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 POST-HEARING REPLY BRIEF

March 20, 2020

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INTRODUCTION

Respondent, FDRLST Media, LLC (FDRLST or Respondent), respectfully submits this Post-Hearing Reply Brief. On March 10, 2020, Respondent and the General Counsel submitted simultaneous post-hearing briefs with the Administrative Law Judge (ALJ) Kenneth Chu. On March 10, 2020, according to the oral instructions given by the ALJ during the February 10, 2020 hearing, R-8 at 30:4–10,[1] Respondent, via email, requested that the ALJ set a deadline for filing simultaneous optional reply briefs. The ALJ set March 20, 2020 as the deadline for parties to file their post-hearing reply brief. This timely Post-Hearing Reply Brief follows.

This case should be dismissed for lack of personal jurisdiction and lack of subject-matter jurisdiction before reaching the merits. In the event the ALJ reaches the merits, the General Counsel has failed to prove that the Respondent engaged in an unfair labor practice under 29 U.S.C. § 158(a)(1). Consequently, the ALJ should dismiss the case against FDRLST.

ARGUMENT

I. NLRB HAS FAILED TO PROVE FACTS TO SUPPORT ITS ARGUMENT

There are several factual inaccuracies in the General Counsel's post-hearing brief:

- The General Counsel erroneously states that "Mr. Domenech uses his personal Twitter account @bdomenech to promote and discuss Respondent's business." GC Br. at 4. This statement is Counsel for General Counsel's sheer speculation that is not supported by facts in the record. As explained by Respondent, FDRLST Br. at 4–5, there is no factual basis for the Counsel for General Counsel to make that statement. Nor should Counsel for General Counsel be permitted to testify through briefing about his own speculation and opinion about how Mr. Domenech uses his personal Twitter account and what viewpoints he conveys using that account.

[1] Respondent's record cites in this filing remain consistent with the record cites it used in Respondent's Closing Post-Hearing Brief. In addition, "GC Br." refers to the General Counsel's post-hearing brief and "FDRLST Br." refers to the Respondent's post-hearing brief, both filed on March 10, 2020.

- The General Counsel states, "Vox Media magazine websites—online magazines like The Federalist—went 'dark as hundreds of employees stage[d] [a] walkout to demand [a] union deal.'" GC Br. at 4 (bracketed text alterations appear in GC's brief). General Counsel's *ipse dixit* seems to be relying on several premises, none of which has any basis in fact. Nothing in the record suggests—nor could it suggest because it did not happen—that Respondent's employees staged a walkout like Vox Media employees did. Nothing in the record suggests—nor could it suggest because it did not happen—that Respondent's website went dark. Nothing in the record suggests—nor could it suggest because it did not happen—that FDRLST employees demanded a union deal. Such misleading implications, suggestions, and speculations are dangerous and an inappropriate method of proof. They undermine the generally accepted practice, grounded in civil procedure and logic, of presenting provable facts and meeting the burdens of proof and persuasion.

- The General Counsel states, GC Br. at 1, that the "charge filed on June 7, 2019" was "served four (4) days later." There is no proof that the Charging Document was served on Respondent. As noted and explained by Respondent, the two subpoenas were mailed to the wrong mailing address. FDRLST Br. at 11–12. The wrong mailing address was supplied by the Charging Party on the Charging Document. *See* R-7; GC-1. There is no proof in the record as to the address where the "charge" was "served." GC Br. at 1. Therefore, the General Counsel's statement that the "charge" was "served" four days after June 7, 2019 is not supported by facts in the record.

The ALJ should give no weight to the General Counsel's speculative musings. Instead, the ALJ should stick to the actual facts in the record. Those facts show the Charging Party and the General Counsel have no case against Respondent.

II. NLRB'S CLAIM AGAINST FDRLST MEDIA, LLC FAILS AS A MATTER OF LAW

NLRB has filed a substantive brief providing legal argument and caselaw support for its theory that Respondent violated the NLRA. This is the first time that Respondent has seen the General Counsel's argument fully fleshed out in writing. The legal theory the General Counsel propounds has flimsy, if any, basis in pertinent caselaw. The cases the General Counsel discusses in his post-hearing brief fail to support the legal theory he urges the ALJ to adopt. That peculiar legal theory, if adopted, would be a marked departure, not only from precedent but also from the narrow authority Congress has given the National Labor Relations Board.

A. General Counsel Ignores that Humor and Satire Are Fully Protected under the First Amendment and Do Not Violate the NLRA Without Independent Proof of Threat

General Counsel lays bare once again the entire basis for prosecuting this case against FDRLST Media, LLC:

- "the virulently anti-union editorial stance of The Federalist," GC Br. at 4;
- the General Counsel's speculation that "The Federalist is a vehemently anti-union website," GC Br. at 7; and
- the General Counsel's assumption that "[i]n light of the anti-union position of The Federalist and, *a fortiori*, Mr. Domenech, no reasonable reader would interpret the threat explicitly made in the Tweet as anything other than another expression of Mr. Domenech's anti-union sentiment," GC Br. at 7 (italics in original).

These statements are consistent with the General Counsel's argument presented during the February 10 hearing. *See* FDRLST Br. at 7–11; R-8 at 14:4–14.

The General Counsel argues that a violation of 29 U.S.C. § 158(a)(1) occurs when an individual who works for a media company expresses an anti-union message even when there is *no proof* that employees were actually threatened or felt threatened. That notion ignores in wholesale fashion the plain proscription of the First Amendment and 29 U.S.C. § 158(c) that NLRB has no authority to prosecute particular viewpoints and label them as violating the NLRA.

There is a further problem with the General Counsel's newly minted test. He assumes Mr. Domenech's satire and the personal viewpoints of specific authors whose articles Respondent publishes are also the viewpoints of the Respondent. Without any citation to pertinent authority, he then concludes that as publisher, Mr. Domenech's viewpoints are the publication's viewpoints as a matter of law. This is an absurd and unsupported proposition. The General Counsel has submitted no proof—because there is none—that those individual viewpoints are one and the same. *See* FDRLST Br. at 8.

Indeed, humor and satire are fully protected speech. *See Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 493 (2d Cir. 1989) (concluding that humor or satire is speech that is fully protected under the First Amendment). The General Counsel, therefore, especially absent proof of unfair labor practice, has an illegitimate and unconstitutional basis to prosecute this case against FDRLST.

B. The Cases General Counsel Cites Fail to Support His Argument; They Instead Support Respondent's Argument that Respondent Did Not Violate the NLRA

The cases the General Counsel cites, GC Br. at 5 n.34, to support his convoluted theory in fact do not support it. *Best Distributing Co., Inc.*, 255 NLRB 165 (1981), and *Herb Kohn Electric Co.*, 272 NLRB 815 (1984), both involved charges filed by employees who were actually discharged by the employer. 255 NLRB at 166, 167 ("Go home today. We don't need you. You are laid off as of Friday at 5:30"; "[employee] stated that it sounded to him as if he were being laid off *for* joining the Union") (emphasis added); 272 NLRB at 816 (stating that employer "discharged [two employees] *because of* their union and/or other protected concerted activities") (emphasis added). It is unsurprising that statements made by an employer's agent directly to an individual employee during the conversation in which the employer's agent fires the employee would likely trigger 29 U.S.C. § 158(a)(1). And it is unsurprising that employers who fire employees *for* or *because of* the employee's pro-union position likely violate the NLRA.

FDRLST's situation in this case, however, is far removed from such a scenario. *Best Distributing Co.* and *Herb Kohn Electric Co.* are inapposite to deciding this case. This case involves a satirical tweet.

The General Counsel readily admits that the tweet "is most naturally understood as a reaction to and commentary upon that [*i.e.*, Vox Media] walkout." GC Br. at 7. The General Counsel has failed to prove that such satire published by a publishing company's executive expressing his own views on his personal Twitter account who works for a company that routinely publishes commentary on all sorts of contemporary newsworthy topics triggers § 158(a)(1). The General Counsel failed to prove that any FDRLST employee took the tweet to be anything other than a joke. And the General Counsel failed to prove that any FDRLST employee took the statement to be Mr. Domenech directing them as their supervisor.

Nor does the General Counsel's argument based on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), fare any better. *See* GC Br. at 5 n.35 & accompanying text.[2] The General Counsel recites the test accurately, *id.*: "The expression of any views, argument, or opinion shall not be evidence of an unfair labor practice, *so long as such expression contains no threat of reprisal or force or promise of benefit*." 395 U.S. at 617 (emphasis added; cleaned up). But he fails to prove that the tweet actually *contains* a threat of reprisal or force or promise of benefit. Before ever filing this case, he had the option of telephonically calling FDRLST employees and Mr. Domenech to ascertain whether any threat transpired here. The General Counsel could have sought to call them to the stand to provide live testimony; he, instead, voluntarily withdrew all subpoenas that were issued—to Mr. Domenech and four FDRLST employees (only the female employees, oddly). NLRB failed to gather evidence to prove their case—not once, but twice.

Had the General Counsel investigated, he would have learned that FDRLST employees took Mr. Domenech's tweet as obvious satire. In fact, two FDRLST employees (represented by counsel separate from FDRLST's counsel) submitted sworn affidavits, signed under penalty of perjury, unequivocally stating that the tweet did not actually contain any threat of reprisal or force or promise of benefit. *See* FDRLST Br. at 4, 6. The two employees stated that the tweet was "a satirical and funny way of expressing personal views on a contemporary topic," "was funny, obviously sarcastic, and was

[2] The General Counsel addresses Respondent's First Amendment argument in a single three-sentence paragraph and cites no case other than *Gissel Packing* to support his position. GC Br. at 8.

a pithy way of expressing personal views on a contemporary topic." R-5 ¶ 8; R-4 ¶ 8; FDRLST Br. at 6–7. Mr. Domenech's affidavit stated that he uses his personal Twitter account to express his own "views, not those of FDRLST Media, LLC." R-3 ¶ 8; FDRLST Br. at 4–5. And he stated that the tweet was "satire." R-3 ¶ 5. The General Counsel, who carries the burden of proof and persuasion on the merits, failed to produce any evidence under this crucial component of the *Gissel Packing* test.

Furthermore, the *Gissel Packing* test cannot be expanded to cover the General Counsel's current, novel legal theory without gutting the test altogether. The Supreme Court has said that the statement itself "shall not be evidence of an unfair labor practice" unless there is proof, independent of the statement, that shows the statement "contains … threat of reprisal or force or promise of benefit." 395 U.S. at 617; *see id.* at 618–19 ("[A]n employer is free to communicate to his employees any of his general views about unionism"; "conveyance of the employer's belief" is not actionable under the NLRA "unless" the threat "is capable of proof.") (cleaned up). *Gissel Packing* has long foreclosed the kind of *res ipsa loquitur*—or the statement-speaks-for-itself—theory of proving a violation of § 158(a)(1) that the General Counsel has proposed in this case.

Put differently, General Counsel's unproven perception of FDRLST as anti-union does not provide the independent proof of threat that is necessary to satisfy the *Gissel Packing* test. Being a media company willing to publish anti-union articles cannot be the circumstance—under the totality-of-circumstances test—that makes Mr. Domenech's personal tweet a violation of the NLRA. *See* FDRLST Br. at 6 (discussing *GM Electrics*, 323 NLRB 125 (1997)).

The General Counsel next cites *Miller Electric Pump & Plumbing*, 334 NLRB No. 108 (2001), GC Br. at 5 n.36, for the proposition that "the Board does not consider either the motivation for the statement or its actual effect."[3] But that proposition is only one part of *Miller Electric*'s holding. *Miller Electric* cites *Gissel Packing* and reiterates the Supreme Court's formulation of the test: "The Board will not *ordinarily* look to the Employer's motive, or whether the alleged coercion succeeded or failed, but

[3] *See also* GC Br. at 8 & n.44 (stating that "as noted above, … the intent of the speaker is irrelevant" as is the "actual effect upon the listener") (citing *Teamsters Local 391 (UPS)*, 357 NLRB 2330 (2012); *Smithers Tire*, 308 NLRB 72 (1992); *Waco, Inc.*, 273 NLRB 746 (1984)).

whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act. … [T]here are situations where motive and probable success or failure of the coercion *may be considered*." 334 NLRB No. 108 at *11 (citing *Rossmore House*, 269 NLRB 1176 (1984), *aff'd by* 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Center*, 277 NLRB 1217 (1985)) (emphasis added).

There are, therefore, situations, as here, where it is proper to consider motives under the totality-of-circumstances test. The General Counsel himself offered evidence of motive by admitting into the record articles written about the unrelated Vox Media walkout. *See generally* GC-3 & Exhibits attached thereto. Those articles were the General Counsel's attempt to show that Mr. Domenech's motive was to supply his personal commentary on the news of the day. Mr. Domenech expressed his views by using satire on a platform that permits users to input only 280 characters of text. To clarify for the record the actual motive of the speaker—as well as how the statement was objectively perceived by employees of FDRLST—the Respondent introduced and the ALJ admitted three affidavits into the record. *See* R-3; R-4; R-5. Two employees of FDRLST "reasonably underst[ood] the statement" as satirical. GC Br. at 5. The reason the tweet is reasonably interpreted as a joke is because there is no evidence Mr. Domenech owns a salt mine; no evidence that FDRLST employees had previously been made to work in a salt mine, and no evidence that Mr. Domenech has any authority or ability as publisher of a web magazine to force FDRLST employees to work in a salt mine. The absurdity of any of those propositions is what makes it a joke. *See* The Free Dictionary, *Back to the Salt Mine* ("Today the term is only used ironically."). Thus, given *no* evidence from the General Counsel and competent controverting evidence from Respondent, the General Counsel's blanket assertion—that there is "no plausible alternative" reading of the tweet and therefore that the tweet violates the NLRA (GC Br. at 5–6)—simply falls short.

The General Counsel tries to prop up his evidence-less inference by citing three cases, GC Br. at 5 n.37: *Franklin Preparatory Academy*, 366 NLRB No. 67 (2018); *Nellis Cab Co.*, 362 NLRB 1587 (2015); *Lamar Advertising of Hartford*, 343 NLRB 261 (2004). These cases in fact confirm that the operative test is whether "*an employee* would reasonably understand the statement as threatening adverse

action *in response to* protected activity." GC Br. at 5 (emphasis added). FDRLST employees, in fact, understood the statement as satire. *See* R-4; R-5. Moreover, the test requires the General Counsel or the Charging Party to prove—and they have not so proved here—that the alleged unlawful statement was made *in response to protected activity*. There is nothing in the record to suggest that FDRLST employees ever engaged in any protected activity—because they did not—nor that Mr. Domenech's tweet was in response to such protected activity. To the contrary, the General Counsel himself confirms that Mr. Domenech's tweet was not in response to FDRLST employees' engaging in protected activity but that "it is most naturally understood as a reaction to and commentary upon that [*i.e.*, Vox Media] walkout." GC Br. at 7. These cases only confirm the *Gissel Packing* rule that the General Counsel or the Charging Party must offer proof other than the alleged unlawful statement to show that the statement in fact threatened reprisal or force or promise of benefit. The General Counsel has provided no proof to satisfy the test.

To gloss over his lack of proof, the General Counsel cites, GC Br. at 6 n.38, *Frazier Industrial Co.*, 328 NLRB No. 89 (1999). In *Frazier Industrial*, the General Counsel proved through testimony and other competent evidence that the employer "discharged [employee] because he failed to adhere to the [employer's] unlawful rule barring union talk during worktime" "but permitting other nonwork discussions," and therefore that the employer violated § 158(a)(1) of the NLRA. 328 NLRB No. 89 at *3, *6. Thus, there was evidence in *Frazier Industrial* independent of the alleged threatening remark that proved an NLRA violation.[4] The General Counsel in his case against FDRLST has presented no proof

[4] The same is true of *Meisner Electric, Inc.*, 316 NLRB No. 102 (1995) that the General Counsel cites. GC Br. at 8 n.46. The General Counsel proved through evidence independent of the actual statements made by the employer that the employer in *Meisner* made "several threats about employees' union activities." 316 NLRB No. 102 at *1. In *Ethyl Corp.*, 231 NLRB No. 40 (1987) that the General Counsel cites, GC Br. at 8 n.46, the General Counsel called several witnesses to the stand. 231 NLRB No. 40 at *12, *17, *25, *30. The General Counsel and the Charging Party in *Southwire Co.*, 282 NLRB No. 117 (1987)—another case that the General Counsel cites, GC Br. at 8 n.46—also called several witnesses, including employees of the respondent employer, to the stand to present live testimony and evidence. *Id.* at *7, *12, *13, *15. Despite entering live testimony from witnesses into the record, the General Counsel in *Southwire* failed to prove "the obvious basis for the remarks by both employee and supervisor." *Id.* at *15. The ALJ, therefore, concluded that "the substance of the remarks standing alone would not be probative of a violative intent or attitude. The General Counsel has simply failed to show that the remarks relied on were grounded in animus toward the Union or employees who

other than Mr. Domenech's tweet despite having full opportunity to do so (for example, the General Counsel had the option of not voluntarily withdrawing five subpoenas he had issued to compel live witness testimony of Mr. Domenech and four of FDRLST's six employees). In contrast to situations involving hundreds of employees, because FDRLST has only six employees, the General Counsel had full opportunity to interview them and Mr. Domenech as part of his investigation prior to issuing the Complaint. Instead, the General Counsel chose to conduct no investigation—neither before filing the complaint nor after filing the complaint. His speculation is not an appropriate stand-in for such evidence. And such speculation cannot satisfy the burden of proof and persuasion that is on the General Counsel to prove his case against FDRLST.

Online communications can easily become decontextualized by third parties. *See, e.g.*, R-6 (Charging Party re-tweeting Mr. Domenech's tweet). A speaker might send an email to one person, only to see that person forward the message to dozens of others or post it on a public mailing list. Such decontextualization circumvents any effort by a speaker to provide additional context, outside the plain words of the statement, that would make the non-threatening intent of the statement clear. Thus, not inquiring into a speaker's intent (as permitted under *Gissel Packing*) for online communication inevitably chills constitutionally protected speech, as speakers like Mr. Domenech would bear the burden of accurately anticipating the potential reaction of unfamiliar listeners or readers—often thousands of readers. *See, e.g.*, R-3 ¶¶ 9–10 ("As of February 4, 2020, I have sent over 86,000 tweets. As of February 4, 2020, I have over 96,000 followers on Twitter."). *Gissel Packing*'s totality-of-the-circumstances test addresses this problem by allowing a factfinder to consider evidence contextualizing the online comment, including the speaker's intended audience, other remarks clarifying the challenged statement's meaning, the speaker's motive for making the statement, and so forth. Proving situation-specific information about a speaker's choices regarding the scope, reach, and intended audience is precisely the sort of evidence that is relevant to a factfinder's assessment of the speaker's intent, and

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supported the Union and therefore coercive. The record actually shows the opposite to be true." *Id.* The ALJ held in *Southwire* that the "General Counsel has failed to sustain his burden of proof for any allegation in the complaint," and that "[employer] has not, by the conduct of its agents, … violated Section 8(a)(1) of the Act." *Id.*

whether, given the totality of circumstances, the statement is actionable under 29 U.S.C. § 158(a)(1), and then whether the statement actually violates that section of the NLRA. The General Counsel neither investigated nor presented evidence on any of these points to meet his burden of proof and persuasion. In contrast, Respondent presented proof showing the tweet was meant to be and was perceived by FDRLST employees as Mr. Domenech's personal satirical opinion.[5] This prosecution of FDRLST is, therefore, both groundless and meritless.

C. General Counsel, Purportedly to Prove His Case, Concocts a Brand-New Test that Improperly Expands Authority Given to NLRB by Congress

The General Counsel, as discussed above, cobbles together a brand-new test by selectively cutting out pieces from the test that are incompatible with his theory of the case. In doing so, General Counsel resorts to stacking speculation upon speculation—without actual proof. The test the General Counsel consequently urges the ALJ to adopt and apply looks nothing like the test that the NLRB and federal courts have applied in a long line of precedent from *Gissel Packing* onward. If adopted, the

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[5] *See, e.g.*, *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978): "The record shows that before the March, 1975, election (the second election) was held, during a change in the work shift of foreman Bowlby's employees, the workmen were laughing and sticking the red dot card in Bowlby's face and daring, teasing, and bantering him to blow on the red dot on the card to see if it would turn blue. Bowlby picked up one of the cards that was laying on top of employee Emerson's tool box and looked at it and smiled, whereupon Emerson said 'blow on it and see if it will turn blue.' Bowlby replied, 'I bet I can make it turn brown.' He then placed a burning cigarette lighter under the red dot until it turned brown and caught on fire. Bowlby then blew out the fire and put the card down. Emerson did not object nor protest in any way to Bowlby's action; and, in fact, laughed with Bowlby about it. At the trial Emerson was asked if the whole incident was a joke and he did not deny it. He admitted in his testimony that he 'snickered' and 'laughed' when the incident occurred. The Administrative Law Judge held that the red dot card incident was a destruction of Union literature and violated Section 8(a)(1) of the Act and interfered with the holding of a fair and free election. We do not agree. It is obvious that the entire incident was a joke and occurred in jest for the purpose of evoking laughter, which actually occurred. Foreman Bowlby was merely having fun in responding to what is known in common parlance as 'kidding' and 'horseplay' by the employees, including Emerson himself. It must be remembered that all of these people were close friends and knew each other on a first name basis, and an incident such as this would not be unusual or unexpected among them. There is no indication that Bowlby's act was designed to hurt Emerson or his property, or to influence or to affect the election." *Cf. Steinhauer v. DeGolier*, 359 F.3d 481, 487 (7th Cir. 2004) ("[I]nane comments do not constitute sufficient evidence of anti-male bias to create an issue of fact as to [employer's] motivation for firing [employee]").

General Counsel's strained reading of applicable law would lead to a conspicuous expansion of the narrow authority Congress has given to the National Labor Relations Board.

In addition to the General Counsel's omissions and half-truths discussed above, the General Counsel, for example, alleges in the Complaint that Mr. Domenech "*implicitly* threatened employees with loss of their jobs if they formed or supported a union." GC-1 ¶ 6 (emphasis added). This implicit-threat theory, if adopted, would work a vast expansion of NLRB's authority beyond the scope of the NLRA as well as cause the ALJ to breach the First Amendment. *See generally* FDRLST Br.; R-9.

A mere statement, without further proof, is insufficient as a matter of law to confer authority on NLRB to allege an unfair labor practice and then for the ALJ/Board to conclude that the speaker "implicitly threatened" employees in violation of 29 U.S.C. § 158(a)(1). The Charging Document did not allege anything other than that Mr. Domenech publicly posted a tweet. NLRB conducted no investigation of the circumstances surrounding the tweet. Had even a cursory investigation occurred, NLRB personnel would have easily found out that the Charging Party is not FDRLST's employee nor someone with a nexus to a FDRLST employee; instead, he is some random person who saw the tweet on the internet. That investigation would also have helped NLRB personnel understand the totality of the circumstances surrounding the tweet—that it was satire, perceived as such by FDRLST employees. NLRB did none of that. Instead, the General Counsel used his own sense of humor as a stand-in for how FDRLST employees perceive satire and issued a complaint alleging that the statement constitutes an implicit threat. Now the General Counsel, again without procuring any evidence—evidence that he had full opportunity to collect since June 2019—urges the ALJ to adopt the General Counsel's myriad speculations as somehow proof that Mr. Domenech threatened employees and that such threat constitutes an unfair labor practice that is actionable under § 158(a)(1).

The ALJ should conclude that the General Counsel has failed to prove allegations made in the Complaint and, therefore, that the Complaint should be dismissed in its entirety—if the ALJ does not first dismiss it on jurisdictional grounds.

III. RESPONDENT'S EXHIBITS R-3, R-4, R-5 WERE PROPERLY ADMITTED INTO THE RECORD

Respondent's exhibits were properly admitted into the record. The affidavits and the statements contained therein supply evidence to rebut the General Counsel's speculation. As such the affiants' statements are "more probative" than General Counsel's evidence-less speculation. GC Br. at 11 & n.58. Being sworn to under penalty of perjury, they contain "sufficient guarantees of trustworthiness to be admitted." GC Br. at 11 & n.58. In any event, the ALJ has already admitted the three affidavits into the record. R-8 at 26:22–25 ("And I'll accept [them] for what those affidavits are worth, with the understanding that they are hearsay statements. So Respondent Exhibits 3, 4, 5 are in.").

To reiterate, Respondent would not have had to submit affidavits if NLRB personnel had properly investigated the Charge filed against Respondent before filing the Complaint, and then, after filing the Complaint, if the General Counsel had engaged in any discovery. That investigation and/or discovery would have shown that the Charging Party is a random person not in privity with FDRLST or its employees and that no violation of the NLRA occurred.

The General Counsel would not have had to spend scarce taxpayer resources fighting over affidavits, GC Br. at 9–13; he could simply have not voluntarily withdrawn the five subpoenas he had issued, calling Mr. Domenech and four FDRLST employees to testify in New York City. Had they refused to comply with the subpoena and refused to testify, the General Counsel had the option of compelling them to appear and testify. *See* 29 C.F.R. § 102.31(c). Instead, the General Counsel simply voluntarily withdrew those subpoenas on the eve of the hearing.

Given that the General Counsel's case-in-chief lacks proof—other than the misconstrued tweet itself—it is proper for the ALJ to consider the affidavits as concrete, factual evidence that outweighs and successfully controverts the General Counsel's speculation, assumption, and premises, none of which the General Counsel supported by factual proof. As such, the General Counsel's renewed objection to the affidavits already in the record only strengthens Respondent's argument and underscores the fact that the General Counsel has failed to supply anything to meet NLRB's/Charging

Party's burden of proof and persuasion on the question of whether Respondent violated 29 U.S.C. § 158(a)(1).

CONCLUSION

This case should be dismissed for lack of subject-matter jurisdiction and/or lack of personal jurisdiction.

In the event the ALJ rules on the merits, NLRB has failed to prove facts to support its argument. Its claim against Respondent fails as a matter of law. The General Counsel/Charging Party have failed to carry their burden of proof and persuasion. NLRB's case against FDRLST Media, LLC should, therefore, be dismissed.

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, Respondent's "Post-Hearing Reply Brief" was electronically filed and served by e-mail, return receipt requested on the following parties:

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