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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

JONATHAN B. KREISBERG, Regional Director of Region
34 of the National Labor Relations Board, for and on behalf
of the **NATIONAL LABOR RELATIONS BOARD**

Petitioner

vs.

**HEALTHBRIDGE MANAGEMENT, LLC; 107 OSBORNE
STREET OPERATING COMPANY II, LLC D/B/A
DANBURY HCC; 710 LONG RIDGE ROAD OPERATING
COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD;
240 CHURCH STREET OPERATING COMPANY II, LLC
D/B/A NEWINGTON HEALTH CARE CENTER; 1 BURR
ROAD OPERATING COMPANY II, LLC D/B/A WESTPORT
HEALTH CARE CENTER; 245 ORANGE AVENUE
OPERATING COMPANY II, LLC D/B/A WEST RIVER
HEALTH CARE CENTER; 341 JORDAN LANE
OPERATING COMPANY II, LLC D/B/A WETHERSFIELD
HEALTH CARE CENTER**

Respondent

CIVIL NO.

Dated: September 7, 2012

**PETITIONER'S MOTION TO TRY 10(J) PETITION ON THE BASIS OF AFFIDAVITS
AND EXHIBITS SUPPLEMENTED BY ORAL ARGUMENT**

The Petitioner moves the court to try the issues in this matter on the basis of the affidavits and exhibits to be submitted shortly, rather than hold a full evidentiary hearing. Thus, trying the case on this basis can both expedite the instant proceeding and conserve the resources of the court and the parties. In this regard, as described in Petitioner's accompanying Memorandum of Law Regarding the Statutory Scheme Pursuant to Which Relief is Sought, Section 10(j) of the Act authorizes United States District Courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. To resolve a 10(j) petition, a district court in the Second Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act, and whether temporary injunctive relief is "just and proper." See, e.g., Kaynard v. MMIC, Inc., 734 F.2d 950, 953 (2d Cir. 1984) and cases cited therein; Kreisberg ex rel. N.L.R.B v. Stamford Plaza Hotel & Conference Center, L.P., --- F.Supp. ---, 2012 WL 996609, D. Conn. March 22, 2012 (NO. 3:12CV104 MRK); Hoffman v. Polycast Technology, Division of Uniroyal Technology Corp., 79 F.3d 331 (2d Cir. 1996).

In light of this statutory scheme, it is well settled that district courts in proceedings under Section 10(j) or 10(l)¹ are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act. See Kaynard v. Mego Corp., 633 F.2d 1026, 1032-1033 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is "reasonable

¹ Section 10(l), [29 U.S.C. Section 160(l)], the companion provision to Section 10(j), mandates the NLRB to seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., Hirsch v. Building and Construction Trades Council, 530 F.2d 298, 302 (3d Cir. 1976).

cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." Kaynard v. Mego Corp., 633 F.2d at 1033, quoting McLeod v. Business Machine and Office Appliance Mechanics Conference Board, 300 F.2d 237, 242 n. 17 (2d Cir. 1962); Hoffman v. Hartford Hospital, 149 LRRM 2248, 2249 (D.Conn. 1995). Accordingly, the district court should not resolve contested factual issues; the Regional Director's version of the facts "should be given the benefit of the doubt" (Seeler v. The Trading Port, Inc., 517 F.2d at 37) and, together with the inferences therefrom, "should be sustained if within the range of rationality" (Kaynard v. Mego Corp., 633 F.2d at 1031).

The district court also should not attempt to resolve issues of credibility of witnesses. Kaynard v. Palby Lingerie, Inc., 625 F.2d at 1051-1052, n. 5. See also Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in the evidence; Respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence); Fuchs v. Jet Spray Corp., 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), *affd.* per curiam 725 F.2d 664 (1st Cir. 1983). In light of the Regional Director's "relatively insubstantial burden of proof",² it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See Gottfried v. Samuel Frankel, 818 F.2d at 493 and 494 [Sec. 10(j)]; San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 [Sec. 10(l)]. See also Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751.

² Kobell v. Suburban Lines, Inc., 731 F.2d at 1084; Levine v. C & W Mining Co., 610 F.2d at 435; Gottfried v. Samuel Frankel, 818 F.2d at 493; Aguayo v. Tomco Carburetor, Inc., 853 F.2d at 748.

In view of the above, the affidavits and other exhibits to be submitted will provide all of the necessary evidence in support of the Petitioner's contention that there is reasonable cause to believe that Respondent violated the Act as alleged in the Petition. See, e.g., Bloedorn v. Francisco Foods, Inc., d/b/a Piggly Wiggly, 276 F.3d 270, 288 (7th Cir. 2001); Silverman v. JRL Food Corp., 196 F.3d 334, 335-337 (2d Cir. 1999); Rivera-Vega v. ConAgra, Inc., 70 F.3d 153, 157 n.3, 161 (1st Cir. 1995); Seeler v. Trading Port, Inc., 517 F.2d 33, 37, n.7 (2d Cir. 1975). Furthermore, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) and 10(l) cases upon evidence presented in the form of affidavits. See Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751; Squillacote v. Graphic Arts International Union, 540 F.2d at 860. Accord: Gottfried v. Samuel Frankel, 818 F.2d at 493 (combination of affidavits and ALJ transcript); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (affidavits); Kennedy v. Teamsters, Local 542, 443 F.2d 627, 630 (9th Cir. 1971) (same); Squillacote v. Automobile, Aerospace & Agricultural Implement Workers, 383 F. Supp. 491, 493 (E.D. Wis. 1974)(same).³

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, Kennedy v. Sheet Metal Workers, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968),⁴ and such procedures do not deny a fair hearing or due process to the Respondent. See Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751; Asseo v. Pan American Grain Co., 805 F.2d at 25-26; Gottfried v. Samuel Frankel, 818 F.2d at 493; Squillacote v. Graphic Arts

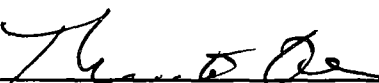
³ See generally F.T.C. v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951); U.S. v. Wilson Williams, Inc., 277 F.2d 535 (2d Cir. 1960); Johnston v. J.P. Stevens & Company, Inc., 341 F.2d 891 (4th Cir. 1965).

⁴ There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546.

International Union, 540 F.2d at 860; Kennedy v. Teamsters, Local 542, 443 F.2d at 630; San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546. Cf. Brock v. Roadway Express, Inc., 481 U.S. 252, 263-264, 107 S. Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

In sum, submission of this Section 10(j) matter based upon the affidavits and other relevant exhibits will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657(a) and the original intent of the 1947 Congress which enacted Section 10(j). See Legislative History LMRA 1947, 414, 433 (Government Printing Office 1985). However, it will likely be necessary for the parties to present evidence on the equitable criteria for injunctive relief element of the case as the affidavits and exhibits may not contain all such evidence. Therefore, Petitioner requests an opportunity to orally argue the overall merits of the petition for equitable relief before this Court.

Dated at Hartford, Connecticut this 7th day of September, 2012.


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