UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE CSC HOLDINGS, LLC, AND CABLEVISION SYSTEMS NEW YORK CITY CORP.	)	Case No. 13-1191
Petitioners		

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO EMERGENCY MOTION TO STAY AGENCY ACTION

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

MARGERY E. LIEBER
Associate General Counsel

ABBY PROPIS SIMMS
Acting Assistant General Counsel for Special Litigation
(202) 273-2934
Abby.Simms@nlrb.gov

BOB ENGLEHART
Supervisory Attorney
(202) 273-2978
Bob.Englehart@nlrb.gov

DAVID SEID
PAUL THOMAS
Attorneys
(202) 273-2941/(202) 273-3788
David.Seid@nlrb.gov
Paul.Thomas@nlrb.gov

NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET, NW
WASHINGTON, DC 20570

GLOSSARY OF ABBREVIATIONS

NLRA: The National Labor Relations Act, 29 U.S.C. § 151 et seq.

The Board/NLRB: The National Labor Relations Board, the Respondent in this case.

The Companies: CSC Holdings, LLC and Cablevision Systems New York City, the Petitioners in this Case.

The Union: Communications Workers of America, AFL-CIO, the charging party in the underlying Board case.

ALJ: Administrative Law Judge.Mot.: The present motion, styled as Petitioner's Emergency Motion To Stay Agency Action.

Pet.: The Petition for Writ of Mandamus filed in this Court by CSC Holdings, LLC and Cablevision Systems New York City Corp. on May 30, 2013.

Pet. Add.: The Addendum attached to the petition for writ of mandamus.

Opp. Add.: The Addendum attached to this Opposition.

Regional Director Paulsen: James Paulsen, Regional Director for Region 29 of the Board, the issuer of the Second Consolidated Complaint and Notice of Hearing.

Regional Director Fernbach: Karen Fernbach, Regional Director for Region 2 of the Board, and the issuer of an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing.

SUMMARY OF ARGUMENT

CSC Holdings, LLC ("CSC"), and its subsidiary, Cablevision Systems New York City Corporation ("Cablevision") (collectively, "the Companies") have filed an emergency motion to stay agency action.[1] The Companies cannot satisfy any – much less all – of the prerequisites for emergency injunctive relief under *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008). Therefore, this emergency motion should be denied.

STATEMENT OF FACTS

Cablevision, a subsidiary of CSC, provides broadband cable and communication services to customers in Brooklyn and the Bronx. On February 7, 2012, the Board certified the Communications Workers of America, AFL-CIO ("the Union") as the exclusive bargaining representative for 277 employees of Cablevision in Brooklyn. (Pet. Add. 15.)

Beginning in July 2012, the Union filed multiple unfair labor practice charges against Cablevision and CSC. The charges alleged that one or both of the Companies violated the NLRA by failing to bargain in good faith with the Union in Brooklyn, discouraging employees in the Bronx and elsewhere from selecting the Union, and committing other acts interfering with employee rights under the

[1] The Companies also filed a petition for writ of mandamus, which the Board also will oppose if directed by the Court.

NLRA. (Pet. Add. 1-25.) On February 15, 2013, an employee filed a petition to decertify the Union as bargaining representative in Board case 29-RD-098466. That petition was administratively dismissed by Regional Director Paulsen on April 29, 2013, but is subject to reinstatement if the unfair labor practice allegations are ultimately found unmeritorious. (Opp. Add. at 1-3.)

On April 17 and 29, 2013, after conducting investigations into the charges, the Board's Regional Directors for Region 2 and Region 29, respectively, issued unfair labor practice complaints against the Companies.[2] On May 14, Counsel for Region 29 informed the Companies that the Region was also seeking authorization from the Acting General Counsel and the Board to petition for injunctive relief under Section 10(j) of the NLRA (29 U.S.C. § 160(j)). (Pet. Add. 29.)

On May 24, the two unfair labor practice complaints were consolidated and set for a July 8 hearing before an administrative law judge. (Pet. Add. 32, 37-50.) Shortly thereafter, the Companies requested that the Acting General Counsel suspend prosecution of the cases, as well as any related existing or potential litigation under 10(j) of the NLRA, until the Board "regains a quorum of three validly appointed members." (Pet. Add. 33.) On May 28, the Acting General

[2] Cases 02-CA-085811 and 02-CA-090823 arise out of Region 2 (covering the Bronx); Cases 29-CA-097013, 29-CA-097557, and 29-CA-100175 arise out of Region 29 (covering Brooklyn).

Counsel denied that request. (Pet. Add. 51.) On May 30, the Companies filed this Motion, together with a Petition for Mandamus against the Board.

ARGUMENT

THE COMPANIES' MOTION SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE STRINGENT REQUIREMENTS FOR EMERGENCY RELIEF

The Companies request that the Court stay the scheduled July 8 administrative hearing pending this Court's disposition of the mandamus proceeding. Before granting such a motion the Court looks to four factors, all of which must be satisfied: "(1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest." D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011); *see also* D.C. Cir. R. 8; *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 22 (2008) (rejecting a formulation of the test for obtaining preliminary relief which permitted plaintiffs to obtain injunctive relief with a strong showing of likely success and a mere possibility of irreparable harm). In *Nken v. Holder*, the Supreme Court explained that when the government is the opposing party, the third and fourth factors merge. 556 U.S. 418, 435 (2009). Accordingly, in Part C we will address those factors together. As we now show, *none* of these factors favors the granting of the Companies' motion.

A. The Petition Is Unlikely To Succeed on the Merits

For preliminary relief to be granted, the party seeking relief must be able to show that it is likely, not merely plausible, that it will succeed on the merits of the underlying case. *Winter*, 555 U.S. at 20. To succeed on the merits, a mandamus petitioner must be able to meet a three-pronged standard:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380-81 (2004) (quotations and citations omitted). As shown below, the Companies will not be able to meet the standard to obtain mandamus relief.

1. *Noel Canning* does not prevent the Board from continuing to decide cases.

The Companies are unlikely to succeed primarily because their right to mandamus relief is not "clear and indisputable" on the question that is the foundation for all of the Companies' claims: whether the Board currently has a valid quorum. The Companies' claim of a clear and indisputable right admittedly rests on this Court's decision in *Noel Canning*, which this Court has acknowledged conflicts with the decisions of other circuits. *Noel Canning*, 705 F.3d 490, 505-06, 509-10 (D.C. Cir. 2013), citing *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).[3] Moreover, the Board has petitioned for certiorari and Noel Canning has stated that it does not oppose the Board's petition. *See* Petition for Certiorari, *NLRB v. Noel Canning*, No. 12-1281 (U.S. April 25, 2013); Brief of Respondent, *id.* (May 23, 2013). In light of the circuit split, and the ongoing litigation over the issues, the Companies cannot establish that their entitlement to relief is "clear and indisputable." *Lux v. Rodrigues*, 131 S.Ct. 5, 7 (Sept. 30, 2010) (Roberts, C.J., in chambers) (finding a party's right to injunctive relief not "indisputably clear" in part because "the courts of appeals appear to be reaching divergent results in this area").

[3] On May 16, 2013, a divided panel of the Third Circuit issued a decision that joined the D.C. Circuit in holding that the Recess Appointments Clause authorizes appointments only during intersession recesses of the Senate and not intrasession recesses. *See NLRB v. New Vista Nursing & Rehab.*, ___ F.3d ___, 2013 WL 2099742 (3d Cir. May 16, 2013). These opinions only add to the split in the circuits regarding the validity of intrasession recess appointments. At the same time other courts of appeals continue to actively consider cases involving challenges to the President's recess appointments to the Board. *See, e.g.*, *NLRB v. Enter. Leasing Co. SE, LLC*, No. 12-1514 (4th Cir.) and *Huntington Ingalls, Inc. v. NLRB*, Nos. 12-2000, 12-2065 (4th Cir.) (joint oral argument held Mar. 22, 2013); *Dresser-Rand Co. v. NLRB*, No. 12-60638 (5th Cir.) (reply brief filed May 10, 2013); *FTS Int'l Proppants, LLC v. NLRB*, Nos. 12-3322, 12-3654 (7th Cir.) (denying motion to stay pending *Noel Canning* on Apr. 4, 2013, requested after opening and response briefs were filed and setting case for oral argument on May 31, 2013); *DirecTV v. NLRB*, Nos. 12-72526, 12-72639 (9th Cir.) (reply brief filed Feb. 7, 2013).

Nor can the Companies claim that they have no other adequate means of obtaining review. They will be able to seek review of any final Board decision in a court of appeals under § 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f). As more fully explained below, p. 13-16, this process is entirely adequate.[4]

The Companies' argument (Mot. 4, 12, 18-20) that the Board was required to seek a stay of this Court's mandate in *Noel Canning* in order to continue to enforce the NLRA finds no support in the mandate itself. The Court's mandate in *Noel Canning* does not order the Board to take any action, nor does it prohibit any particular function of the Board (much less the specific functions at issue here). The mandate in *Noel Canning* granted Noel Canning's petition for review and denied the Board's cross-petition for enforcement, and no more. *See* Judgment,

[4] Indeed, mandamus is especially inappropriate here given venue uncertainty. Under multidistrict litigation procedures, if the Companies and the Union each file a petition for review within 10 days after the Board issues a final order, then pursuant to 28 U.S.C. § 2112(a)(3), the Second Circuit, not this Court, may be the circuit selected "random[ly]" by the Judicial Panel on Multidistrict Litigation to review the case. *See, e.g.*, Consolidation Order, *Target Corp. v. NLRB*, No. 13-01758 (2d Cir. May 22, 2013) (randomly selecting Second Circuit to hear case where petitions for review filed in Second and D.C. Circuits); Order, *NLRB v. Orni 8, LLC*, No. 13-71219 (9th Cir. June 3, 2013) (by special procedure, randomly selecting Ninth Circuit to hear case where petition for enforcement filed in Ninth Circuit and petition for review filed in D.C. Circuit on the same day). Or the Board could dismiss the complaint altogether, leaving the choice of appellate forum only to the Union. A grant of mandamus by this Court would effectively oust the Second Circuit (which, as noted, disagrees with this Court over the scope of the President's Recess Appointment power, *U.S. v. Allocco*, 305 F.2d at 709-15) of its prospective jurisdiction over this case.

Noel Canning v. NLRB, 705 F.3d 490 (No. 12-1115) (Opp. Add. 72). There is no dispute that the Board has complied with the mandate, as it has not asked Noel Canning to comply with the Board's Order.[5]

The Companies cite numerous cases (Mot. at 10-11; Pet. at 22-23) for the proposition that a court has the authority to issue writs of mandamus to enforce or clarify its mandate in a particular case.[6] These cases--all dealing with aspects of the "law of the case" doctrine--are inapposite, as they all involve enforcement of a mandate between two parties to the prior case. The Companies were not parties to *Noel Canning* and this proceeding is collateral to it. The Companies seek, in effect, to invoke the doctrine of offensive nonmutual collateral estoppel against the Board, but it is settled law that that doctrine is not available against the government. *United States v. Mendoza*, 464 U.S. 154, 159-63 (1984) (explaining that the government is not bound to follow adverse judgments in future cases involving

[5] Moreover, even if the Board had requested, and the Court had granted, a stay of the mandate, the stay would not have lessened the decision's precedential effect, which is the only effect the Companies can rely on here. As previously discussed, the Board does not dispute that *Noel Canning* is circuit precedent, but it is insufficient to establish a clear and indisputable right to mandamus relief.

[6] *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999); *MCI Telecomms. Corp. v. FCC*, 580 F.2d 590, 597 (D.C. Cir. 1978); *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Yablonski v. United Mine Workers of Am.*, 454 F.2d 1036, 1038 (D.C. Cir. 1971). *See generally* 18B Wright, Miller & Cooper, Fed. Practice & Procedure Juris. 2d § 4478.3, n.11 (2002) (mandamus permitted to enforce the law of the case).

entities not party to that adverse judgment). As this Court has observed on multiple occasions, the government is permitted to relitigate issues decided in a proceeding involving a different party. *Cotton v. Heyman*, 63 F.3d 1115, 1119 n.2 (D.C. Cir. 1995); citing *American Fed'n of Gov't Employees, Council 214 v. FLRA*, 835 F.2d 1458, 1462 (D.C. Cir. 1987). Moreover, even under common law principles, the doctrine of nonmutual collateral estoppel does not apply where courts are divided on a legal or factual issue. *See* Restatement (Second) of Judgments § 29, cmt. f.

2. *Noel Canning* does not prevent the Acting General Counsel from issuing unfair labor practice complaints nor the Board's administrative law judges from holding hearings on those complaints.

The Companies also argue that neither the Acting General Counsel, nor the Regional Directors on his behalf, has authority to issue or prosecute these unfair labor practice complaints because the Board lacks a lawful quorum. They also argue that the Board's administrative law judges (ALJs) cannot hold trials without a Board quorum. However, it is not "indisputably" clear that the Acting General Counsel, the Regional Directors, and the Board's ALJs lack authority to act in the absence of a Board quorum.

Contrary to the Companies' assertions, the authority to issue unfair labor practice complaints is statutorily committed to the 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). As this Court has previously written, "Section 153(d) of the [NLRA] dictates that the General Counsel is the '*final* authority . . . in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board.' 29 U.S.C. § 153(d)."[7]

Thus the General Counsel's authority to investigate unfair labor practice charges and prosecute complaints derives not from any power "delegated" by the Board (Mot. at 9), but rather directly from the text of the NLRA. In enacting Section 3(d), "Congress intended to create an officer *independent of the Board* to handle prosecutions." *UFCW*, 484 U.S. at 127 (emphasis added).

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. And Regional Directors, who are members of the General Counsel's staffs engaged in

[7] *Beverly Health & Rehab. Servs. Inc. v. Feinstein*, 103 F.3d 151, 153 (D.C. Cir. 1996) (emphasis added); *cf. Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 669 (5th Cir. 1966) (courts should not "police the procedural purity of the NLRB's proceedings long before the administrative process is over").

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 (S.D.N.Y. 1965), *affd.* 366 F.3d 776 (2d Cir. 1966).

The Companies also argue (Pet. at 15-17; Mot. at 9-10) that the unfair labor practice complaints were *ultra vires* due to supposed invalidities in the appointments of Regional Directors Paulsen and Fernbach. It is not necessary to determine the validity of Paulsen's and Fernbach's appointments, however, because the Acting General Counsel effectively ratified the issuance of the challenged complaints.[8] In his letter of May 28, 2013, he observed that "the authority to issue complaint lies with me," and that the Regional Directors "derive their authority to issue complaints from the authority of the General Counsel." (Pet. Add. 51-52.) Ratification occurs where a principal sanctions prior actions by a purported agent.[9] Such ratification is permissible so long as the principal was

[8] Contrary to the Companies' claim (Pet. at 16, 17), nothing in 29 C.F.R. § 102.15 suggests that Regional Directors hold *exclusive* authority to issue complaints—nor could it, because "final authority" to issue or refuse to issue complaints is expressly committed to the General Counsel by 29 U.S.C. § 153(d). The argument that Regional Directors' power to issue complaints has lapsed (Mot. p. 9 and n. 5) rests upon the false premise that that power has been delegated to them by the Board under § 3(b), 29 U.S.C. §153(b), rather than by the General Counsel under § 3(d).

[9] *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998); *see also F.E.C. v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (permitting ratification of agency's decision, made during a period when the agency was illegally constituted, to bring enforcement suit against a company).

able "not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."[10] The Acting General Counsel, at all relevant times, had the ability to issue the challenged complaints. His approval of those complaints removes any conceivable doubt as to their validity.

Separately, the Companies assert that the Board's delegation of authority to ALJs to hear cases and issue recommended decisions lapsed when the Board allegedly lost a quorum. (Mot. at 9-10.) The Companies' argument relies *solely* on this Court's statement in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009), that "delegated power to act . . . ceases when the Board's membership dips below the Board quorum." But the quoted language is of uncertain precedential value and insufficient to establish the "clear and indisputable right" that the Companies' request for relief requires. In addressing the same delegation question considered in *Laurel Baye*, the Supreme Court in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010), pointedly declined to follow the agency theory invoked by *Laurel Baye*. The Supreme Court emphasized that although it reached the same result, "we do not adopt the District of Columbia

[10] *Doolin*, 139 F.3d at 212 (quotations omitted). Although Congress, in response to *Doolin*, limited the circumstances in which some agency actions could be ratified, 5 U.S.C. § 3348(d)(2), the General Counsel of the NLRB was expressly exempted from those limitations, 5 U.S.C. § 3348(e)(1), in recognition of the statutory independence of the General Counsel from the Board. *See* S. Rep. No. 105-250, 105th Cong., 2d Sess. 18-19, 20 (1998).

Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended." *Id.* at 2643 n.4. Specifically, with respect to the questions at issue here, the Court stated, "Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." *Id.* (emphasis added).

Three other Courts of Appeals have rejected *Laurel Baye*'s reasoning and have held that Board delegations of the authority to seek preliminary injunctions under Section 10(j) of the NLRA, 29 U.S.C. § 160(j), did not cease when the Board dipped below a quorum. *See Frankl v. HTH Corp*., 650 F.3d 1334, 1354 (9th Cir. 2011) (ruling that *Laurel Baye's* underlying premise was rejected by *New Process Steel*, which "instructs that the [NLRA's] quorum requirement must be satisfied when the Board is acting directly through its members, but does not need to be satisfied for the Board's earlier exercises and assignments of its authority, made with a proper quorum, to remain valid and in effect); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010) ("At the time of its delegation [of Section 10(j) authority] to the General Counsel, the Board comprised the requisite number of members to constitute a quorum. The fact that Board membership subsequently dipped below a quorum does not retroactively invalidate the Board's

prior delegation"); *Osthus v. Whitesell Corp*., 639 F.3d 841, 844 (8th Cir. 2011) (following *Overstreet*).[11] Given the number of court decisions disputing the validity of *Laurel Baye*'s agency theory, the Companies have failed to shoulder their burden to establish that they have a "clear and indisputable right" to stay a hearing before an ALJ or "any related litigation the Board may commence stemming from [the pending unfair labor practice cases]." (Mot. p. 1.)

For the foregoing reasons, the Companies have not shown that they are likely to succeed on the merits of the underlying mandamus petition. Accordingly, on this basis alone, this Motion should be denied.

B. The Companies Will Not Suffer Irreparable Harm If The Present Motion Is Not Granted

Irreparable harm to the petitioners must be likely, not merely possible, in the absence of extraordinary relief before such relief may be granted.[12] The primary harm from which the Companies seek immediate relief in its emergency motion is

[11] Recent District Court decisions are also in accord in disputing that *Laurel Baye*'s agency theory invalidates the prior delegations of the Board. *See Overstreet v. SFTC, LLC d/b/a Santa Fe Tortilla Co*, No.1:13-cv-00165-RB-LFG, 2013 WL 1909154, at *5-6 (D.N.M. May 9, 2013); *Calatrello v. JAG Healthcare*, Inc., No. 1:12-CV-726, 2012 WL 4919808, at *3-4 (N.D. Ohio, Oct. 16, 2012), appeal pending 6th Cir. Case No. 12-4258; *Gottschalk v. Piggly Wiggly Midwest, LLC*, 861 F. Supp. 2d 962, 964 (E.D. Wis. 2012); *Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 345-50 (E.D.N.Y. 2012).

[12] *See Winter*, 555 U.S. at 22 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

the cost of litigating the Board case before the ALJ. (Mot. at 11-18.) It is settled law, however, that mere litigation expense, even where it is substantial and unrecoverable, does not rise to the level of "irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974), citing *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 51-52 (1938). As the *Myers* Court aptly observed, "lawsuits . . . often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."[13] In accord with these holdings, both the Supreme Court and this Court have recently denied similar motions for emergency relief based upon *Noel Canning,* for failure to meet the stringent requirements for such relief.[14]

The Companies argue that the Acting General Counsel's mere initiation of proceedings against them has irreparably harmed them by depriving them of "constitutional freedoms" (Mot. at 13), and they seek to distinguish *Myers* on the ground that they are challenging the NLRB's authority to act at all after *Noel Canning*. (Mot. 14-16.) As previously discussed, however, courts are presently divided on the question whether *Noel Canning* was correctly decided, and no court has held that *Laurel Baye* impacts either on the authority of the Acting General

[13] *Id. Accord Cities of Anaheim & Riverside, Cal. v. F.E.R.C.*, 692 F.2d 773, 779 (D.C. Cir. 1982) (same).

[14] *HealthBridge Mgmt. LLC v. Kreisberg*, No. 12A769, 133 S. Ct. 1002 (Feb. 4, 2013 denial by Justice Ginsburg; Feb. 6, 2013 denial by full Court); Order, *Ozburn-Hessey Logistics, LLC v. NLRB*, No. 13-1170 (D.C. Cir. May 14, 2013).

Counsel to perform his statutory duties to investigate and prosecute alleged unfair labor practices or on the authority of administrative law judges to hold evidentiary hearings and make recommended decisions. In the absence of any clear and indisputable right to the relief they claim, the litigation costs that the Companies incur as a result of the NLRB's continuing to perform its statutory duties, pending ultimate determination by the Supreme Court, do not constitute irreparable harm. *See Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972) ("This is a risk of litigation that is inherent in society and not the type of injury to justify judicial intervention.")

The Companies also suggest briefly that their expenses are "extraordinary." (Mot. 15, n.9.) "Extraordinary" cases include cases where the respondent is forced to incur fines or penalties in order to challenge the agency's actions, and cases where the relevant statute does not even arguably cover the respondent (and thus litigation of the merits of a case would be futile). *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467-69 (1943). Neither of these scenarios applies here. First, because the NLRA does not provide for imposition of money penalties, the Companies need not risk fines or penalties in order to challenge the Board's action in court. Second, as shown above, the NLRB has at least arguable jurisdiction to decide these cases as it is presently constituted and the NLRB's statutory jurisdiction over the Companies is undisputed. *See Myers*, 303

U.S. at 51 (arguable jurisdiction). Thus, the well-settled principle that litigation expenses do not constitute irreparable injury remains applicable here, even assuming the unlikely possibility that the Companies could incur the costs of a second trial.

In any event, the Companies' arguments are entirely speculative. After the Supreme Court's decision in *New Process Steel*, 130 S. Ct. 2635 (2010) (holding that a two-member Board lacks the authority to decide cases), circuit courts remanded cases to the Board for reconsideration by an appropriately constituted group. We are unaware of a single case which required a remand for additional investigation or a new trial. Furthermore, this case could end in a myriad of ways other than a denial of enforcement under *Noel Canning*: it could settle; it could be dismissed at the administrative stage; the present Board could issue a final decision which is upheld following reversal of *Noel Canning* by the Supreme Court; or the Senate could confirm a quorum of term-appointed Board members who ultimately issue a final decision in this case. Given the speculative nature of the harm here, the Companies cannot show that irreparable harm is "likely," as required by *Winter*. *See* 555 U.S. at 22.

C. The Possibility of Harm to Other Parties and the Public Interest Weigh Strongly Against Granting a Stay.

The Companies minimize the injury to the public interest if the case is enjoined, contending that the only injury will be delay to the Board's proceeding.

(Mot. at 17.) However, a stay in this case would irreparably prejudice the rights of employees that the Board protects. Although these employees have been represented by the Union since February 2012, collective bargaining has been marred by allegations that the Companies have engaged in unfair labor practices calculated to weaken the employees' support for their representative. At the same time, some employees have now petitioned to have the Union decertified and the processing of their petition has been halted by the pending unfair labor practice charges. Determining whether the unfair labor practice allegations have merit and whether interim relief pending litigation is warranted is thus vital both to those employees who support the Union and those who oppose it. Accordingly, the NLRB's continuing efforts to resolve the issues raised by the unfair labor practice complaints are consistent with the objective of national labor policy to encourage an early resolution of unfair labor practice disputes.

Moreover, as the Companies implicitly acknowledge (Mot. 5), the witnesses in this case will need to, among other things, address the details of over two dozen bargaining sessions and one week of mediation. An inordinate delay of the hearing will cause the case to be heard "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 419 (1960), quoting H. R. Rep. No. 80-245, at 40 (1947). This harm potentially impacts all parties, and it

is truly "irreparable"; science has yet to develop a means by which a lost memory can be reconstructed.

Finally, while no determination has been made at this time whether interim relief is warranted, if such a determination were made, the Acting General Counsel's seeking Section 10(j) relief in the Southern or Eastern District of New York would be in the public interest. The distinct role of the Section 10(j) injunction is to prevent the kind of injuries to employee rights that could not be effectively remedied by an eventual Board decision and order. See *Pascarell v. Vibra Screw*, 904 F.2d 874, 876 (3d Cir. 1990) (§ 10(j) relief intended to protect lawful status quo pending Board disposition of administrative case). For example, interim relief has been found warranted where bad faith bargaining and other serious unfair labor practices threaten irreparable injury to a newly established bargaining relationship. *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 373 (11th Cir. 1992).

For all these reasons, the public interest is served by the continued processing of the unfair labor practice complaints until such time as the Supreme Court resolves the conflict in the circuits over the recess appointment issues decided in *Noel Canning*. By conducting hearings when memories are fresh and witnesses are available and by considering the necessity of interim relief, the NLRB contributes to the prompt and fair resolution of industrial disputes. The

Board's judgment that continuing to adjudicate cases while the challenges to its authority are being resolved serves the public interest is supported by its recent experience. For example, of some 550 decisions issued by the two-member Board prior to issuance of the Supreme Court's decision in *New Process*, only about 100 were impacted by that decision. And in none of those cases did a reviewing court find that the administrative hearing was flawed because it was conducted at a time there was only a two-member Board. Further, nearly all of the other matters decided by the two-member Board were 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 June 10, 2013). Similarly, in the period since *Noel Canning* was decided, approximately 90 percent of meritorious unfair labor practice charges have been settled. Lawrence E. Dube, *Solomon Reports Labor Board Nearing Crisis, Senate Confirmations of 'Critical Importance,'* Daily Labor Report, June 7, 2013, at A3. This experience supports the Board's present determination to continue processing this case. Accordingly, this factor, like the other *Winter* factors, supports a denial of this motion.

CONCLUSION

The Companies cannot satisfy any, much less all, of the *Winter* factors analyzed in determining whether emergency relief is appropriate. First, the

mandamus petition is unlikely to succeed on the merits. Second, the Companies can show no irreparable harm from denial of the instant motion because litigation costs are not irreparable harm. Third, the interests of other parties and the public are served by the prompt holding of administrative hearings for the purpose of taking evidence, determining the merit of the unfair labor practice complaints, and considering the possible need for interim relief.

In light of the foregoing, the Companies' Motion should be denied.

Respectfully submitted,

June 10, 2013

/s/Abby Propis Simms
ABBY PROPIS SIMMS
Acting Assistant General Counsel
For Special Litigation
(202) 273-2934
Abby.Simms@nlrb.gov

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

MARGERY E. LIEBER
Associate General Counsel

BOB ENGLEHART
Supervisory Attorney
(202) 273-2978
Bob.Englehart@nlrb.gov

DAVID SEID
PAUL THOMAS
Attorneys
(202) 273-2941/(202) 273-3788
David.Seid@nlrb.gov
Paul.Thomas@nlrb.gov

NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET, N.W.
WASHINGTON, D.C. 20570

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2013, a true and correct copy of the foregoing Response of the National Labor Relations Board in Opposition to Petition for Writ of Mandamus or Writ of Prohibition was filed using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Doreen S. Davis
Jones Day
222 East 41st St.
New York, NY 10017
(212) 326-3833

Matthew D. McGill
Eugene Scalia
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. NW
Washington, D.C. 20036
(202) 955-8500

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

/s/ Abby Propis Simms
ABBY PROPIS SIMMS