

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRIME HEALTHCARE SERVICES - ENCINO,
LLC D/B/A/ ENCINO HOSPITAL MEDICAL
CENTER,

Case Nos. 31-CA-066061,
31-CA-070323,
31-CA-080554 and
21-CA-080722

Respondent,

SEIU LOCAL 121RN,

Union,

and

SEIU UNITED HEALTHCARE WORKERS-WEST,

Union,

PRIME HEALTHCARE SERVICES - GARDEN
GROVE, LLC D/B/A GARDEN GROVE
HOSPITAL & MEDICAL CENTER,

Respondent,

SEIU UNITED HEALTHCARE WORKERS-WEST,

Union.

REPLY IN SUPPORT OF REQUEST FOR SPECIAL PERMISSION TO APPEAL

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I. INTRODUCTION

The Respondents' Opposition to the Unions' appeal, as with all of their briefing in this dispute, is long on rhetoric but short on analysis.¹

Existing Board law prohibits a respondent from asserting a boilerplate affirmative defense “with the mere hope of discovering evidence to support it,” for that tactic would improperly turn any unfair labor practice proceeding into the vehicle for an “open-ended inquiry” or “fishing expedition” conducted by the respondent. *Flaum Appetizing Corp.*, 357 NLRB No. 162, slip op. at 4-5, 2011 NLRB LEXIS 785, *17-24 (2011). In this case, Respondents' pursuit of their purported conflict of interest defense is precisely the sort of tactic that *Flaum Appetizing* categorically rejected.² Respondents offer only the unconvincing response that *Flaum*

¹ The December 18, 2013 Request for Special Permission to Appeal (as well as the pending, related appeal request dated November 14, 2013) was filed by the Charging Parties, United Healthcare Workers-West and SEIU Local 121-RN, together with their parent union, Service Employees International Union (“SEIU”) (collectively, “Unions”). Among the other baseless arguments made in their Opposition, Respondents contend that SEIU lacked standing to file the underlying motion to strike. *See* Prime Healthcare's Opposition to Unions' Request for Special Permission to Appeal (“Opp.”) at 2 n.1. This contention cleverly ignores that the Unions' November 25, 2013 motion to strike, like the ensuing appeal, was filed by *all three union entities* including the two Charging Parties, as the ALJ explicitly recited in the first sentence of his Order denying that motion. *See* December 4, 2013 Order, attached as Appendix B to Dec. 18 Appeal (stating that “SEIU and the Charging Party Local Unions, SEIU 121RN and SEIU-United Healthcare West (UHW), move to strike the Respondent Hospitals' affirmative defense”). That the Respondents would now make such a patently frivolous attack on standing only underscores their insistence on raising untenable claims as obstacles to the enforcement of NLRA Section 7 rights.

² The Board has repeatedly rejected use of NLRB processes to conduct such a “fishing expedition” aimed at union organizing and Section 7 activities. *See, e.g., 800 River Road Operating Co.*, 359 NLRB No. 48, slip op. at 2 (2013) (“halt[ing] the Employer's manifest fishing expedition” into the Union's organizing campaign); *Interstate Builders, Inc.*, 334 NLRB 835, 842 (2001); *Burns Int'l Security Servs., Inc.*, 278 NLRB 565, 565–66 (1986) (“Burns' broad requests for the production of records and testimony are a mere ‘fishing expedition’ not entitled to a subpoena from the Board.”); *Cintas Corp.*, No. 29-RC-11769, 2010 NLRB LEXIS 106, at *11 (Apr. 16, 2010) (revoking employer subpoena in order to avoid what amounted to a “fishing

Appetizing's holding is limited to a compliance proceeding. It is not. The Board's rationale in *Flaum Appetizing* was premised on "ordinary rules of pleading," the same rules that apply to Respondents' answer here.

Respondents turn *Flaum Appetizing* on its head, arguing that their mere assertion of a disqualifying "conflict of interest" defense justifies a burdensome, wide-ranging investigation and lengthy trial probing the Unions' collective bargaining and organizing strategy and activities. Needless to say, Respondents must do more than simply assert the defense and cite obviously inapplicable cases. They must articulate a sufficient basis under controlling law to pursue their disqualification defense, which they have failed to do despite ample opportunity.

Here, even assuming for the sake of argument all of the supporting allegations they seek to document and prove, the Respondents' conflict of interest defense fails as a matter of law. The asserted basis for this defense – that the Unions are legally disqualified from continued representation of Respondents' employees as a result of their cooperative labor-management relationship with Kaiser Permanente, one of Respondents' alleged competitors, and because the Unions have pursued an advocacy campaign against the Respondents and their parent company – stands in direct opposition to Board cases emphatically rejecting the conflict of interest defense in similar circumstances.

For these reasons, discussed further below, and for all the reasons presented in the Unions' prior appeal submissions, the Board should grant the Unions' December 18, 2013

expedition" encompassing the union's election campaign and seeking "confidential" documents, including internal documents regarding the union's organizing strategy).

Request for Special Permission to Appeal, as well as the companion Appeal Request filed on November 14, 2013.

II. ARGUMENT

A. The Ruling Below Should Be Reviewed *De Novo*

Respondents unconvincingly argue that abuse of discretion is the proper standard of review for denial of the Unions' motion to strike a legally unfounded defense. Opp. at 4. Not only do Respondents fail to cite any legal support for their argument, they fail to offer any basis whatsoever for their misguided assertion.

Instead, the appropriate standard of review in this case, which presents a dispositive question of law, is *de novo*. Just like a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a complaint by assuming the truth of the facts alleged, here the Unions' motion to strike tests the legal sufficiency of Respondents' affirmative defense by assuming the truth of Respondents' factual allegations.³ In both cases, the issue is a purely legal one. Accordingly, just like an order granting or denying a motion to dismiss on a question of law, the denial of the Unions' motion to strike Respondents' sixth affirmative defense in this case should be reviewed *de novo*, not for an abuse of discretion. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001) ("When a district court dismisses a claim pursuant to a Rule 12(b)(6) motion, we evaluate the complaint *de novo* to decide whether it states a claim upon which relief could be granted.") (internal quotation marks and citations omitted). *Accord, Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006).

³ As the parties' submissions in this proceeding reflect, the Respondents did not plead any facts in their answer to the ULP complaint; instead, they offered factual support for their sixth affirmative defense following the Unions' pursuit of petitions to revoke Respondents' trial subpoenas, together with a fluid, shifting legal theory.

See also *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012) (court must “exercise *de novo* review” where lower court’s denial of motion to dismiss “involves a pure question of law”); *Janvey v. Alguire*, 647 F.3d 585, 592 (5th Cir. 2011) (although factual findings on injunction are subject to clearly-erroneous standard of review, “conclusions of law are subject to broad review and will be reversed if incorrect”) (citations and quotation marks omitted).⁴

Upon *de novo* review of the legal question presented in this case, it is clear that the Unions’ motion should be granted and the Respondents’ legally unfounded defense should be stricken. As the Unions have shown in their earlier briefs, Respondents’ sixth affirmative defense is premised on the conjunction of (1) the Unions’ cooperative collective bargaining relationship with Kaiser Permanente, an alleged competitor of Respondents and their parent company; and (2) the Unions’ alleged advocacy campaign (using legislation, lobbying, petitioning of administrative agencies and negative publicity) to raise public concerns about Respondents’ parent corporation and its efforts to expand its business operations. Simply put, even crediting all their supporting factual allegations the Respondents do not and cannot

⁴ Moreover, however the standard of review is characterized, the result in this case is the same in any event because a ruling that is contrary to controlling authority or otherwise legally erroneous is a *per se* abuse of discretion. “An abuse of discretion standard does not mean a mistake of law is beyond appellate correction, because ‘[a] district court *by definition abuses its discretion when it makes an error of law.*’ . . . ‘Accordingly, the abuse of discretion standard includes review to determine that the discretion was not guided by *erroneous legal conclusions.*’” *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 205 (5th Cir. 1999) (emphasis added) (citing and quoting from *Koon v. United States*, 518 U.S. 81, 100 (1996)). *Accord, Scarangella v. Group Health, Inc.*, 713 F.3d 146, 151 (2d Cir. 2013) (“A court necessarily abuses its discretion when it applies an incorrect legal standard.”); *Janvey v. Alguire, supra*, 647 F.3d at 592 (even in matters subject to deferential “abuse of discretion” standard, “a decision grounded in erroneous legal principles is reviewed *de novo*”) (citations and quotation marks omitted); *Rice v. Rivera*, 617 F.3d 802, 811 (4th Cir. 2010) (“Of course, a district court by definition abuses its discretion when it makes an error of law”) (citation and quotation marks omitted).

establish the legal conclusion, under controlling Board law, that the Charging Parties have a conflict of interest that disqualifies them from representing Respondents' employees and privileges Respondents' refusal to bargain. *See* Nov. 14 Appeal at 17-28.

B. *Flaum Appetizing* Is Based on “Ordinary Rules of Pleading” and Is Not Limited to Compliance Proceedings.

Respondents mistakenly contend that *Flaum Appetizing* applies to only compliance proceedings and does not reflect the standard governing pursuit of affirmative defenses generally. *Opp.* at 5-8.⁵ Each contention is wrong.

The issue in *Flaum Appetizing* was not, as Respondents mistakenly argue, limited to an affirmative defense asserted in an NLRB compliance proceeding. Rather, the Board reviewed federal case law governing civil proceedings and described the broad issue as follows:

The question before us here, then, is whether a party must articulate a basis for pleading an affirmative defense, thereby opening up an avenue through which to subpoena documents and examine witnesses in order to discover evidence to support its defense. Without such a requirement, a party can plead an affirmative defense with the mere hope of discovering evidence to support it. We do not believe *generally applicable rules of pleading* permit a pleading to be interposed for the purpose of engaging in such open-ended inquiry

Flaum Appetizing Corp., 357 NLRB No. 162, slip op. at 6 (emphasis added). Indeed, it was “ordinary rules of pleading,” not a specific requirement for pleadings in an NLRB compliance proceeding, that supported “striking the affirmative defenses . . . to the extent the Respondent articulated no factual support (or reason to believe it could obtain such factual support)”

⁵ Respondents further argue that *Flaum Appetizing* should apply to unfair labor practice complaints as well as answers. *Opp.* at 8. This argument is a distraction. Respondents have never moved for a bill of particulars or raised any other specificity objections to the underlying consolidated unfair labor practice complaint in this case. And the Agency's current practice and format for pleading ULP allegations in complaints appears cognizant of and consistent with prevailing federal pleading standards.

Id., slip op. at 8. As the Union previously demonstrated, *Flaum Appetizing* fully accords with those federal pleading standards as currently defined by the Supreme Court, whether viewed as “heightened” or merely clarified. *See* Dec. 18 Appeal at 10-12. Notably, Respondents fail to point to anything in *Flaum Appetizing* that limits its reasoning to compliance proceedings.

Furthermore, regardless of how one characterizes the pleading standard reflected in *Flaum Appetizing*, it certainly does require a respondent, when challenged, to articulate a sufficient factual basis, at some point prior to trial, for pursuing an affirmative defense with trial subpoenas, the precise issue here. In *Flaum Appetizing*, the insufficient factual basis for the respondent’s affirmative defense was exposed following the General Counsel’s filing of a motion for bill of particulars prior to trial. 357 NLRB No. 162, slip op. at 4-5. Here, the deficient factual basis for Respondents’ defense was exposed following the Unions’ filing of petitions to revoke. Notwithstanding that immaterial procedural difference, the result should be the same: because Respondents have failed to offer a legally sufficient basis for their conflict of interest defense under controlling Board law, their defense should be stricken and their corresponding subpoenas should be revoked in full.⁶ *See Flaum Appetizing Corp.*, slip op. at 8.

C. Respondents’ Mere Invocation of the Conflict of Interest Defense Does Not Entitle Them to Pursue this Defense Regardless of the Basis For the Defense.

Respondents’ final argument stands *Flaum Appetizing* on its head. They argue that because the Unions “do not deny the existence of the conflict of interest defense,” Respondents

⁶ Respondents contend that “adoption of the heightened pleading standards gains [the Unions] nothing,” since Respondents can be granted leave to amend any deficiencies in their answer. Opp. at 7. This argument mistakenly assumes that *Flaum Appetizing* reaches only the face of a pleading. As discussed above, *Flaum* goes further. The Board requires that, regardless of how a legal defense is worded in the pleadings, a respondent must be prepared, when asked, to articulate a legally sufficient factual basis for a particular affirmative defense before it can demand compliance with burdensome trial subpoenas and necessitate a trial over the defense.

should be permitted to pursue it here. Opp. at 9. In other words, Respondents contend that their mere invocation of the defense, regardless of their alleged factual basis or whether it is supported by existing Board law, entitles them to use trial subpoenas to discover evidence in support of the defense and to conduct a lengthy trial over it.

To state the obvious, the mere assertion of any set of facts in support of a particular affirmative defense is not a sufficient basis to allow a respondent to pursue that defense. Even where a respondent initially pleads some factual basis for a defense in its answer (or subsequently proffers specific allegations), that defense is nonetheless legally deficient if the respondent's allegations fail to establish what would be required to prevail on the merits under controlling Board law. *See, e.g., Greyhound Lines, Inc.*, 319 NLRB 554, 557 (1995) (striking conflict of interest defense where respondent's allegations did not satisfy applicable precedent defining the limited categories of legally disqualifying conflict); *Murcel Mfg. Corp.*, 231 NLRB 623, 625 n.10 (1977) (striking conflict of interest defense where respondent failed to make the legally required showing "that the danger of a conflict of interest interfering with the collective-bargaining process is clear and present"); *Roadway Package Sys., Inc.*, 292 NLRB 376, 426-27 (1989) (asserted conflict of interest defense ruled insufficient as a matter of law based on respondent's offer of proof).

As the Unions have already established, the factual basis for Respondents' defense in this case – that the Unions maintain a cooperative bargaining relationship and labor-management Partnership with Respondents' alleged competitor, Kaiser Permanente, and have concurrently campaigned against Respondents and their parent company – is inadequate under controlling Board law to establish that the charging parties have a disqualifying conflict of interest. *See Nov.*

14 Appeal at 17-28. Because Respondents have failed to articulate a sufficient basis under existing Board law to pursue their conflict of interest defense, the defense should be stricken and the corresponding trial subpoenas revoked.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in the Unions' companion appeal docketed on November 14, 2013, United Healthcare Workers – West, SEIU Local 121-RN, and SEIU respectfully request that their Request for Special Permission to Appeal be granted, and that the Respondents' sixth affirmative defense be stricken from their answer.

Dated: January 16, 2013

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Re: Encino Hospital Medical Center
Case Nos. 31-CA-066061, 31-CA-070323, 31-CA-080554 and 21-CA-080722

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On January 16, 2014, I served the foregoing document described as **REPLY IN SUPPORT OF REQUEST FOR SPECIAL PERMISSION TO APPEAL** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.



DOROTHY A. MARTINEZ

Re: Encino Hospital Medical Center
Case Nos. 31-CA-066061, 31-CA-070323, 31-CA-080554 and 21-CA-080722

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