United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

June 10, 2013

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

RE: *D.R. Horton, Inc.* v. *NLRB*, No. 12-60031

Dear Mr. Cayce:

Per Rule 28(j), we respond to D.R. Horton's invocation of *NLRB v. New Vista Nursing and Rehabilitation*, 2013 WL 2099742 (3d Cir. May 16, 2013). *New Vista* held that challenges to the validity of an NLRB panel member's appointment are "jurisdictional" in the sense that courts are required to consider such objections, even if untimely. *Id.* at *3-6. It also limited the Recess Appointments Clause to intersession recesses. *Id.* at *11-30. Judge Greenaway dissented on both grounds. *Id.* at *30-52 & n.3.

New Vista's jurisdictional holding is wrong,[1] as this type of administrative review case does not implicate the rule that an appellate court must *sua sponte* consider the jurisdiction of a "lower court[]," *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). That rule derives from courts' special duty to police the limits of federal judicial power in a system where jurisdiction overlaps with state courts, *see, e.g.*, *id.*; *Mansfield C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 384 (1884); Wright et al., *Federal Practice & Procedure* § 3522 (2013), a concern not implicated when the only question is whether an administrative agency exceeded its authority.

---

[1] Its merits holding is also wrong, but in light of this Court's February 8th Order directing the parties to refrain from merits briefing at this juncture, we do not address the issue further.

Moreover, just a few days after *New Vista* was decided, the Supreme Court rejected the "reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts." *City of Arlington v. FCC*, 2013 WL 2149789, at *5 (May 20, 2013). *New Vista* committed that error and should not be followed.

Finally, *New Vista*'s suggestion that the NLRA's quorum or panel composition requirement is "jurisdictional" in the sense that it triggers mandatory *sua sponte* divestment of jurisdiction of an Article III court cannot be squared with the Supreme Court's "bright line" test that requires a "clear statement" by Congress to establish that a requirement is jurisdictional. *Auburn Reg. Med. Ctr.*, 133 S. Ct. 817, 824 (2013). 29 U.S.C. 153(b) sets forth the Board's quorum and delegation authority, and it neither refers to "jurisdiction" nor indicates that Congress intended the severe consequences that attach to that label, including restrictions on judicial review.

Respectfully submitted,

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th St. NW
Washington, DC 20570
(202) 273-2960