointments, and consequently the power to make recess appointments, however, does not exist during periods when the Senate is not in recess.

The Senate was not in recess when the January 4 Appointments were made. The President made these Appointments the day after the Senate met and in the midst of a period when the Senate adjourned for no more than three days between pro forma sessions. As early as 1921, it has been recognized that “an adjournment of 5 or even 10 days [does not] constitute the

recess intended by the Constitution.” Opinion of U.S. Attorney Harry M. Daugherty, 33 U.S. Op. Att’y Gen. 20, 24-25 (1921). Most recently, Deputy Solicitor General Neal Katyal, during oral argument before the Supreme Court in *New Process Steel, L.P.*, stated that the “recess appointment power can work in – in a recess. I think our office has opined the recess has to be longer than 3 days.” *New Process Steel, L.P. v. NLRB*, Case No. 08-1457, Transcript of Oral Argument, Mar. 23, 2010, at 50:3-5.

There is also an even more fundamental reason for finding that the Senate was not in recess on January 4, 2012 – the Senate says that it was not in recess. The Constitution vests in each House of Congress the power to “determine the Rules of its Proceedings.” U.S. Constitution, Art. I, § 5, cl. 2. Rules “governing how and when the Senate meets and adjourns are quintessential rules of proceedings.” Cooper at § IV. The Rulemaking Clause commits to the Senate judgments about the meaning of its own rules. As the Supreme Court held in *United States v. Balin*, 144 U.S. 1 (1892):

Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. *The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.*

Id. at 5 (emphasis added).

Pursuant to the separation of powers constitutionally engrafted into our system of government, it is not the province of the Executive Branch to dictate the Senate’s rules of proceedings or determine the meaning of those rules. The Senate’s determination that it was

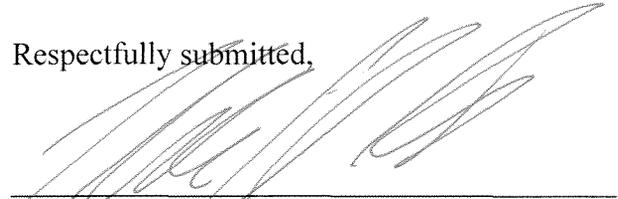
repeatedly in session, and not in recess, between December 17, 2011 and January 23, 2012 should be determinative.

**IV.**  
**CONCLUSION**

For the reasons set forth above, the Board should stay these proceedings until a constitutionally valid quorum has been appointed and the Board again has the requisite number of members to act.

Dated: April 11, 2012

Respectfully submitted,



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**PROOF OF SERVICE BY E-MAIL**

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On April 11, 2012, I served a true and correct copy of:

RESPONDENT'S MOTION TO STAY ALL PROCEEDINGS  
PENDING PROPER APPOINTMENT OF NEW MEMBERS  
ESTABLISHING A VALID QUORUM

by e-mailing the document to the following persons at the e-mail addresses listed below:

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Executed on April 11, 2012, at San Diego, California.



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ROSA DYER