UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ALL AMERICAN SCHOOL BUS CORP., *et al.*

Respondents and Counterclaim/Third-Party Plaintiffs,

v.

JAMES G. PAULSEN, *et al.*,

Counterclaim/Third-Party Defendants.

No. 1:13-cv-3762 (KAM)(RER)
Judge Kiyo A. Matsumoto

COUNTERCLAIM/THIRD PARTY DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM/THIRD PARTY COMPLAINT COUNTS ONE AND TWO FOR LACK OF SUBJECT MATTER JURISDICTION

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FACTS

As of March 2013, 28 named Respondents (the Companies) were engaged in joint collective bargaining for a successor contract with the representative of the Companies' employees, Local 1181-1061, Amalgamated Transit Union, AFL-CIO (the Union). Dkt. No. 1-6, Pet. Exh. B2 ¶¶ 23, 26; Dkt No. 1-6, Exh. C ¶¶ 12, 13. On March 19, the Companies declared an impasse in bargaining and proceeded to unilaterally implement changes in terms and conditions of employment. Dkt. No. 1-6, Pet. Exh. C ¶¶ 20, 22, 24. On March 20 and 21, the Union filed a series of unfair labor practice charges with Region 29 of the National Labor Relations Board (the NLRB) in Brooklyn, New York, alleging that the Companies had violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5) (the NLRA or the Act), by this conduct. Dkt. No. 1-5, Pet. Exh. A2. Following an investigation, Region 29 Director James Paulsen (the Regional Director), on behalf of NLRB Acting General Counsel Lafe Solomon, found merit to the charges and, on June 10, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Consolidated Complaint), Dkt. No. 1-6, Pet. Exh. A3. The Consolidated Complaint set the cases for hearing before an administrative law judge on July 9 (*id.*).

The Companies filed a Motion and Request For Postponement of Hearing on June 21, seeking to delay the hearing until July 29. Declaration of James Paulsen ¶ 3, Exh. 1. Counsel for the Acting General Counsel opposed this request, but the Board's Office of Administrative Law Judges continued the hearing until July 22. Declaration of James Paulsen, ¶¶ 4, 5, Exhs. 2, 3. On July 8, 2013, the Companies wrote to the Acting General Counsel and the Regional Director, demanding that the Complaint be withdrawn, allegedly because the Board lacks a quorum of members and, in the Companies' view, the Board's quorum status affects the General Counsel's

ability to prosecute unfair labor practice cases as well as administrative law judges' ability to hear those cases and issue recommended decisions.[1] Declaration of James Paulsen, ¶ 6, Exh. 4. On July 12, 2013, the Acting General Counsel denied this request and expressly ratified the issuance and prosecution of the Complaint issued by the Regional Director. Declaration of James Paulsen, ¶ 7, Exh. 5.

In addition to issuing the Complaint, the Regional Director also sought authorization from the Acting General Counsel and the Board to obtain preliminary injunctive relief against the Respondents pending the Board's final adjudication of the unfair labor practice cases, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. §160(j). On June 28, 2013, the Acting General Counsel authorized this proceeding, and on the same date, the Board did likewise. Declaration of James Paulsen, ¶ 8, Exh. 6. Accordingly, on July 3, the Regional Director filed the Petition for Preliminary Injunction (the Petition) which initiated this case. Dkt. No. 1. On that date, this Court ordered the Companies to show cause why the petition should not be granted, setting July 10 as the date for their answer, July 15 as the date for the Board's reply, and July 16 as the hearing date. Dkt. No. 2.

On July 8, the Companies filed a Motion to Adjourn Conference in this Court seeking to delay their obligation to respond until after the conclusion of the administrative trial, then scheduled to commence July 22. Dkt No. 6. On the same day, this Court postponed the Companies' obligation to answer the Petition to July 12. Order on Motion to Adjourn Conference, no docket number, dated 7/8/13. The next day, the Court ordered the parties to file briefs based on the administrative record on August 5, and response briefs on August 12, and set

[1] In this memorandum, references to the "General Counsel" refer generally to the office, while references to the "Acting General Counsel" refer specifically to Mr. Solomon, who currently holds that title by designation under the Federal Vacancies Reform Act, 5 U.S.C. § 3345 et seq.

the case for hearing on August 16. Order on Motion to Adjourn Conference, no docket number, dated 7/9/13. This hearing was later postponed to August 20. Order on Motion to Adjourn Conference, no docket number, dated 7/12/13.

On July 12, the Companies filed their Answer to the Petition. Dkt. No. 18. In that Answer, they denied in pertinent part the factual allegations of the Petition, asserted affirmative defenses including assertions that the NLRB "cannot lawfully act on this complaint inasmuch as it does not have a legal quorum" and that NLRB officials "have not been legally appointed, and thus have no authority to bring this action", and also asserted a "Counterclaim and Third-Party Complaint" (the Counterclaim) against the Regional Director, the Acting General Counsel, and NLRB Members Sharon Block and Richard Griffin, Jr (the Defendants). *Id.* at 3. The Companies brought the Counterclaim against the four Defendants "as purporting to act" in their official capacities. On its face, the Counterclaim does not assert any claims against the Defendants in their individual capacities. Counts One and Two of the Counterclaim request this Court to enjoin the Board from further processing the unfair labor practice case and declare that further processing of that case would be "*ultra vires* and unlawful." *Id.* at ¶21, 23, 30-A, B. Count Three of the Counterclaim requests money damages against all of the Defendants. All three Counts of the Counterclaim rely on the theory that the actions of the NLRB in bringing and prosecuting the Consolidated Complaint and the instant Petition for Preliminary Injunction violated the NLRA's quorum provision and the Companies' constitutional due process rights. *Id.* at ¶5-14.

In addition to the above, on July 15, the Companies filed a Petition for Writ of Mandamus in the D.C. Circuit seeking the same relief, for the same reasons as the asserted Counterclaim. D.C. Circuit Case No. 13-1221. On August 1, 2013, the D.C. Circuit issued a per curiam order placing the Petition for Writ of Mandamus in abeyance pending disposition of a

group of mandamus petitions making similar allegations challenging the legality of the appointments of certain Board Members. Declaration of James Paulsen, ¶ 9, Exh. 7.

On July 17, the Companies filed in this Court a Motion for Temporary Restraining Order and Preliminary Injunction seeking to enjoin the unfair labor practice hearing scheduled for July 22. Dkt. No. 25. On July 18, this Court denied the Motion for Temporary Restraining Order, concluding that the Companies were unlikely to succeed on the merits of the Counterclaim, that they had not demonstrated a likelihood of irreparable harm if the Board hearing was not restrained, that they had unreasonably delayed in bringing their motion, and that a restraining order would not be in the public interest. Order on Motion for TRO, no docket number, dated 7/18/2013. The next day, this Court denied the motion for a preliminary injunction for the same reasons. Order on Motion for Preliminary Injunction, no docket number, dated 7/19/2013.

On July 23, the Defendants requested a pre-motion conference preparatory to filing this motion and proposed a briefing schedule. On July 28, the Companies replied by letter. This letter indicated for the first time that the Companies intended to assert Count Three of the Counterclaim against the Defendants in their individual capacities.[2] On July 29, this Court found that a pre-motion conference was not necessary and approved the Defendants' proposed briefing schedule.

[2] Counsel for the NLRB does not represent the Defendants in their individual capacities and accordingly this Motion to Dismiss does not address Count Three of the Counterclaim. By way of explanation, federal employees sued in their individual capacities may request representation by the Department of Justice under 28 C.F.R. 50.15, 50.16. To obtain DOJ representation, the employee must request representation in writing and the Department of Justice must conclude that representation of the employee is in the interests of the United States. In the interests of resolving this case as expediently as possible under the circumstances, the official-capacity Defendants are proceeding with this Motion to Dismiss the Counts pertaining to them. This motion is brought without prejudice to the rights of the individual-capacity Defendants to bring a subsequent Rule 12(b) motion at a later date.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) provides that a party may raise lack of subject-matter jurisdiction by motion before answering a complaint. "The burden of proving jurisdiction is on the party asserting it." *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996) (citing *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir.1994)). In ruling on a motion to dismiss under Rule 12(b)(1), a district court is not confined to the complaint and may refer to evidence outside the pleadings. *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000) (citing *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986)). "[N]o presumptive truthfulness attaches to the complaint's jurisdictional allegations." *Frisone v. Pepsico, Inc.*, 369 F. Supp. 2d 464, 470 (S.D.N.Y. 2005) (quotations omitted).

ARGUMENT

I. Prosecution of This Case Cannot Be Enjoined Because The Companies Have An Adequate Remedy At Law

The Counterclaim requests an injunction and declaratory relief against the prosecution of *this* 10(j) case. Dkt. No. 18, ¶¶ 21, 23, 30A, B. This claim is procedurally barred. An injunction will not issue where the party seeking it has an adequate remedy at law. 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2944 (2d ed. 1995). "If [a] plaintiff . . . can assert his claim as a defense in some other proceeding, the alternative remedy is adequate." *Id.* (citing *Georgia v. City of Chattanooga,* 264 U.S. 472 (1924) and *Inmates of the Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) for the proposition that the ability to assert a claim as a defense in another proceeding constitutes an adequate remedy at law). The Companies' ability to oppose the Board's petition for injunctive relief in this Court provides the Companies with an adequate alternative remedy, thus obviating the Companies' need to seek injunctive relief through its counterclaim. Indeed, in their Answer

to the Petition, the Companies have already asserted that the 10(j) Petition is invalid because of claimed defects in the Defendants' appointments. Dkt. No. 18, at 3. The Companies would have an additional opportunity to make that argument before the Court in their August 5th and August 12th filings, and at the August 20th hearing. Thus there is no need to "enjoin" prosecution of the 10(j) Petition by counterclaim because the Companies can seek dismissal of the 10(j) Petition in the normal course of litigation.

II. This Court Lacks Subject-Matter Jurisdiction To Issue the Requested Relief

The Companies' second request in Counterclaim Counts One and Two seeks an injunction of the Board's unfair labor practice proceedings, or a declaratory judgment that those proceedings are unlawful. But this Court lacks subject matter jurisdiction to issue the requested relief. When it enacted the National Labor Relations Act (the NLRA or the Act), Congress carefully constructed a system of judicial review in which the NLRB's orders would be subject to direct judicial review only in the Courts of Appeals, and only upon issuance of a final Board order. The Companies, however, seek to short-circuit this system by obtaining premature judicial relief from a forum – this Court – which has only a peripheral role to play in the Congressional plan.

The Companies' claims as to this Court's jurisdiction do not withstand scrutiny. They first assert that this Court has jurisdiction to issue injunctive and/or declaratory relief against the Board's processing of the Consolidated Complaint under 28 U.S.C. § 1361 (the Mandamus Act), Dkt. No. 18, ¶1, 30-A, B. That statute, however, does not apply to agencies whose decisions are subject to direct appellate review. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984).

They also claim jurisdiction under the judicially-created rule of *Leedom v. Kyne*, 358 U.S. 184 (1958), and *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), Dkt. No. 18, ¶1. Those cases,

however, permit district courts to exercise jurisdiction only in extraordinary circumstances where there is no alternative means of review of patently unlawful or unconstitutional agency action. Here, neither requirement is met. The NLRA provides ample opportunity for the Companies to obtain judicial review of their claims, and the Board's actions are not patently unlawful.

A. The Statutory Scheme of the National Labor Relations Act Does Not Provide for District Court Review of NLRB Action

The NLRA guarantees employees certain rights in Section 7 (29 U.S.C. § 157) and enforces those rights by declaring certain employer and union activities to be unfair labor practices in Section 8 (29 U.S.C. § 158). It also empowers the National Labor Relations Board to enforce the foregoing provisions and to prevent "any person" from engaging in unfair labor practices in Section 10 (29 U.S.C. § 160). As such, the Board is statutorily vested with the responsibility for administering the Act. 29 U.S.C. § 153(a). *See generally In re Irving*, 600 F.2d 1027, 1032 (2d Cir. 1979). To that end, the NLRA establishes a unique statutory scheme of review in which federal district courts handle only certain limited matters collateral to unfair labor practice cases.[3]

The Board's administrative adjudication of unfair labor practice cases is subject to review only upon the issuance of a final Board order at the conclusion of an unfair labor practice proceeding. 29 U.S.C. §§ 160(e), (f). *See also NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 118-22 (1987); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 51 (1938). Review of final Board orders in Circuit Courts affords "an adequate

[3] These matters include Section 10(j) relief, Section 10(l) relief involving mandatory injunction proceedings against certain types of unlawful conduct by unions, and Section 11(2) subpoena enforcement proceedings. 29 U.S.C. §§ 160(j), (l); 161(2). Congress specifically authorizes in Section 10(j) of the Act that District Courts of the United States will have jurisdiction to review a Board injunction petition and grant the Board such relief as the court "deems just and proper." If any party feels aggrieved by the district court's final order, an appeal may be taken to the United States Court of Appeals pursuant to 28 U.S.C. §§ 1291, and 1292. *See, e.g., Minnesota Min. & Mfg. Co.Mining and Manufacturing v. Meter*, 385 F.2d 265 (8th Cir. 1967).

opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers*, 303 U.S. at 48. The Supreme Court gave two principal reasons for this conclusion. First, the Board does not have the power to enforce its own orders. *Id.* And second, when reviewing a Board order, "all questions of the jurisdiction of the Board and the regularity of its proceedings and all questions of constitutional right or statutory authority are open to examination by the court." *Id.* at 49 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)).

Thus, if a court of appeals finds reversible error in the Board's order, "the Board's petition to enforce it will be dismissed, or the [opposing party's] petition to have it set aside will be granted." *Id.* at 50. Together, these features provide "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id.* at 48; *see also E.I. DuPont De Nemours & Co. v. Boland*, 85 F.2d 12, 15 (2d Cir. 1936) ("The provisions of the act for the enforcement and review of the cease and desist orders afforded the appellants an adequate, complete, and exclusive remedy."). This principle continues to guide reviewing courts to this day, *cf. Amerijet Int'l, Inc. v. NLRB*, No. 11-22919-CIV, 2012 WL 3526620 (S.D. Fla. Aug. 8, 2012), *aff'd*, No. 12-14657, 2013 WL 2321401, *1-2 (11th Cir. May 29, 2013) (per curiam) (rejecting suggestion that company attacking the Acting General Counsel's authority lacks the ability to obtain later judicial review), *pet. for reh'g en banc filed* (July 12, 2013), and is the precise reason this Court must refuse the Companies' invitation to consider their Counterclaim.

Furthermore, and crucially, district courts do not obtain general jurisdiction over NLRB actions any time that a Section 10(j) petition is filed. *See Zipp v. Geske & Sons Inc.*, 103 F.3d 1379, 1384 (7th Cir. 1997); *Squillacote v. Teamsters Local 344*, 561 F.2d 31, 40 (7th Cir. 1977);

Lineback v. Printpack, 979 F. Supp. 831, 853-58 (S.D. Ind. 1997) (each dismissing for lack of subject-matter jurisdiction various counterclaims raised in a 10(j) or 10(l) injunction proceeding). Because a counterclaim "must be viewed as an independent action challenging non-final Board action," it is subject to dismissal in the district court. *Squillacote*, 561 F.2d at 40.

B. The Mandamus Act Does Not Apply Where Agency Action Is Subject to Direct Review By The Courts of Appeals

The Companies apparently do not dispute the general principle that District Courts ordinarily lack jurisdiction over NLRB proceedings. Instead, they seek extraordinary district court jurisdiction under two theories. They first rely on the Mandamus Act, 28 U.S.C. § 1361, which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Id. See* Dkt. No. 18, ¶1. That Act provides no support for this Court's jurisdiction, however.

Jurisdiction under the Mandamus Act, 28 U.S.C. § 1361, is available only when there are no other avenues of review. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). In the landmark case *Telecomms. Research & Action Ctr. v. FCC*, the D.C. Circuit held squarely that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." 750 F.2d 70, 77-79 (D.C. Cir. 1984), *cited with approval in In re FCC*, 217 F.3d 125, 140 n.10 (2d Cir. 2000). In *Telecomms. Research*, "[b]ecause review [was] available in the Court of Appeals . . . action by the District Court under section 1361 [was] not." *Id.* at 88; *see also City of New York v. Heckler*, 742 F.2d 729, 739 (2d. Cir. 1984) (recognizing that the availability of jurisdiction for traditional appellate review would normally preclude mandamus jurisdiction). As described above, the NLRA provides the courts of appeals with

exclusive jurisdiction to review final Board action in unfair labor practice proceedings. Thus, jurisdiction to issue a writ of mandamus against NLRB unfair labor practice proceedings rests, if anywhere, solely in the Courts of Appeals.

C. The Companies Fail to Meet the Requirements of the *Leedom v. Kyne* Exception to the Rule of No Jurisdiction

The Companies' second claim of jurisdiction relies on a line of cases holding that district courts can intervene in NLRB proceedings to remedy plain violations of explicit mandatory requirements in the Act, where no alternative judicial remedy exists; and plain constitutional violations, where no alternative judicial remedy exists. *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958); *Semi-Alloys, Inc. v. Morio*, 490 F. Supp. 422, 424-25 (S.D.N.Y. 1980); *see also Telecomms. Research & Action Ctr.*, 750 F.2d at 78 (noting this exception to exclusive Court of Appeals jurisdiction).[4] Petitioners must establish both (1) the lack of an alternative avenue of review and (2) a plain constitutional or statutory violation before the district court can exercise jurisdiction to review the Board's action under *Leedom*. *See Modern Plastics Corp. v. McCulloch*, 400 F.2d 14, 17 (6th Cir. 1968); *Grutka v. Barbour*, 549 F.2d 5, 7-10 (7th Cir. 1977).[5] Here, the Companies cannot meet either of the two conjunctive requirements for District Court intervention.

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[4] *Morio* used a standard for district court jurisdiction over asserted violations of constitutional rights which is essentially indistinguishable from the standard set forth in *Leedom*. This is consistent with the views of other circuits, which treat these tests as "alike." *Squillacote*, 561 F.2d at 37 (citing *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1969)).

[5] The Companies also rely on *Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949) (Dkt. No. 18, ¶ 1), which contains dicta which could be read to permit district courts to assert jurisdiction over all non-"frivolous" claims concerning a party's constitutional "property" rights in a representation case under Section 9 of the NLRA, 29 U.S.C. § 159. However, *Fay* has never been adopted by the Supreme Court and has been repeatedly criticized by subsequent court decisions. *Amerco v. NLRB*, 458 F.3d 883, 888-90 (9th Cir. 2006); *see also Squillacote*, 561 F.2d at 37-38, and cases cited therein. And the Second Circuit itself has questioned *Fay*'s continuing validity, *Utica Mut.*

1. The Companies Have Adequate Alternative Means To Obtain Review Of Their Allegations

The first *Leedom* prong requires that the party lack any adequate means to obtain review of the challenged decision. But the Companies have ample access to judicial review here. The Companies can obtain "full, expeditious, and exclusive" review of the unfair labor practice proceedings in either the Second Circuit or the D.C. Circuit following issuance of a final Board order. *Myers*, 303 U.S. at 48 n.5 (quotation omitted). As previously discussed in Section II-A, the Supreme Court long ago concluded that "the judicial review . . . provided [by the NLRA] is adequate." *Myers*, 303 U.S. at 50. This rule applies fully even though the Companies will have to expend resources litigating the case. 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." *Id.* Because the NLRA provides the Companies with an adequate means of obtaining judicial review of the issues they attempt to assert in their Counterclaim, the Companies cannot satisfy the first prong of the *Leedom* test. Therefore, district court jurisdiction pursuant to *Leedom* is unavailable.

2. The Companies Cannot Show That The Board Has Plainly Violated The NLRA Or The Constitution

The second prong of *Leedom* requires that a party show that the Board has acted "contrary to a specific prohibition in the Act." *Leedom*, 358 U.S. at 188. The party seeking to invoke *Leedom* must make a "strong and clear" showing that the Board disregarded a "clear, specific and mandatory" provision. *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968). In fact, the party must show that the agency's action is "blatantly lawless." *Abercrombie v. Office of Comptroller of Currency*, 833 F.2d 672, 675 (7th Cir. 1987).

Ins. Co. v. Vincent, 375 F.2d 129, 134 (2d Cir. 1967), while district courts even within the Second Circuit have declined to apply *Fay*'s dictum literally. *Morio*, 490 F. Supp. at 424-25.

The Companies claim that the Board cannot validly act because it lacks a required quorum of Members under Section 3(b) of the NLRA.[6] But this claim has been overtaken by events. The Board now has five Senate-confirmed members. *See* 159 Cong. Rec. S6049-S6051 (daily ed. July 30, 2013). The new Board will decide this case. There is no basis under either the Act or the Constitution to believe that the new Board's decision would be in any way tainted by an alleged prior loss of a quorum. To our knowledge, no court has ever invalidated a Board decision because the unfair labor practices occurred, the complaint was issued, or the trial was held, during a period when the Board lacked a quorum; indeed, such decisions have been routinely enforced without comment.[7] Even in cases where an invalid Board issued an initial decision which was later remanded, courts have held that a subsequent Board could rely upon the same administrative record in rendering a new decision.[8] Further processing of this case will be entirely consistent with the text of the Act and the Constitution.

Moreover, the "prosecution" of unfair labor practices by the General Counsel of the NLRB and the Regional Director, and the preliminary adjudication of this case by the administrative law judge, which the Companies seek to enjoin, are clearly authorized by the Act even during periods when the Board lacks a quorum. The General Counsel holds "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). This final authority to investigate unfair labor practice charges and prosecute

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[6] 29 U.S.C. § 153(b) ("[T]hree members of the Board shall, at all times, constitute a quorum of the Board . . .").

[7] *See, e.g., Southern Power Co. v. NLRB*, 664 F.3d 946 (D.C. Cir. 2012) (unfair labor practices occurred, complaint issued and Administrative Law Judge decision issued during period when Board had only two members); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22 (D.C. Cir. 2011) (same).

[8] *See, e.g., SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 5 (D.C. Cir. 2012).

complaints does not derive from any "agency" or "delegate" status. Instead, it flows directly from the words of Section 3(d). Courts understand section 3(d) to be a firm limitation on the jurisdiction of federal courts to examine the General Counsel's exercise of those functions. Thus, "[b]oth [the D.C. Circuit] and the Supreme Court have declared . . . that decisions of the General Counsel of the National Labor Relations Board whether to issue complaints are not subject to review by this court." *Patent Office Prof'l Ass'n v. FLRA*, 128 F.3d 751, 753 (D.C. Cir. 1997) (citing *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 117-33 (1987) (*UFCW*), and *Beverly Health & Rehab. Servs., Inc. v. Feinstein*, 103 F.3d 151, 155 (D.C. Cir. 1996)).[9] As early as 1940, a District Court judge held that a request to enjoin the prosecution of an unfair labor practice case was **"**contrary to a host of decisions which have construed the National Labor Relations Act." *Sanco Piece Dye Works v. Herrick*, 33 F. Supp. 80, 81 (S.D.N.Y. 1940). Seventy-three additional years of history have not altered this basic truth about the NLRA's statutory scheme.

Regional Directors, who are members of the General Counsel's staff engaged in prosecution of unfair labor practices, derive their authority to issue and prosecute complaints not from the Board, but from the General Counsel. *See United Elec. Contractors Ass'n v. Ordman*, 258 F. Supp. 758, 760 (S.D.N.Y. 1965), *aff'd*, 366 F.2d 776 (2d Cir. 1966); *Dunn v. Retail Clerks Int'l Ass'n*, 307 F.2d 285, 288 (6th Cir. 1962). Moreover, any conceivable defect in the Regional Director's authority here (Dkt. 18, ¶¶7, 11-14) was remedied when the Acting General

[9] *See also Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 396 (6th Cir. 2002) (reversing district court for "enjoining the Board from prosecuting [a] complaint"); *Mayer v. Ordman*, 391 F.2d 889, 889 (6th Cir. 1968) (per curiam) (declaring it "well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint thereon"); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 669 (5th Cir. 1966) (rejecting the proposition that courts should "police the procedural purity of the NLRB's proceedings long before the administrative process is over").

Counsel expressly ratified the issuance of the complaint. Declaration of James Paulsen, ¶ 7, Exh. 5. *See Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996).

For slightly different but related reasons, the Board's Administrative Law Judge holds statutory authority to take evidence, conduct the unfair labor practice trial, and issue a recommended decision regardless of whether the Board has a quorum or not.[10] Section 10(b) provides for a hearing "before the Board or a member thereof, or before a designated agent or agency," and Section 10(c) provides that testimony taken in such a hearing shall be reduced to writing and that the judge taking testimony shall issue a proposed report and recommended order which automatically becomes the order of the Board if no exceptions are timely filed. 29 U.S.C. § 160(b), (c). This power is indeed assigned to the Board's cadre of administrative law judges by a delegation – and the delegation in question has been operational since 1936. *See* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936).[11] Thus, all of the Agency's actions involving the prosecution of this unfair labor practice proceeding are clearly authorized by the statute and the Companies cannot establish a "clear" violation of the Act.

The Companies' only argument to the contrary rests on the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). That court held that "delegated power to act . . . ceases when the Board's membership dips below the Board quorum." 564 F.3d at 475. This argument, however, fails to account for the Supreme Court's

[10] While the Companies have not expressly challenged the authority of Administrative Law Judges to hold trials in their Counterclaim and Third-Party Complaint, they have done so in their letter to the NLRB's Acting General Counsel. Declaration of James Paulsen, ¶ 6, Exh. 4.

[11] Moreover, it is well settled that interlocutory rulings of the NLRB – including but not limited to administrative law judges' decisions on trial motions – cannot be reviewed by district courts. *See, e.g., Fugazy Continental Corp. of Connecticut v. NLRB*, 514 F. Supp. 718, 720 (E.D.N.Y. 1981).

decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court declined to rely on *Laurel Baye*, stating that its "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." 130 S.Ct. at 2643 n.4. Since *New Process*, three 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); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp*., 639 F.3d 841, 844 (8th Cir. 2011).[12]

Even if *Laurel Baye* remains possible authority for the broad propositions the Companies assert, that is all it is. *Laurel Baye* did not amend the text of the statute; it merely offered a single contested interpretation of it. No other court has adopted that interpretation, and numerous decisions have expressly repudiated it. This is a far cry indeed from the requirement of a "strong and clear showing" that the Board has disregarded a "specific and mandatory" provision of the Act. *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1969).

Similarly, the Companies do not meet their burden of showing a clear constitutional violation, even as to actions of the Board itself. As an initial matter, as stated above, the Board members whose appointments the Companies challenge did not issue a final decision in this

[12] 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*, No. 13-CV-0165 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 dismissed*, No. 12-4258 (6th Cir. July 2, 2013); *Gottschalk v. Piggly Wiggly Midwest, LLC*, 861 F. Supp. 2d 962, 964-65 (E.D. Wis. 2012); *Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 345-50 (E.D.N.Y. 2012).

matter; that decision is forthcoming and will ultimately be rendered by a Board whose members are undisputedly constitutional.

Moreover, the question of whether the Board had a valid quorum prior to the Senate's recent confirmation of new Members is the subject of a circuit court split, and, in any event, is irrelevant to this case. The Circuit Courts of Appeal are divided on the validity of the appointments challenge that the Companies identify in their Counterclaim. *Compare, e.g.*, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861, 2861-62 (holding, *inter alia*, that intrasession recess appointments are constitutionally invalid) *with Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc) (upholding the constitutionality of the intrasession recess appointments). Indeed, in its recent opinion on the issue, the D.C. Circuit candidly acknowledged that its conclusions conflict with those reached by the Second, Eleventh, and Ninth Circuits, *id.* at 505-06, 509-10 (discussing *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962), *Evans*, 387 F.3d at 1226 , and *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (limited en banc)). Since *Noel Canning*, divided panels of two other Circuit Courts have concurred with part of its holding. *See NLRB v. New Vista Nursing & Rehab.*,719 709 F.3d 203 (3d Cir. 2013); *NLRB v. Enterprise Leasing Co. Se.*, Nos. 12-1514, 12-2000, __ F.3d __, 196 L.R.R.M. 2269, 2013 WL 3722388 (4th Cir. July 17, 2013).

In light of this conflict among circuit courts, any action taken by challenged Board members hardly amounts to a "clear" constitutional violation. Jurisdiction pursuant to *Leedom* or *Fay* is inappropriate in any case where the Board's position has even "colorable support." *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1313 (D.C. Cir. 1984). A circuit split constitutes colorable support even where the circuit in which the *Leedom* case is brought has previously rejected the Board's position. *Armco Steel Corp. v. Ordman*, 414 F.2d 259, 260-61 (6th Cir.

1969) (per curiam). Here, far from rejecting the Board's position, the Second Circuit has already agreed with the Board's position as to one of *Noel Canning*'s two alternate holdings, *Allocco*, 305 F.2d at 709-15, and has not passed upon the other.

What is more, even if the purported unconstitutionality of the recess appointments of Members Block and Griffin was "clearly" established (which it is not), it is irrelevant. There would still be no plain constitutional violation in processing the case through the steps prior to the Board's involvement. As mentioned above, the Board has not taken a final action in this case and any action the Board renders will be taken by new members whose appointments have not been challenged. It makes no sense to say that invalidity of the Board itself would taint action taken by separate branches of the agency before the Board has even received the record in a case.[13]

Pepsico, Inc. v. FTC, cited by the Companies in their letter to the Court of July 28 (Dkt. No. 37), not only fails to support their claim of *Leedom* jurisdiction, but actively undercuts it. 472 F.2d 179 (2d Cir. 1972). In that case, the Second Circuit indicated that *Leedom* applies when "an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order." *Id.* at 187. There is no dispute that this case affects a labor dispute in interstate commerce and therefore is within the NLRB's jurisdiction. And given that, as noted earlier, the Senate has now confirmed a full five-member Board, there can no longer be any dispute that this unfair labor practice case will be

[13] The record of a case is not transferred to the Board until after the Administrative Law Judge has issued a decision in the case. 29 C.F.R. § 102.45.

"conducted in a manner that can result in a valid order." The Board passes the test of *Pepsico* with flying colors.[14]

[14] As mentioned earlier, because Count Three of the Counterclaim seeks monetary damages, the Board understands that count to apply only to the Defendants in their individual capacities under a *Bivens* theory. In their letter to the Court, however, the Companies cite to *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, n.11 (1949), in response to the Defendants' suggestion that sovereign immunity bars Count Three. The Companies' letter seems to suggest that *Larson* might offer a route to the recovery of monetary damages. While *Larson* and the related case *Dugan v. Rank*, 372 U.S. 609, 620-22 (1963), created an exception to sovereign immunity in certain official capacity cases involving federal officers, the Supreme Court has made clear that the so-called *Larson-Dugan* exception does not extend to requests for "monetary relief." *See Clark v. Library of Congress*, 750 F.2d 89, 102-03 (D.C. Cir. 1984) ("these two exceptions are only applicable to suits for specific, non-monetary relief"); *accord, e.g.*, *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (exception applied when complaint sought "only injunctive and declaratory relief"). Accordingly, to the extent that the Companies are attempting to assert Count Three against the Defendants in their official capacities, that count must be dismissed for lack of subject-matter jurisdiction on sovereign immunity grounds. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (sovereign immunity deprives court of subject-matter jurisdiction).

CONCLUSION

The Companies ask this Court to step outside of its limited role in the statutory process and usurp the jurisdiction of the Courts of Appeals to determine whether actions of NLRB officials are consistent with the Act and with the Constitution. Such extraordinary action is hardly justified by the quotidian facts of this case. In light of the foregoing, the first two counts of the Counterclaim should be dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction.

Respectfully submitted,

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