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VIA CM/ECF ONLY

The Honorable Neal P. McCurn
Senior U.S. District Court Judge
Northern District of New York
U.S. Courthouse
100 So. Clinton Street
Syracuse, NY 13261

Re: Healthcare Association of New York State, Inc. *et al.* v. Pataki *et al.*, Index No. 03-CV-0413 (NRM/RFT)

Dear Judge McCurn:

This letter is submitted on behalf of *amici curiae* Chamber of Commerce of the United States, the HR Policy Association, and the Business Council of New York State, Inc., in support of Plaintiffs' objections, as set forth in their letter to the Court dated November 1, 2004, to the Attorney General's submissions and arguments set forth in its Post-Hearing Submission of Exhibits dated October 22, 2004. We join in Plaintiffs' request that, for the reasons stated, the Court should strike from the record the Attorney General's extraneous arguments and submissions. In the alternative, we join in Plaintiffs' request to be provided an opportunity to submit a response if the Court should accept the Attorney General's submissions.

In any event, because the Court did specifically request a copy of the employer's exceptions to the NLRB ALJ's decision in Independence Residences, Inc., NLRB Case No. 29-RC-10030 (hereinafter "IRI"), with the Court's indulgence, we would like to take this opportunity to highlight certain of them. In its exceptions, IRI has asserted that:

- "DeNatale also testified about not using his supervisors, not training them to resist organizing efforts, and generally to being passive and reactive in the pre-election period, all of which would have been reversed in a non-211-a environment. He also testified that since he was not a consultant he wouldn't know all of the things that he could have done, and that he know he couldn't hire a consultant to advise him about things to do to

discourage unionization." Objections Filed by Independence Residences, p. 5 (objection to Page 20, lines 34-39).

- "The Regional Director's and the Board's allowing the election to proceed with the knowledge that IRI's ability to communicate with its employees was seriously restricted by a state law that conflicted with and was preempted by the Act, in derogation of Section 8(c) of the Act and the Section 7 rights of IRI's employees, even as the Board authorized the General Counsel to file an *amicus* brief to challenge a similar state law in California in the Ninth Circuit *Lockyer* case[,] impermissibly interfered with the election process and contributed directly to the conduct of an election in which laboratory conditions were not, and indeed could not have been , maintained . . . ." Objections Filed by Independence Residences, p. 7 (objection to Page 24, Line 44 to Page 25, Line 4).

- "IRI had no choice as to how to run its campaign. With more than 99% of its monies subject to the prohibitions of § 211-a and the Commissioner of Labor not having promulgated any implementing regulations . . .[,] IRI was foreclosed from running an aggressive campaign opposing union organizing activity. As a practical matter, IRI was compelled to run a neutral campaign because more than 99% of its budget comes from monies subject to the prohibitions of § 211-a, and the actual amount of those monies and whether or not there are restrictions on their use is subject to the vagaries of private fundraising, which in one year was barely over $12,000. . . . " Objections Filed by Independence Residences, p. 12 (objection to Page 29, lines 5-34).

- "The manner of campaigning here by IRI was compelled by statute as a practical matter given IRI's nearly complete dependence on public monies . . . , its inability to use supervisors or consultants, and onerous recordkeeping requirements. . . . . It was not the ALJ's responsibility to evaluate IRI's conduct vis a vis § 211-a. Whether IRI's conduct was neutral is irrelevant. Nonetheless, the ALJ's finding that IRI was not neutral in footnote 16 unwittingly makes the Board an instrumentality of New York State and its Attorney General insofar as enforcement of § 211-a, a statute that the ALJ believes is preempted." Objections Filed by Independence Residences, p. 13 (objection to Page 30, lines 3-5, 43-45) (emphasis added).

As is apparent, IRI has vigorously argued that Labor Law § 211-a effectively tied its hands in terms of the campaign it would have conducted in the absence of the provision.

Very truly yours,

Willis J. Goldsmith
Counsel for *Amici* Chamber of Commerce of the United States, the HR Policy Association, and the Business Council of New York State, Inc.

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