UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ARDIT COMPANY	:	
	:	
Employer	:	Case No.: 9-RC-83978
	:	
and	:	
	:	
INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFT WORKERS, OHIO KENTUCKY ADMINISTRATIVE COUNCIL, LOCAL NO. 18	:	
	:	
Petitioner	:	
	:	

THE ARDIT COMPANY'S MOTION TO STAY REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION ON OBJECTIONS UNTIL THE BOARD REACHES A LAWFUL QUORUM

Now comes the Employer, The Ardit Company ("Ardit" or "Employer"), by and through Counsel and hereby respectfully requests that the Board refrain from issuing a ruling upon Ardit's Request for Review in the matter referenced above until the Board reaches a lawful quorum. A Memorandum in Support of said Motion is attached hereto.

Respectfully submitted,

/s/ Ronald L. Mason

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MEMORANDUM IN SUPPORT

I. BACKGROUND

On Friday August 10, 2012 a representation election was held in this matter. The Employer filed post-election objections on August 16, 2012 and submitted evidence in support of said objection on August 27, 2010. On September 6, 2012 the Regional Director issued a Supplemental Decision on Objections in which he overruled the Employer's objections in their entirety. The Employer filed its Request for Review pursuant to Section 102.67 of the Board Rules and Regulations on September 20, 2012.

II. THE BOARD CANNOT RULE UPON THE EMPLOYER'S REQUEST FOR REVIEW UNTIL IT OBTAINS A LAWFUL QUORUM

The Board has no legal authority to function when it lacks a quorum of three members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Naturally, persons appointed to the Board in violation of the Appointments Clause of the U.S. Constitution do not count towards this necessary quorum. *Cf. Ryder v. United States,* 515 U.S. 177 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

The Board currently lacks a quorum because Sharon Block and Richard Griffin are not lawful members of the Board. On January 4, 2012, President Obama announced "recess" appointments for these individuals. However, the United States Senate was in session at the time of these purported appointments.[1] The President did not obtain the advice and consent of the Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires. Consequently, the

[1] By unanimous consent, the Senate voted to remain in session for the period of December 20, 2011 through January 23, 2012. Sen Ron Wyden, "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012," remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784). Moreover, the House of Representatives never gave its consent to a Senate recess of more than three days, as would have been required by Art. I, Section 5, Clause 4 of the Constitution.

appointments of Block and Griffin to the Board are invalid under Articles I and II of the U.S. Constitution.

The President's claim that these appointments were valid "recess" appointments is inconsistent with Article II, Section 2, Clause 3 of the Constitution, which requires that the Senate actually be in recess when such appointments are made. *See Evans v. Stephens,* 387 F. 3d 1220, 1224 (11th Cir. 1994) (requiring a "legitimate Senate recess" to exist in order to uphold a recess appointment); *see also Wright v. United States,* 302 U.S. 583 (1938); and *Kennedy v. Sampson,* 511 F. 2d 430 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages). Article I, Section 5, Clause 2 provides that each Congressional chamber is the master of its own rules. Because neither the House nor the Senate declared themselves in recess under their rules, the purported recess appointments are invalid.

Moreover, the longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term "recess" includes only those intra-session breaks that are of "substantial length."[2] The Obama Administration's Solicitor General stated on the record at the U.S. Supreme Court during the oral argument in *New Process Steel* that a recess must be longer than three days in order for a recess appointment to occur. Transcript of Oral Argument in *New Process Steel, L.P. v. NLRB*, Case No. 08-1457 (Mar. 23, 2010).

Similarly, the opinion of Attorney General Daugherty in 1921 opined that for recess appointments to be made, the recess must be of such duration that the Senate could "not receive

[2] See, Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992), available at http://www.justice.gov/olc/schmitz.10.htm (18-day recess).

communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 24 (1921). No such break has occurred in the present circumstances. Indeed, the Senate was in session during the period when the appointments were made and was able to receive communications and participate in the appointment process. This is conclusively proven by the fact that only days before the Obama recess appointments were made, during its ongoing *pro forma* sessions, the Senate passed the payroll tax bill and communicated with the President and the House with regard to that important legislation. See, 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed that legislation, never protesting that it was invalidly enacted due to a congressional recess.[3]

Accordingly, the appointments of Block and Griffin to the Board are invalid. As a result, the Board lacks a quorum under *New Process Steel* and cannot rule upon the Company's Request for Review and/ or adjudicate this case until such time as it attains a proper quorum.

III. CONCLUSION

The Board, upon attaining a lawful quorum, should grant the Employer's Request for Review

[3] On January 6, 2012, a political appointee of the Attorney General's office issued a Memorandum Opinion purporting to justify the President's recess appointments. The Opinion was not made public until January 12, 2012. See, Memorandum Opinion For The Counsel To The President (Jan. 6, 2012), available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf. In this Opinion, the Attorney General's Office declares for the first time that the Senate's convening of periodic *pro forma* sessions does not have the legal effect of interrupting an intra-session recess otherwise long enough to qualify as a recess of the Senate under the Recess Appointments Clause. This Opinion is contrary to the Constitutional power vested in the Senate to "determine the Rules of its Proceedings." U.S. Const. Article I, Section 5, Clause 2. By declaring the Senate's on-going *pro forma* sessions to be ineffective to prevent a recess, the Opinion implicitly declares the Senate to be in violation of the Constitutional requirement that neither House shall adjourn without the consent of the other for more than three days. U.S. Const. Article I, Section 5, Clause 4. In making this declaration, the Attorney General's Opinion for the Executive Branch grievously disrespects the proceedings of a co-equal branch of government. The Opinion is also contradicted by the actual experience of *pro forma* sessions of the Senate, as noted above, which demonstrate that the Senate was in fact available to fulfill its constitutional duties to consider any appointments that the President wished to put forward for advice and consent. Thus, the unprecedented Opinion of the Attorney General fails to justify the President's attempted recess appointments and should not be adopted by any court.

Dated at Dublin, Ohio this 20th day of September, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 2012, an electronic original of The Ardit Company, Inc's Motion to Stay Request for Review was transmitted the National Labor Relations Board, office of the Executive Secretary, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing Motion were transmitted to the following individuals by electronic mail:

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