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 ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

Despite generally agreeing with the Administrative Law Judge's ("ALJ" or "ALJ Chu") decision ("ALJD"), and with his finding that there was a violation of Section 8(a)(1) of the National Labor Relations Act ("Act"), the Counsel for General Counsel ("General Counsel") is still not satisfied. The General Counsel now requests that the Board exclude evidence to which ALJ Chu assigned "little weight" and grant unconstitutional, illogical, and impossible remedies that have no basis in fact or law. None of these remedies is justified.

ARGUMENT

Respondent incorporates by reference the arguments that the National Labor Relations Board ("NLRB" or the "Board") lacks subject-matter jurisdiction over this action, that NLRB Region 2 lacked personal jurisdiction over Respondent FDRLST Media, LLC ("FDRLST"), and that FDRLST did not commit an "unfair labor practice" as argued in both its Exceptions to the Administrative Law Judge's Order and Brief in Support thereof (filed June 16, 2020) ("FDRLST Exceptions" and "FDRLST Exceptions Br.," respectively) and its Reply Brief in Support thereof (filed July 20, 2020) ("FDRLST Reply Br.").

I. THE ALJ DID NOT ABUSE HIS DISCRETION WHEN HE ADMITTED THE AFFIDAVITS OF MR. DOMENECH AND TWO OF RESPONDENT'S EMPLOYEES

Unfair labor practice proceedings are "so far as practicable, [to] be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States." 29 U.S.C. § 160(b); 29 C.F.R. § 102.39 (same). The Board looks to the Federal Rules of Civil Procedure ("FRCP") when the Board's rules contained in 29 C.F.R. fail to provide specific guidance. *Brink's, Inc.*, 281 NLRB 468, 468 (1986). Under the Federal Rules of Evidence ("FRE"), relevant evidence—evidence that "make[s] a [material] fact more or less probable"—is admissible. FRE 401. Relevance is defined broadly under Rule 401. *See U.S. v. Certified Envtl. Servs., Inc.*, 735 F.3d 72, 90 (2d Cir. 2014). Evidence need not be conclusive; its incremental effect is sufficient to establish its relevance. *Id.* "[U]nless an exception applies, all 'relevant

evidence is admissible.'" *Haynes v. Acquino*, 692 F. App'x 670, 671 (2d Cir. 2017) (citation omitted) (Rule 401's relevance standard is "very low.").

ALJ Chu did not abuse his discretion when he admitted the affidavits of Mr. Domenech and two of Respondent's employees. Even if the affidavits were admitted in error (they were not), the error is harmless. ALJ Chu noted that he "would give little weight to the two employee affidavits." ALJD 5 n.8. However, the ALJ's discussion and analysis suggests that he did not consider either of the employee affidavits in formulating his decision at all. *See* ALJD 5:27–39 (discussing the employee affidavits but determining that "[a]ny subjective interpretation from an employee is not of any value to this analysis."). The ALJ's Decision is silent as to what weight, if any, was given to Mr. Domenech's affidavit. However, as with the employee affidavits, the ALJ's discussion and analysis suggests he did not consider the affidavit in formulating his decision. *See* ALJD 5:13–25 (discussing Mr. Domenech's affidavit and its statements that the tweet was satire but determining that it was not).

The affidavits are relevant under Rule 401's broad definition. The Board uses an objective totality-of-the-circumstances test to determine if a statement constitutes an unfair labor practice. *See GM Electrics*, 323 NLRB 125, 127 (1997) (the test "is whether under all circumstances the remark reasonably tends to restrain, coerce, or interfere with the employees' rights guaranteed under the Act."). Thus, any fact that makes it "more or less probable" that the tweet could reasonably be perceived to restrain, coerce, or interfere with FDRLST employees' rights is relevant to determining whether an "unfair labor practice" occurred. Despite General Counsel's objections, all of the facts in the affidavits are relevant under the totality-of-the-circumstances test, because they show the factual circumstances in which the alleged "unfair labor practice" occurred.[1] For example, how two of

[1] The problem with the General Counsel's purportedly objective test is that the Charging Party in this case is a stranger to the employer and to the employees. There is no reason to believe that any employee of the company found the tweet threatening or objected to the tweet in the slightest. An objective test makes no sense in the absence of at least one person within the zone of protected interests who is raising an *internal* objection. Suppose for the sake of argument that Mr. Domenech is anti-union. Suppose further, for the sake of argument, that *all six* of FDRLST's employees share his anti-union viewpoint. General Counsel's position appears to be that none of that matters and that an employer and employee cannot even joke about something they all agree about. Under this theory,

FDRLST's six employees perceived the tweet establishes that it is less probable that a reasonable FDRLST employee would interpret Mr. Domenech's tweet as (1) a statement of FDRLST, and/or (2) a threat. *See* R-4, ¶¶ 8–9; R-5, ¶¶ 8–9. Similarly, Mr. Domenech's affidavit makes it more probable that his satirical tweet was an expression of his personal views, not Respondent's. *See* R-3, ¶¶ 4–5, 7.

The declarants were unavailable, but not in the way the General Counsel understands unavailability. The availability of a declarant only matters if the statements of the unavailable witness fall under Rule 804(b)'s exceptions. *See* FRE 804(b) (former testimony and statements made under the belief of imminent death, against interest, of personal or family history, or offered against a party that wrongfully caused the declarant's unavailability are not excluded as hearsay under Rule 804). The affidavits here do not fall under those exceptions, and Rule 804 is inapplicable.

The witnesses, however, were unavailable in the sense that a Region 2 ALJ could not exercise personal jurisdiction over them in Region 2, and Respondent could not compel their appearances. The facts and circumstances establish that all the declarants are outside the jurisdictional reach of Region 2, and they could not be compelled to testify at the hearing. *See* R-3 ("No FDRLST Media, LLC employee resides within the geographic boundaries of [Region 2]."); *see also* 29 U.S.C. § 161(2) (limiting the Board's enforcement of subpoenas to federal courts "within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business"); *Cf.* FRCP 45(c)(1)(A) ("A subpoena may command a person to attend a trial, hearing, or deposition only as follows: … within 100 miles of where the person resides … [or] within the state where the person resides.").[2] Moreover, Respondent made a special appearance

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the Board would prohibit even the National Right to Work Committee from joking with its employees about unionizing.

[2] The cases the General Counsel relies on are, on the facts provided, not inconsistent with the jurisdiction and convenience concerns of FRCP 45. *See Park Maintenance*, 348 NLRB 1373, 1373 n.2 (2006) (Complaint was against a West New York, New Jersey-based employer and the hearing was held in Newark, New Jersey); *Limpco Mfg., Inc. and/or Cast Products, Inc.*, 225 NLRB 987, 987 n.1 (1976), enfd. mem. 565 F.2d 152 (3d Cir. 1977) (Complaint was against a Greensburg, Pennsylvania-based employer and the hearing was held in Pittsburgh, Pennsylvania); *G.M. Mechanical, Inc.*, 326 NLRB 35, 35 n.1 (1998) (Complaint was against a Covington, Ohio-based employer and the hearing was in Steubenville, Ohio). The oddity here is that the Charging Party filed the charge in Region 2, which has

at the February 10, 2020 hearing to contest jurisdiction and venue, and it remains the Respondent's view that calling witnesses could have waived its jurisdictional arguments. R-8 at 6:17–9:11; 24:12–25:2.[3]

The affidavits fall under the residual hearsay exception.[4] The residual hearsay exception permits the admission of a statement that is "supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement" and that statement "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." FRE 807(a). "The residual hearsay exception applies only when 'certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present.'" *United States v. Jayyousi*, 657 F.3d 1085, 1113 (11th Cir. 2011).

The employees' affidavits are supported by sufficient guarantees of trustworthiness. The voluntarily submitted affidavits were sworn and subscribed, and the employees were independently represented by counsel of their choice. *See* R-4, 2; R-5, 2. Both employees stated unambiguously in their respective sworn affidavits that they did not perceive the tweet as a threat, reprisal, use of force, or

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no connection to Respondent, Respondent's employees, or to the conduct complained of, which would lead to personal-jurisdiction and venue issues if a witness were compelled to appear. Perhaps the General Counsel, to avoid these very issues, voluntarily withdrew all the subpoenas he had issued—to Mr. Domenech and four of FDRLST's six employees. It is odd, therefore, that after trying to avoid the personal jurisdiction issue, the General Counsel would then change tack to create one by filing cross-exceptions to the ALJ's decision on this point.

[3] Entering a personal appearance when the underlying personal jurisdiction and venue issues are contested creates the type of catch-22 that 29 U.S.C. § 160(e) prevents insofar as it allows a circuit court to order the adducing of additional evidence on the request of a party. So, it cannot be the case that because a party entered a special appearance to contest personal jurisdiction and venue, the party thereby forfeited its arguments and evidence on the merits. When personal jurisdiction and venue are contested, the proper course—and the only course of action—that was available to Respondent was to enter a special appearance. In other words, the ALJ could have vacated the February 10 hearing to give the parties a chance to resolve the personal jurisdiction and venue issues, but he did not. He and the General Counsel insisted that the parties proceed to a hearing on the merits without establishing the factual and legal sufficiency of the Board's subject-matter jurisdiction, and the factual and legal sufficiency of personal jurisdiction and venue in Region 2. Such cavalier omissions on the part of the ALJ and the General Counsel are fatal to the cross-exceptions the General Counsel has taken.

[4] Respondent also agrees that the affidavits do not fall within any of Rule 803's enumerated exceptions.

promise of benefit. *See* R-4, ¶¶ 8–9; R-5, ¶¶ 8–9. Mr. Domenech's affidavit is also sufficiently trustworthy, as it was also sworn and subscribed. *See* R-3, 2–3. Mr. Domenech's affidavit stated that the satirical tweet was from his personal Twitter account, through which he engages in his own expressive conduct. *See* R-3, ¶¶ 4–5, 7. Mr. Domenech stated that the views expressed on his personal Twitter account are only his, not the Respondent's. *Id.* at ¶ 8.

These statements are highly probative of how Respondent's employees assessed the context of Mr. Domenech's tweet and whether the satirical tweet could reasonably be considered a threat. Together, the statements in these affidavits are highly probative of whether a violation of Section 10(b) occurred. *See GM Electrics*, 323 NLRB at 127. The voluntarily provided affidavits were the only reasonable method to establish this evidence because all affiants reside outside of the territorial jurisdiction of Region 2. As such, they are not amenable to service of subpoenas testificandum. *See, e.g., Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622, 627 (1925). As a matter of personal jurisdiction, they cannot be made to testify.[5] *See* 29 U.S.C. § 161(2); *cf.* FRCP 45(c)(1)(A). If the Board were to exclude the affidavits and uphold personal jurisdiction over FDRLST in Region 2, that would violate Respondent's due process rights to mount a defense.

II. THE REMEDIES THE GENERAL COUNSEL DEMANDS IN CROSS-EXCEPTION 2 HAVE NO BASIS IN FACT OR LAW AND SHOULD BE DENIED

Because the Board lacks jurisdiction in this matter, the ALJ had no power to recommend an order for the remedies the General Counsel seeks in Cross-Exception 2. *See* FDRLST Exceptions Br. at 4–31; FDRLST Reply Br. at 1–9; *see also, e.g.*, FDRLST Exceptions Nos. 31, 53, 54, 101. Respondent also maintains that Mr. Domenech's tweet was not a "threat" within the meaning of the Act, or attributable to the FDRLST, and therefore that FDRLST is not subject to any remedial sanctions. *See* FDRLST Exceptions Br. at 31–49; FDRLST Reply Br. at 9–10; *see also, e.g.*, FDRLST Exceptions Nos.

[5] The General Counsel could have sought to call them to the stand to provide live testimony; he, instead, voluntarily withdrew all subpoenas that were issued to Mr. Domenech and four FDRLST employees. Had the witnesses been called, they could have protested their subpoenas on jurisdictional grounds directly.

55–101. Even assuming the Board had jurisdiction and the power to order remedies in this matter (it does not), and that such remedies were warranted (they are not), the remedies the General Counsel now demands have no basis in fact or law.

A. General Counsel's Demanded "Delete the Tweet" Remedy Is Unconstitutional, Illogical, Impossible, and Based on Little More than Speculation and Conjecture

The true nature of the "delete the Tweet" order that the General Counsel requests in Exception 2(a) is clear. The General Counsel wants to order a media publication to force one of its employees to delete his personal, expressive speech and viewpoint on his personal Twitter account. The Constitution does not tolerate this type of compelled silence because it "extinguishes the individual's right of expression."[6] *Burns v. Martuscello*, 890 F.3d 77, 84 (2d Cir. 2018). "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796–97 (1988); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Bd. of Education v. Barnette*, 319 U.S. 624, 637 (1943)) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"). The General Counsel's "delete the Tweet" order is an affront to constitutional guarantees of free speech and expression and should be denied.

The "delete the Tweet" order General Counsel seeks is illogical and impossible to comply with because it would require that Respondent FDRLST delete a tweet from an account that is not within its control. GC-3, ¶ 24, 25; R-3, ¶ 4. Mr. Domenech sent the tweet from his *personal* account—not

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[6] Respondent maintains that Mr. Domenech's personal speech is protected by the First Amendment. *See* FDRLST Exceptions Br. at 37–39; FDRLST Reply Br. at 9–10; *see also, e.g.,* FDRLST Exceptions Nos. 55–99.

Respondent's account. *Id.* The General Counsel has not proven that Mr. Domenech has full and free access to and control over FDRLST's Twitter account, if one exists. The General Counsel has not proven whether FDRLST has full and free access to and control over Mr. Domenech's personal Twitter account. Mr. Domenech is not a party to this case. FDRLST is. As a non-party, the Board lacks any jurisdiction over Mr. Domenech or his personal Twitter account. *Cf. Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 40 (2d Cir. 1989) ("A district court cannot exercise personal jurisdiction over a nonparty to a litigation … unless personal jurisdiction is established over the nonparty."); *see also In re Infant Formula Antitrust Litig., MDL 878 v. Abbott Labs.*, 72 F.3d 842, 843 (11th Cir. 1995) (holding that a district court lacks subject matter jurisdiction to enjoin a non-party).[7] Because the Board lacks jurisdiction over Mr. Domenech, it has no mechanism by which it can enforce compliance with the "delete the Tweet" order. Nor could the Board seek compliance with the "delete the Tweet" order through the courts, because the courts in Region 2 would also lack jurisdiction over non-party Mr. Domenech. Enforcement of Board orders requires compliance by a respondent, which is impossible here because the offending tweet is not under FDRLST's control. *See* 29 C.F.R. § 101.13. If a respondent fails to comply, the Board may enforce its order through a court judgment and, potentially, a petition for an order "hold[ing] the respondent in contempt of court," seeking remedial action, and imposing sanctions and penalties. *See* 29 C.F.R. §§ 101.14–101.15. Not so with respect to non-respondent Mr. Domenech, however.

Moreover, FDRLST—as a media publication—does not regulate the personal speech of its employees, including Mr. Domenech, and there is no mechanism that would allow FDRLST to demand Mr. Domenech to remove the tweet from his personal account. *See* R-8 at 16:8–13.

Finally, the "delete the Tweet" order is based only on the General Counsel's speculation and conjecture that "the threatening Tweet remains visible on Domenech's Twitter feed, thereby

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[7] In addition to the fact that the Board does not have jurisdiction over Mr. Domenech because he is a non-party, the jurisdictional failures maintained by the Respondent also apply to jurisdictional considerations related to Mr. Domenech. *See* FDRLST Exceptions Br. at 4–31; FDRLST Reply Br. at 1–9; *see also, e.g.*, FDRLST Exceptions Nos. 31, 53, 54, 101.

continuing to remind employees of Respondent's intended reaction to unionization efforts." General Counsel Brief in Support of Cross-Exceptions at 10 ("Gen. Counsel Br. Cross-Exceptions"). General Counsel cites no legal basis for the "delete the Tweet" order. *Id.* Nor does the General Counsel cite any factual basis for the view that the tweet "continu[es] to remind employees of Respondent's intended reaction to unionization efforts." *Id.* The General Counsel had a chance to prove that deleting the tweet was a necessary remedy to cure the alleged unfair labor practice but presented no evidence to that effect—nor could he because such evidence does not exist. *Cf.* R-5, ¶¶ 8–9; R-4, ¶¶ 8–9.

B. The ALJ's Recommended Order and Notice Already Prohibits the Conduct the General Counsel's Exception 2(b) Seeks to Prohibit

Respondent maintains that the ALJ's recommended order should never have been issued to begin with.[8] Assuming otherwise, there still is no basis for the General Counsel's Cross-Exception 2(b). The General Counsel now requests a more specific order, which in all practicality is the same remedy already ordered by the ALJ. General Counsel's "specific prohibition" order demand is illogical and without merit.

ALJ Chu recommended that Respondent be ordered to "[c]ease and desist from" "[t]hreatening employees with unspecified reprisal because they engaged in protected activity" "[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. " ALJD 7:15–19; ALJD Appendix (recommended notice stating Respondent will do same). "Section 7 of the Act provides that, 'employees shall have the right to self-organization, to form, join, or assist labor organizations … .'" ALJD 4:8–11; ALJD Appendix ("Federal law gives you the right to [f]orm, join or assist a union" (emphasis omitted)); *see also* 29 U.S.C. § 157. Read together with the text of Section 7 of the Act that ALJ Chu quoted in his decision, the ALJ's recommended order and notice clearly states and informs employees that Respondent cannot threaten employees with reprisal for unionization efforts. What's more, the ALJ's order already

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[8] *See* FDRLST Exceptions Br. at 4–50; FDRLST Reply Br. at 9–10; *see also, e.g.,* FDRLST Exceptions Nos. 31, 53, 54, 101.

requires Respondent FDRLST to "cease and desist from" threatening employees. What then is the basis for the General Counsel's cross-exception to the ALJ's cease-and-desist order?

The case the General Counsel cites in support of Cross-Exception 2(b), *Big Buck Lumber*, 244 NLRB 156 (1978), offers little support for the "specific prohibition" order the General Counsel demands. In *Big Buck Lumber*, the Board found that a company's assistant manager's interrogating and threatening an employee during a known unionization effort was an unfair labor practice.[9] Unlike the face-to-face interrogation during an actual unionization effort in *Big Buck Lumber*, the allegedly offending conduct here was simply a publicly available satirical tweet. R-3, ¶¶ 6. There is also nothing in the factual record supporting that any unionization effort was underway by or among FDRLST's employees—and there couldn't be any such evidence because no such effort was made before or was ever ongoing at the time that Mr. Domenech published the allegedly offending tweet. The General Counsel's intimations to the contrary are improper, not based in fact, and rooted in a misperception of FDRLST's (or Mr. Domenech's) reaction to the Vox incident. *See* Gen. Counsel Br. Cross-Exceptions at 10 ("the threat came prior to any *(known)* unionization efforts" (emphasis added)).

Respondent is not aware of, nor does General Counsel cite any statutory, regulatory, or other legal authority requiring the Board to order any specific remedy or order. While Respondent maintains that the ALJ's recommended order should never have been issued, a more "specific prohibition" order is not warranted under the facts or law.

CONCLUSION

The Board should deny the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge.

Respectfully submitted, on the 20th day of July, 2020.

By Attorneys for Respondent, FDRLST Media, LLC
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[9] That finding was also supported by the ALJ's credibility resolution of live witness testimony. *Big Buck Lumber*, 244 NLRB at 157.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, Respondent's "Answering Brief to General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge" was electronically filed and served by e-mail, return receipt requested on the following parties:

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