

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

FDRLST MEDIA, LLC,
Respondent

-and-

JOEL FLEMING
Charging Party

Case No. 02-CA-243109

**RESPONDENT FDRLST MEDIA, LLC'S
EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION
(ORAL ARGUMENT REQUESTED, 29 C.F.R. § 102.46(g))**

June 19, 2020

Aditya Dynar
Kara Rollins
Jared McClain
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Adi.Dynar@NCLA.legal
Kara.Rollins@NCLA.legal
Jared.McClain@NCLA.legal
Attorneys for Respondent, FDRLST Media, LLC

Respondent, FDRLST Media, LLC (FDRLST or Respondent), respectfully submits the following exceptions to the April 22, 2020 Decision issued by Administrative Law Judge (ALJ) Kenneth W. Chu. The Respondent submits these exceptions pursuant to 29 C.F.R. § 102.46.

On May 8, 2020 the National Labor Relations Board's (NLRB or Board) Office of Executive Secretary extended the time to file these exceptions and the accompanying brief in support to and including June 19, 2020. Respondent's Exceptions and Brief in Support are, therefore, timely filed.

Respondent requests that the Board schedule oral argument pursuant to 29 C.F.R. § 102.46(g).

EXCEPTIONS TO THE FINDINGS OR CONCLUSIONS REGARDING SUBJECT-MATTER JURISDICTION

1. Exception is taken to the ALJ's implicit finding of subject-matter jurisdiction contained in the statement, "This case was tried in New York, New York on February 10, 2020." (ALJD 1:1–2 & 4 n.6).

2. Exception is taken to the ALJ's implicit conclusion that the Board has subject-matter jurisdiction contained in the statement, "The Respondent admits to corporate status, corporate location, operations, and revenue in a stipulation entered with the counsel for the General Counsel (GC Exh.2)." (ALJD 2 n.4 & 4 n.6).

3. Exception is taken to the ALJ's failure to dismiss the complaint on the basis that neither Mr. Fleming nor the General Counsel established subject-matter jurisdiction. (ALJD 4 n.6).

4. Exception is taken to the ALJ's implicit conclusion of law that NLRB has statutory and constitutional authority to investigate and prosecute FDRLST based on Mr. Fleming's charge. (ALJD 4 n.6).

5. Exception is taken to the ALJ's implicit conclusion of law that Mr. Fleming is "aggrieved" within the meaning of 29 U.S.C. § 160(b). (ALJD 4 n.6).

6. Exception is taken to the ALJ's implicit conclusion of law that Mr. Fleming is within the zone of interests protected by the National Labor Relations Act (NLRA). (ALJD 4 n.6).

7. Exception is taken to the ALJ's ignoring that the burden of proving subject-matter jurisdiction is on the General Counsel and that he did not meet that burden of proof. (ALJD 4 n.6).

8. Exception is taken to the ALJ's failure to take into account the text of 29 U.S.C. § 160(b) and use all available tools of statutory construction to determine whether a random person like Mr. Fleming, who is not a "person aggrieved" within the meaning of Section 160(b), could sustain the charge against FDRLST. (ALJD 4 n.6).

9. Exception is taken to the ALJ's failure to enforce the NLRA according to its plain meaning. (ALJD 4 n.6).

10. Exception is taken to the ALJ's failure to read Section 160(b) in context and in harmony with the rest of the provisions of the NLRA. (ALJD 4 n.6).

11. Exception is taken to the ALJ's implicit use of 29 C.F.R. § 102.9 to override the statutory text of 29 U.S.C. § 160(b). (ALJD 4 n.6).

12. Exception is taken to the ALJ's assertion of subject-matter jurisdiction in this dispute by expanding NLRB's authority or jurisdiction beyond what Congress has granted to NLRB. (ALJD 4 n.6).

13. Exception is taken to the ALJ's erroneous assertion of jurisdiction in this dispute when the charging party is not the "person aggrieved" by the alleged "unfair labor practice" within the meaning of 29 U.S.C. § 160(b). (ALJD 4 n.6).

14. Exception is taken to the ALJ's implicit conclusion that the subject of the passive-voice sentences of Section 160(b) is indeterminate. (ALJD 4 n.6).

15. Exception is taken to the ALJ's implicit rejection of the Distributive-Phrasing Canon that clarifies the meaning of 29 U.S.C. § 160(b) such that only persons aggrieved by the alleged unfair labor practice can be charging parties. (ALJD 4 n.6).

16. Exception is taken to the ALJ's implicit conclusion that the applicable statutes and Board regulations expand charging-party status to encompass persons who would not have Article III standing. (ALJD 4 n.6).

17. Exception is taken to the ALJ's implicit conclusion that the charging party could be someone who has not suffered an injury-in-fact to a legally protected interest and that such injury

need not be concrete and particularized, actual or imminent, but can be conjectural or hypothetical. (ALJD 4 n.6).

18. Exception is taken to the ALJ's implicit conclusion that the injury need not be fairly traceable to the challenged action of the Respondent and that it could be entirely speculative that the injury could be redressed by a decision favorable to the charging party in such circumstances. (ALJD 4 n.6).

19. Exception is taken to the ALJ's implicit conclusion that the Article III standing analysis is inapposite in evaluating the "person aggrieved" statutory language relating to charging-party status during administrative adjudications like this one. (ALJD 4 n.6).

20. Exception is taken to the ALJ's failure to evaluate whether Mr. Fleming's charge satisfies the third-party exception to standing. (ALJD 4 n.6).

21. Exception is taken to the ALJ's failure to consider the lack of any existing or associational relationship between Mr. Fleming with FDRLST, FDRLST's employees, independent contractors, their family members, and/or a union. (ALJD 4 n.6).

22. Exception is taken to the ALJ's implicit conclusion of law that Mr. Fleming is a proper charging party based on the erroneous speculation that there is a patent closeness of relationship between him and FDRLST, FDRLST's employees, independent contractors, their family members, and/or a union. (ALJD 4 n.6).

23. Exception is taken to the ALJ's erroneous adjudication of a generalized grievance against FDRLST. (ALJD 4 n.6).

24. Exception is taken to the ALJ's failure to determine whether Mr. Fleming falls within the zone of interests of the NLRA by using traditional tools of statutory interpretation to evaluate whether a legislatively conferred cause of action encompasses Mr. Fleming's charge. (ALJD 4 n.6).

25. Exception is taken to the ALJ's failure to consider that the fact that Mr. Fleming was not injured *qua* FDRLST's employee, independent contractor, intern, or someone with privity or nexus with FDRLST's employees, independent contractors or interns. (ALJD 4 n.6).

26. Exception is taken to the ALJ's failure to consider that Mr. Fleming's alleged injury is not proximately caused by Mr. Domenech's tweet. (ALJD 4 n.6).

27. Exception is taken to the ALJ's implicit conclusion that Mr. Fleming is a person adversely affected or aggrieved under the NLRA within the meaning of 5 U.S.C. § 702. (ALJD 4 n.6).

28. Exception is taken to the ALJ's implicit conclusion that Mr. Fleming satisfies the Administrative Procedure Act's zone-of-interests test. (ALJD 4 n.6).

29. Exception is taken to the ALJ's implicit conclusion that the Board had authority to investigate Mr. Fleming's charge against FDRLST. (ALJD 4 n.6).

30. Exception is taken to the ALJ's conclusions of law insofar as they are inconsistent with these exceptions. (ALJD 6:30–36; 7:1–2).

31. Exception is taken to the ALJ's finding that the facts of this case support subject-matter jurisdiction such that the ALJ can order the prescribed remedy of requiring FDRLST to post and electronically distribute the provided notice to its employees. (ALJD 7:5–37).

**EXCEPTIONS TO THE FINDINGS OR CONCLUSIONS
REGARDING PERSONAL JURISDICTION AND VENUE**

32. Exception is taken to the ALJ's implicit conclusion that Region 2 properly asserted personal jurisdiction over FDRLST contained in the statement, "This case was tried in New York, New York on February 10, 2020." (ALJD 1:1–2 & 4 n.6).

33. Exception is taken to the ALJ's implicit conclusion that Region 2 properly asserted personal jurisdiction over FDRLST contained in the statement, "The Respondent admits to corporate status, corporate location, operations, and revenue in a stipulation entered with the counsel for the General Counsel (GC Exh.2)." (ALJD 2 n.4 & 4 n.6).

34. Exception is taken to the ALJ's exercising of personal jurisdiction over FDRLST, a non-resident defendant with no minimum contacts to the forum of Region 2. (ALJD 1:1–2 n.4 & 4 n.6).

35. Exception is taken to the ALJ's implicit finding that the General Counsel made a *prima facie* showing of jurisdictional facts sufficient to satisfy Region 2's exercise of personal jurisdiction over FDRLST. (ALJD 1:1–2 n.4 & 4 n.6).

36. Exception is taken to the ALJ's failure to conduct an evidentiary hearing on personal jurisdiction when Respondent entered a special appearance at the February 10 evidentiary hearing. (ALJD 1:1–2 n.4 & 4 n.6).

37. Exception is taken to the ALJ's implicit conclusion that FDRLST is amenable to process in New York and that FDRLST's alleged conduct brought it within the reach of New York's long-arm statute. (ALJD 1:1–2 n.4 & 4 n.6).

38. Exception is taken to the ALJ's implicit conclusion that a tweet is a minimum jurisdictional contact directed at the forum simply because the tweet occurred on the Internet and could be viewable from within Region 2. (ALJD 1:1–2 n.4 & 4 n.6).

39. Exception is taken to the ALJ's implicit conclusion that Mr. Domenech somehow directed his tweet at the forum of Region 2. (ALJD 1:1–2 n.4 & 4 n.6).

40. Exception is taken to the ALJ's implicit conclusion that FDRLST purposefully directed activities at the residents of the forum of Region 2. (ALJD 1:1–2 n.4 & 4 n.6).

41. Exception is taken to the ALJ's implicit conclusion that someone within Region 2 was injured by Mr. Domenech's tweet and that the cause of action somehow arose out of FDRLST's contacts with Region 2. (ALJD 1:1–2 n.4 & 4 n.6).

42. Exception is taken to the ALJ's implicit conclusion that FDRLST was somehow "at home" in Region 2 or otherwise subject to general personal jurisdiction in the forum. (ALJD 1:1–2 n.4 & 4 n.6).

43. Exception is taken to the ALJ's implicit conclusion that the burden of traveling to Region 2 did not outweigh the other factors relevant to fair play and substantial justice. (ALJD 1:1–2 n.4 & 4 n.6).

44. Exception is taken to the ALJ's implicit conclusion that Mr. Fleming, the supposed aggrieved party, had any connection to the forum of Region 2. (ALJD 1:1–2 n.4 & 4 n.6).

45. Exception is taken to the ALJ's implicit conclusion that venue was proper in Region 2 contained in the statement, "This case was tried in New York, New York on February 10, 2020." (ALJD 1:1-2 & 4 n.6).

46. Exception is taken to the ALJ's implicit conclusion that venue was proper in Region 2 contained in the statement, "The Respondent admits to corporate status, corporate location, operations, and revenue in a stipulation entered with the counsel for the General Counsel (GC Exh.2). (ALJD 2 n.4 & 4 n.6).

47. Exception is taken to the ALJ's decision to move forward in an improper venue when the General Counsel and Charging party failed to even attempt to carry their burden of showing that Region 2 was the proper venue. (ALJD 1:1-2 n.4 & 4 n.6).

48. Exception is taken to the ALJ's implicit finding that a person aggrieved by the alleged unfair labor practice resides within Region 2. (ALJD 1:1-2 n.4 & 4 n.6).

49. Exception is taken to the ALJ's decision to ignore NLRB's venue requirements. (ALJD 1:1-2 n.4 & 4 n.6).

50. Exception is taken to the ALJ's decision to ignore the requirement on the charging form that the Charging Party file the charge in the forum in which the alleged unfair labor practice occurred. (ALJD 1:1-2 n.4 & 4 n.6).

51. Exception is taken to the ALJ's failure to find that FDRLST should not be required to proceed in a faraway forum with no connection to the underlying alleged conduct. (ALJD 1:1-2 n.4 & 4 n.6).

52. Exception is taken to the ALJ's conclusions of law insofar as they are inconsistent with these exceptions. (ALJD 6:30-36; 7:1-2).

53. Exception is taken to the ALJ's finding that the facts of this case support personal jurisdiction such that the ALJ could order the prescribed remedy of requiring FDRLST to post and electronically distribute the provided notice to its employees. (ALJD 7:5-37).

54. Exception is taken to the ALJ's finding that the facts of this case support venue in Region 2 such that the ALJ can order the prescribed remedy of requiring FDRLST to post and electronically distribute the provided notice to its employees. (ALJD 7:5–37).

**EXCEPTIONS TO THE FINDINGS OR CONCLUSIONS
REGARING MR. DOMENECH'S TWEET**

55. Exception is taken to the ALJ's mistaken citation and application of the test for evaluating whether an employer violates 29 U.S.C. § 158(a)(1). (ALJD 4:13–16).

56. Exception is taken to the ALJ's misstatement and misapplication of the test to evaluate “whether the [employer's] statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities.” (ALJD 4:13–16).

57. Exception is taken to the ALJ's misstatement and misapplication that the test used to evaluate whether an employer engaged in an unfair labor practice “does not turn on the employer's motive or on whether the coercion succeeded or failed.” (ALJD 4:16–22).

58. Exception is taken to the ALJ's mischaracterization and misapplication that the test to evaluate whether an employer engaged in an unfair labor practice asks whether “the employer's conduct, viewed from the perspective of a reasonable person, tends to interfere with the free exercise of employee rights.” (ALJD 4:24–27).

59. Exception is taken to the ALJ's finding that Mr. Domenech's tweet is an idiom. (ALJD 4:33–34).

60. Exception is taken to the ALJ's definition of idiom. (ALJD 4:34–5:3).

61. Exception is taken to the ALJ's apparent determination that “the expression ‘salt mine’ is most often used to refer to tedious and laborious work.” (ALJD 5:10–11).

62. Exception is taken to the ALJ's failure to consider that Mr. Domenech's tweet is satire, parody, humor, or commentary. (ALJD 5:15-6:24 and accompanying notes).

63. Exception is taken to the ALJ's conclusion based not on facts but on his opinion that the tweet was “clearly directed to the employees of FDRLST, contained in the statement: “It is significant to note that although the tweet was from Domenech's personal account, the tweet itself was

prefaced with the Respondent's name and it was 'FYI' or 'For Your Information', which, in my opinion, was clearly directed to the employees of FDRLST and not to the general public." (ALJD 5:16–25).

64. Exception is taken to the ALJ's failure to find that Mr. Domenech's tweet is satire, parody, humor, or commentary. (ALJD 5:15-6:24 and accompanying notes).

65. Exception is taken to the ALJ's conclusion that Mr. Domenech's use of Respondent's name and "FYI" in the tweet indicated that the tweet "was clearly directed to the employees of FDRLST and not to the general public." (ALJD 5:16–19).

66. Exception is taken to the ALJ's misquotation of the tweet at issue as "if you unionize, you will be sent to the salt mines." (ALJD 5:19-21).

67. Exception is taken to the ALJ's finding that the conclusion that the tweet was directed to the employees of FDRLST and not to the general public was "a reasonable conclusion to draw since the statement 'if you unionize, you will be sent to the salt mines' was meant for the FDRLST employees and not the public." (ALJD 5:19–21).

68. Exception is taken to the ALJ's conclusion that Mr. Domenech's tweet is "an obvious threat." (ALJD 5:21–24).

69. Exception is taken to the ALJ's assertion that the tweet was considered under the "totality of the circumstances." (ALJD 5:23–25).

70. Exception is taken to the ALJ's conclusion that under the "totality of the circumstances surrounding the tweet, this tweet had no other purpose except to threaten the FDRLST employees with unspecified reprisal." (ALJD 5:23–25).

71. Exception is taken to the ALJ's failure to consider the tweet's more obvious purposes. (ALJD 5:23–25).

72. Exception is taken to the ALJ's finding that "the underlying meaning of 'salt mine'" is a threat "with unspecified reprisal." (ALJD 5:23–25).

73. Exception is taken to the ALJ's failure to consider whether an employee of the FDRLST would have reasonably understood the tweet as a threat. (ALJD 4:24–27).

74. Exception is taken to the ALJ's failure to consider whether employees of the FDRLST would have reasonably understood the tweet to interfere with their free exercise of employee rights under the NLRA. (ALJD 4:24–27).

75. Exception is taken to the ALJ's conclusion based on discarding the fact or not giving any weight to the fact that that two FDRLST employees stated that the “tweet was funny and sarcastic and neither one felt that the expression was a threat of reprisal (R. Exh. 3).” (ALJD 5:27–30).

76. Exception is taken to the ALJ's giving of “little weight to the two employee affidavits as corroborating documents to support Domenech's assertion that his tweet was satirical.” (ALJD 5–6 n.8).

77. Exception is taken to the ALJ's misstated test that “a threat is assessed in the context in which it is made and whether it tends to coerce a reasonable employee.” (ALJD 5:27–30).

78. Exception is taken to the ALJ's misstated test that “[a]ny subjective interpretation from an employee is not of any value to this analysis.” (ALJD 5:31–39).

79. Exception is taken to the ALJ's failure to consider that the Counsel for General Counsel could have, but did not, ascertain the views of any of the FDRLST's six employees. (ALJD 4 nn.7, 8).

80. Exception is taken to the ALJ's failure to consider that two of the six FDRLST employees provided affidavits explaining their views of Mr. Domenech's tweet. (ALJD 5 n.8).

81. Exception is taken to the ALJ's implicit credibility determination of the two employee affidavits, that they should be given “little weight.” (ALJD 5 n.8).

82. Exception is taken to the ALJ's failure to consider that the two employees who provided affidavits were represented by counsel of their own choice. (ALJD 5 nn.7, 8 & Affidavits referenced therein).

83. Exception is taken to the ALJ's failure to consider that the two employees' affidavits were signed under penalty of perjury. (ALJD 5 nn.7, 8 & Affidavits referenced therein).

84. Exception is taken to the ALJ's consideration that the two employees were “chosen to provide affidavits.” (ALJD 5 n.8).

85. Exception is taken to the implicit accusation that the affidavits of the two employees, signed under penalty of perjury, while being represented by independent counsel of their choice, and having been assured by FDRLST that no adverse or favorable consequences will follow if they decide to submit or not submit an affidavit, may have been the subject of improper influences by Respondent because the employees did not explicitly state that the affidavits were made “absent any implied threats... and no assurances were given by the Respondent that there would be no reprisals for refusing to provide a statement.” (ALJD 5–6 n.8 & Affidavits referenced therein).

86. Exception is taken to the ALJ’s finding that “a reasonable interpretation of the expression meant that working conditions would worsen or employee benefits would be jeopardized if employees attempted to unionize.” (ALJD 6:1–4).

87. Exception is taken to the ALJ’s consideration of extrinsic evidence related “to the internet blackout at Vox Media.” (ALJD 6:4–5).

88. Exception is taken to the ALJ’s equating the “walkout by union employees at Vox Media” with the relationship between FDRLST and its employees. (ALJD 3:11–13).

89. Exception is taken to the ALJ’s finding that Mr. Domenech “clearly expressed his displeasure with the Vox walkout and made that known to his employees through his tweet.” (ALJD 6:5–6).

90. Exception is taken to the ALJ’s evidence-less conclusion that “Vox Media ... carries the stories, podcasts, and events produced by ... the Federalist.” (ALJD 3:13–15).

91. Exception is taken to the ALJ’s implicit and evidence-less conclusion that “the walkout by unionized employees [at Vox Media] resulted in ... the Federalist, to ‘go dark.’ (GC Exhs. 3.8 and 3.9; GC Br. at 4).” (ALJD 3:15–17).

92. Exception is taken to the ALJ’s finding that “the tweet is reasonably considered as a threat because it tends to interfere with the free exercise of employee rights.” (ALJD 6:6–8).

93. Exception is taken to the ALJ’s finding that it is “irrelevant” that Mr. Domenech’s tweet was an expression of his personal views on his personal account. (ALJD 6:8–9).

94. Exception is taken to the ALJ's implicit finding that Mr. Domenech speaks on behalf of FDRLST. (ALJD 6:8–24).

95. Exception is taken to the ALJ's implicit finding that Mr. Domenech's posts on his personal Twitter account are the views of FDRLST, not Mr. Domenech. (ALJD 6:8–24).

96. Exception is taken to the ALJ's implicit finding that Mr. Domenech's tweet expressing his personal views on his personal account is attributable to Respondent. (ALJD 6:8–24).

97. Exception is taken to the ALJ's determination that Mr. Domenech's tweet "reasonably tend[ed] to interfere with the free exercise of employee rights under Section 7 of the Act." (ALJD 6:25–26).

98. Exception is taken to the ALJ's implicit conclusion that the tweet was threatening because the "tweet was consistent with The Federalist's anti-union editorial position." (ALJD 3:24–30).

99. Exception is taken to the ALJ's failure to find that Mr. Domenech's tweet is protected by the First Amendment. (ALJD 6 n.9).

100. Exception is taken to the ALJ's conclusions of law insofar as they are inconsistent with these exceptions. (ALJD 6:30–36; 7:1–2).

101. Exception is taken to the ALJ's finding that the facts of this case support the prescribed remedy of requiring FDRLST to post and electronically distribute the provided notice to its employees. (ALJD 7:5–37).

Respectfully submitted, on the 19th day of June, 2020.

By Attorneys for Respondent, FDRLST Media, LLC,

/s/ Aditya Dynar

Aditya Dynar

Kara Rollins

Jared McClain

New Civil Liberties Alliance

1225 19th St. NW, Suite 450

Washington, DC 20036

(202) 869-5210

Adi.Dynar@NCLA.legal

Kara.Rollins@NCLA.legal

Jared.McClain@NCLA.legal

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

FDRLST MEDIA, LLC,
Respondent

-and-

JOEL FLEMING
Charging Party

Case No. 02-CA-243109

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020, Respondent's "Exceptions to the Administrative Law Judge's Decision" were electronically filed and served by e-mail, return receipt requested on the following parties:

John J. Walsh, Jr.
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278-0104

Jamie Rucker
Field Attorney
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278-0104
Jamie.Rucker@nlrb.gov

Joel Fleming
129 Franklin St. Apt. 141
Cambridge, MA 02139
Fleming.Joel@gmail.com

By Attorneys for Respondent, FDRLST Media, LLC,
/s/ Aditya Dynar
Aditya Dynar
Kara Rollins
Jared McClain
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Adi.Dynar@NCLA.legal
Kara.Rollins@NCLA.legal
Jared.McClain@NCLA.legal