UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL FLEMING *Charging Party*	Case No. 02-CA-243109

RESPONDENT'S CLOSING POST-HEARING BRIEF

March 10, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Respondent, FDRLST Media, LLC (FDRLST or Respondent), respectfully submits this Closing Post-Hearing Brief. On February 10, 2020, Administrative Law Judge (ALJ) Kenneth Chu conducted an evidentiary hearing. Respondent, through undersigned counsel, entered a special appearance, not a general appearance at the hearing. At the conclusion of that hearing the ALJ allowed Respondent until March 10, 2020 to file a closing post-hearing brief. R-8 at 29:23–25.[1] This timely Closing Post-Hearing Brief follows.

ARGUMENT

At the outset, it is important to note that the ALJ has no reason to look at the merits of NLRB's "unfair labor practice" case against Respondent because this tribunal and NLRB lack subject-matter jurisdiction, and lack personal jurisdiction as explained in Respondent's Motion to Dismiss, which is expressly incorporated herein. The ALJ gave Respondent a Hobson's Choice—"pack up and leave" or "proceed [with] whatever evidence [Respondent wishes] to submit." R-8 at 17:9–11. Given the threshold and dispositive jurisdictional issues, the February 10 hearing should not even have occurred. Respondent, therefore, files this post-hearing brief under protest to point out that if the ALJ proceeds to unconstitutionally rule on the merits, the record provides no basis to sustain any part of NLRB's case against Respondent.

I. THE CHARGING DOCUMENT FAILED TO ESTABLISH JURISDICTION

On June 7, 2019, Mr. Joel Fleming filed a charge with the National Labor Relations Board. *See* Charging Doc., attached as Exhibit 1 and introduced as Respondent's exhibit R-7.

Despite the Charging Document's clear statement in its one and only instruction—"File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring," R-7 at 1—Mr. Fleming nonetheless decided to file it in Region 2, *i.e.*, a region

[1] The February 10, 2020 hearing transcript is attached as Exhibit 2 and introduced as Respondent's exhibit R-8.

that has no connection with or relation to FDRLST Media, LLC, the alleged unfair labor practice, to Mr. Fleming's place of residence, to Respondent's place of incorporation or to Respondent's principal place of business.

Mr. Fleming erroneously gave a Chicago, IL address for FDRLST Media, LLC. R-7 at 1. As stipulated to among the Charging Party, General Counsel for NLRB, and Respondent, that is not Respondent's address. GC-2 at ¶¶ 1, 3.[2]

Mr. Fleming erroneously stated that Respondent employs "50" persons. R-7 at 1. As stipulated to among the Charging Party, General Counsel for NLRB, and Respondent, the total number of Respondent's employees is *six*. GC-2 at ¶ 14.

Mr. Fleming listed his own residence as Cambridge, MA, R-7 at 1, which again is not within the geographic limits of Region 2.

Mr. Fleming stated Respondent's "principal product or service" as "Conservative media commentary," R-7 at 1, thus identifying or implying that Respondent or authors published by Respondent express what Mr. Fleming perceives as a particular viewpoint.

Mr. Fleming described the basis of the charge as follows:

> At 8:39 PM EST on June 6, 2019, Ben Domenech, who is the publisher of The Federalist, sent the following tweet from his Twitter account (@bdomenech): 'FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine.' As of 2:00 pm EST on June 7, 2019, that tweet is publicly available here: https://twitter.com/bdomenech/status/1136839955068534784
>
> I am not an employee of The Federalist. This charge is submitted pursuant to 29 CFR § 102.9, which provides that 'Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce.'

R-7 at 2.

Mr. Fleming further described the basis of the charge as exclusively falling under "8(a)(1)," that is, 29 U.S.C. § 158(a)(1): "Within the previous six-months, the Employer has interfered with,

[2] GC-1, GC-2, GC-3 refer to General Counsel's Exhibits 1, 2, and 3, respectively, admitted during the hearing. R-1, R-2, R-3, R-4, R-5, R-6 refer to Respondent's Exhibits 1, 2, 3, 4, 5, and 6, respectively, admitted into evidence during the hearing.

restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by threatening to retaliate against employees if they joined or supported a union." R-7 at 3. He alleged "Ben Domenech" as the "Employer's Agent/Representative who made the statement" on "June 6, 2019." R-7 at 3.

Based on the foregoing facts, the Charging Document is *on its face*, as a matter of law, deficient to support NLRB's basis for asserting subject-matter jurisdiction and personal jurisdiction over Respondent. This Charging Document should not have triggered NLRB's investigative authority or prosecutorial power over Respondent. Respondent moved to dismiss the complaint (based solely on the Charging Document) for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue.

On February 7, 2020, the Board issued an order denying Respondent's motion. In light of that order and Respondent's preserved right to appeal that order to federal court, Respondent entered a special appearance before the ALJ during the February 10, 2020 hearing held in New York City. R-8 at 6:17–9:11; R-8 at 15:10–16:2.

However, for reasons already explained in Respondent's Motion to Dismiss,[3] and expressly incorporated herein, dismissing this case for lack of subject-matter jurisdiction or lack of personal jurisdiction would be the most straightforward course to take here. The entire trial and events leading up to it are a sham if there is no jurisdictional basis for the NLRB to investigate and prosecute Respondent. *See* R-10.[4] The Charging Document, which is the genesis of this suit, shows on its face that this fishing expedition against FDRLST should never have commenced.

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[3] Respondent's Motion to Dismiss and Reply in Support are attached as Exhibit 3 and introduced as Respondent's exhibit R-9.

[4] Relevant correspondence between counsel for parties and the ALJ are attached as Exhibit 4 and introduced as Respondent's exhibit R-10.

II. NLRB FAILED TO PROVE ITS CASE AGAINST RESPONDENT

A. NLRB Failed to Prove Allegations Made in Its Complaint at ¶¶ 6, 7, 8

1. NLRB Failed to Prove How Mr. Domenech Uses His Twitter Account; Instead NLRB Offered Only Speculation about His Twitter Use

NLRB failed to prove the factual allegation it made in ¶ 6 of the Complaint. That paragraph states: "On June 6, 2019, Respondent, by Domenech, via the Twitter account https://twitter.com/bdomenech, threatened employees with reprisals and implicitly threatened employees with loss of their jobs if they formed or supported a union." GC-1 ¶ 6.

The General Counsel failed to prove that Mr. Domenech always speaks for or on behalf of the Respondent through tweets he posts on his personal Twitter account.

Establishing that Mr. Domenech speaks for and on behalf of Respondent—and that he did speak on behalf of Respondent when he published the Tweet—is a central, threshold question on which NLRB has adduced no proof. Instead, Counsel for General Counsel has only offered his own speculation and assumptions, neither of which constitutes proof on this important threshold issue. Thus, the ALJ would have reason not even to peruse the contents of the June 6 Tweet, because looking at the content of the Tweet will become necessary only if the ALJ finds that the General Counsel has proved Mr. Domenech spoke for and on behalf of the Respondent to Respondent's employees (as opposed to the general public) when he published the Tweet.

In fact, Respondent proved that Mr. Domenech speaks for himself, not for Respondent, through his personal Twitter account:

- "I use my personal Twitter account to engage in expressive speech and conduct by posting tweets, re-tweets, replies to tweets, following other Twitter users, liking others' tweets, as well as blocking or muting content." R-3 ¶ 7.
- "I created my personal Twitter account in June of 2008. Since then, I have maintained sole and exclusive control over my personal Twitter. My posts on my personal Twitter account reflect my views, not those of FDRLST Media, LLC." R-3 ¶ 8.

Counsel for General Counsel conflated Mr. Domenech's email use with his Twitter use. In his opening statement, Counsel for General Counsel offered, not proof, but the following speculative observation: "The Respondent may argue that the tweet cannot be attributed to the Employer, because it was made from Mr. Domenech's personal account, but that argument is empty. Mr. Domenech himself does not distinguish between his so called 'personal accounts' and those owned by Respondent in addressing employees, as his use of email shows." R-8 at 13:17–22.

It is an illogical leap to conflate email use with Twitter use. There is nothing in the record suggesting Mr. Domenech uses his personal Twitter account to communicate with Respondent's employees regarding business matters. In fact, the parties have stipulated: "Since at least January 1, 2019, Ben Domenech has communicated with (and continues to communicate with) Respondent employees about Respondent's business matters using his own personal *e-mail* account(s) as well as an *email* account owned by Respondent." GC-2 ¶ 28 (emphasis added). The parties did not stipulate—and General Counsel did not prove—that Mr. Domenech uses his personal Twitter account to communicate with Respondent's employees about Respondent's business matters. Mr. Domenech, via affidavit, testified he uses his personal Twitter account to express his personal views, "not those of FDRLST Media, LLC." R-3 ¶ 8. He testified that the Tweet was "satire and an expression of [his] personal viewpoint on a contemporary topic of general interest." R-3 ¶ 5. Mr. Domenech uses his "personal Twitter account to engage in expressive speech and conduct by posting tweets, re-tweets, replies to tweets, following other Twitter users, liking others' tweets, as well as blocking or muting content." R-3 ¶ 7.

2. NLRB Failed to Prove the Allegation It Made at Complaint ¶ 6

The General Counsel stated the applicable rule during the hearing but ultimately failed to factually prove the elements of that rule. Counsel for General Counsel stated: "In determining whether a statement violates [Section] 8(a)(1) [of the NLRA], the Board … consider[s] … *only whether an employee would reasonably understand the statement as threatening adverse action in response to protected activities*." R-8 at 13:7–11 (emphasis added). Two employees who saw the Tweet in question and offered testimony for

the record both stated unambiguously in their respective sworn affidavits that they did not perceive the Tweet as a threat, reprisal, use of force, or promise of benefit. *See* R-5 ¶¶ 8–9; R-4 ¶¶ 8–9. On information, knowledge, and belief, the Counsel for General Counsel never spoke with a single employee during the pendency of the investigation or hearing.

Thus, even if the ALJ somehow were to reach the question as to whether the content of the Tweet violated the NLRA, NLRB has still failed to show that, when objectively viewed under the totality-of-the-circumstances test, this Tweet was an "unfair labor practice" within the meaning of the National Labor Relations Act. NLRB's test "is whether under all circumstances the remark reasonably tends to restrain, coerce, or interfere with the employees' rights guaranteed under the Act." *GM Electrics*, 323 NLRB 125, 127 (1997).

At trial, NLRB's General Counsel failed to prove that a reasonable FDRLST employee would take Mr. Domenech's satire to be threatening such consequences, loss of a job, or promise of a benefit. The General Counsel failed to prove that a reasonable FDRLST employee would perceive Mr. Domenech's statement as anything other than a joke.

In fact, at trial Respondent proved that FDRLST employees understood the tweet to be satire. Two employees voluntarily submitted sworn affidavits, under penalty of perjury, in support of Respondent and against NLRB, stating:

- "The Tweet was a satirical and funny way of expressing personal views on a contemporary topic. … I did not in any manner perceive Mr. Domenech's Tweet as a threat, reprisal, use of force, promise of benefit, or in any manner whatsoever as touching, concerning, or relating to any workplace activity that is protected under the National Labor Relations Act." R-5 ¶¶ 8–9.
- "The Tweet was funny, obviously sarcastic, and was a pithy way of expressing personal views on a contemporary topic. … I did not in any manner perceive Mr. Domenech's Tweet as a threat, reprisal, use of force, promise of benefit, or in any manner whatsoever as touching, concerning, or relating to any workplace activity that is protected under the National Labor Relations Act." R-4 ¶¶ 8–9.

The General Counsel failed to prove the essential element of the test that, by NLRB counsel's own concession, the Board uses in determining whether a statement violates NLRA Section 8(a)(1). NLRB has, therefore, failed to prove the central allegation of its entire case against Respondent—the allegation contained in ¶ 6 of the Complaint.

The General Counsel's failure of proof also reveals the strangeness of this case where FDRLST's employees or those in privity with them are *not* the Charging Parties. It shows that this case is nothing short of harassment of Respondent. If the General Counsel's case-in-chief proves anything, it proves that Respondent is being subjected to a costly, unnecessary, and unconstitutional administrative process. This onerous and unconstitutional process is the punishment here. For administrative adjudications like this one, it is "rather fundamental" and a "basic tenet of due process" that "the Government cannot, without violating due process, needlessly require a party to undergo the burdens of litigation" because "[t]he Government is not a ringmaster for whom individuals and corporations must jump through a hoop at their own expense each time it commands." *Cont'l Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *cf. Bartkus v. Illinois*, 359 U.S. 121, 127 (1959) (holding that "the cruelty of harassment by … prosecutio[n]" can violate the Due Process Clause of the Fifth Amendment). The ALJ should forthwith rule as a matter of law in favor of Respondent and dismiss NLRB's case against FDRLST in its entirety.

3. NLRB Perception of Respondent as an "Anti-Union Website" Is Insufficient to Prove Respondent Engaged in an Unfair Labor Practice

Counsel for General Counsel, perhaps unwittingly, revealed the true reason why NLRB is harassing Respondent:

> The Federalist, anti-union website, is demonstrated by its editorial content. As the publisher of The Federalist, and CEO of the Respondent, the editorial positions of the website are reasonably understand – understood as Mr. Domenech's own. In light of the anti-union position of The Federalist, an apatory (phonetic), Mr. Domenech, no reasonable reader would interpret the threat as anything other than simply another expression of Mr. Domenech's anti-union stance. The foregoing being so, the facts demonstrate Respondent's violation of the Act, and Your Honor should so find. That's it.

R-8 at 14:4–14 (underlining in original); *see also* R-8 at 22:17–24 (stating that General Counsel introduced certain exhibits "for the purpose of showing The Federalist's *political position* on unionization (underlining in original; emphasis added)). The General Counsel's entire theory of the case—not proof, but theory—is that tweeting a seemingly anti-union joke is a *per se* violation of the National Labor Relations Act. For reasons explained below, that cannot be so.

Respondent, as stipulated by the parties, "is a web magazine focused on culture, politics, and religion that publishes commentary on a wide variety of contemporary newsworthy and controversial topics." GC-2 ¶ 31. It expresses a variety of viewpoints of outside authors. The General Counsel admitted into evidence newspaper articles written around the time Mr. Domenech published his Tweet. *See* GC-3 & Exhibits attached thereto. All of these newspaper articles show the respective authors' viewpoints on a contemporary, controversial topic. And the corresponding articles admitted into evidence by Respondent—to show those articles were published elsewhere *in addition to* being published on FDRLST's website and where the *authors* solicited publication on FDRLST's website, not vice versa—prove that Respondent provides a forum for a variety of authors to express their personal views. *See* R-1; R-2. General Counsel did not present *any* evidence that FDRLST has published any so-called anti-union editorial authored by FDRLST's editorial board—and there is none. As to op-eds published by FDRLST employees, if any, those op-eds also express viewpoints of the respective authors, *not* the viewpoint of FDRLST. In any event, Counsel for General Counsel presented *no* evidence apart from his speculative leap to show why all of these individual viewpoints can be conflated with, attributed to, or necessarily become the viewpoints of Respondent. And Counsel for General Counsel presented *no* evidence, even assuming these are Respondent's viewpoints, that Respondent therefore has actually threatened Respondent's employees such that it constitutes an actionable "unfair labor practice."

NLRA defines "unfair labor practices by employer." 29 U.S.C. § 158(a). Employers engage in an "unfair labor practice" if they, for example, "interfere with, restrain, or coerce employees in the exercise of [§ 157 rights]," "dominate or interfere with the formation or administration of any labor organization," "discriminat[e] in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization," "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter," "to refuse to bargain collectively with the representatives of his employees." *Id.* However, the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Even under an expansive reading of "unfair labor practice," Respondent did not engage in a practice that can be categorized as a "*labor* practice," let alone an "*unfair* labor practice." Non-respondent Mr. Domenech posted a satirical comment on his personal Twitter account. A stranger—Mr. Fleming—saw Mr. Domenech's tweet. Mr. Fleming's sensibilities were apparently offended, either by Mr. Domenech's Tweet, by his Twitter persona, or by the mere fact that people hold viewpoints different from that of Mr. Fleming. Mr. Fleming even re-tweeted Mr. Domenech's Tweet. *See* R-6. Mr. Domenech did not interfere with, restrain or coerce FDRLST Media, LLC employees (or Mr. Fleming) in any manner whatsoever.

4. Prosecution Based on NLRB's Perception of Respondent Violates the First Amendment and NLRA Section 158(c)

Assuming arguendo that the personal views of Mr. Domenech, Respondent, and Respondent's employees or invited authors (as expressed through stipulated-to articles that are admitted into evidence) are all one and the same, then that is all the more reason for NLRB to keep its hands off Respondent. These individuals have banded together because they share common beliefs. Publishing these common beliefs, even if they are disfavored by some, is necessary for a functioning democratic society. Protecting this right and freedom of association, protecting and encouraging the formation of such associations is the very reason NLRB purportedly exists. *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("both the employee and the employer are protected by the First Amendment when they express themselves") (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–18 (1969)).

The General Counsel's theory of the case is that a publisher's "expression of [an] anti-union stance" is a "violation of the Act." R-8 at 14:4–14. This *per se* rule against speech by groups who allegedly hold a viewpoint that the General Counsel disfavors would interfere with the freedom-of-speech, freedom-of-press, and freedom-of-association rights of those who have banded together based, in part, on such shared beliefs. If the ALJ were to adopt the General Counsel's theory, the tribunal would be achieving the exact opposite of NLRB's stated mission.

This right to speak or associate freely is sacrosanct under the First Amendment to the U.S. Constitution. "The First Amendment gives freedom of mind the same security as freedom of conscience. … And the rights of free speech and free press are not confined to any field of human interest." *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *see also Knight First Amendment Inst. at Columbia v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) ("As a general matter, social media is entitled to the same First Amendment protections as other forms of media."). Indeed, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication (such as Twitter) appears. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *see also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011).

It is "not sound" to claim that "the First Amendment's safeguards" are rendered ineffectual or "wholly inapplicable" because "interests of workingmen are involved." *Thomas*, 323 U.S. at 531. Indeed, "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The "prospect" that someone "might be persuaded by" a viewpoint is *not* a violation of the National Labor Relations Act; "it *is* the democratic political process." *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting).

Parody, satire, or commentary on a politically charged issue of our times is "a form of artistic expression" that is "protected by the First Amendment." *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 493 (2d Cir. 1989). It is "deserving of substantial freedom" either as "entertainment [or] as a form of social and literary criticism." *Id.* (cleaned up). It is "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "In the realm of private

speech or expression, government regulation must not favor one speaker over another." *Id.* "Discrimination against speech because of its message is *presumed* to be unconstitutional." *Id.* (emphasis added). Like here, where the "government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. NLRB "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

What's more, 29 U.S.C. § 158(c) also specifically prohibits NLRB from persecuting speakers for "expressing … views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form … if such expression contains no threat of reprisal or force or promise of benefit." *See NLRB v. Gissel Packing Co.*, 395 U.S. at 617 (Section 158(c) "merely implements the First Amendment by requiring that the expression of any views, argument, or opinion shall not be evidence of an unfair labor practice." (cleaned up)). The view, argument, or opinion expressed in Mr. Domenech's Tweet is precisely the type of expression that is protected by the First Amendment and § 158(c). This case is nothing more than a naked attempt at silencing a disfavored viewpoint. NLRB would ill serve its mission if it were to fall for such an obvious attempt by an apparently offended random activist to unleash government prosecution and to chill constitutionally protected freedom of speech, of the press, and of association.

B. NLRB Failed to Prove Allegations Made at Complaint ¶¶ 2, 3

Based on the incorrect address supplied on the Charging Document, and also presumably based on incorrect information found by NLRB personnel, NLRB served "Subpoena Duces Tecum B-1-15S84ZF" and "Subpoena Ad testificandum A-1-15S83QZ" by certified and regular mail on "Custodian of the Records" of "FDRLST Media, LLC" at the following two incorrect addresses: (1) "6160 N. Cicero Ave., Suite 410, Chicago, IL 60646"; and (2) "8647 Richmond Hwy, Suite 618, Alexandria, VA 22309." GC-1 Ex. C. Neither Respondent's business nor its custodian is located at either of those two addresses. Ms. Fatima Powell, "Designated Agent of NLRB" signed an affidavit stating truthfully that she mailed by certified and regular mail the two aforementioned subpoenas to the two aforementioned mailing addresses. GC-1 Ex. C.

Parties later truthfully stipulated that Respondent "maintains an office at 611 Pennsylvania Ave., SE, Room 247, Washington, D.C. 20003." GC-2 ¶ 3. But, prior to the parties entering this stipulation, NLRB incorrectly stated in the Complaint, "Subpoenas *ad testificandum* and *duces tecum* were properly served upon Respondent by certified and regular mail on July 12, 2019, requiring and directing Respondent to appear on July 26, 2019 and produce certain documents[.]" GC-1 ¶ 3(a). By stipulating that the Respondent maintains an office in Washington, DC, NLRB now admits that the two subpoenas were *not* properly served upon Respondent.

NLRB has failed to prove allegations made in ¶ 2 of the Complaint. Paragraph 2 of the Complaint (underlining in original; italics added) states: "At all material times, Respondent, a limited liability company with offices and places of business in Washington, DC and *Chicago, Illinois*, has been engaged in publishing an online magazine called The Federalist, which is a division of Respondent." The two subpoenas mentioned in the Complaint have never been served on Respondent at Respondent's stipulated-to Washington, DC address; they were served at a Chicago, IL address and an Alexandria, VA address—addresses that are not Respondent's nor that of Respondent's custodian of records.

In Paragraph 3(b) of the Complaint, NLRB alleged that Respondent "failed to timely file Petitions to Revoke said subpoenas." GC-1 ¶ 3(b). NLRB further alleged that "Respondent did not appear on July 26, 2019, nor has it in any other manner complied with the subpoenas referenced in sub-paragraph 3(a)." GC-1 ¶ 3(c). At the hearing, Counsel for General Counsel did not offer any proof—and there is none—to suggest that this failure to respond to subpoenas, which were not properly served on Respondent to begin with, is somehow indicative of Respondent's or Mr. Domenech's culpability under the NLRA's definition of unfair labor practice.

CONCLUSION

NLRB's case against FDRLST Media, LLC should be dismissed in its entirety for lack of personal jurisdiction and lack of subject-matter jurisdiction. In addition, General Counsel has failed to prove its case against Respondent: a case based on investigation that was never lawfully opened in the first place, and a prosecution that, now after an evidentiary hearing, is lacking any basis or evidence to conclude that Respondent engaged in any practice that is actionable under the NLRA.

Respectfully submitted, on the 10th day of March, 2020.

By Attorneys for Respondent, FDRLST Media, LLC
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL FLEMING *Charging Party*	Case No. 02-CA-243109

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020, Respondent's "Closing Post-Hearing Brief" was electronically filed and served by e-mail and by certified U.S. Mail, return receipt requested on the following parties:

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EXHIBIT 1
ATTACHED TO
RESPONDENT'S CLOSING POST-HEARING BRIEF

R-7

CHARGING DOCUMENT

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
02-CA-243109	6-7-19

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
FDRLST Media, LLC

b. Tel. No. (773) 255-5846

c. Cell No.

f. Fax No.

d. Address *(Street, city, state, and ZIP code)*
6160 N. CICERO AVENUE Suite 410
IL Chicago 60646-____

e. Employer Representative
Ben Domenech
Publisher

g. e-Mail
ben@thefederalist.com

h. Number of workers employed
50

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Printing & Publishing

j. Identify principal product or service
Conservative media commentary

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

--See additional page--

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Joel Fleming Title:

4a. Address *(Street and number, city, state, and ZIP code)*
129 Franklin St Apt 141
MA Cambridge 02139-____

4b. Tel. No. (617) 388-0622

4c. Cell No.

4d. Fax No.

4e. e-Mail
fleming.joel@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Joel Fleming
(signature of representative or person making charge)

Joel Fleming
Title:
(Print/type name and title or office, if any)

Address 129 Franklin St Apt 141 Cambridge MA 02139-____

06/7/2019 14:04:01
(date)

Tel. No. (617) 388-0622

Office, if any, Cell No.

Fax No.

e-Mail
fleming.joel@gmail.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Additional Information in Support of Charge

Charging Party Name : Joel Fleming
Inquiry Number : 1-2505077611
Date Submitted : 06/7/2019 14:04:01

Please provide a brief description of the specific conduct involved in your charge. The information you provide may be viewed by the charged party in the event of a formal proceeding, so PLEASE DO NOT GIVE A DETAILED ACCOUNT OF YOUR CHARGE OR A LIST OF POTENTIAL WITNESSES AT THIS TIME. A Board Agent will contact you to obtain this and other detailed information after your charge is docketed. After you submit this E-Filed Charge form, you will receive a confirmation email with an Inquiry Number (Sample Inquiry Number: 1-1234567890) and a link to the E-Filing web page. You may use the link and the Inquiry number provided in the email to e-file any additional documents you wish to present in support of your charge.

Additional Information Provided:

At 8:39 PM EST on June 6, 2019, Ben Domenech, who is the publisher of The Federalist, sent the following tweet from his Twitter account (@bdomenech): "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." As of 2:00 pm EST on June 7, 2019, that tweet is publicly available here: https://twitter.com/bdomenech/status/1136839955068534784

I am not an employee of The Federalist. This charge is submitted pursuant to 29 CFR § 102.9, which provides that "Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce."

Basis of the Charge

8(a)(1)

Within the previous six-months, the Employer has interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by threatening to retaliate against employees if they joined or supported a union.

Name of Employer's Agent/Representative who made the statement	**Approximate date**
Ben Domenech	June 6, 2019

EXHIBIT 2
ATTACHED TO
RESPONDENT'S CLOSING POST-HEARING BRIEF

R-8

TRANSCRIPT OF FEBRUARY 10, 2020 HEARING

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 02

In the Matter of:

FDRLST Media, LLC, **Case No. 02-CA-243109**

Respondent,

and

Joel Fleming,

Charging Party.

Place: New York, New York

Dates: February 10, 2020

Pages: 1 through 31

Volume: 1

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 02

In the Matter of: FDRLST MEDIA,LLC, Respondent, and JOEL FLEMING, Charging Party.	Case No. 02-CA-243109

The above-entitled matter came on for hearing, pursuant to notice, before **KENNETH W. CHU**, Administrative Law Judge, at the National Labor Relations Board, Region 02, Jacob K. Javits Federal Building, 26 Federal Plaza, Suite 3614, New York, New York 10278, on **Monday**, **February 10, 2020, 9:44 a.m.**

APPEARANCES

On behalf of the General Counsel:

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On behalf of the Respondent:

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EXHIBITS

EXHIBIT	IDENTIFIED	IN EVIDENCE
General Counsel:		
GC-1	5	6
GC-2	6	9
GC-3	6	10
Respondent:		
R-1	20	26
R-2	21	26
R-3	21	27
R-4	21	27
R-5	21	27
R-6	21	27

PROCEEDINGS

JUDGE CHU: Good morning, everybody. I'm Administrative Law Judge, Kenneth W. Chu. I'm here presiding over the matter of FDRLST Media, LLC, and Joel Fleming, an Individual and the Charging Party, case number 02-CA-243109. Today is the 10th of February. It's approximately a quarter to 10 a.m.

Before we go any further, let me have notice of appearances from the parties. I'll start with the counsel for the General Counsel.

MR. RUCKER: Jamie Rucker, for the General Counsel.

MR. DYNAR: Aditya Dynar, for FDRLST Media, LLC.

MS. ROLLINS: Kara Rollins, for FDRLST Media, LLC.

MR. MCCLAIN: And Jared McClain for the FDRLST Media, LLC.

JUDGE CHU: Thank you very much. And your address is what's noted in the participant list, 1225 19th Street --

MR. MCCLAIN: Yes, sir.

JUDGE CHU: -- Northwest, Suite 450, Washington, DC 20036?

Also present in this proceeding is an employee of the National Labor Relations Board, here as an observer.

Before going on the record this morning, we should briefly discuss a settlement possibility. The Respondent does not believe that it's worthwhile to discuss settlement; ready to go forward with the trial.

I also mentioned briefly that the Board had issued its order, also over the weekend, that had denied the Respondent's

motion to dismiss the complaint, and that order fully indicated that all arguments on the motion to dismiss the complaint before the Board were denied.

At this time, I believe, Mr. Rucker, you have some moving papers you want to submit for the record?

MR. RUCKER: Sure. First there's the --

MR. DYNAR: Judge, too, if I may? We would like to make an opening statement after Mr. Rucker, if he wishes to make an opening statement.

JUDGE CHU: We're just talking about the moving papers at the moment. We're not talking about opening statements yet.

MR. DYNAR: Well, I believe --

JUDGE CHU: All right.

MR. DYNAR: -- there are certain issues with the papers. Judge, as you are aware, we stipulated to the authenticity of the papers that Mr. Rucker wishes to move.

JUDGE CHU: I want to see the papers first, all right?

MR. DYNAR: Okay.

JUDGE CHU: So what do we have?

MR. RUCKER: First, there's the formal papers, GC Exhibit 1, which they've been given a chance to examine.

JUDGE CHU: Right.

MR. RUCKER: So moving those in.

JUDGE CHU: All right. That's made part of the record, which is the complaint and the answer.

(General Counsel Exhibit Number 1 Received into Evidence)

MR. RUCKER: Then there's what I'll mark as GC Exhibit 2, which is the factual stipulation number one between the parties.

(General Counsel Exhibit Number 2 Marked for Identification)

JUDGE CHU: Thank you.

MR. RUCKER: And then there's a further stipulation about authenticity and judicial notice, which I'll mark as GC Exhibit 3, with certain documents attached. And I'm going to ask to move those attached documents into the record as well.

(General Counsel Exhibit Number 3 Marked for Identification)

JUDGE CHU: All right. Any --

MR. DYNAR: Judge -- Judge, too, if I -- if I may?

JUDGE CHU: -- objection to General Counsel Exhibit 1?

MR. DYNAR: Exhibit 1 is the complaint to the --

JUDGE CHU: And your answer?

MR. DYNAR: We have no objection to the introduction of the complaint, but before we get into the exhibits, I do want to mention that we are entering a special appearance on behalf of FDRLST Media, LLC. We are not entering a general appearance, because we wish to appeal the Board's decision on the motion to dismiss. So this is -- we are not waiving our personal jurisdiction objections. We are not making --

JUDGE CHU: There was never any waiver from your ability to appeal from the Board's order, if in fact you intend to do

that.

MR. DYNAR: I understand that, and that's why I wanted to make it clear for the record that this is a special appearance only. This is not a general appearance.

JUDGE CHU: Well, I don't understand the difference. Are you telling me that there's certain things you won't do at this hearing?

MR. DYNAR: Well, we would, if ordered to do so under protest, sure. But the meaning of a special appearance is, we do not concede that the Board currently has personal jurisdiction. We could, you know, maybe discuss the availability of a transfer venue. I believe, Judge, you started mentioning that venue -- there was an issue of venue in this case. So in that respect, I mean, we would still, you know, have a special appearance in the court. This is not a general appearance.

JUDGE CHU: I'm not going to discuss any of the rulings that the Board made in this order, all right? I'm only going to discuss the allegation and the complaint, to the extent that it's raised by the General Counsel or the Respondent. And like I said two minutes ago, if you think you should appeal the Board's order, that's your prerogative. That's not before me, as the Administrative Law Judge.

And again, whatever the order is, is what I stated it was at the pre-hearing conference, but is not something that I'm

going to look into the merits of in this hearing.

MR. DYNAR: I understand. That's why, Judge, I appreciate you stating that for the record.

But also for the record, we would say that if you order us to proceed today, we would proceed with, you know, entry of exhibits and evidence, and all of that.

JUDGE CHU: I'm not going to order you --

MR. DYNAR: But --

JUDGE CHU: -- to do anything. This is the hearing. Whatever you think is necessary to present as evidence on behalf of your company, fine. Whatever you don't think is necessary, then don't. I'm not ordering anybody to do anything that they wish to do at the hearing. You -- everybody here are capable attorneys. You decide what you want to submit as evidence for this complaint -- for this hearing. And anything else you don't want to, that's your business.

MR. DYNAR: Sure. I mean, in the sense that, you know, we are only proceeding under a special appearance, so what that means, I, again, want to clarify for the record; is, we are going to appeal the motion to dismiss. But it also means that there is a substantial due process consideration of making us proceed with the merits of the underlying dispute, when the threshold dispositive issues about jurisdiction, personal jurisdiction, subject matter jurisdiction, and venue, have not been clarified by a Federal Court.

So we believe -- I mean, we would proceed, as I said earlier, under protest. But I wanted to state for the record that there are serious due process concerns of proceeding -- of making us proceed as if this is a general appearance, when it is not.

JUDGE CHU: That's fine. You can call it whatever you want, and you can submit whatever evidence you want. And again, it's not my position to direct you to do certain things at this proceeding. Again, you -- everybody here are capable attorneys. You decide what you want to introduce as evidence, and you can proceed in that manner.

There's General Counsel Exhibit 2; any objection to 2?

MR. DYNAR: Exhibit 2 is the stipulation entered by the parties on -- it doesn't have a date, but it has 31 paragraphs. We don't have any objections, Judge, to it.

JUDGE CHU: All right.

(General Counsel Exhibit Number 2 Received into Evidence)

JUDGE CHU: And again, if you want to discuss the stipulation and you open a statement, that's fine. But all I'm asking the parties to do now, whether they object or do not object to certain exhibits.

General Council Exhibit 3, again, is a stipulation between the parties. And again, it's consigned by the parties with attachment.

Any objections to General Counsel Exhibit 3?

MR. DYNAR: Judge, too, if it helps, we would like to create a complete record of Exhibit 3. The way we understand it is, Exhibit 3 also includes some newspaper articles that are attached to the exhibit.

Now, some of those articles had been published in other publications before they were published on The Federalist, which is the website for FDRLST Media, LLC. So if it's okay with you, Judge, and with Mr. Rucker, we would also like to complete the record on the exhibit by introducing, or we could wait --

JUDGE CHU: You can introduce whatever you want, if it's relevant for the purpose of supplementing General Counsel Exhibit 3. You can identify it as Respondent Exhibit 1 to Counsel Exhibit 3. We'd take a look at it, I'll ask Mr. Rucker if there are any objections, and I'll discuss the objections if there are any, and we proceed from there.

MR. DYNAR: Thank you, Judge.

JUDGE CHU: All right. So General Counsel Exhibit 3 is admitted for the record.

(General Counsel Exhibit Number 3 Received into Evidence)

JUDGE CHU: Now, Mr. Rucker, you have an opening statement to make?

MR. RUCKER: Yes. But I wanted to clarify that I'm also moving the documents attached individually, into evidence, that they're their own --

JUDGE CHU: All right.

MR. RUCKER: -- three.

JUDGE CHU: They're all part of Exhibit 3?

MR. RUCKER: Right.

JUDGE CHU: I guess it would've been good if you had paginated it so that when we would refer to page 3 of the attachment, we'd know what it is, but --

MR. RUCKER: I believe they have exhibit numbers on them, on the footers, so you can look at that.

JUDGE CHU: All right. I'll note for the record that General Counsel Exhibit 3 has attachments, and these attachments have been identified as also exhibits, from 2 --

MR. RUCKER: 1 through --

JUDGE CHU: -- I'm sorry, from 1 to 14.

MR. RUCKER: 15.

JUDGE CHU: 15? So 1 through 15 are sub-exhibits to General Counsel Exhibit 3.

Anything else, then, before opening statement?

MR. RUCKER: Not from General Counsel, Your Honor.

JUDGE CHU: All right. Let's hear your opening statement.

MR. RUCKER: All right. I will not ask for much of your time. FDRLST Media, the Respondent in this case, operates a few different media outlets, including a website it styles a web magazine called The Federalist, at the URL thefederalist.com. Respondent has employees, including staff

writers, and editors, who work in various locations across the U.S.

The CEO and Publisher of the Federalist is Mr. Ben Domenech, an admitted supervisor and agent of Respondent. Mr. Domenech communicates with FDRLST employees about job related matters through his own personal email account, as well as through an email account owned by Respondent. And while The Federalist has its own Twitter account handle, @FDRLST, Mr. Domenech uses his personal Twitter account, @bdomenech to promote and discuss Respondent's business.

On June 6th, 2019, various online media, including The Washington Post, Bloomberg News, CNN, Huffington Post, et cetera, curried accounts of a walkout by the employees of Fox Media. That same day, Mr. Domenech sent out a tweet, which read, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." It is undisputed that employees of Respondent saw the message.

General Counsel contends that that tweet violated Section 8(a)(1) of the National Labor Relations Act. There's no doubt that joining, or trying to join a union, is a right guaranteed by Section 7 of the Act. Since that part of the statute explicitly provides employees the right to "form, join, or assist" labor organizations.

And Section 8(a)(1) of the Act, which makes it unlawful for an employer to interfere with, restrain, or coerce

employees, in the exercise of Section 7 rights, has long been interpreted to prohibit employer statements threatening to take adverse action against employees for engaging in those Section 7 rights. Such statements are not protected by the First Amendment, by virtue of containing a threat of reprisal, which the Supreme Court ruled, in NLRB Gissel Packing.

In determining whether a statement violates 8(a)(1), the Board does not consider either the motivation for the statement, or its actual effect, but only whether an employee would reasonably understand the statement as threatening adverse action in response to protected activities.

Here, Mr. Domenech's tweet unambiguously threatens to respond to any attempt to join or form a union with being "sent back to the salt mine." So long as that phrase "send you back to the salt mine" is reasonably understood as an adverse employment action, the statement violates 8(a)(1).

The Respondent may argue that the tweet cannot be attributed to the Employer, because it was made from Mr. Domenech's personal account, but that argument is empty. Mr. Domenech himself does not distinguish between his so called "personal accounts" and those owned by Respondent in addressing employees, as his use of email shows.

Second, the tweet itself is reasonably understood as explicitly directed to employees of The Federalist. It is only employees, rather than readers, who are in a position to

unionize at The Federalist. And only employees Mr. Domenech is in a position to take action against.

And lastly, it's tweeted to @FDRLST. Nor is the message reasonably understood as a joke. The Federalist, anti-union website, is demonstrated by its editorial content. As the publisher of The Federalist, and CEO of the Respondent, the editorial positions of the website are reasonably understand -- understood as Mr. Domenech's own.

In light of the anti-union position of The Federalist, an apatory (phonetic), Mr. Domenech, no reasonable reader would interpret the threat as anything other than simply another expression of Mr. Domenech's anti-union stance. The foregoing being so, the facts demonstrate Respondent's violation of the Act, and Your Honor should so find. That's it.

JUDGE CHU: Thank you.

Counsel for the Respondent, either one of you three have an opening statement?

MR. DYNAR: Thank you, Judge.

There are several oddities in the General Counsel's case. I would reiterate that Respondent has a continuing objection to this entire hearing. Respondent objects to this hearing because this tribunal lacks subject matter jurisdiction. This tribunal lacks personal jurisdiction, the venue is improper in Region 2. The burden of proof on all matters lies with the General Counsel. The General Counsel has failed to produce any

evidence that proves that this hearing should proceed.

Late on Friday, February 7th, the Board denied Respondent's motion to dismiss. It relied on no constitutional, statutory, or federal case law; and instead, relied exclusively on NLRB cases, and NLRB regulations, to deny the motion to dismiss. Moving forward with today's hearing leads to a series of serious due process clause violations. Respondent preserves all such objections for purposes of appeal.

Respondent to counsel, today, is not appearing -- not entering a general appearance. Respondent to counsel is entering only a special appearance. Respondent does not waive its objection to personal jurisdiction. Respondent does not waive its objection that venue in Region 2 is improper. Respondent cannot waive its objection that this tribunal lacks subject matter jurisdiction. Therefore, Respondent is entering a limited special appearance in today's hearing, and continues to contest the threshold dispositive, and outcome, determinative jurisdictional and constitutional issues.

To the extent the tribunal orders Respondent to proceed with the hearing, Respondent, for the record, lodges a formal protest, and wants to make clear, for everyone concerned, that this hearing is highly irregular, and inconsistent with the due process clause of the Fifth Amendment to the United States Constitution. Under protest, if we proceed to the merits

today, there are important hurdles in the General Counsel's path that the General Counsel will not be able to overcome.

There is nothing in the record, and the General Counsel will not be able to prove, that FDRLST Media, LLC, engaged in an unfair labor practice. There is nothing in the record, and the General Counsel will not be able to overcome the strict First Amendment standard that applies in this case.

Mr. Benjamin Domenech's speech was satire. The tweet was posted on Mr. Domenech's personal Twitter account. It was publicly available. Mr. Domenech does not speak for his Employer FDRLST Media, LLC. His Employer does not, and cannot, compel or dictate his, or any other employee's, personal viewpoints expressed on their personal Twitter accounts.

There is nothing in the record, and the General Counsel will not be able to overcome the strict Section 8(c) prohibition that requires this tribunal to take no action against Respondent. There is no fact that stretches email use to Twitter use, as the General Counsel insinuated in his opening statement.

Finally, we reserve the right to present other objections, evidentiary or otherwise, during and after the General Counsel's case in chief. We reserve the right to submit a written closing or post-trial brief. We reserve the right to ask for a follow-up, or reopening of the hearing, if one should be required.

Nothing in this opening statement should be construed as Respondent waiving any objections that are not expressly made in the opening statement.

JUDGE CHU: Thank you.

Again, let me make clear, which -- you don't think I did so before we went on the record -- I am not ordering anybody, including the General Counsel, to proceed in this hearing. If the Respondent's attorney, after making an appearance, wish to pack up and leave, that's your prerogative. Again, everybody here are capable attorneys. You can decide on your own if you want to proceed, or whatever evidence to submit, or you're free to go. So I am not ordering -- making clear, I am not ordering anybody in this proceeding to go forward with the trial.

That said, I will turn to the General Counsel and ask if there are any witnesses to this proceeding.

MR. RUCKER: General Counsel is not presenting any live testimony in this proceeding.

JUDGE CHU: General Counsel have any other documents they wish to submit?

MR. RUCKER: No, Your Honor.

I just want to clarify two things -- at least one thing that Mr. Dynar said, which is that he's not waiving any evidentiary objections, and I'm not sure what that means. He has to make objections to the evidence that's been introduced into the record now. He can't save it later for -- deprive me

of the chance to respond to it, so I'm not sure what that's about.

JUDGE CHU: As far as what's already submitted so far by the General Counsel, I've already asked the Respondent if there are any objections. So as far as the three exhibits already submitted, General Counsel 1, 2, and 3, and 3 having subset exhibits 1 through 4 -- 1 through 15, there are no objections.

MR. RUCKER: Okay.

JUDGE CHU: If there are objections to other items then I would expect Respondent counsel to note it for the record, simply because if you don't note it on the record, we don't know whether you waive or do not waive those objections.

All right. That being said --

MR. DYNAR: Wait. Judge, too, I think you asked a question for Respondent's counsel, whether we would want to proceed with the hearing. And you aren't ordering us to proceed with the hearing. And the way we see that, it's a Hobson's choice that this tribunal has given us, because the concern is then, if we leave, which I would be inclined to do, then the question is, do we forfeit the merits. And that's a serious concern. And it's really a Hobson's choice that the tribunal has put us in; I mean, we either proceed or not. I mean, you can't, you know, give us that kind of a choice, we believe.

JUDGE CHU: I'm not giving you a choice. I'm saying

that's your prerogative to do. You decide if you want to proceed with the trial, or you don't. If you're confident that the Federal Courts will agree with your position, then that's fine. The Federal Court may well reorder rehearing of this hearing, or they may just dismiss the complaint outright. You're not giving that up by going forward with this hearing this morning.

So again, you can proceed. I don't see any Hobson choice about this, because even if I was to issue a decision, finding against the Respondent, you can still appeal that decision, too. And if you prevail, then you prevail. I think you have the best of both worlds. I think you've got two bites of the apple as opposed to a Hobson's choice. You can prevail at this hearing or you can prevail if you expect to appeal the Board's order to the district court, so you've got two bites of the big apple, not one.

MR. DYNAR: Well, we think, I mean, just for the record, that if we leave, I mean, that this tribunal does not have any evidence from us -- from the Respondent. And then once we go to Federal Court, it's on substantial evidence. It's the evidence that's in the record, so it's not really -- it is really Hobson's choice that the tribunal has given us. So with that understanding, again, for the record, we want to present some evidence to just, you know, complete the record. But again, I just wanted to clarify that for the record.

JUDGE CHU: Go ahead. Submit whatever evidence you want. It's -- the ball's in your court now. General Counsel has completed his case in chief.

MR. DYNAR: Just, too, if I may, I would like to introduce two articles which would be Exhibit 1 for the Respondent. These are articles that were submitted by the counsel for the General Counsel. And the articles that we wish to submit are ones that were previously published in other publications, and then they were published on The Federalist's website.

(Respondent Exhibit Number 1 Marked for Identification)

MR. RUCKER: And I guess I'm going to ask what the relevance of those articles is --

JUDGE CHU: Well, let me --

MR. RUCKER: -- that they were published elsewhere.

JUDGE CHU: Let me look at it, and you can take a look at it. And then we can hear your objection to the relevancy of those documents.

(Counsel confer)

JUDGE CHU: Off the record, Barry.

(Off the record at 10:10 a.m.)

JUDGE CHU: We had a short recess for the Respondent to prepare certain documents to be submitted as Respondent Exhibits. Respondent Exhibit 1 is a one-page, two-sided document which is in reference to General Counsel 3.1.

Respondent Exhibit 2 is also a one-page, two-sided

document that is in reference to General Counsel Exhibit 3.7.

(Respondent Exhibit Number 2 Marked for Identification)

JUDGE CHU: Respondent Exhibit 3 is an affidavit of Benjamin Domenech. Respondent Exhibit 4 is also an affidav -- oh, and the affidavit of Mr. Domenech is one-page, two-sided.

(Respondent Exhibit Number 3 Marked for Identification)

JUDGE CHU: Respondent Exhibit 4 is a two-page document, which is also an affidavit from an Emily Jashinsky -- that's the best I can.

(Respondent Exhibit Number 4 Marked for Identification)

JUDGE CHU: And Respondent Exhibit 5 is a three-page document, also an affidavit, of Madeline Osburn.

(Respondent Exhibit Number 5 Marked for Identification)

JUDGE CHU: And finally, for now, Respondent Exhibit 6 is an email from the Charging Party Individual, Joel Fleming, that has the tweet from Mr. Domenech.

(Respondent Exhibit Number 6 Marked for Identification)

MR. DYNAR: And Judge, just a tiny correction for the record. Benjamin Domenech's affidavit has three pages, not two pages.

MR. MCCLAIN: And Your Honor, you said Exhibit 5 has three pages; I believe you have the second page of Ben Domenech's affidavit as the third page to Exhibit 5, when it should be Exhibit 3.

JUDGE CHU: Oh, the last page is just a notary?

MR. MCCLAIN: Yeah. But that should go with Exhibit 3, rather than Exhibit 5, I think.

JUDGE CHU: And Domenech's, I've got two pages.

MR. DYNAR: Right. And the third page is the notarization.

JUDGE CHU: There's a third page?

MR. DYNAR: Yes, sir.

JUDGE CHU: I don't have the third page before me.

MR. RUCKER: Why don't you swap yours with --

JUDGE CHU: I've got a complete Respondent Exhibit 3 now, which is, it is three pages. The third page is the notary.

All right. And again, if there are other exhibits that the Respondent wishes to submit, prior to closing the hearing record this morning, that's fine. And then I indicated that the parties can submit additional exhibits as part of their post-hearing brief on this matter.

Now, I'm turning to the General Counsel; are there any objections to the exhibits that I just announced?

MR. RUCKER: Yes, Your Honor. So with respect to Exhibits 1 and 2, General Counsel objects on relevance grounds. The General Counsel exhibits to which they refer, introduced for the purpose of showing The Federalist's political position on unionization, if you will. These do not address that at all, and I'm not sure what they would address.

And then Exhibits 3, 4, and 5 --

MR. DYNAR: Judge, may we respond to each exhibit -- objections to each exhibit, or all these objections in one go?

JUDGE CHU: I don't control how you strategize your case. Whatever you'd like to do, you can do it.

MR. DYNAR: Well, then if I may proceed to respond to the objection that was --

JUDGE CHU: All right.

MR. DYNAR: -- mentioned.

JUDGE CHU: Why don't you note for the record your response to General Counsel -- objections to Respondent Exhibit 1 and 2.

MR. DYNAR: Thank you, Judge. As to relevance, we believe the exhibits that we introduced, Exhibit Numbers 1 and 2, show that these articles were published elsewhere. And it shows the way in which the FDRLST Media, LLC, conducts its business. It invites outside authors who are not employees, not independent contractors, not interns. And it invites them to present their viewpoint. So these are viewpoints expressed by the authors of the article, not by FDRLST Media, LLC. And that is relevant because the General Counsel's case tries to conflate articles published on FDRLST Media, LLC, with the FDRLST Media, LLC supervisors' personal viewpoints.

JUDGE CHU: All right. Moving on.

Mr. Rucker, any other objections to the exhibits?

MR. RUCKER: Yes. For Exhibits 3, 4, and 5, I object on

both hearsay and relevance grounds. Obviously, these are out-of-court statements. For the truth of what they contain, they could've called these people as witnesses and allowed us to cross-examine them. They chose not to do that. And mainly, they address issues that are not relevant, such as Mr. Domenech's intentions in publishing the tweet, and the reactions of employees who saw the tweet, neither of which are relevant to the 8(a)(1) that's noted in the opening statement.

And then finally, Respondent Exhibit 6, I think it's a tweet by Joel Fleming of Mr. Domenech's tweet. And again, I don't understand the relevance of that.

JUDGE CHU: All right. This here, your response to the objections, please?

MR. DYNAR: So if I heard Mr. Rucker correctly, there is a hearsay objection and a relevance objection. I'll take both of them in turn. As to calling -- but there's, like, a preliminary issue that Mr. Rucker raised as to calling witnesses. The General Counsel had subpoenaed these witnesses and they withdrew those subpoenas. We are not required to call witnesses in the hearing, as Respondents. And our -- as to calling witnesses on the side of the Respondent, it goes to our present jurisdiction argument; this is, we aren't entering a general appearance, as I have stated repeatedly. So calling witnesses would be viewed as waiver of that argument. And that kind of goes to the hearsay argument, I believe, in Bench Book

Section 16-807.1. It allows affidavits to come in as evidence in such situations.

Notes an opportunity for hearing. Again, the General Counsel had issued subpoenas to testify, and the General Counsel withdrew those subpoenas, so the General Counsel has not expressed any desire to examine these witnesses at this time. If the Court wants to give the General Counsel that opportunity, you know, we might have the General Counsel issue subpoenas again, and the witnesses would be here. But the procedural posture of this case, we believe, precludes the General Counsel from claiming hearsay statements, or from claiming that these are not relevant.

As to relevance, the affidavits show the motives of Mr. Domenech in making the tweet. They also show how the tweet was perceived by two of the six FDRLST Media employees. As to the tweet by Joel Fleming, it shows the functionality of Twitter. It shows that Mr. Domenech publicly posted a tweet. It was not directed towards FDRLST Media employees. In fact, Joel Fleming agreed to it and disseminated the tweet from his own personal Twitter account. It shows the motivation of the Charging Party in filing a charge against Respondent.

JUDGE CHU: Anything else?

MR. DYNAR: There's also an unavailability of argument as to Mr. Domenech. He is attending funeral at this point -- today, in fact -- and for that reason, he's also an unavailable

witness. In addition, I would say that because these affidavits are notarized, they are self-authenticating. And they're independent indicia of trustworthiness, like stating something under penalty of perjury. That takes care of some of the problems with out-of-court statements.

JUDGE CHU: All right. Let me just state for the record, Respondent Exhibit 1 and 2 are entered into the record over the objections of the General Counsel.

(Respondent Exhibits Number 1 and 2 Received into Evidence)

JUDGE CHU: It just adds to the background information and the totality of the circumstances for General Counsel Exhibit 3, and for that reason, I will allow those two exhibits in so that I get a better picture of the exhibit that's attached to General Counsel Exhibit 3, specifically, 3.1 and 3.7.

The three affidavits objected to by General Counsel, I will allow them in also. For once, Respondent should be happy that the National Labor Relations Board does not strictly follow Federal Rules of Civil Procedure, because you stand as corrected that strict technical rules of hearsay are not followed in these administrative proceedings. And for that reason, out-of-court statements are permitted in, such as emails, affidavits, and other out-of-court statements. And I'll accept for what those affidavits are worth, with the understanding that they are hearsay statements. So Respondent Exhibits 3, 4, and 5 are in.

(Respondent Exhibits Number 3, 4, and 5 Received into Evidence)

JUDGE CHU: And I don't see any problem with Respondent 6. It's just something that has been stated in the General Counsel complaint, and Respondent 6 just shows that the tweet was received and read by, I guess, Mr. Joel Fleming. So I don't have a problem with Respondent Exhibit 6.

(Respondent Exhibit Number 6 Received into Evidence)

JUDGE CHU: All right. Again, if there are other documents that the parties neglected to submit this morning, you can do so in your post-hearing brief, as attachments to the brief, if indeed Respondent intends to submit a post-hearing brief. Again, everything done this morning, and subsequent to the hearing being closed is at the prerogative of the Respondent Counsel. I don't order or instruct the Respondent to do anything in particular. So far, anyway, this morning.

Are there other comments or questions at this time?

MR. RUCKER: Yes --

JUDGE CHU: Mr. Rucker?

MR. RUCKER: -- Your Honor. I'm confused about allowing the submission of further documents in the post-hearing briefs. If they're not part of the record or introduced as part of the record, General Counsel's deprived of an opportunity to object to their admission. So I'm not sure what the status of those documents are that you're allowing to be attached to the briefs.

JUDGE CHU: You know, that's always been a problem, Mr. Rucker, and I've seen it go both ways, that post-hearing briefs submitted by the parties, including the General Counsel, oftentimes has attachment to them. And it's always beyond me how that happens, but it's permissible, and I'm going to allow it.

If you believe, Mr. Rucker, that a surrebuttal or rebuttal to the closing statements made because they have attachments that you had not had the time to look at, I'll leave that up to you as a prerogative or as an option. And you can note that if necessary. And I'll have a conference call with the parties to discuss that further. But at this time, I'm going to allow it.

And if there's an issue with it by the General Counsel, or even by the Respondent, because as I indicated earlier, I've seen attachments as part of General Counsel's post-hearing briefs. So it's gone both ways, and I've received objections from opposing counsel when General Counsel attempts to submit exhibits as part of the post-hearing brief. So at this time, I will allow it, subject to objections from the parties. And I'll set up a settlement -- not a settlement, but a conference call to discuss that. All right?

MR. RUCKER: Okay.

JUDGE CHU: Any other comments or questions from the Respondent counsels?

MR. DYNAR: We would definitely like to submit a post-hearing brief. Is the tribunal going to enter any specific number of days in which we are allowed to, I believe -- it's under Bench Book Section 15-300, we get --

JUDGE CHU: You have up to 35 days.

MR. DYNAR: -- 35 -- thank you, Judge.

JUDGE CHU: You need the maximum time?

MR. DYNAR: Yes, sir.

MR. RUCKER: I would ask for a shorter time. This is a very limited case -- obviously, a very limited record -- a single --

JUDGE CHU: The record's very limited. I don't see a reason why you would need 35 days. I will set a time. And as you know -- as the parties know, if there is a need for extension of time to go beyond the date that we set today, you can always ask for what we call an EOT, extension of time, to file post-hearing briefs. I just approved two of them last week. It's pretty routine, but if we can get it within the time frame, that's fine.

I can do 30 days. We can have it on March 10th. And again, if additional time is needed, then by all means, put in a motion or request for extension of time.

All right. Let the record reflect that closing post-hearing briefs are afforded to the parties. And we set a deadline for submission of the brief for March 10th. And

again, if additional time is requested by the party, I certainly will consider additional time to submit a post-hearing brief.

And secondly, if there are any objections to any attachments to the post-hearing brief, by the parties, one or the other side, send me an email. And if you cannot resolve the attachments among yourselves, then I'll set up a conference call to look into the possibility of having the parties file rebuttal briefs to the closing briefs, which has been done in the past also.

Anything else at this time; General Counsel?

MR. RUCKER: No, Your Honor.

JUDGE CHU: Respondent counsels?

IN UNISON: No, Your Honor.

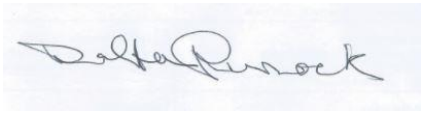
JUDGE CHU: All right.

Barry, let's close the record, and I'll wait for the post-hearing briefs. Thank you.

(Whereupon, the hearing in the above-entitled matter was closed at 10:39 a.m.)

CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 02, Case Number 02-CA-243109, FDRLST Media, LLC, and Joel Fleming, at the National Labor Relations Board, Region 02, Jacob K. Javits Federal Building, 26 Federal Plaza, Suite 3614, New York, New York 10278, on Monday, February 10, 2020, 9:44 a.m., was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.



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BARRINGTON MOXIE

Official Reporter

EXHIBIT 3
ATTACHED TO
RESPONDENT'S CLOSING POST-HEARING BRIEF

R-9

RESPONDENT'S MOTION TO DISMISS AND REPLY IN SUPPORT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL FLEMING *Charging Party*	Case No. 02-CA-243109

RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

January 13, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules and Regulations

Other Authority

INTRODUCTION

Respondent, FDRLST Media, LLC (FDRLST or Respondent), respectfully requests that the complaint against it be dismissed in its entirety.

This case commenced when Mr. Joel Fleming, the Charging Party, disapproved of a tweet he saw on Twitter.com (Twitter) posted by a twitter user—Mr. Ben Domenech—from his personal account. Mr. Fleming filed a charge with the National Labor Relations Board (NLRB) against Mr. Domenech's employer, FDRLST Media, LLC.

The Complaint should be dismissed because NLRB has no authority to prosecute this case when there is no "person aggrieved" within the meaning of the National Labor Relations Act (NLRA) This tribunal lacks subject-matter jurisdiction under the Constitution and the NLRA, and it lacks personal jurisdiction over Respondent. Region 2 is also an improper venue to litigate this matter. As such, the Complaint should be dismissed forthwith.

BACKGROUND AND FACTS

Mr. Domenech holds the position of Publisher with Respondent FDRLST Media, LLC. Stip. ¶ 10.[1] FDRLST publishes "The Federalist" web magazine which publishes cultural, political, and religious commentary on a variety of contemporary newsworthy and controversial topics. Stip. ¶ 31. The Federalist website maintains a Twitter account under the username "@FDRLST." Stip. ¶ 24. Mr. Domenech maintains a personal Twitter account with the username "@bdomenech." Stip. ¶ 25. On June 6, 2019, Mr. Domenech, who is not a named respondent in the Complaint, publicly tweeted on his *personal* Twitter account: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." Stip. ¶ 26.

[1] The General Counsel, Respondent, and Charging Party executed a Stipulation, which is attached as Exhibit 3 to this Motion.

Mr. Joel Fleming, who is not and has never been Respondent's employee, independent contractor, or paid or unpaid intern, apparently did not like Mr. Domenech's tweet and filed a charge with NLRB the next day on June 7, 2019. Stip. ¶ 30; *see generally* Charging Doc.[2]

On September 11, 2019, the Board filed a Complaint against FDRLST based on Mr. Fleming's charge. *See generally* Compl.[3]

STANDARD OF REVIEW

The Board's rules provide for the filing of a motion to dismiss after the answer is filed. 29 C.F.R. § 102.28. "Upon receipt of a motion for … dismissal, the Board may deny the motion or issue a notice to show cause why the motion should not be granted. If a notice to show cause is issued, the hearing, if scheduled, will normally be postponed indefinitely." 29 C.F.R. § 102.24(b). Motions can be made "in writing … or stated orally on the record." 29 C.F.R. § 102.24(a).

This tribunal is required to, "so far as practicable," conduct the proceeding "in accordance with the … rules of civil procedure for the district courts of the United States." 29 U.S.C. § 160(b). This tribunal and the Board look to the Federal Rules of Civil Procedure (FRCP) where the Board's rules contained in 29 C.F.R. fail to provide specific guidance. *Brink's, Inc.*, 281 NLRB 468, 468 (1986). The Board's rules do not specify the defenses that are available and that can be pleaded in motions to dismiss. Where Board rules or decisions do not contain specific guidance, this tribunal looks at FRCP and federal cases deciding FRCP questions for elucidation, instruction and relevant authority. *Id.*

Thus, if the General Counsel asserts a claim for relief, this tribunal looks to FRCP 12(b) defenses to decide, upon the filing of a motion to dismiss, whether the complaint should be dismissed. *See, e.g.*, *Allied Mechanical Services, Inc.*, 357 NLRB 1223, 1224 (2011) (applying FRCP 12(b) to a union's motion to dismiss the complaint).

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[2] Attached as Exhibit 1 to this Motion.

[3] Attached as Exhibit 2 to this Motion.

A. The Motion-to-Dismiss Standard for Lack of Subject-Matter Jurisdiction

To decide a motion to dismiss for lack of jurisdiction, FRCP 12(b)(1), the "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the [tribunal] lacks the statutory or constitutional power to adjudicate it." *Makarova*, 201 F.3d at 113; *Cardox Division*, 268 NLRB 335 (1983).

Rule 12(b)(1) motions can be either facial or fact-based. When a Rule 12(b)(1) motion is facial, it is "based solely on the allegations of the complaint or the complaint and exhibits attached to it (collectively the 'Pleading')." *Carter v. HealthPort Techs., LLC*, 822 F.2d 47, 56 (2d Cir. 2016) (cleaned up). The nonmovant "has no evidentiary burden" when the movant files a facial motion. *Id.* The task of this tribunal in deciding a facial motion to dismiss "is to determine whether the Pleading alleges facts that affirmatively and plausibly suggest" that there is jurisdiction. *Id.*

A fact-based Rule 12(b)(1) motion to dismiss is one in which the movant "proffer[s] evidence beyond the Pleading." *Id.* at 57. To oppose such a motion, the opposer "will need to come forward with evidence of their own to controvert that presented by the defendant." *Id.*

B. The Motion-to-Dismiss Standard for Lack of Personal Jurisdiction

To defeat a motion to dismiss for lack of personal jurisdiction under FRCP 12(b)(2), the nonmovant bears the burden of showing that the tribunal has personal jurisdiction over the defendant. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). When no evidentiary hearing is held, the nonmovant may defeat a motion to dismiss based on "legally sufficient allegations of jurisdiction." *Id.* But when an evidentiary hearing is held, the nonmovant "must demonstrate … personal jurisdiction over the [movant] by a preponderance of the evidence." *Id.* at 567. If no evidentiary hearing is held and the nonmovant conducts "extensive discovery regarding the [movant's] contacts with the forum" then the nonmovant's "*prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the [movant]." *Id.* (cleaned up).

The amenability of a corporation to suit "is determined in accordance with the law of the state where the [tribunal] sits." *Id.* In resolving questions of personal jurisdiction in a diversity action, this tribunal conducts a "two-part inquiry": (1) "whether the [nonmovant] has shown that the [movant] is amenable to service of process under the forum state's laws"; and (2) "whether the tribunal's assertion of jurisdiction under these laws comports with the requirements of due process." *Id.* (cleaned up). *See also Walden v. Fiore*, 571 U.S. 277, 283 (2014) (giving forum state's law and the Due Process Clause as the two factors in the personal-jurisdiction inquiry).

For NLRB Region 2, which services a geographic area fully contained within the boundaries of New York State, https://www.nlrb.gov/region/02/area-served, the Charging Party or the General Counsel must show this Region can validly exercise personal jurisdiction over FDRLST Media, LLC under New York's long-arm statute. *See id.*

N.Y. C.P.L.R. § 302, New York's long-arm statute, "does not extend to the full limits permitted by the Due Process Clause of the Fourteenth Amendment." *Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GmbH & Co.*, 150 F. Supp. 2d 566, 572 & n.24 (S.D.N.Y. 2001) (citing *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 459–60 (1965)). "[I]n setting forth certain categories of bases for long-arm jurisdiction," New York's long-arm statute "does not go as far as is constitutionally permissible." *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 67 (1984). That is, "a situation can occur in which the necessary contacts to satisfy due process are present, but personal jurisdiction will not be obtained in this State because the statute does not authorize it." *Id.*

Because both prongs of the personal-jurisdiction test need to be met, in addition to showing that New York's long-arm statute would allow the exercise of personal jurisdiction, the General Counsel or Charging Party would still need to show whether, under the second part of the test, personal jurisdiction exists under the test articulated by the Supreme Court under the Due Process Clause. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

For general personal jurisdiction over FDRLST to be valid, nonmovants must show that FDRLST is "at home" in Region 2. *Daimler*, 571 U.S. at 137. Corporate entities like FDRLST are at

home in their "place of incorporation" or in their "principal place of business." *Id.* "[E]xercise of general jurisdiction in every state in which a corporation 'engages in a substantial, continuous, and systematic course of business' … is unacceptably grasping." *Id.* at 138.

For specific personal jurisdiction over FDRLST to be valid, nonmovants must show that "the business [FDRLST] does in [Region 2] is sufficient to subject [FDRLST] to specific personal jurisdiction in [Region 2] on claims related to the business it does in [Region 2]." *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1559 (2017).

C. The Motion-to-Dismiss Standard for Improper Venue

The "same standard of review" applies to a motion to dismiss for improper venue under FRCP 12(b)(3) as applies to dismissals for lack of personal jurisdiction pursuant to FRCP 12(b)(2). *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005); *Minholz v. Lockheed Martin Corp.*, 227 F. Supp. 3d 249, 260 (N.D.N.Y. 2016). That is, "[i]f the court chooses to rely on pleadings and affidavits, the [nonmovant] need only make a *prima facie* showing of [venue]. But if the court holds an evidentiary hearing, the [nonmovant] must demonstrate [venue] by a preponderance of the evidence." *CutCo Indus. v. Naughton*, 806 F.2d 341, 364–65 (2d Cir. 1986) (cleaned up). In either instance the *nonmovants—i.e.*, Mr. Fleming and the General Counsel—bear the burden of proving that venue is proper. *EPA v. Port Auth. of N.Y. & N.J.*, 162 F. Supp. 2d 173, 183 (S.D.N.Y. 2001).

Under the general venue statute, a defendant corporation "reside[s] in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c). Thus, for venue to be proper in NLRB Region 2, the nonmovants must show this Region has personal jurisdiction over Respondent.

ARGUMENT

I. THE CHARGING PARTY AND THE GC FAIL TO ESTABLISH SUBJECT-MATTER JURISDICTION

The Complaint should be dismissed because Mr. Fleming and the Board have failed to establish subject-matter jurisdiction. That is so because Mr. Fleming is not "aggrieved" within the meaning of NLRA Section 160(b), he is not within the zone of interests protected by the NLRA, and NLRB lacks statutory authority to investigate FDRLST based on Mr. Fleming's charge.

A. Mr. Joel Fleming Is Not "Aggrieved" Within the Meaning of 29 U.S.C. § 160(b)

Section 160(b) (emphasis added) states in part:

> Whenever it is charged that any person has engaged in any *such unfair labor practice*, the Board … shall have power to issue and cause to be served upon such person a complaint … : Provided, That no complaint shall issue based upon any *unfair labor practice* … unless the *person aggrieved thereby* was prevented from filing *such charge* by reason of service in the armed forces.

Mr. Fleming was not "aggrieved" by the alleged "unfair labor practice." As such, his charge is deficient as a matter of law to establish subject-matter jurisdiction over FDRLST Media, LLC.

While the text of Section 160(b) and the structure of the NLRA show Congress's textual commitment to allow "persons aggrieved" to file a charge, NLRB's corresponding regulation seems to allow "any person" to file an unfair-labor-practice charge. 29 C.F.R. § 102.9. The panoptic charging-party status invented by NLRB's regulation cannot survive scrutiny when one employs traditional tools of statutory construction. It also fails as a constitutional matter.

Congress enacted the NLRA in 1935 and created a statutory cause of action for a "person aggrieved" by an "unfair labor practice" to file a charge with the Board. The filing of the "charge" triggers the Board's authority to investigate. 29 U.S.C. § 161. If the allegation is substantiated, the Board may prosecute the charge by issuing a "complaint" against the charged party. 29 U.S.C. § 160(b). The NLRA protects the "right of employees to organize." 29 U.S.C. § 151. It does not authorize random people like Mr. Fleming to act as self-appointed surrogates for Respondent's employees. Otherwise NLRB, without Congressional authorization, could investigate and prosecute whomever it

chooses based upon the filing of a charge by a person who is a complete stranger to and has no connection with the alleged unfair labor practice.

The NLRA does not give such carte blanche harassment power to Mr. Fleming, and it does not grant NLRB, contrary to what Mr. Fleming and the General Counsel seem to suggest here, a virtually limitless power to search and harass people with whose views they disagree. The ability of any random person to subject a company to a government-directed and funded unfair-labor-practice action forcing it to endure the cost of defending against the litigation, as has happened here, contorts the legislative scheme into something it is not.

There is nothing in the Complaint—nor in the charging document—that even arguably alleges that Mr. Fleming is a "person aggrieved" within the meaning of Section 160(b). He is not an employee or independent contractor of FDRLST Media, LLC.[4] Stip. ¶ 30. Nor is he in privity with any employee or independent contractor of Respondent. In fact, there is no nexus or privity whatsoever between Respondent and Mr. Fleming. He is nothing more than a random person on the internet who does not share Mr. Domenech's views or sense of humor and who reported one of Mr. Domenech's tweets posted on his personal Twitter account that was intended to be, and was obviously, a joke.

Courts have interpreted aggrievement requirements in statutes to require and ensure that the charging party has Article III standing. The cases on standing are an important tool to determine the meaning of Section 160(b).

When Congress uses the words "person aggrieved," it shows "a congressional intent to define standing as broadly as is permitted by Article III of the Constitution"—and not broader than the constitutional standing requirement. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972); *see also Loeffler v. Staten Island University Hosp.*, 582 F.3d 268, 280 (2d Cir. 2009) (concluding that the phrase "any person aggrieved" in the Rehabilitation Act of 1973, 29 U.S.C. §§ 794–794a, "evinces

[4] Mr. Fleming is also not an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." 29 U.S.C. § 152(3). Nor is he an "individual having the status of an independent contractor" of FDRLST Media, LLC. *Id.*

a congressional intention to define standing … as broadly as is permitted by Article III of the Constitution").

Therefore, the charging party must show (1) it has suffered an injury in fact to a legally protected interest and that injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Envtl. Servcs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U.S. at 185. A person aggrieved in one respect does not have standing to bring a broader challenge, as "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). And the "usual rule" is that "a party may assert only a violation of its own rights." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988).

In truth, Mr. Fleming has suffered *no* "injury in fact." He has suffered no injury to any "legally protected interest" he might have. His fabricated aggrievement—his choice to take offense—is neither "concrete" nor "particularized." Moreover, Mr. Domenech's satire comes nowhere close to establishing "actual" or "imminent" injury to Mr. Fleming, or to any other persons who can realistically claim aggrievement. Mr. Fleming's made-up injury arises out of perhaps an overly active imagination, but it is not "fairly traceable" to FDRLST Media, LLC.

Furthermore, it is highly "speculative," even downright nonsensical, that such an injury could be "redressed" by a decision favorable to Mr. Fleming. Noteworthy in this respect, the General Counsel, "as part of the remedy" for the alleged unfair labor practice "seeks an Order *requiring Respondent to delete the tweet*." Compl. at 3 lines 6–7 (emphasis added). There is no allegation that Respondent dictates or can compel Mr. Domenech, its other employees, officers, supervisors, or agents, to "delete" a tweet any of them posted on their personal Twitter accounts expressing their personal opinion on a currently debated topic.[5] There is no allegation that FDRLST dictates or compels Mr. Domenech's or anyone

[5] Twitter is a microblogging and social networking service on which users post and interact with messages known as Tweets. Tweets are limited to 280 characters and may contain photos, videos,

else's personal beliefs or what they choose or do not choose to publish on their personal Twitter accounts. Even assuming for argument's sake that the tweet constituted a threat, Mr. Fleming was not threatened, so removing the tweet does not remove any threat against him. Mr. Fleming does not want the tweet removed because of any effect the tweet has upon himself personally, aside from his generalized objection to its contents.

The Complaint, therefore, also flunks *Lujan*'s three prongs. As such, Mr. Fleming does not meet even the minimum requirement to claim aggrievement under 29 U.S.C. § 160(b).

Nor does Mr. Fleming fall within the familiar exception to the bar against asserting third-party standing based on a close relationship between him and Respondent's employees, independent contractors, their family relatives, and/or a union. For example, two physicians were accorded standing to challenge a state statute that prohibited the use of state Medicaid funds to pay for nontherapeutic abortions because there was a "patent" "closeness of … relationship" between doctor and patient, and the physicians were "intimately involved" in the patient's decision to exercise her constitutional right to abortion. *Singleton v. Wulff*, 428 U.S. 106, 117 (1976).

Not so here. Mr. Fleming saw a tweet on Twitter, felt provoked, and reported that to the Board by filing a charging document. Recognizing him as being "aggrieved" within the meaning of 29 U.S.C. § 160(b) in these circumstances would stretch the statute beyond the scope Congress established.

Even if Mr. Fleming's reaction were well-intentioned, his relationship to FDRLST Media, LLC, its employees, independent contractors, and/or their family members is more attenuated than

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links, and text. Users like Mr. Domenech and Mr. Fleming can post, like, and retweet Tweets. Users access Twitter through its website, through Short Message Service, or Twitter's mobile-device application. Users can voluntarily "follow" another user, which means that the follower subscribes to the user's Tweets. Stip. ¶ 19. As Mr. Domenech's follower, Mr. Domenech's Tweets will appear on Mr. Fleming's Twitter Timeline. Mr. Fleming can choose to not follow Mr. Domenech on Twitter to make his Tweets not appear on Mr. Fleming's Timeline. In that scenario, Mr. Fleming will still be able to access public Tweets posted by Mr. Domenech but will have to browse Mr. Domenech's entire Twitter account if he wishes to see all of Mr. Domenech's public tweets. The functionality (or lack thereof) of Twitter also suggests Mr. Fleming's filing of a charge is nothing more than a roving tactic employed by him perhaps against those he perceives to be his ideological opponents.

was Michael Newdow's to his daughter. In *Elk Grove Unified School District v. Newdow*, the Court denied third-party standing to a father who sued on behalf of his school-aged daughter to challenge the Pledge of Allegiance recital requirement in public schools. 542 U.S. 1 (2004).[6] A nonexistent relationship between Mr. Fleming and those who could potentially be "aggrieved" by the alleged "unfair labor practice" does not permit him to assert aggrievement on their behalf within the meaning of 29 U.S.C. § 160(b).

Mr. Fleming's assertion that he is a "person aggrieved," therefore, is at most a generalized grievance expressing his concern as a citizen or taxpayer that a *non-Respondent* (Mr. Domenech) should refrain from potentially offending random people on the internet. A "generalized grievance" is "inconsistent with the framework of Article III because the impact on [the complainant] is plainly undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575 (cleaned up). Congress did not enact the NLRA so that anyone can wield Section 160 as a sword against business competitors or ideological adversaries. Indeed, statutes are "interpreted in a way that avoids absurd results." *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000)

Having failed to show Mr. Fleming is a "person aggrieved," NLRB's perfunctory investigation and the subsequent filing of a complaint have broken out of its statutory bounds. Congress has conferred jurisdiction on the Board to investigate only those charges that are filed by a "person aggrieved" by an alleged "unfair labor practice," and to issue complaints only in cases that satisfy this essential statutory minimum. The Board simply does not have jurisdiction in circumstances such as those presented here. Consequently, the tribunal should dismiss this action for having been instituted outside the statutory constraints placed upon NLRB by Congress.

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[6] *Newdow* was abrogated on other grounds by *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). As noted in *Lexmark*, the Court did not abrogate the "third-party standing" portion of *Newdow*, which is relevant here. 572 U.S. at 127 n.3 (*Lexmark* "does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day.").

B. Mr. Fleming Is Not Within the Zone of Interests Protected by Statute

Mr. Fleming is also not within the zone of interests protected by the National Labor Relations Act. Try as he might, he cannot realistically show he is a "person aggrieved" by an unfair labor practice—and therefore within the zone of interests protected by the NLRA. 29 U.S.C. § 160(b). This is another reason why the Board lacks jurisdiction and should therefore dismiss this case.

Lexmark International, Inc. v. Static Control Components, Inc. provides an authoritative formulation of the zone-of-interest test. 572 U.S. 118 (2014). Foremost, "[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 572 U.S. at 128 (cleaned up).

The zone-of-interests inquiry is relevant here because NLRB, like all federal administrative agencies, can exercise powers only to the extent authorized by Congress. If "traditional tools of statutory interpretation" show NLRB lacks authority to take an action against Respondent under this set of facts, then this tribunal lacks jurisdiction and should dismiss the case.

In *Lexmark*, the question was whether "Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a)." *Id.* at 128. Similarly, the question here is whether Mr. Fleming falls within the class of persons whom Congress has authorized to file a "charge" alleging an unfair labor practice. In *Lexmark*, as here, that "question requires us to determine the meaning of the congressionally enacted provision creating a cause of action"—"whether Congress in fact" authorized Mr. Fleming to charge FDRLST Media, LLC with committing an unfair labor practice. *Id.* The traditional tools of statutory interpretation show that Congress did not extend charging-party status to random people on the internet who are perhaps too easily offended by someone else's exercise of Constitutionally protected speech or expression. Nor did it empower such random people to brandish the power of the NLRB against someone whom they perceive to be their ideological opponents.

Canons of construction render the meaning of Section 160(b) clear. They also show that NLRB's interpretation of the statute is deeply flawed and unsupportable under an ordinary statutory-interpretation analysis.

The Distributive-Phrasing Canon, for example, dictates that "[d]istributive phrasing applies each expression to its appropriate referent (*reddendo singular singulis*)." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 214 (Thompson/West 2012). Some "word[s] signa[l] a distributive sense." *Id.* Section 160(b) has two words—such and thereby—that reveal its meaning: "Whenever it is charged" that a person has engaged in "any *such* unfair labor practice," then the Board can file a complaint, but "no complaint shall issue upon any *unfair labor practice* occurring more than six months prior to the filing of the charge … unless the person aggrieved *thereby* was prevented from filing *such* charge … ." The distributive words "such" and "thereby" point to "unfair labor practice." Section 160(b), therefore, requires that the charging party be a "person aggrieved" by an "unfair labor practice."

Another aspect of Section 160(b) is telling: the use of passive voice in the phrase "[w]henever it is charged." While "a legislature's use of the passive voice sometimes reflects indifference to the actor," courts do not attribute such indifference to the actor if it "would be inconsistent with the [NLRA's] statutory declaration of purpose." *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 479 (7th Cir. 2016). Even if the "passive-voice phrasing … introduces some ambiguity," NLRA's declaration of policy—among others, "restoring equality of bargaining power between employers and employees," 29 U.S.C. § 151—"clarifies" that only persons aggrieved by an alleged unfair labor practice can file charging documents with the Board. *Rubin*, at 479–80 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So, when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (cleaned up))); *see also* Anita S. Krishnakumar, *Passive-Voice References in Statutory Interpretation*, 76 Brook. L. Rev. 941 (2011) (collecting and discussing cases interpreting passive-voice legislative text).

In short, the statutory cause of action—the filing of a charge with NLRB—extends only to those whose interests "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 126 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The "breadth of the zone of interests varies according to the provisions of law at issue." *Id.* at 130 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). The provisions of 29 U.S.C. § 160(b) foreclose precisely the type of search-and-destroy tactic that Mr. Fleming wishes to wield against those whom he perceives to be his ideological opponents.

Put differently, Mr. Fleming has no protectable interest—neither one provided for by statute nor by the Constitution. A random person's purported indignation at a joke does not transform him into an aggrieved person falling within the zone of interests protected by the NLRA. Mr. Fleming is not and has never been an "employee" as defined at 29 U.S.C. § 152(3), and Respondent is not and has never been Mr. Fleming's "employer" as defined at 29 U.S.C. § 152(2). Stip. ¶ 30; *cf. American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., joined by Thomas, J., concurring in the judgment) (there is no such thing as "[o]ffended observer standing" because it "is deeply inconsistent with" the "longstanding principl[e] … that generalized grievances … are insufficient to confer standing" (cleaned up)) (citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974); *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004)).

In *Lexmark*, as here, "[i]dentifying the interests protected by" the NLRA "requires no guesswork, since the Act includes … a statement of the statute's purposes." 572 U.S. at 131. The purpose of the Lanham Act at issue in *Lexmark* was "protecting persons engaged in commerce within the control of Congress against unfair competition." *Id.* (cleaned up). To fall within the zone of interests of the Lanham Act § 1125(a)'s false-advertising provision, "a plaintiff must allege an injury to a commercial interest in reputation or sales," and the plaintiff's injuries must be "proximately caused by violations of the statute." *Id.* at 131–32. Likewise, the General Counsel and the Charging Party here needed to allege—but have not so alleged and will be unable to prove—that Mr. Fleming is injured *qua* "employee" in his exercise of rights protected by the NLRA and that such injuries are "proximately

caused" by Mr. Domenech's June 6, 2019 tweet. Mr. Fleming's "work" has *not* "ceased as a consequence of, or in connection with … or because of" Mr. Domenech's June 6 Tweet. 29 U.S.C. § 152(3).

Even if Section 160(b) itself were considered silent on the question of whether only an "aggrieved" person may file a charge, the default aggrievement requirement of the Administrative Procedure Act (APA) would still apply. *See* 5 U.S.C. § 702. APA § 702 authorizes suit by any "person … adversely affected or aggrieved … within the meaning of a relevant statute." The Supreme Court has read the APA's aggrievement requirement to "establish a regime under which a plaintiff may not sue unless he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011) (cleaned up). *Thompson* "incorporate[d]" this APA zone-of-interests test for the term "aggrieved" in Title VII of the Civil Rights Act. *Id.* at 178 (citing 42 U.S.C. § 2000e-5(f)(1) ("a civil action may be brought … by the person claiming to be aggrieved")). The zone-of-interest test, thus, "enable[s] suit by any plaintiff with an interest arguably sought to be protected by the statute, … while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in [the relevant statute]." *Id.* at 178 (cleaned up). Thus, apart from Mr. Fleming's feigned or generalized injury, he simply does not have any interest that is protected by the NLRA. His interest is unrelated to Section 160(b), which confers charging-party status on a person aggrieved by an alleged unfair labor practice.

Mr. Fleming is *not* a "person aggrieved" by the alleged "unfair labor practice" for purposes of 29 U.S.C. § 160(b). The Board, therefore, lacks jurisdiction to investigate and prosecute a "charg[e]" filed by a person who is not within the zone of interests protected by the NLRA.

C. The Board Lacks Statutory Authority to Investigate Respondent Based on Mr. Fleming's Charge

The Board also lacks statutory authority to investigate FDRLST based on Mr. Fleming's charge. Section 161 of the NLRA confers investigatory powers on the Board "for the exercise of the powers vested in it by sectio[n] … 160." This means that the Board's investigatory authority is contingent upon a valid charge filed by a "person aggrieved" by an alleged "unfair labor practice." 29

U.S.C. § 160(b). Because the condition precedent that triggers the Board's investigatory authority, as discussed above, has not been and cannot be met here, the Board lacks the authority to investigate FDRLST based on an inherently invalid charge filed by Mr. Fleming.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court held unconstitutional an act of Congress providing that "any person may commence a civil suit on his own behalf … to enjoin any person … who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). *Lujan* held that the "any person" statutory language is unconstitutional because it would allow plaintiffs with generalized grievances to "commence a civil suit" against anyone. Congress cannot by statute expand the "Article III case or controversy" requirement. 504 U.S. at 573.

Thus Congress could not have conferred on NLRB the authority—which *it* did not possess to begin with—to expand the scope of the "person aggrieved" requirement to allow "any person" (29 C.F.R. § 102.9) to file an "unfair labor practice" charge like the one Mr. Fleming filed here. NLRB, which can exercise only the authority granted to it by Congress has no power to investigate Respondent under 29 C.F.R. § 102.9. The plain words of 29 U.S.C. § 160(b) foreclose that possibility. The statute has not delegated to NLRB such a broad authority. Congress has already decided that only "persons aggrieved" by an "unfair labor practice" can file a charge. This case, on its face, does not fit the limited category of cases that Congress has authorized NLRB to investigate and prosecute. This tribunal should interpret the statute not to permit "any person" to file a charge because if it interprets the statute to permit that, Section 160(b) would be unconstitutional under *Lujan*.

The Board simply lacks statutory authority to prosecute FDRLST based on a charge leveled by Mr. Fleming. NLRA § 160(b) confers prosecution authority on the Board, but that prosecutorial power flows as a consequence of a charge filed by a "person aggrieved" by an "unfair labor practice." Absent a showing that the threshold set by Congress has been met as a matter of law, this entire search-and-destroy operation remains unauthorized by statute. NLRB has stepped outside the metes and bounds of its authority. The case should therefore be dismissed in its entirety.

II. NLRB REGION 2 LACKS PERSONAL JURISDICTION OVER RESPONDENT

The respective residences of FDRLST and Mr. Fleming—both outside the geographic boundaries of NLRB Region 2—also reveal NLRB's misguided investigation and prosecution. FDRLST is a Delaware corporation, Stip. ¶ 1, with its principal place of business in Washington, DC. Stip. ¶ 3. Mr. Fleming is a resident of Cambridge, Massachusetts. Charging Doc. at 1, ¶ 4a. FDRLST is not "amenable to service of process under [New York's] laws," and therefore NLRB Region 2 has no personal jurisdiction over Respondent. *Metropolitan Life Ins. Co.*, 84 F.3d at 567. Nor would NLRB Region 2's "assertion of jurisdiction compor[t] with the requirements of due process." *Id.* (cleaned up). FDRLST is not "at home" in Region 2 or New York State for general jurisdiction purposes. Region 2 covers neither Delaware nor Washington, DC—respectively, FDRLST's place of incorporation and principal place of business. Region 2, therefore, cannot obtain general personal jurisdiction over FDRLST under the *Daimler* test. 571 U.S. at 137.

Region 2 also lacks specific personal jurisdiction over FDRLST. In unfair-labor-practice cases, the charging party is typically an employee or a collective-bargaining representative of an employee. Mr. Fleming being neither, Stip. ¶ 30, underscores the absurdity of this case. It is unsurprising in most situations that employees or unions will file "unfair labor practice" charges in the region where the employer's place of business is located. If an employer has multiple locations across the nation, employees or unions typically file charges in the region where a particular office is located in which an alleged unfair labor practice occurred. Mr. Fleming's charge is far removed from situations that readily meet the *BNSF Railway* specific personal jurisdiction test. 137 S. Ct. at 1559.

The NLRB-supplied form which Mr. Fleming filled out and submitted against FDRLST further shows the lack of personal jurisdiction. The very first—and only—instruction at the top of the NLRB-drafted form (Form No. NLRB-501 (2-08)) says: "File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring." Charging Doc. at 1; *see also* 29 C.F.R. § 102.10 ("[A] charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring."). The information Mr. Fleming filled out reveals he has absolutely no relationship, nexus, or privity with FDRLST or its employees,

independent contractors, or interns. For example, as the employer's address, Mr. Fleming supplied a Chicago, IL address—which is also outside of Region 2. Charging Doc. at 1. He listed "50" in the column for "[n]umber of workers employed" (Charging Doc. at 1); FDRLST in fact has six employees. Stip. ¶ 14. He supplied his own address as Cambridge, Massachusetts—which is also outside Region 2. Charging Doc. at 1. Mr. Fleming also provided the following additional information: "I am not an employee of The Federalist." Charging Doc. at 2; *see also* Stip. ¶ 30. It is apparent, on the *face* of the charging document that Region 2 lacks personal jurisdiction.

There is no allegation that FDRLST is "at home" in Region 2, or that its contacts with Region 2 support the assertion of specific personal jurisdiction in this case. Tellingly, because Mr. Fleming does not reside in Region 2, there is not—and cannot be—any allegation that the alleged injury was felt in Region 2.

If this charge is allowed to proceed, any random slacktivist with an internet connection will be able to file an "unfair labor practice" charge in the NLRB region covering Hawaii against a Delaware company merely because one of the corporation's employees tweeted a statement the slacktivist apparently found offensive. The NLRA does not confer such a sweeping, roving jurisdiction on the Board to bring suit in a region that cannot establish personal jurisdiction over the respondent company, and the Constitution's Due Process Clause does not permit it. *See Daimler*, *supra*, *BNSF*, *supra*. Region 2's assertion of personal jurisdiction over FDRLST, therefore, is untenable.

The Board's attempt to hale FDRLST into Region 2 does not satisfy New York's long-arm statute. Nor does it satisfy the test articulated by the Supreme Court under the Due Process Clause. That, alone, is reason to dismiss the Complaint in its entirety.

III. NLRB REGION 2 IS AN IMPROPER VENUE

Under the "same standard" as is applicable in determining personal jurisdiction, NLRB Region 2 also is an improper venue to maintain this action. *Gulf Ins.*, 417 F.3d at 355. Given that FDRLST's place of incorporation and principal place of business both are located within NLRB Region 5, it would be unremarkable if a proper charging party (*i.e.*, someone other than Mr. Fleming) had instigated

the case in Region 5. *See* NLRB Region 5, https://www.nlrb.gov/region/05/area-served (servicing, as relevant, Delaware except New Castle County, and the District of Columbia).

In whichever manner one chooses to parse Mr. Fleming's charge and the NLRB's subsequent filing of the complaint against Respondent, Region 2 cannot be the proper venue. Neither the Charging Document nor the Complaint shows that either Mr. Fleming or FDRLST or any of FDRLST's employees reside within the geographic boundaries of Region 2. The Charging Document and the complaint fail to show that any of the events or conduct that forms the basis of this action occurred within Region 2. The proper remedy to cure improper venue is to transfer the action to the appropriate jurisdiction. *Gonzalez v. Hasty*, 651 F.3d 381, 319 (2d Cir. 2011) (transferring case from S.D.N.Y. to E.D.N.Y. due to improper venue). *See also Denver & R.G. W.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 559–60 (1967) (the proper venue to sue a union "should be determined by looking to the residence of the association itself rather than that of its individual members" because holding otherwise "is patently unfair to the association"). Consequently, Region 2 being an improper venue, the case should be dismissed from this Region.

Alternatively, a transfer from one Region to another is provided for in 29 C.F.R. § 102.33. Under the NLRB regulations, the case could conceivably be transferred to Region 5. Respondent, however, takes no position at the present time on the propriety of the complaint being transferred to Region 5, and reserves the right to seek dismissal of such a complaint because of the underlying problem with Mr. Fleming as the charging party.

Given the other insurmountable problems with Mr. Fleming's and the General Counsel's litigation position, such as lack of jurisdiction, the better course of action would be to dismiss the case outright because Mr. Fleming is not a person aggrieved and therefore not an appropriate charging party.

* * *

Neither the General Counsel nor the Charging Party should be allowed to file a charging document and complaint subjecting Respondent to a costly administrative-review process on as flimsy a basis as Mr. Fleming's charge. This case is nothing more than the Charging Party's naked attempt at

silencing or punishing FDRLST with administrative process and costs—a form of regulatory harassment—based on a personal opinion expressed by *non-Respondent* Mr. Domenech on his personal Twitter account. That Mr. Fleming likely views Mr. Domenech's tweet as not ideologically aligned with his own viewpoint is no reason to marshal NLRB's administrative apparatus and waste its resources on investigating and prosecuting satirical personal opinions against that person's employer.

CONCLUSION

The Complaint against FDRLST Media, LLC should be dismissed forthwith in its entirety.

Respectfully submitted, on the 13th day of January, 2020.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL FLEMING *Charging Party*	Case No. 02-CA-243109

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, Respondent's "Motion to Dismiss the Complaint" was electronically filed and served by e-mail and by certified U.S. Mail, return receipt requested on the following parties:

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL FLEMING *Charging Party*	Case No. 02-CA-243109

REPLY BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

January 24, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Regulations

INTRODUCTION

The General Counsel's opposition misunderstands, misconstrues, and avoids Respondent's arguments in support of its Motion to Dismiss.[1] Section 160(b) of the National Labor Relations Act ("NLRA"), codified at 29 U.S.C. § 160(b), imposes a constraint on the subject-matter jurisdiction of the National Labor Relations Board ("NLRB" or "Board"). Congress has not authorized the Board to investigate or prosecute an alleged unfair labor practice unless a person aggrieved by that alleged unfair labor practice files a charge with the Board. Because no aggrieved person has filed a charge in this case, the Board lacks subject-matter jurisdiction to pursue this action against FDRLST Media, LLC ("FDRLST").

Additionally, Region 2 cannot exercise personal jurisdiction over Respondent, a non-resident, because the General Counsel has not alleged—let alone established—that FDRLST purposefully directed any contacts at the forum or that those contacts relate to the current action. Just because Mr. Ben Domenech, a non-party, published a tweet does not mean the company for which he works is subject to personal jurisdiction in every forum with Twitter access, regardless of where the purported injury occurred. The General Counsel has failed to carry its burden of proof and has forfeited any further argument to the contrary.

[1] The General Counsel spends much of its brief contesting the applicability of the Federal Rules of Civil Procedure and the pleading standards for a complaint that the Board files. These points are irrelevant to the jurisdictional issues that Respondent raised in its Motion to Dismiss. Accordingly, Respondent shall reserve its response to the Board's off-point arguments rather than following the Board even further afield. Respondent maintains, however, that the plain language of 29 U.S.C. § 160(b) requires the Board to apply, "so far as practicable," the "rules of civil procedure for the district courts of the United States." Any Board decision to the contrary is incorrect as a matter of law and reinforces the inaccuracy of the General Counsel's position that there are no "due-process concerns." Opp. Br. at 6.

Region 2 is also an improper venue for the present action because the alleged unfair labor practice did not occur within the region. Neither the General Counsel nor Mr. Joel Fleming has alleged otherwise.

These issues all implicate FDRLST's constitutional right to the due process of law. No position taken by the General Counsel (or the Board, for that matter) deserves deference or special treatment in the adjudication of purely legal constitutional questions that are collateral to the administrative issues contained in the Complaint. *See Miller v. Johnson*, 515 U.S. 900, 923 (1995) (rejecting agency deference when deciding "serious constitutional questions").

ARGUMENT

I. THE BOARD LACKS SUBJECT-MATTER JURISDICTION

The parties agree that Congress wrote the first sentence of Section 160(b) of the Act in passive voice: "Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice[.]" In the General Counsel's view, the statute's failure to identify explicitly the subject of this sentence leaves the Board free to define the subject as "any person[.]" Gen. Counsel's Opp. to Resp.'s Mot. to Dismiss at 6 [hereinafter "Opp. Br."]. The General Counsel's suggested reading of the statute eliminates any restriction that Section 160(b) imposed on the Board's subject-matter jurisdiction. This approach would authorize an agency to define expansively its own jurisdiction any time Congress speaks in the passive voice—effectively eliminating a restriction that Congress imposed on its authority. Agencies have only those powers that Congress delegates to them. Passive voice in a statute does not alter this fundamental limitation on agency power. And canons of statutory interpretation confirm this reading. Any contrary interpretation offered by the agency represents unlawful administrative overreach.

A statute "should be enforced according to its plain and unambiguous meaning." *U.S. v. Livecchi*, 711 F.3d 345, 351 (2d Cir. 2013). The best understanding of congressional intent can be

gleaned from statutory text. *U.S. v. Monsanto*, 491 U.S. 600, 610 (1989) ("Congress' intent is best determined by looking to the statutory language that it chooses[.]") (cleaned up). Accordingly, statutory interpretation "begins with the text." *Ross v. Blake*, 578 U.S. ___, ___, 136 S. Ct. 1850, 1856 (2016); *see also In re Ames Dep't Stores, Inc.*, 582 F.3d 422, 427 (2d Cir. 2009) ("Statutory interpretation always begins with the plain language of the statute."). "The 'plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Greathouse v. JHS Sec., Inc.*, 784 F.3d 105, 111 (2d Cir. 2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). For this reason, a single term or sentence "cannot be construed in a vacuum." *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. ___, ____, 139 S. Ct. 1743, 1748 (2019) (citation omitted). Instead, its words "must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot*, 139 S. Ct. at 1748 (citation omitted); *see also* Antonin Scalia & Bryan A. Garner, Reading Law 167 (2012) ("The text must be construed as a whole.").

Reading the first sentence of Section 160(b) in context and harmony with the rest of the provision reveals that the Charging Party must be aggrieved by an unfair labor practice to trigger the Board's authority. Section 160(b) states as follows:

> Whenever it is charged that any person has engaged in any **such unfair labor practice**, the Board … shall have power to issue and cause to be served upon such person a complaint … : *Provided*, That no complaint shall issue based upon any unfair labor practice more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless **the person aggrieved thereby** was prevented from filing **such charge** by reason of service in the armed forces.

(Emphasis added). Synthesizing these two sentences, Section 160(b) contemplates that the person "filing such [a] charge" is a "person aggrieved" by "a[n] unfair labor practice." This is the most straightforward reading and gives meaning to the provision in its entirety. By contrast, the General Counsel reads the aggrieved-person requirement as qualifying only the armed-forces tolling provision,

not whose charge authorizes the Board to issue a complaint. *See* Opp. Br. at 5. The General Counsel has offered no support for why Congress, without explanation, would have permitted non-aggrieved persons to file a charge but limited the armed-forces tolling provision to only aggrieved persons. Courts interpret statutes to avoid such absurd results. *See, e.g.*, *N.Y. v. Mountain Tobacco Co.*, 942 F.3d 536, 547 (2d Cir. 2019) ("[A] statute should be interpreted in a way that avoids absurd results."); *see also Repub. of Sudan v. Harrison*, 587 U.S. ___, ____, 139 S. Ct. 1048, 1060 (2019) ("[I]ts ordinary meaning better harmonizes the various provisions in [the statute] and avoids the oddities that respondents' interpretation would create.").

In addition to the absurd implications of the General Counsel's reading, its position also fails because it impermissibly expands the jurisdictional limit that Congress has set on the NLRB. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (citation omitted). Section 160(b) so circumscribes NLRB's authority.

An agency cannot expand its own authority or jurisdiction. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986); *see also Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477–78 (1988) (holding that the Equal Access to Justice Act restricted to a 30-day period the jurisdiction of an agency to consider an application for attorneys' fees, leaving the NLRB without authority to expand its own jurisdiction by granting a time extension); *Spencer v. Banco Real, S.A.*, 87 F.R.D. 739, 743–44, 746–47 (S.D.N.Y. 1980) (rejecting a regulation promulgated by the Equal Employment Opportunity Commission that permitted the Commission to issue right-to-sue letters to aggrieved persons prior to a 180-day waiting period because Congress made the waiting period mandatory and jurisdictional, and the Commission's regulation had the effect of expanding jurisdiction); *cf. Great Atl. & Pac. Tea Co. v. Supermarket Equip. Co.*, 340 U.S. 147, 156

(1950) (Douglas, J., dissenting) ("The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction."). In fact, when interpreting a statutory limit on jurisdiction, courts will construe provisions more strictly than they "might read the same wording . . . in a non-jurisdictional provision of the Code." *U.S. v. Bond*, 762 F.3d 255, 261 (2d Cir. 2014).

Congress could have easily drafted Section 160(b) to grant NLRB roving authority to investigate and enforce suspected unfair labor practices. Instead, Congress chose to constrain NLRB's authority to instances when "a person aggrieved" by the alleged unfair labor practice files a charge. Reading Section 160(b) to permit "any person"—regardless of whether that person is aggrieved—to trigger NLRB's authority by filing a charge, the General Counsel eviscerates the constraint on its own authority that Congress imposed. Under the General Counsel's expansive reading, a Field Attorney with the NLRB could trigger the Board's authority by filing a charge. The General Counsel's position effectively removes any restriction on the Board's authority. This reading is inconsistent the plain language of Section 160(b).

The Supreme Court's decision in *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9 (1943), is not to the contrary as the General Counsel suggests. *See* Opp. Br. 5-6. In that case, a union (Local B-9 of the International Brotherhood of Electrical Workers) was the Charging Party. *Ind. & Mich. Elec. Co.*, 318 U.S. at 11. Local B-9 alleged that the Company was interfering with its employees right to join or assist labor organizations by promoting a company-dominated union to its employees. *Id.* at 14. According to the Company, however, the Board lacked jurisdiction to investigate or enforce the charged unfair labor practice due to the improper motives of Local B-9: Local B-9's officers and members (including some who were witnesses at the Board's proceedings) committed several crimes to instigate the action for the union's own benefit. *Id.* at 14–16. The question confronting the Supreme Court was whether misconduct or improper motives of the Charging Party deprived the

Board of its jurisdiction. *Id.* at 16–18. The Court held that "[d]ubious character, evil or unlawful motives, or bad faith of the informer cannot deprive[] the Board of its jurisdiction to conduct the inquiry." *Id.* at 18. Any ill motives were merely a consideration for the Board in exercising its own prosecutorial discretion. *Id.*

Without any analysis of the statutory language, the Court in *dicta* relied on one statement by one Senator during a committee hearing for the proposition that Section 160(b) did not require "that the charge be filed by a labor organization or an employee."[2] *Id.* at 17. The Senator objected to construing the provision to exclude strangers to a labor contract because "it was often not prudent for the workman himself to make a complaint against his employer[.]" *Id.* The General Counsel in this case clings to this statement, attempting to elevate *dicta* to law, and misstating Respondent's position in the process. Opp. Br. 5-6.

FDRLST has not argued that only employees and unions may file a charge. In fact, FDRLST agrees that *any* person—regardless of whether an employee, union, or otherwise—may file a charge, so long as that person is statutorily *aggrieved* by the charged unfair labor practice.[3] Aggrievement—not employment status—is the limitation Congress chose to impose on a Charging Party. That is not to say, however, that employment status is irrelevant. Just because a non-employee and non-union person could be aggrieved by an unfair labor practice does not transform Mr. Fleming into an "aggrieved person" within the meaning of Section 160(b).

As explained more thoroughly in the Motion to Dismiss, Mr. Fleming is not "aggrieved" because he is not within the zone of interests protected by the NLRA. Mr. Fleming does not claim

[2] Considering a labor organization filed the charge in *Ind. & Mich. Electric Co.*, the question of whether Section 160(b) permits a non-employee or non-labor organization to file a charge was not before the Court.

[3] To the extent § 102.9 of the Board's Rules and Regulations would permit a non-aggrieved person to file a charge, it is inconsistent with the statute and therefore devoid of any force or effect.

to have any relationship, nexus, or privity with anyone whose interests the Act protects, be it an employee or labor organization. This lack of privity or protected interest excludes Mr. Fleming from the class of persons who can trigger NLRB's authority. When Congress uses the term "person aggrieved," it is referring to the class of persons who would have standing to bring a claim in an Article III court. *See, e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 280 (2d Cir. 2009); *see also Home Depot*, 139 S. Ct. at 1749 (reasoning that a term's use "in related contexts bolsters" a determination of a statute's meaning).

The standing analysis set out in the Motion to Dismiss is relevant not because Article III standing applies to the NLRB proceedings themselves,[4] but because it informs who may be aggrieved by an unfair labor practice. Mr. Fleming may not have needed "standing" to file a charge. But a charge invokes NLRB's subject-matter jurisdiction to investigate and prosecute the charge only if the Charging Party is aggrieved. Because no person aggrieved by an alleged unfair labor practice has filed a charge against FDRLST, the Board lacks subject-matter jurisdiction. Accordingly, the case must be dismissed.

II. NLRB REGION 2 LACKS PERSONAL JURISDICTION OVER RESPONDENT

Restrictions on a forum's exercise of personal jurisdiction are territorial limitations, not just "a guarantee of immunity from inconvenient or distant litigation." *Bristol-Myers Squibb Co. v. Superior Court*

[4] The Charging Party, by the Board's own rules, is a party to the enforcement action and may participate fully in the administrative proceedings, including by filing an appeal. *See, e.g.*, 28 C.F.R. § 102.19(a); *see also Ind. & Mich. Elec. Co.*, 318 U.S. at 20-21 ("Local B-9 was a party to the proceedings and appeared throughout the hearings[.]"). In this case, however, Mr. Fleming would lack standing to appeal a judgment in favor of FDRLST. *Cf. Richards v. NLRB*, 702 F.3d 1010 (7th Cir. 2012) (concluding the Charging Party did not have standing to appeal because the Charging Party was not "aggrieved" by NLRB's decision in favor of the respondent and against respondent's employees on whose behalf the Charging Party claimed to be pursuing suit). This standing problem lurking in the future illustrates the absurdity of the General Counsel's position. It makes little sense, then, to interpret Congress as having given party-status at the administrative-proceeding stage to a person or entity without Article III standing to appeal the case to federal court.

of Cal., S.F. Cty., 582 U.S. ___, 137 S. Ct. 1773, 1780 (2017) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). In determining whether personal jurisdiction exists over a non-resident in a particular case, "the primary concern is the burden on the defendant." *Id.* (cleaned up). In addition to various practical burdens, such as the inconvenience of travel to a distant forum, the defendant's burden includes "the more abstract matter of submitting to the coercive power of a state that may have little legitimate interest in the claims in question." *Id.* The party that brings the action—here, the General Counsel or Mr. Fleming as the Charging Party—must prove the propriety of the forum exercising personal jurisdiction over a non-resident. *See Friedman v. Bloomberg L.P.*, 884 F.3d 83, 90 (2d Cir. 2017).

The General Counsel, for its part, fails to articulate any grounds to support Region 2's exercise of personal jurisdiction over FDRLST. In its opposition brief, the General Counsel does not respond to FDRLST's personal-jurisdiction argument except to conclude without explanation that "[t]here is no evidence of prejudice nor are there due-process concerns." Opp. Br. at 6. This does not begin to carry the General Counsel's burden of proof. By not briefing the issue in its Opposition, the General Counsel has forfeited any further argument. Given the importance of the due-process concerns at issue, however, Respondent will enunciate further just how unreasonable it was for the General Counsel to file its complaint in Region 2 rather than a forum in which FDRLST is subject to personal jurisdiction.

An analysis of whether specific personal jurisdiction[5] exists in a case begins with "the long-arm statute of the forum state, in this instance, New York." *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997). If the non-resident's contacts with the forum bring him or her within the reach of the long-arm statute, the contacts must also comport with the Due Process Clause for an exercise of

[5] This brief will address only specific personal jurisdiction because, as FDRLST established in its Motion to Dismiss, it is not "at home" in Region 2 and therefore not subject to general jurisdiction in this region. *See BNSF Ry. Co. v. Tyrell*, 581 U.S. ___, 137 S. Ct. 1549, 1558–59 (2017).

personal jurisdiction to be permissible. *Friedman*, 884 F.3d at 90. The General Counsel fails to satisfy both the long-arm statute and constitutional test.

New York's long-arm statute, as relevant here, permits the exercise of personal jurisdiction over "any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state[.]" N.Y. C.P.L.R. § 302(a) (McKinney 2019). Moreover, the cause of action against a non-resident defendant must "'relate to' [the] defendant's minimum contacts with the forum." *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 167 (2d Cir. 2010).

The General Counsel asserts, in its discussion of venue, that Mr. Domenech's tweet "occurred on the Internet, not in a specific geographical NLRB Region." Opp. Br. at 7. This is not, however, how the law works. In fact, New York's long-arm statute does not extend to a statement published in media or on the internet that is accessible to New York readers. *See, e.g.*, *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253 (2d Cir. 2007) (collecting cases that hold that a non-resident's posting of information on a website is insufficient to establish that the non-resident directed tortious conduct or purposefully availed him or herself of the forum). There is no allegation in this case that Mr. Domenech published his tweet from New York or directed his tweet at anyone in New York. Worse yet, the General Counsel doesn't even allege that anyone in New York read the tweet.

In addition to its failure to satisfy the requirements of New York's long-arm statute, the General Counsel's theory that tweets defy regional boundaries also transgresses the Due Process Clause of the U.S. Constitution. By suggesting that statements online subject a non-resident to specific personal jurisdiction in every forum with Internet access, the General Counsel conflates general and specific personal jurisdiction. But as the Supreme Court has made clear repeatedly in its recent jurisprudence, "[s]pecific jurisdiction is very different" than general jurisdiction. *Bristol-Myers Squibb*,

137 S. Ct. at 1780; *see also BNSF Ry. Co. v. Tyrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

As the Supreme Court has emphasized, due process limits a forum's adjudicatory authority over a defendant to "issues deriving from, or connected with, the very controversy" at issue. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Therefore, a forum's exercise of specific jurisdiction is constitutionally sound only when when the claim "arise[s] out of or relate[s] to the defendant's contacts with the forum[.]" *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). The non-moving party must establish that (1) the defendant has "purposefully directed its activities at residents of the forum"; (2) the claim "arise[s] out of or relate[s] to" those same activities directed at the forum; and (3) the forum's exercise of jurisdiction will not offend "traditional notions of fair place and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted).

Again, there is no allegation that FDRLST purposefully directed any contacts at the residents of Region 2. Nor does the General Counsel allege that this claim is in any way related to FDRLST's contacts with Region 2. Mr. Domenech tweeted from his personal Twitter account, directing that tweet @FDRLST. The General Counsel has not alleged or established that Mr. Domenech, FDRLST, or any person aggrieved by the tweet resides in Region 2. Consequently, haling FDRLST into Region 2 offends the due process of law. The General Counsel's conclusory protestations to the contrary are insufficient to establish that Region 2 has personal jurisdiction over FDRLST. The case against FDRLST must be dismissed.

III. NLRB REGION 2 IS AN IMPROPER VENUE

Venue is also improper in Region 2 for reasons similar to why Region 2 lacks personal jurisdiction over FDRLST. Tweets don't just "occur" on the Internet. *Contra* Opp. Br. at 7. The

Board's rules set the venue in which an aggrieved party's charge must be filed. *See* 29 C.F.R. § 102.10. Specifically, Section 102.10 reads as follows:

> Except as provided in § 102.33, a charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of those Regions.

Similarly, the NLRA's venue provisions, 29 U.S.C. § 160(e) and (f), provide geographic limitations on where the Board may petition for an enforcement order and where a party aggrieved by the Board's final order may seek redress. *Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1002 (6th Cir. 2012). Like the Board's rule determining where an aggrieved party must file a charge, both venue provisions provide a place that "turns on classic venue concerns—'choosing a convenient forum.'" *Id.* (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006)). Also, like the Board's rule, Sections 160(e) and (f) "permit[] the action to proceed in the circuit where 'the unfair labor practice in question' occurred." *Brentwood at Hobart*, 675 F.3d at 1002. Unlike 29 C.F.R. § 102.10, the NLRA's venue provisions also permit actions to proceed in the United States court of appeals in the circuit where the Respondent "resides or transacts business" or the D.C. Circuit. 29 U.S.C. § 160(e), (f). The NLRA's venue provisions are focused on convenience and the "provisions ensure that the company will not be forced to defend an action in a faraway circuit." *Id.* NLRB's rule governing where an aggrieved party can file a charge should be subject to the same convenience considerations because a Respondent should not have to defend against a charge in a faraway Region.

The General Counsel's assertion that venue in this case exists in Region 2 runs counter to the Board's own rules and the controlling statute. There is simply no allegation that the alleged unfair labor practice in this case occurred in Region 2; nor is Region 2 the residence of FDRLST, its employees, or any person who could conceivably be statutorily aggrieved by the joke in Mr. Domenech's tweet. Not even Mr. Fleming resides in Region 2. He simply chose to file his charge there. So, in addition to not being "aggrieved" as required by the NLRA, Mr. Fleming has shown he

is so removed from the alleged unfair labor practice that he was not able to guess accurately where the alleged incident occurred for purposes of filing his charge correctly.[6] Permitting such non-aggrieved persons to file charges sends NLRB on wild goose chases and foments frivolous litigation that innocent parties like FDRLST must finance.

Mr. Domenech's tweet is the alleged unfair labor practice in this instance. While the tweet is visible on the Internet, Mr. Domenech published it at a specific place and time. Neither the Charging Party nor the General Counsel has articulated a connection between Mr. Domenech's tweet and Region 2. According to the Board's own rules, Region 2 is an improper venue. The charge and Complaint in this case should have been filed in the region in which the alleged unfair labor practice occurred, if at all.

CONCLUSION

The Complaint against FDRLST Media, LLC, should be dismissed in its entirety for a lack of subject-matter jurisdiction. Further, the case must be dismissed for a lack of personal jurisdiction.

Respectfully submitted on the 24th day of January 2020.

By Attorneys for Respondent, FDRLST Media, LLC
/s/ Aditya Dynar
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Jared McClain
New Civil Liberties Alliance
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Jared.McClain@NCLA.legal
Attorneys for Respondent, FDRLST Media, LLC

[6] Further demonstrating Mr. Fleming's lack of connection to FDRLST or the alleged unfair labor practice, Mr. Fleming listed a Chicago, IL, address for FDRLST, which is also outside of Region 2.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, Respondent's "Reply Brief in Support of Respondent's Motion to Dismiss the Complaint" was filed electronically and served by e-mail and/or by certified U.S. Mail, return receipt requested on the following parties:

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

Jamie Rucker
Field Attorney
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Joel Fleming
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By Attorneys for Respondent, FDRLST Media, LLC
/s/ Aditya Dynar
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Jared McClain
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Adi.Dynar@NCLA.legal
Kara.Rollins@NCLA.legal
Jared.McClain@NCLA.legal
Attorneys for Respondent, FDRLST Media, LLC

EXHIBIT 4
ATTACHED TO
RESPONDENT'S CLOSING POST-HEARING BRIEF

R-10

CORRESPONDENCE BETWEEN COUNSEL FOR PARTIES AND THE ALJ

- January 22, 2020 ALJ Order Denying Respondent's Motion to Dismiss the Complaint
- January 24, 2020 ALJ Order Vacating the Denial of Respondent's Motion to Dismiss the Complaint
- January 23, 2020 Email from ALJ to Counsel for Respondent and Counsel for General Counsel
- January 24, 2020 Email from Counsel for Respondent to ALJ and Counsel for General Counsel
- January 24, 2020 Email from ALJ to Counsel for Respondent and Counsel for General Counsel
- February 6, 2020 ALJ Order Denying Respondent's Motion to Vacate the Scheduled Hearing Date

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FDRLST MEDIA, LLC,

and **Case 02-CA-243109**

JOEL FLEMING, an Individual

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

On January 13, 2020, the Respondent moved to dismiss the above complaint. The counsel for the General Counsel submitted an opposition to the motion on January 16. For the reasons set forth in the General Counsel's opposition, the Respondent's motion to dismiss the complaint is denied and the hearing scheduled for February 10, 2020, will proceed accordingly.

The National Labor Relations Board has a set of Rules and Regulations that it follows and while the Federal Rules of Civil Procedures (FRCP) may serve as guidance on occasions, the Board's Rules and Regulations are paramount in our administrative proceedings. As such, following Section 102.24, my denial of the motion to dismiss was construed in the light most favorable to the General Counsel; that the factual allegations in the complaint are accepted as true; and a determination was made that the General Counsel can reasonably prove the set of facts in support of the claims in the complaint. *Detroit Newspapers Agency*, 3330 NLRB 524 (2000).

Further, I agree with the General Counsel that the Board has subject-matter jurisdiction in this complaint. The charging party need not be an aggrieved party because he is not an employee of the Respondent. Contrary to the Respondent's arguments on this point, an aggrieved party in referenced to Section 10(b) of the Act is in connection with the Act's statute of limitations and not an aggrieved party in other contexts of the Act to file a charge. Section 102.9 of the Board's Rules and Regulations permit any person to file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce.

Finally, Region 2 has jurisdiction over this complaint. Although the charging party resides in Cambridge, MA and the Respondent is a Delaware corporation with an office in Washington, D.C. and Region 2 is located in New York City, the Board's Rules and Regulations under Section 102.10 allows a charge alleging to have occurred in one or more regions to be filed with the Regional Director for any of those Regions.

The hearing shall proceed as scheduled for February 10, 2020 in the NLRB Offices on the 36th Floor of 26 Federal Plaza, New York, New York at 10 a.m. In my last communications

with the parties, it was my understanding that a stipulation to the documents in the counsel for the General Counsel's subpoenas would be possible. In the event that no stipulation is reached, I expect the Respondent to submit a timely petition to revoke the subpoenas no later than January 31 and an opposition to the petition to revoke be submitted by the counsel for the General Counsel no later than February 5, 2020.

Kenneth W. Chu

_____

Kenneth W. Chu
Associate Chief Administrative Law Judge

Date: January 22, 2020
New York, New York

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FDRLST MEDIA, LLC,

and Case No. 02-CA-243109

JOEL FLEMING, an Individual

ORDER VACATING THE DENIAL OF RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

On January 22, 2020, I issued an order denying the Respondent's motion to dismiss the complaint in the above matter.

Inasmuch as the Respondent's motion is pending before the Board, my order denying the Respondent's motion is herein vacated for the Board's de novo review of the motion.

Kenneth W. Chu

Kenneth W. Chu
Associate Chief Administrative Law Judge

Date: January 24, 2020
New York, New York

Adi Dynar

From: Chu, Kenneth W. <Kenneth.Chu@nlrb.gov>
Sent: Thursday, January 23, 2020 8:30 PM
To: Adi Dynar; Caleb Kruckenberg; Rucker, Jamie
Cc: Sullivan, Suzanne
Subject: FDRST Media 02-CA-243109

All,

Please be advised that I will be issuing a new order that will vacate my earlier order on the Respondent's motion to dismiss. The Respondent's motion is pending de novo with the Board and is not before me.

Judge Chu

Adi Dynar

From: Adi Dynar
Sent: Friday, January 24, 2020 12:32 PM
To: 'Chu, Kenneth W.'
Cc: Sullivan, Suzanne; Rucker, Jamie; Kara Rollins; Jared McClain; 'Herlands, Zachary'
Subject: RE: FDRST Media 02-CA-243109

Judge Chu,

Respondent, FDRLST Media, LLC, respectfully asks for a clarification of the January 22nd and January 24th Orders. The January 22 Order stated that the hearing will be conducted as scheduled. The January 24 Order stated the January 22 Order is vacated. Does this mean the scheduled hearing is vacated pending de novo determination of the motion to dismiss by the Board? We are requesting clarification so we can better streamline the case, finalize travel plans, minimize litigation costs, and conserve the Board's resources.

Respectfully,

Adi Dynar
Litigation Counsel
New Civil Liberties Alliance

From: Chu, Kenneth W. <Kenneth.Chu@nlrb.gov>
Sent: Thursday, January 23, 2020 8:30 PM
To: Adi Dynar <adi.dynar@ncla.legal>; Caleb Kruckenberg <caleb.kruckenberg@ncla.legal>; Rucker, Jamie <Jamie.Rucker@nlrb.gov>
Cc: Sullivan, Suzanne <Suzanne.Sullivan@nlrb.gov>
Subject: FDRST Media 02-CA-243109

All,

Please be advised that I will be issuing a new order that will vacate my earlier order on the Respondent's motion to dismiss. The Respondent's motion is pending de novo with the Board and is not before me.

Judge Chu

Adi Dynar

From: Chu, Kenneth W. <Kenneth.Chu@nlrb.gov>
Sent: Friday, January 24, 2020 12:58 PM
To: Adi Dynar
Cc: Sullivan, Suzanne; Rucker, Jamie; Kara Rollins; Jared McClain; Herlands, Zachary
Subject: Re: FDRST Media 02-CA-243109

All,

The usual policy is to proceed with the hearing date unless otherwise instructed by the Board.

Judge Chu

On Jan 24, 2020, at 12:32 PM, Adi Dynar <adi.dynar@ncla.legal> wrote:

Judge Chu,

Respondent, FDRLST Media, LLC, respectfully asks for a clarification of the January 22nd and January 24th Orders. The January 22 Order stated that the hearing will be conducted as scheduled. The January 24 Order stated the January 22 Order is vacated. Does this mean the scheduled hearing is vacated pending de novo determination of the motion to dismiss by the Board? We are requesting clarification so we can better streamline the case, finalize travel plans, minimize litigation costs, and conserve the Board's resources.

Respectfully,

<image001.png>

Adi Dynar
Litigation Counsel
New Civil Liberties Alliance

From: Chu, Kenneth W. <Kenneth.Chu@nlrb.gov>
Sent: Thursday, January 23, 2020 8:30 PM
To: Adi Dynar <adi.dynar@ncla.legal>; Caleb Kruckenberg <caleb.kruckenberg@ncla.legal>; Rucker, Jamie <Jamie.Rucker@nlrb.gov>
Cc: Sullivan, Suzanne <Suzanne.Sullivan@nlrb.gov>
Subject: FDRST Media 02-CA-243109

All,

Please be advised that I will be issuing a new order that will vacate my earlier order on the Respondent's motion to dismiss. The Respondent's motion is pending de novo with the Board and is not before me.

Judge Chu

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FDRLST MEDIA, LLC,

and

Case No. 02-CA-243109

JOEL FLEMING, an Individual

ORDER DENYING RESPONDENT'S MOTION TO VACATE
THE SCHEDULED HEARING DATE

On February 4, 2020, the Respondent submitted a motion to vacate the hearing scheduled for February 10 because its earlier motion to have the complaint dismiss is pending before the Board and it would make little sense to continue with the hearing before the Board rules on the motion. The counsel for the General Counsel opposes the motion to vacate the hearing date.

For the reasons set forth in the General Counsel's opposition to the motion to vacate, the Respondent's motion is denied. I note that this matter has been pending since last year and another postponement of the hearing would be prejudicial to all parties. I further note that the Respondent could have petitioned the Board to postpone the hearing pending a ruling on its motion to dismiss the complaint but did not.

Board policy is to go forward with the hearing on the scheduled date even though a pending motion before the Board may (or may not) affect the outcome of the hearing. Unless instructed otherwise by the Board, the hearing on February 10 on this complaint will go forward as scheduled.

Kenneth W. Chu

_____

Kenneth W. Chu
Associate Chief Administrative Law Judge

Date: February 6, 2020
New York, New York