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February 7, 2013

BY E-FILING

Chairman Mark Gaston Pearce
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Re: 24 Hour Fitness USA, Inc. and Alton J. Sanders, No. 20-CA-035419,
Supplemental Letter in Support of 24 Hour Fitness USA, Inc.'s Exceptions

Dear Chairman Pearce:

I write on behalf of the Chamber of Commerce of the United States of America (the “Chamber”). The Chamber filed a Motion to File a Brief *Amicus Curiae* in Support of 24 Hour Fitness USA, Inc. (“Motion”) as well as a Brief *Amicus Curiae* in Support of 24 Hour Fitness USA, Inc. (“Brief”) in the above-captioned matter when it was pending before Administrative Law Judge William L. Schmidt. The Chamber seeks to re-file its Brief in support of 24 Hour Fitness USA, Inc.’s (“24 Hour Fitness”) exceptions to Judge Schmidt’s opinion, provide additional support for 24 Hour Fitness’ position, and to request that Board decisions that are no longer valid be stricken from the Acting General Counsel’s Post-Hearing Brief before Judge Schmidt in this matter.

In addition to the reasons set forth in the Chamber’s Brief for finding in favor of 24 Hour Fitness, the Board should find for 24 Hour Fitness based on the United States Court of Appeals for the District of Columbia Circuit’s recent decision in *Noel Canning v. National Labor Relations Board*, No. 12-1115 (filed Jan. 25, 2013). Under *Noel Canning*, it is clear that the Board lacked a quorum when issuing *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), the decision upon which Judge Schmidt’s opinion in the above-captioned matter was nearly exclusively based.

In *Noel Canning*, this Court ruled that *all* intra-session Presidential recess appointments are unconstitutional. Slip op. 30. The majority additionally ruled that inter-session recess appointments can only take place for vacancies that “happen” (i.e., originate) during that same recess. *Id.* at 30-32, 43-44. Because the unconstitutional appointments deprived the Board of the statutorily mandated quorum, the Court concluded that “its decision must be vacated.” *Id.* at 30, 43.

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Noel Canning compels a decision in support of 24 Hour Fitness in the instant case. According to the Board, it issued *D.R. Horton* on January 3, 2012 and it was authored by Members Pearce, Hayes, and Becker, with Member Hayes recusing himself from the decision for unspecified reasons. Under *Noel Canning*, however, Member Becker's recess appointment on March 27, 2010, was unconstitutional both because (1) it occurred intrasession (during the second session of the 111th Congress, see *Congressional Directory for the 112th Congress* 536-38 (Dec. 1, 2011), <http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf>, and (2) it purported to fill a seat on the Board that did not become vacant during the same inter-session recess, but rather, had become vacant years earlier. Thus, the *D.R. Horton* decision is invalid for a lack of quorum because at most, under *Noel Canning*, there were only two properly sitting Board members when the decision was issued on January 3, 2012.

In light of the D.C. Circuit's decision in *Noel Canning*, the Board has been acting since August 27, 2011, without a valid quorum under *New Process Steel, L.P. v. NLRB*, --- U.S. ----, 130 S. Ct. 2635 (2010), and thus any cases decided by the Board after that date are no longer valid. Accordingly, the Chamber also respectfully requests that the following cases decided by the Board after August 27, 2011, that are referenced or cited to in the Acting General Counsel's brief before Judge Schmidt, and any arguments based thereon, be stricken from The General Counsel's Post-Hearing Brief: *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012); *Center For Social Change, Inc.*, 358 NLRB No. 24 (Mar. 29, 2012); *DTG Operations, Inc.*, 357 N.L.R.B. No. 175 (Dec. 30, 2011); *Plaza Healthcare and Rehabilitation, LLC*, No. Case 22-RC-013206, 2011 WL 6950504 (Dec. 31, 2011).

Sincerely,

/s/ Willis J. Goldsmith

Willis J. Goldsmith

cc: Counsel of Record

STATEMENT OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years, and not a party to the within action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. On February 7, 2013, I served the within document:

**SUPPLEMENTAL LETTER IN SUPPORT OF 24 HOUR FITNESS USA, INC.'S
EXCEPTIONS**

- by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is mdavis@jonesday.com.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 7, 2013, at San Francisco, California.

 /s/ Mindy Davis
Mindy Davis