UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MARRIOTT INTERNATIONAL, INC., D/B/A
J.W. MARRIOTT LOS ANGELES AT L.A. LIVE

and Case No. 21-CA-39556

UNITE HERE! LOCAL 11

MOTION FOR RECONSIDERATION

Respondent Marriott International Inc., d/b/a J W. Marriott Los Angeles at L.A. Live ("Marriott") hereby respectfully seeks reconsideration of the September 28, 2012 Decision and Order by Chairman Pearce and Members Hayes and Block for each of the following reasons:

I. THE DECISION AND ORDER DISREGARDS THE VOLUNTARY RECOGNITION OF THE UNION AND THE CONSTRUCTIVE RELATIONSHIP BETWEEN THE PARTIES.

Marriott respectfully submits that the Decision and Order should be reconsidered and reversed because no reasonable employee would read the two alleged work rules to prohibit Section 7 activity.

Neither of the rules reference or expressly implicate Section 7 activity, nor do they have a purpose of affecting the right of employees to unionize or conduct union activity. This is especially true because of Marriott's constructive relationship with the Union since the Hotel opened in early 2010. In fact, Marriott (1) agreed to a neutrality and card check agreement, (2) invited Union representatives to speak to employees as part of their new hire orientation, (3) permitted Union organizing while remaining neutral, and (4) agreed to voluntarily recognize the Union. Furthermore, since the date of the underlying decision by the administrative law judge, Marriott has been negotiating in good faith with the Union and the parties were able to reach an initial labor agreement. There is simply no suggestion that anti-union animus motivated the

rules. *See Adtranz ABB Daimler-Benz Transp., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) (the Board "may not cavalierly declare policies to be facially invalid without supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy").

The Decision further fails to recognize the following key undisputed facts: (1) there is no evidence that Marriott applied the rules in a manner that restricted Section 7 rights; (2) there is no evidence that Marriott promulgated the rules in response to union activity; (3) there is no evidence that even a single employee ever believed the rules prohibit Section 7 activity; and (4) there is no evidence that Marriott has ever disciplined any employee for engaging in Section 7 activity on or off of its property. In light of all these facts, no reasonable employee would construe the rules to prohibit Section 7 activity and the NLRB appears to be improperly placing form over substance when declaring them invalid under Section 8(a)(1).

II. THE DECISION AND ORDER DOES NOT PROVIDE SUFFICIENT GUIDANCE FOR COMPLIANCE.

The Decision and Order should be modified to provide better practical guidance for compliance. As stated by Member Hayes in his dissent, even though the Decision "posit[s] that exceptions might be valid under narrow 'special circumstances,'" "the concept remains illusory and of no practical benefit to employers seeking guidance in this area" because it does not provide any "concrete examples" of legitimate exceptions. *See* Decision at p. 6. Indeed, under the terms of the Decision, "[e]ven a rule that detailed specific exceptions for off-duty access to the facility and permitted no employer discretion whatsoever would be unlawful." *Id*. This is because the Decision is unclear as to how "narrow" an exception must be and what circumstances are "special" enough to justify the exception.

Based upon the Board's recent decisions, an exception for "any and all events sponsored by the" employer is "not a narrow one that might arguably be viewed as justified by 'special circumstances.'" *Saint John's Health Center*, 357 NLRB No. 170, *6 (2011). On the other hand, "exceptions for visiting patients or seeking medical care . . . do[es] not make the policy unlawful." *Sodexo America LLC*, 358 NLRB No. 79, *3 (2012). However, neither of these cases provide enough guidance to the issues at hand. For instance, even though an exception for "holiday parties sponsored by Marriott" may be "narrow" enough, is it justified by "special circumstances" to support the exception? Likewise, even though an exception for "employee medical emergencies" may be justified by "special circumstances," is it "narrow" enough to make it valid? Even more difficult would be an exception to allow employees to "use the guest facilities based upon availability." Such an exception arguably meets the *Sodexo* requirements of granting/denying access "on the same basis and under the same procedures as for members of the public" but is clearly not "narrow" enough to meet the requirements of *Saint John's*. *See Sodexo*, 358 NLRB No. 79 at *3; *Saint John's Health Center*, 357 NLRB No. 170 at *6. The Decision and Order should be modified to provide better practical guidance for compliance in this regard.

III. THE NLRB LACKED QUORUM WHEN ISSUING THE DECISION AND ORDER BECAUSE THE "RECESS" APPOINTMENTS WERE IMPROPER.

On January 4, 2012, the President purported to make the intrasession "recess" appointments of Sharon Block, Terence Flynn, and Richard Griffin to the NLRB. These appointments were invalid because the Senate was not actually in recess at the time of the appointments. The Senate had convened just one day before, on January 3, to commence the second session of the 112th Congress, and convened again two days later, on January 6. Such a short, three-day intrasession break is not a "recess" to support the President's appointments.

Therefore, the NLRB lacked a quorum when it issued the instant Decision and Order and it should be reversed.

It has long been held that the Senate must adjourn for more than three days under the Adjournment Clause of the Constitution before the President can make an intrasession recess appointment. *See* U.S. Const., Art. I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting."); 158 Cong. Rec. S316 (daily ed. Feb. 2, 2012) (Sen. Hatch) ("[F]or decades, the standard has been that a recess must be longer than 3 days for the President to make a recess appointment.").[1] Presidents have also refrained from attempting recess appointments when the Senate has not adjourned for more than three days.[2] Otherwise, every weekend, night, or lunch break would be a "recess" too, effectively enabling Presidents to make "recess" appointments at their convenience. This, in turn, would transform recess appointments into the norm, rather than the auxiliary method of appointment they were intended to be.

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[1] *See also* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 424 (2005) ("[T]he recess appointment power is best understood as available during . . . Senate recesses of more than three days."); Memorandum from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel for Alberto R. Gonzales, Counsel to the President, Re: *Recess Appointments in the Current Recess of the Senate* at 2 (Feb. 20, 2004) ("Arguably, the three days set by the Constitution as the time during which one House may adjourn without the consent of the other, U.S. Const. art. I, § 5, cl. 4, is also the length of time amounting to a 'Recess' under the Recess Appointments Clause").

[2] *See e.g.*, Henry B. Hogue & Maureen Bearden, Cong. Research Serv., R42329, *Recess Appointments Made by President Barack Obama* at 12 (2012) ("Between the beginning of the Reagan presidency in January 1981 and the end of December 2011, it appears that the shortest intersession recess during which a President made a recess appointment was 11 days, and the shortest intrasession recess during which a President made a recess appointment was 10 days.").

Here, there is no doubt that, on January 4, the Senate had not adjourned for more than three days under the Adjournment Clause. *See, e.g.*, 158 Cong. Rec. S24 (daily ed. Jan. 23, 2012) (Sen. Grassley) ("No concurrent resolution authorizing an adjournment was passed by both chambers."). Instead, the Senate met in pro forma sessions every three or four days between January 3, 2012, and January 23, 2012. Since Sundays do not count for purposes of the Recess Appointments Clause,[3] there was no adjournment for more than three days and no "recess" allowing for the purported appointments of Ms. Block and Messrs. Flynn and Griffin to the Board. Consequently, the NLRB lacked a quorum when it issued the instant Decision and Order, which now must be reversed. *See New Process Steel*, 130 S. Ct. 2635, 2644-2645; 29 U.S.C. §153(b).

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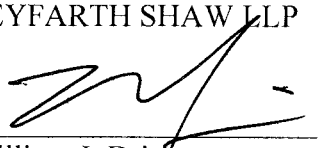
[3] Sundays are ignored for purposes of the Recess Appointments Clause, such that four-day breaks including a Sunday are interchangeable with three-day breaks not including a Sunday. *See e.g.*, Jefferson's Manual and Rules of the House of Representatives (Washington: GPO, 2007), § 83 ("Sunday is not taken into account in making this computation."); 5 *Hinds' Precedents of the House of Representatives* 846 (1907).

For the foregoing reasons, Marriott respectfully requests reconsideration of the instant Decision and Order to reverse the administrative law judge's rulings, findings, and conclusions. The Amended Complaint should be dismissed.

Dated: October 30, 2012

Respectfully Submitted,
SEYFARTH SHAW LLP



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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2012, a copy of **Respondent's Motion for Reconsideration** was submitted by e-filing to the National Labor Relations Board. I further certify that I emailed the foregoing document to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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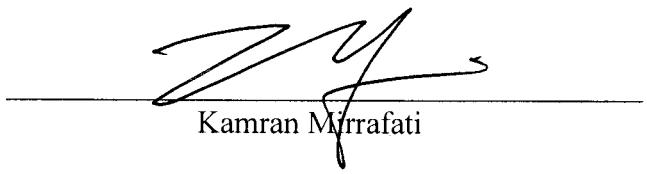

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