IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and COALITION FOR A DEMOCRATIC WORKPLACE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 11-2262 Judge James E. Boasberg

MEMORANDUM IN OPPOSITION TO DEFENDANT'S
RULE 59(E) MOTION TO ALTER OR AMEND THE JUDGMENT

The Rule 59(e) motion filed by Defendant National Labor Relations Board ("Defendant" or "Board") should be rejected on its face because the Defendant (yet again) raises a new quorum argument and (yet again) presents new evidence to support its new argument. In addition, the Defendant's new legal theory is wholly inconsistent with the affidavit of a member of the Board that it submitted before final judgment was entered in this case. As an initial matter, therefore, Defendant's motion fails to meet the "stringent standard [courts apply] when evaluating Rule 59(e) claims." *Konarski v. Donovan*, No. 10-1733, 2012 WL 1957791, at *2 (D.D.C. May, 31, 2012) (internal quotation marks omitted). The Defendant's new argument and the additional detail about an action of Member Hayes's Deputy Chief Counsel were plainly available throughout these proceedings and could have and should have been raised and presented prior to the entry of final judgment. It is plainly not a basis upon which to seek Rule 59(e) relief.

Even were it acceptable under Rule 59(e) to make a new argument (and present new

evidence) that could have been raised prior to the entry of judgment (which it clearly is not), as explained below Defendant's latest argument and evidence continue to fall short of satisfying the statutory requirement that "three members of the Board shall, at all times, constitute a quorum of the Board." 29 U.S.C. § 153(b).

Indeed, not only are the Defendant's newfound arguments wrong, they expressly and impermissibly seek to contradict evidence the Defendant previously submitted. The Defendant now contends that Member Hayes "deliberately abstained from voting on this rule." Def.'s Mot. 1; *see also, e.g.*, *id.* at 2 ("his choice not to vote the following day was a deliberate *abstention*"). However, in an affidavit submitted by Defendant earlier in this case, Member Hayes expressly stated that after voting on the Board's procedural order "I gave no thought to what further action was required of me." Def.'s Opp., Exh. 1 at ¶ 11 (Dkt. 29-1) ("Hayes Decl."). Indeed, as Member Hayes's declaration makes clear, the Board's failure to satisfy the quorum requirement stems from the fact that in its haste to promulgate a final rule it simply failed to follow normal procedures:

> *In situations where a particular Board member has not voted and immediate action is desired, the Executive Secretary or Solicitor may convey, by phone or e-mail, a request to act*. After I voted against the procedural Order on December 15 and indicated that I would not attach a personal statement to the Final Rule, I gave no thought to whether further action was required of me. *I was not asked by email or phone to record a final vote in JCMS before or after the Final Rule was modified.* . . . In retrospect, I believe my colleagues viewed their approval of the procedural Order of December 15 providing for subsequent issuance of personal statements as obviating the need for any further action by me.

Hayes Decl. ¶ 11 (emphases added); *see also* Mem. Op. 6-7 (extensively quoting Hayes Decl.). As this Court correctly found: "Hayes himself has averred that he neglected to vote on the final rule *not out of an intent to abstain* or to block the rule's promulgation, but rather *because he did not realize that his further participation was required*. *See* Hayes Decl., ¶ 11." Mem. Op. 17

(Dkt. 40) (emphases added).

Accordingly, for the reasons discussed more fully herein, Plaintiffs Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace (the "CDW") respectfully request the Court deny Defendant's Rule 59(e) motion.

BACKGROUND

The Defendant's bob-and-weave attempts to satisfy the three-member quorum requirement started early in this litigation. As this Court noted in its Memorandum Opinion, the Board issued the Final Rule concluding that one member, Member Hayes, had "effectively indicated his opposition." Mem. Op. 1-2 (Dkt. 40) (referring to 76 Fed. Reg. 80,138, 80,146 (December 22, 2011)). Because it appeared on the face of the rule that the Board failed to meet the National Labor Relations Act's quorum requirement, counsel for the Plaintiffs, on January 13, 2012, met with the Defendant's counsel to discuss what seemed to be a lack of any evidence in the record that the Board had satisfied the quorum requirement when it issued the Final Rule. Pls.' Ext. Mot. 1-2 (Dkt. 15).[1]

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[1] As explained to the Court in the January 30, 2012 request for a three-day extension:

> At this meeting, counsel for Plaintiffs pointed out that, absent circumstances that do not appear present here, the National Labor Relations Act, 29 U.S.C. §§ 151-169, expressly requires a quorum of three members to participate in a decision for the Board to conduct its business . . . . Counsel for the Plaintiffs requested counsel for the Board to provide any portion of the administrative record that might affect the application of the quorum provision. *See* Kerr Declaration. Specifically, counsel for Plaintiffs requested any evidence that the Board had delegated its authority, which creates an exception to the three-member quorum requirement, or any evidence that Mr. Hayes voted *or otherwise participated in issuing the Final Rule*. *Id.*

Pls.' Ext. Mot. 2 (emphasis added); *see also* Pls.' Ext. Mot., Exh. 1 (Kerr Decl.) at ¶ 6 (Dkt. 15-1) ("Counsel for the Plaintiffs specifically asked . . . counsel for the Board to share as soon as possible any evidence that Mr. Hayes in fact voted or *participated in issuing the final rule*." (emphasis added)).

In response to this indication in the administrative record that Chairman Pearce and then-Member Becker acted without the required quorum, shortly before summary judgment motions were due the Defendant produced its first pieces of new evidence—a December 15, 2011 procedural order and a supporting affidavit by the Executive Secretary dated January 30, 2012. The Defendant then argued in its Summary Judgment motion that Member Hayes participated in approving the Final Rule by voting on two procedural actions related to drafting the Final Rule. Def.'s S.J. Mot. 42 & Exhs. 3-4 (Dkt. 21).

Plaintiffs specifically argued in their motion for summary judgment that voting on the procedural order was not the same as voting on the Final Rule and thus "Two Members Of The Board Issued The Final Rule Without The Statutorily Required *Participation* By Three Members." Pls.' S.J. Mot. 8 (Dkt. 22) (emphasis added); *see also, e.g.*, *id.* at 12 (arguing that "three members *must participate* . . ."). Indeed, in its conclusion to this argument, Plaintiffs specifically noted that: "In closing, only two members *participated* in the vote to approve (or not) the Final Rule." *Id.* at 15 (emphasis added).

Shortly before the parties' oppositions were due, Defendant again produced new evidence—an affidavit signed by Member Hayes—and argued in its opposition brief that it was not necessary for Hayes to participate in approving the Final Rule because the quorum requirement was satisfied by his "*mere presence*" on the Board. Def.'s Opp. 3 & Exh. 1 (Dkt. 29); *see also id.* at 2 (describing Plaintiffs' summary judgment argument as "claiming that only two members '*participated*' in this rulemaking" (emphasis added)).

Because Defendant had again raised a new argument in its opposition, Plaintiffs sought the Defendant's consent and the leave of the Court to file a short reply to address the Defendant's new quorum arguments. In that reply, Plaintiffs specifically argued:

> Member Hayes took no action. Hayes Decl. ¶ 11. He did not enter a vote either to approve or to note the Final Rule. *Id.* And he was not asked to record a final vote. *Id.* He was completely absent from the notation voting procedure. *This complete lack of purposeful action by member Hayes in the official vote to approve the Final Rule is akin to an absent voter*, either not present at the meeting or not participating in any meaningful, purposeful way. . . . The Board's suggestion that Member Hayes was like a participant in a formal meeting who abstained from voting, therefore, is an inapt analogy. There is no basis for suggesting that Member Hayes purposefully "abstained" from voting. Indeed, he stated that "he gave no thought to whether further action was required." Hayes Decl. ¶ 11.

Pls.' Reply 4 (Dkt. 33-1). Although the rule was not slated to go into effect for over a month (and this Court's ruling would not issue for nearly two more months), the Defendant did not request or in any way attempt to file a reply of its own.

In its opinion, the Court granted summary judgment in favor of Plaintiffs and rejected the arguments that the Defendant made: "Member Hayes cannot be counted toward the quorum merely because he held office, and his participation in earlier decisions related to the drafting of the rule does not suffice. He need not necessarily have voted, but he had to at least show up." Mem. Op. 2 (Dkt. 40).

Now the Defendant, for the third time, seeks to introduce new evidence (which has been available to the Defendant throughout this litigation)—this time an affidavit from the Chief Information Officer dated June 11, 2012—and present a new argument on how the quorum requirement was purportedly satisfied. Def.'s Mot. 1, 7 (Dkt. 41). The Defendant now argues that Member Hayes was not "merely present" on the Board, but that in actual fact he "showed up" and "*deliberately chose* not to cast a vote." *Id*. In other words, Defendant now argues that Member Hayes purposefully and intentionally abstained.

Defendant's request for the Court to reconsider its final judgment in this case, based on this new argument and its new evidence—which was available prior to the entry of the judgment and contradicts evidence previously submitted—should be rejected. As set forth below, this

attempt to take a third bite at the apple, after a final judgment has been entered, is not allowed under Rule 59(e). Moreover, it is inconsistent with the earlier evidence that the Defendant submitted to this Court. And it is also simply wrong. Accordingly, the Defendant's motion should be rejected.

ARGUMENT

A. THE DEFENDANT HAS FAILED TO SATISFY THE STANDARDS FOR RULE 59(E).

"[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 2012). "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); *see also, e.g.*, *Nat'l Ctr. for Mfg. Sciences v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000) ("[A] district court should not grant a motion for reconsideration unless the moving party shows new facts or clear errors of law which compel the court to change its prior position."); *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004) ("Nor do we find any abuse of discretion in the district court's refusal to vacate its judgment based on their allegedly valid ACAA claim as this argument was available to them earlier.").

Courts have universally stressed that "Rule 59 requires that the factual matter at issue in the motion previously have been unavailable." *Lostumbo v. Bethlehem Steel, Inc.*, 8 F.3d 569, 570 (7th Cir. 1993). A "Rule 59(e) motion cannot be used to raise arguments which could, and should, have been made before the trial court entered final judgment." *Garner v. Arvin Indus. Inc.*, 77 F.3d 255, 258 (8th Cir. 1996) (citation omitted); *see also, e.g.*, *Artis v. Bernanke*, 256 F.R.D. 4, 5-6 (D.D.C. 2009) (statements that could have been presented earlier are not "new

evidence" under Rule 59(e)); *City of Moundridge v. Exxon Mobil Corp.*, 244 F.R.D. 10, 13 (D.D.C. 2007) (rejecting Rule 59(e) motion premised on evidence in affidavit available prior to the court's judgment); *Fund For Animals v. Norton*, 326 F. Supp. 2d 124, 126 (D.D.C. 2004) (same); *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001) (same); *Independent Petro. Ass'n of Am. v. Babbit*, 178 F.R.D. 323, 324 (D.D.C. 1998) (same).

Clearly, the Defendant could have argued that Member Hayes purposefully abstained (and presented the additional detail about an action of Member Hayes's Deputy Chief Counsel) prior to the entry of summary judgment. The Defendant does not, and cannot, claim that it is presenting newly discovered evidence. The only explanation the Defendant gives for not raising the argument before now—"In light of the Chamber's apparent position that Member Hayes had abstained, the Board did not have cause to burden the record with evidence about the Board's electronic voting room," Def.'s Mot. 3—simply does not satisfy the standard for Rule 59(e). The Defendant's argument that it did not have a basis to present its evidence because of Plaintiffs' "apparent position" in their opening brief is fatally flawed for at least three reasons.[2]

First, the alleged "apparent position" of Plaintiffs in their opening brief did not *prevent* the Defendant from introducing all the evidence it had relating to the vote on the Final Rule and making all the arguments it could to try to demonstrate how the quorum requirement was met. As explained above, Plaintiffs informed the Defendant in advance that it would be making a

[2] For the same reasons, there is no manifest injustice to correct based on the "new" affidavit, as any alleged injustice "might have been avoided through the exercise of due diligence" on the part of the Defendant. *Fox*, 389 F.3d at 1296. The failure of the Defendant to submit its "new" evidence and make its third quorum argument is even less justified than appellants' failure to respond to the motion to dismiss in *Fox*. In *Fox*, counsel for appellants failed to receive electronic notice of the motion to dismiss, but in the present case, the Defendant was on notice of Plaintiffs' quorum argument before summary judgment was even filed. Simply stated, "manifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered." *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) (internal quotation marks and brackets omitted); *see also id.* ("By failing to advise the court in a timely fashion – i.e., before the court ruled on the motion to dismiss – that there was a limitations problem and that he was prepared to further shorten his complaint, Ciralsky forfeited any claim to an abuse of discretion.").

quorum argument in its opening brief and specifically requested the Defendant to provide any evidence demonstrating that a quorum had issued the Final Rule and that Member Hayes had "voted or otherwise participated in issuing the final rule." *Supra* 3 n.1. The Defendant, therefore, could have made an argument that Member Hayes purposefully abstained in its opening brief and presented all relevant evidence regarding the vote on the Final Rule. The Defendant chose not to. Instead, the Defendant made a strategic decision to pursue its argument that Member Hayes's participation in preliminary procedural votes was enough to satisfy the quorum argument.

With regard to the Defendant's opposition, even if Plaintiffs had taken the "apparent position" that Member Hayes abstained in its opening brief (which they plainly did not), the Defendant could have presented its new evidence in an attempt to bolster this point and make the abstention argument it is now making. The Defendant chose instead to make its "mere presence" argument. Regardless of what motivated the Defendant to select the ligation strategy it chose, including what evidence to present and what to withhold, it was nonetheless clearly the Defendant's choice. The Defendant could have raised its purposeful abstention argument and could have presented its voting system evidence prior to the entry of final judgment. The Defendant, therefore, has clearly failed to satisfy the standard for the extraordinary remedy of reconsideration. *See, e.g.*, *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 198 (4th Cir. 2006) ("[The] proffered justifications for not presenting [an affidavit] sooner were strategic decision[s] for which the [party] bears responsibility." (internal quotation marks omitted)); *City of Moundridge*, 244 F.R.D. at 13 (denying motion for reconsideration where post-judgment affidavit did not contain "previously unavailable new evidence").

Second, the Defendant's characterization of the "apparent position" of Plaintiffs in their

opening brief is specious at best. The Plaintiffs' position in their opening brief was clearly and simply that Member Hayes had not participated in the vote to issue the Final Rule. Pls.' S.J. Mot. 13-15; *id.* at 15 ("In closing, only two members participated in the vote to approve (or not) the Final Rule."); *supra* p. 4-5. The administrative record, of course, indicated that Member Hayes did *not participate* in the vote. Plaintiffs did not have enough information to surmise why Member Hayes did not participate in the vote. Indeed, this question was in part the motivation for meeting with the Defendant's counsel in January 2012 before the Plaintiffs filed for summary judgment. Instead of addressing why Member Hayes did not participate in the vote, however, the Defendant presented alleged evidence regarding procedural votes and argued that this was sufficient to satisfy the quorum requirement. Plaintiffs, therefore, without knowing or venturing a guess as to why he did not participate in the vote, based their argument simply on the fact that Member Hayes did not participate. And Plaintiffs' citation to *Greater Boston* in a footnote clearly did not amount to taking a position that Member Hayes had abstained. After all, the citation to *Greater Boston* (and *Sprint Nextel*) were not related to why the commissioners were not counted towards the quorum in those cases, but rather for the proposition that "[a]pproving the Final Rule is a collective act by the Board and thus requires a decision by a congressionally mandated quorum." Pls.' S.J. Mot. 13-14 n.6. To the extent the Defendant regrets reading too much into this single citation in a footnote, this nonetheless does not warrant the extraordinary remedy of reopening a final judgment.

Third, the Defendant, who now claims that Plaintiffs' reply contradicts Plaintiffs' "apparent position" in their opening brief (Def.'s Mot. 3-4), could have, on that basis, sought leave to file a reply itself. The Defendant should not be able now to second guess its decision

not to do so.[3] The Defendant had ample opportunities to make the abstention argument and present evidence about its voting system prior to the entry of final judgment and chose not to. It has clearly failed to satisfy the standards to seek reconsideration of a judgment under Rule 59(e) and the motion should be denied.[4]

B. THE DEFENDANT'S NEW THEORY AND EVIDENCE FAILS TO DEMONSTRATE IT SATISFIED THE STATUTORY QUORUM REQUIREMENT.

Even if the Court were to consider the new—but not newly discovered—evidence and new abstention argument despite the Defendant's failure to satisfy the Rule 59(e) standard, its new evidence and argument falls short of satisfying the quorum requirement. There simply is no evidence that Member Hayes, as the Defendant now argues, "*deliberately chose* not to cast a vote." Def's Mot.7. The Defendant's latest efforts to relegate "a fundamental constraint on the exercise of the Board's power to an 'easily surmounted technical obstacle,'" Mem. Op. 17 (quoting *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2644 (2010)), must be rejected as the arguments fail for at least three independent reasons (in addition to the analysis in the Court's final judgment).

First, as set forth above, according to Member Hayes, on the day of the vote he "gave no

[3] The Defendant asserts that "[t]he Court relied exclusively upon the argument the Chamber presented on March 22, that Member Hayes was 'completely absent.'" Def.'s Mot. 4. However, it appears that the cornerstone of the Court's decision was that, according to the Board itself, Member Hayes had "effectively indicated his opposition." Mem. Op. 1-2 (Dkt. 40). As set forth above, Plaintiffs stressed this point to the Defendant when the parties met at the outset of the case and continued to make the point throughout the briefing process. The Defendant's attempt now to say it was somehow surprised at the end of the briefing is clearly baseless.

[4] Additionally, as described above, *supra* p. 2, and as discussed in more detail below, *infra* p. 10-11, the Defendant's new argument that Member Hayes "deliberately abstained from voting on this rule", Def.'s Mot. 1, is expressly contradicted by the affidavit the Defendant earlier submitted to this Court with its Opposition Brief and which the Court cited throughout its opinion, that "[he] gave no thought to whether further action was required of [him]." Mem. Op. 6-7, 15 (quoting Hayes affidavit). Plainly Rule 59(e) cannot be used to submit evidence or argument that contradicts evidence or arguments previously advanced by the party. *Cf. Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ("Ordinarily Rule 59 motions for either a new trial or a rehearing [which are analogous to a Rule 59(e) motions] are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings." (citation omitted)).

thought to whether further action was required of [him]." Hayes Decl. ¶ 11. Giving no thought on whether further action is necessary is simply not the same as deliberately choosing not to cast a vote. As Plaintiffs stated in their reply, "[f]ailing to participate is clearly not the same as determinably refraining from voting on the final decision. Only the latter is an abstention; the former is simply an absent voter." Pls.' Reply 4-5 (footnote omitted). Member Hayes also stated that he "was not asked by email or phone to record a final vote in JCMS *before or after* the Final Rule was modified, approved by Chairman Pearce and Member Becker, and forwarded by the Solicitor for publication on December 16." Hayes Decl. ¶ 11 (emphasis added). Thus, contrary to the Defendant's newfound argument, Member Hayes never affirmatively refused to vote.[5] (In addition, the Final Rule did not record Member Hayes as an abstention or otherwise note that he was abstaining, but instead the final rule stated that Member Hayes "effectively" voted against the rule.)

Second, to try to support its contention that Member Hayes "deliberately abstained," the Defendant provides supposedly "new" evidence that after Chairman Pearce and Member Becker voted, "Member Hayes' Deputy Chief Counsel opened th[e] task." Def's Mot., Exh. 1 ¶ 31 ("Burnett Aff.). As an initial matter, the fact that Member Hayes's Deputy Chief Counsel

[5] The Court itself acknowledged this basic fact in its opinion:

> The NLRB further protests that here is no basis "for indefinitely postponing adoption of the final rule and for, in essence, permitting one Member to exercise what would amount to a minority veto over a proper exercise of the Board's rulemaking authority." Final Rule, 76 Fed. Reg. at 80,147. There is no suggestion, however, that this is what happened here. Indeed, Hayes himself has averred that he neglected to vote on the final rule not out of an intent to abstain or to block the rule's promulgation, but rather because he did not realize that his further participation was required.

Mem. Op. 17 (Dkt. 40).

"opened the task" does not demonstrate that *Member Hayes* "showed up." Member Hayes did not "open the task" himself and there is no evidence that he gave any instructions to his Deputy Chief Counsel to vote or otherwise act on this particular matter. Indeed, there is no evidence that Member Hayes even knew his Deputy Chief Counsel had "opened th[e] task." To the contrary, Member Hayes's affidavit indicates that he was totally unaware, as this Court noted in its opinion, that further action was required. Mem. Op. 17 (noting that Member Hayes stated that he failed to participate "because he did not realize his further participation was required"). The Defendant's evidence simply does not demonstrate that Member Hayes "deliberately chose not to cast a vote" or otherwise "showed up."

Even if merely opening a task in an electronic voting room could be considered "participation" (which as explained below it cannot), it was the Deputy Chief Counsel, not Member Hayes himself, that opened the JCMS task – at a minimum the Member himself has to have opened the task. As this Court explained in its opinion, the question in this case is:

> [W]hat does it mean to be present or to participate in a decision that takes place across wires? In other words, how does one draw the line between a present but abstaining voter (who may be counted toward a quorum) and an absent voter (who may not be) when the voting is done electronically? . . . [T]he translation of that physicality-based concept to the JCMS process . . . is not obvious.

Mem. Op. 13-14. Regardless of where courts will ultimately draw that line, it must be that the member him or herself participate, not some staff member.[6]

For example, as this Court explained in discussing *United States v. Ballin*, 144 U.S. 1, 5-6 (1892): "Although the members of the House need not have taken any action *after* they

[6] The Defendant's argument otherwise impermissibly seeks to convert the quorum requirement into nothing more than a membership requirement. *See generally* Mem. Op. 15 ("Something more than mere membership is necessary."); *New Process Steel*, 130 S. Ct. at 2642 ("A quorum is the number of members of a larger body that must participate for the valid transaction of business.").

showed up for the vote, the NLRB's argument only confirms that *they needed to actually be there in the first place*." Mem. Op. 16 (second emphasis added). Of course, it goes without saying that a House Member's Chief of Staff could not go to the House floor in a physical vote setting and be counted as part of the quorum. That, however, is exactly what the Defendant is now arguing: "The facts show that here, as in *Ballin*, Member Hayes was in the room when the vote was held." Def.'s Mot. 4. Rather, the newly alleged facts show at most that the Deputy Chief Counsel was in the room, not the member himself. Similarly, the Wisconsin state police could not have arrested a Democratic Senator's staff member in order to drag the staff member back to the capitol to be counted toward the necessary quorum. *See* Monica Davey, *Wisconsin Bill in Limbo as G.O.P. Seeks Quorum*, N.Y. Times, A14 (Feb. 18, 2011) (cited in Mem. Op. 17).[7] So too, if Congress' quorum requirement in the NLRA is to retain any meaning whatsoever in the digital age we are now in, something more than a staff member "open[ing] th[e] task" in the JCMS is required. And, of course, as the evidence the Defendant submitted earlier in this case makes clear, Member Hayes did not even know he was supposed to vote.

Defendant itself recognizes the distinction between a member and his or her staff: "Member Hayes *directed* eighteen votes to be cast in the room on the 16th while this rule was pending." Def.'s Mot. 5 (emphasis added). With respect to this rule, of course, the Defendant's previously submitted evidence, cited repeatedly and correctly by this Court, was that Member

[7] History is replete with examples at the federal and state level of efforts to force *members* to the Chamber floor to establish a quorum. For example:

> [T]he Senate occasionally directed its sergeant at arms to arrest members. But the first openly physical act of compulsion did not occur until 1988. On February 24, 1988, in an attempt to establish a quorum on a campaign finance reform bill, Capitol police carried Oregon Republican Senator Robert Packwood into the chamber feet first at 1:17 a.m.

http://www.senate.gov/artandhistory/history/minute/Quorum_busting.htm (last visited June 22, 2012). Translating this concept to an electronic voting system requires at a minimum some effort to compel the member into the voting room.

Hayes had no idea he was even asked to vote on the rule on the 16th (or at any point before or after). Hayes Decl. ¶ 11; Mem. Op., 17.[8] However neutered the Defendant would like to make the quorum requirement in an online voting scheme, at a minimum the member must know and be specifically asked to cast a vote and decline to do so. Even the Defendant concedes as much, mightily struggling to argue, despite the undisputed evidence to the contrary, that Member Hayes "deliberate[ly] *abstained*." Def.'s Mot. 2; *see also id.* at 1, 7. Even the definition the Defendant provides of "abstain," from Black's Law Dictionary, makes clear that a voter cannot unknowingly abstain: "[t]o *voluntarily* refrain from doing something." Def.'s Mot. 7 (quoting Black's) (emphasis added). Here of course, Member Hayes himself stated he did not even know that he was supposed to vote, probably because Chairman Pearce and then-Member Becker incorrectly believed the December 15 procedural Order was the relevant final agency action and because the Board itself failed to follow its own normal procedure of having the "Executive Secretary or Solicitor . . . convey . . . a request to act."

Third, even if it had been Member Hayes himself who merely opened the task (which it was not), the Defendant's new evidence does not demonstrate that his Deputy Chief Counsel "opened the task" before the rule was sent to the Federal Register. According to the Defendant's new evidence, Member Hayes' Deputy Chief Counsel "opened the task" over 30 minutes after Member Becker voted to approve the modified version of the draft final rule. Burnett Aff. ¶¶ 28-31. According to the December 15, 2011 Order, however, which the Defendant submitted with its motion for summary judgment, the solicitor was instructed to submit the Final Rule for

[8] Even the latest affidavit submitted by the Defendant describes opening a task by a staff member as the "ministerial function of logging in to the electronic room [and] monitoring events." Burnett Aff. ¶ 8. This is essentially the equivalent of a U.S. Senator having a staff member stationed on or near the floor of the Senate in order to notify the Senator when she must come to the floor to cast a vote. But to be counted in the quorum, the staff member must notify the Senator of the vote and the Senator must either go to the floor to vote or be compelled to the floor to vote. Here, this simply failed to happen.

publication "*immediately* upon the approval . . . by a majority of the Board." Def.'s S.J. Mot., Exh. 3 (emphasis added). Although allegedly only a few minutes, under the evidence submitted by the Defendant, the Final Rule had already been submitted when Member Hayes' staff "opened th[e] task."[9]

In sum, the Defendant's latest attempts to circumvent the quorum requirement are as equally unavailing as their prior attempts. As this Court found, Member Hayes clearly was an absent voter, not an abstaining voter. The most that can be said of the "new" evidence and

[9] Defendant also criticizes the Court for noting that Member Hayes had only "a matter of hours" to vote before it was "forwarded for publication," and note that the rules governing the Federal Register permit agencies under certain circumstances to withdraw rules previously submitted for publication. Def.'s Mot. 7, n.4. For at least three independent reasons, the Defendant's argument is of no moment.

First, as Member Hayes's Affidavit makes plain, he was not asked to vote even after the rule was sent for publication. Hayes' Decl. ¶ 11. As this Court explained: "When no vote or other response was received from Hayes, no one requested that he provide one, per the agency's usual practice." Mem. Op. 14 (citing Hayes Decl. ¶ 11). Thus, even if the vote was open for many months, it would not help the Defendant's argument that Member Hayes "deliberately abstained" or otherwise show he somehow participated in the vote.

Second, what matters, as the D.C. Circuit has held, is whether the agency had authority at the time the action was taken – here, adoption of the final rule on December 16. For example, in *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453 (D.C. Cir. 1967), cited by both the parties and the Court, the D.C. Circuit rejected the argument that because an order was served after a member had left office the decision was invalid. As the D.C. Circuit unambiguously held: "In our view it is plain that once all members have voted for an award and caused it to be issued the order is not nullified because of incapacity, intervening before the ministerial act of service, of a member needed for a quorum." *Id.* at 459. The D.C. Circuit reached this holding despite the fact that under the C.A.B.'s rules (similar to the Federal Register's rules cited by the Defendant) "each Member has retained full power to revise or reverse his vote" until the decision was "served." *Id.* Indeed, every four or eight years, the January 21 Federal Register is filled with Final Rules adopted by the outgoing administration but not published until after the adopting officials' terms in office have ended. Even the NLRB routinely follows this practice, issuing decisions that were adopted with a purported quorum, but which are not issued to the public until after a necessary member of the quorum's term has ended. Thus, the Board released opinions in which Member Becker was supposedly part of a quorum *after* Member Becker's term expired on January 3, 2012 but that were adopted while he was still a member. *See, e.g., D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) (released on January 6, 2012).

Third, under the Administrative Procedure Act, an agency action is final when "an agency has consummated the rule-making process and taken steps that alter or fix legal rights and obligations." *America Farm Bureau v. EPA*, 121 F.Supp.2d 84, 105 (D.D.C. 2000). On December 16, apparently sometime shortly after noon, the Final Rule was "[s]igned in Washington, DC," 76 Fed. Reg. at 80,189, and, according to the December 15 Order, "immediately" submitted for publication. Clearly, at that time, the rule-making process was complete. This is not changed by the fact that the Final Rule had not yet been published or that the Board could have (acting with an appropriate quorum) taken *further agency action* to halt its publication. *See American Farm Bureau*, 121 F.Supp.2d at 105 ("While it is true that publication in the C.F.R., the fact that agency continues to take comments on the policy, and the agency's own characterization of the policy are all important factors for the court to consider in determining whether an agency has consummated the rule-making process and taken steps that alter or fix legal rights and obligations, none of these factors is dispositive.").

argument is that Member Hayes' Deputy Chief Counsel "showed up" (and even that point is not correct). And, the Defendant's belated arguments are not only incorrect, they impermissibly seek "to degrade the quorum requirement from a fundamental constraint on the exercise of the Board's power to an 'easily surmounted obstacle[] of little to no import.' *New Process Steel*, 130 S.Ct. at 2644." Mem. Op. 17 (Dkt. 40).

C. GRANTING THE DEFENDANT'S MOTION WOULD REQUIRE ENTRY OF A NEW JUDGMENT ON ALL SUBSTANTIVE ARGUMENTS RAISED BY PLAINTIFFS.

Finally, if the Court were inclined to reconsider its final judgment on the basis of the Defendant's newfound argument and allegedly "new" evidence, the Defendant's motion calls for the Court to scrap its prior opinion without having prepared a new, final judgment. Specifically, the Defendant requests that the Court "vacate its prior decision" and immediately return to the pre-decision status quo that would "permit[] the rule to go back into effect pending the resolution of the remaining issues in this litigation." Def.'s Mot. 14. Rule 59(e) specifically contemplates that if the Court grants a Rule 59(e) motion, it should enter a new judgment to replace the prior one (and not simply discard the existing judgment and restore the pre-judgment status quo while the Court prepares a completely new opinion). Under Rule 59(e), "[w]hen a trial court grants a motion to alter or amend a judgment, and the alteration or amendment is substantive, *a new judgment results*." 12 James Wm. Moore et al., Moore's Federal Practice ¶ 59.35 (3d ed. 2012) (emphasis added), *id.* ¶ 59.37 (same); *see also id.* ¶ 59.52 ("An order granting the alteration or amendment of a judgment constitutes a new judgment that may be the subject of an appeal."). Defendant thus impermissibly asks that the Court to grant its Rule 59(e) motion on an interim basis without the Court issuing a new decision on the parties' full summary judgment motions. This request should be rejected. *See, e.g.*, *Housing Auth. of the Cnty. of King v. Pierce*, 711 F.

Supp. 19, 24 (D.D.C. 1989) (granting party's Rule 59(e) motion and simultaneously replacing prior judgment with new judgment on the parties' motions for summary judgment).

Moreover, the Defendant's assertion that the Court should separate its Rule 59(e) motion decision from the ultimate issuance of a new judgment is premised on the faulty notion that the Board or general public is suffering "irreparable harm" under the election rules currently in effect. According to the Defendant's motion, "[e]very day that has passed since May 14th [] employees and the Board have been irreparably harmed, contrary to this clear Congressional purpose, because they have not been able to use the representation procedure which the Board has definitely determined is best." Def.'s Mot. 13. The Defendant, however, has given no basis—and Plaintiffs are not aware of any—to support its proposition that as a governmental agency, the Board is suffering "irreparable harm" because its rule has been set aside.[10] In addition, the Defendant's emphasis that each and every day after May 14 triggers irreparable harm should fall on deaf ears given that the Defendant took the maximum 28-day period to file its Rule 59(e) motion (based on evidence it had in its possession since the beginning of the case) following the Court's judgment. In fact, it is plain that the Defendant's lawyers knew Plaintiffs intended to challenge the quorum argument even before initial summary judgment motions were filed. *See supra* 3 n.1 (quoting Pls.' Ext. Mot. 3) ("Plaintiffs requested [on January 30, 2012] . . . any evidence that Mr. Hayes voted *or otherwise participated in issuing the Final Rule*" (emphasis added)). And, even the Defendant concedes that it was aware of the argument on March 22 nearly two months *before* this Court issued its opinion. Thus, the Defendant's arguments do not provide a basis for the Court to vacate the entire opinion and reinstitute the

[10] Defendant's suggestion that it (and the public) were "irreparably harmed" when the Final Rule was enjoined (Def.'s Mot. 12) also is belied by the fact that the prior election rules, which are now again in effect, have been in effect for decades.

election rules pending a new, final judgment.

Notably, the lack of the statutorily required quorum is not the only issue that need be addressed if the Defendant's Rule 59(e) motion were granted and a new judgment prepared by the Court. As set forth in Plaintiffs' summary judgment filings, the Final Rule is inconsistent with the National Labor Relations Act and the Administrative Procedure Act in numerous other respects. The summary judgment motions involve substantial legal arguments that were not addressed by the Court because the Defendant lacked a quorum when Chairman Pearce and then-Member Becker adopted the rule. These other substantive arguments raised by the Plaintiffs would have to be decided if Defendant's Rule 59(e) motion is granted.

Although the Defendant's latest submission provides no basis to overturn or otherwise amend the Court's judgment, even if the Court were so inclined to reverse itself on the quorum issue there is simply no reason the Court should reward the Defendant's litigation tactics to reinstate the fatally invalid rule while it decides the numerous other legal challenges to the rule. Any delay is clearly the Defendant's fault as Plaintiffs here took the extraordinary step of having their counsel meet with the Defendant's lawyers before the initial summary judgment motions in an effort to avoid needless litigation and to conserve the parties' and the Court's resources.[11]

CONCLUSION

As this Court aptly noted in its opinion: "[a]s the Supreme Court has emphasized, the quorum requirement is not a mere 'technical obstacle[]' an agency may contrive to avoid. *See New Process Steel*, 130 S. Ct. at 2644." Mem. Op. 11. Defendant's latest attempt to "contrive to avoid" the quorum requirement should be rejected by this Court. The Rule 59(e) Motion to Alter

[11] Contrary to the Defendant's arguments, it is the Defendant who must meet the demanding test for extraordinary relief under Rule 59(e). Def.'s Mot. 10. This is not a motion for preliminary injunctive relief but rather a flawed request to this Court to amend its final judgment.

or Amend the Judgment fails to satisfy the standard for the extraordinary remedy of reconsidering a final judgment and, even if it did, fails to demonstrate that the Board satisfied the quorum requirement under the NLRA. Plaintiffs therefore respectfully request that the Court deny the Defendant's motion.

Dated: June 27, 2012

Respectfully submitted,

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