

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**WAL-MART STORES, INC.**

**Case 28-CA-167277**

**and**

**RYAN COOK, an Individual.**

**WALMART'S SUPPLEMENTAL REPLY IN SUPPORT OF  
ITS MOTION TO DISMISS FOR LACK OF JURISDICTION**

The question presented by Walmart's Motion to Dismiss is straightforward: Did the Act confer jurisdiction on the Region to issue the Complaint in this matter under § 10(b)'s charge-filing requirement where none of the *Weingarten* Complaint allegations appear in any charge? The analytical framework to answer that question is also straightforward: Do the uncharged *Weingarten* Complaint allegations "closely relate" to the generic, boilerplate language of the pending charge (or even the withdrawn discharge allegation)? And the answer is likewise straightforward: No. As a matter of law and common sense, uncharged *Weingarten* allegations cannot possibly "closely" relate to unspecified boilerplate allegations of generic Act violations, barren of any facts. Indeed, even if one compares the uncharged *Weingarten* Complaint allegations to the withdrawn discharge claim, the answer does not change. The Region lacks authority to "originate complaints on its own initiative." *Nickles Bakery*, 296 NLRB 927, 928 (1989); *Drug Plastics v. NLRB*, 44 F.3d 1017, 1022 (D.C. Cir. 1995) ("Where the Board is unable to connect the allegations in its complaint with the charge allegation, we are unable to find that the Board has jurisdiction over the unrelated complaint allegations.").

In contrast, the CGC's Opposition is not straightforward. The CGC mixes apples, oranges, and cherries to try and avoid the "no jurisdiction" answer supplied by the dispositive

law. To that end, the CGC advances five analytically inaccurate arguments discussed below. Tellingly, the CGC never answers the “Why?” question. Why didn’t the CGC simply get a timely charge amendment to add the *Weingarten* allegations? The CGC investigated the charge for six full months, but did not obtain an amendment. Why not? Whatever the reason, the jurisdictional defect here is of the CGC’s own making because neither the pre-withdrawal discharge claim nor the post-withdrawal boilerplate language from the underlying charge closely relate to the uncharged *Weingarten* Complaint allegations. None of the CGC’s inaccurate arguments support a different conclusion, and the CGC does not meet her burden of proving jurisdiction as required by § 10(b). *Teamsters Local 955*, 325 NLRB 605, 607 (1998) (“Section 10(b) of the Act is jurisdictional and the General Counsel has the specific burden of establishing this statutory requirement.”); *A-NLV Cab Co.*, 340 NLRB 1005, 1009 (2003) (same).<sup>1</sup>

**I. THE UNCHARGED WEINGARTEN ALLEGATIONS CANNOT “CLOSELY RELATE” TO A WITHDRAWN CLAIM THAT CEASED TO EXIST.**

The Charging Party withdrew his sole discharge claim on June 2, 2016, before the Complaint issued on June 7. [Motion to Dismiss, Tab 3.] After that withdrawal, the charge contained nothing but the following generic, boilerplate language; barren of any specific allegations: “During the last 6 months, the above-named Employer by its officers, agents, and supervisors has discriminated against its employees. By the above and other acts the Employer has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights

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<sup>1</sup> A “variance” unquestionably existed between the Region’s uncharged *Weingarten* Complaint allegations and both the pre-withdrawal discharge claim and the post-withdrawal “left over” boilerplate language. In that circumstance, the Board instructs the CGC that “variances between the allegations of the charge and the allegations of the complaint *will require appropriate amendments.*” CHM § 10264.1 (emphasis added); *Towne Ford, Inc.*, 327 NLRB 193, 199 (1998) (“[T]he proper procedure [for addressing a variance] was to seek an amended charge and in the absence of such an amendment, issue a complaint without the [varying] allegations.”). The CGC investigated this charge for six months, but did not follow the Board’s “proper procedure.”

under the National Labor Relations Act.” [MTD, Tabs 1, 3.] But which officers, agents, and supervisors? What acts of discrimination, interference, restraint, or coercion? When? Where? Why? How? How often? How many? The post-withdrawal boilerplate language does not say. And that’s a problem, because – as discussed in more detail below – such barren language cannot possibly “closely relate” to anything. *Rock-Tenn Co.*, 1991 WL 1283424 (Div. of Judges Dec. 10, 1991) (dismissing Complaint for lack of jurisdiction in reliance on *Nickles Bakery* after the Region “approved the withdrawal of most, (if not all) allegations in the charge,” but then issued a Complaint on uncharged allegations supported by nothing more than a “by then barren charge”); *Precision Concrete v. NLRB*, 334 F.3d 88, 92 (D.C. Cir. 2003) (“[T]he Board may not issue a complaint based upon a charge containing only boilerplate § 8(a)(1) allegation . . . unbounded by specific facts because, with the charge so lacking in content *it becomes impossible sensibly to apply the test of substantial relation* between the factual allegations in the charge and those in the complaint.”) (internal citations omitted) (emphasis added).

How does the CGC deal with that problem? Primarily by ignoring it. In the bulk of the CGC’s Opposition to Walmart’s Motion to Dismiss, the CGC simply acts as though Charging Party Ryan Cook never withdrew his sole discharge allegation or blithely presumes the withdrawal does not matter. Tellingly, the CGC devotes an entire page of the Opposition to “Procedural History,” but never mentions that Cook withdrew his discharge-related allegation before the Region issued its Complaint. [Opp. at 2.] The CGC then goes on to inaccurately describe the charge as *including* the withdrawn discharge allegation. [Opp. at 3.] Then, the CGC briefly acknowledges that Cook withdrew his discharge claim, but – undeterred – plows ahead with the imbedded false premise that it does not matter; the CGC repeatedly advances the untenable and wholly unsupported argument that the uncharged *Weingarten* Complaint

allegations “closely relate” to the *withdrawn* discharge allegation. [Opp. at 6, 8-12.] But black-letter Board law holds that a withdrawn charge allegation “ceases to exist” and cannot support a Complaint allegation. *See, e.g., Ducane Heating Corp.*, 273 NLRB 1389, 1391 (1985) (stating that when a “charge has been disposed of,” either through withdrawal or dismissal, it “ceases to exist” and cannot be resurrected); *Lee A. Consaul Co.*, 192 NLRB 1130, 1144 (1971) (finding that a dismissed charge “ceased to be a viable charge and therefore [was] not sufficient to support the [complaint]”); *enf. denied on other grounds*, 469 F.2d 84 (9th Cir. 1972); *see also NLRB v. Electric Furnace Co.*, 327 F.2d 373, 375 (6th Cir. 1964) (“The Board has held that a withdrawn charge cannot support allegations of unfair labor practices, and to allow its reinstatement would circumvent the meaning of § 10(b).”) (citing Board decisions); *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1980) (“[N]either the Board nor the courts have mentioned the existence of another withdrawn or dismissed charge as a factor considered determinative or even relevant. They have only looked at whether there is a timely charge *now pending* that would support the new untimely allegation.”) (emphasis added).<sup>2</sup>

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<sup>2</sup> The CGC states: “The allegations that Respondent denied Mr. Cook’s request to have a witness present during two interviews closely preceding his discharge are encompassed by the broad language of Mr. Cook’s charge and are *closely related to the allegation related to his discharge.*” [Opp. at 6.] “Likewise, by extension, a sufficient factual relationship may be established here, to show that the *withdrawn allegation that Respondent discharged Cook* ‘because he engaged in protected concerted activities’ and the remaining Complaint allegations . . . *relate to* an overall plan by Respondent to undermine its employees’ Section 7 activity.” [Opp. at 8-9.] “It is hardly a stretch to find a sufficient *factual relationship between* Respondent denying Mr. Cook’s requests for a witness . . . as alleged in the Complaint, *and the withdrawn allegation involving Mr. Cook’s discharge . . .*” [Opp. at 9.] “Respondent’s denial of its employees’ requests for witnesses during investigator interviews here *are ‘closely related’ to the withdrawn allegation related to Mr. Cook’s discharge . . .*” [Opp. at 10.] “Similarly, here, it is appropriate for the Regional Director to seek . . . a remedy for Respondent’s denial of Mr. Cook’s requests for a witness . . . since Mr. Cook’s *requests themselves . . . were some of the protected, concerted activities he alleged to have resulted in his discharge . . .*” [Opp. at 11.] “[N]ot only are Mr. Cook’s allegations related to denial of his requests for witnesses encompassed by the charge and

Walmart cited all the foregoing dispositive authority in its Motion to Dismiss (at 5-6), but the CGC simply ignores it. The CGC did not address it and does not dispute it in the CGC's Opposition. The CGC does not offer a single shred of authority for the proposition that the Board or courts analyze uncharged Complaint allegations against withdrawn or dismissed charge allegations. All authority states just the opposite. Thus, the CGC's repeated attempts to connect the uncharged *Weingarten* Complaint allegations to a *withdrawn*, "non-existent" discharge claim fail on their face. Cook's withdrawn discharge claim did not confer § 10(b) jurisdiction on the Region to issue the uncharged *Weingarten* Complaint allegations in this case. Likewise, the "left over" generic, boilerplate language did not confer jurisdiction. Walmart addresses that argument – made in passing at the very end of the CGC's Opposition – in Part V below.

**II. EVEN IF ONE COULD CONSIDER A WITHDRAWN CLAIM, WEINGARTEN ALLEGATIONS DO NOT CLOSELY RELATE TO A DISCHARGE CLAIM.**

The CGC tacitly acknowledges that the generic boilerplate charge language – bereft of any specific factual allegations – cannot rationally relate "closely" to the uncharged *Weingarten* Complaint allegations. The CGC does so by arguing so hard in the Opposition – contrary to all dispositive authority – for the patently wrong proposition that the uncharged Complaint allegations closely relate to a *withdrawn* discharge allegation. That extensive effort at misdirection says a lot. But even if an uncharged Complaint allegation could somehow relate to a withdrawn – deceased – charge allegation (it cannot), the CGC's "closely related" argument still fails because a *Weingarten* allegation does not closely relate to a discharge allegation.

When analyzing whether § 10(b) allows an uncharged Complaint allegation, the Act requires that "the complaint allegation be *related to and arise out of the same situation* as the

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*closely related to his withdrawn discharge allegation* for the reasons discussed herein, but also, those allegations are expressly included in the Complaint." [Opp. at 12.] (Emphasis added.)

conduct alleged to be unlawful in the underlying [still pending and viable] charge.” *Nickles Bakery*, 296 NLRB at 927 (emphasis added). To determine whether an uncharged Complaint allegation meets that “closely related” standard, the Board asks whether (1) the uncharged Complaint allegation and the “charged” ULP allegation “involve the same legal theory,” (2) the allegations “arise from the same factual circumstances,” and (3) “a respondent would raise similar defenses to both allegations.” *Id.* at 928 (citing *Redd-I, Inc.*, 290 NLRB 1115 (1988)). If the proposed uncharged Complaint and charged ULP allegations do not share those factors, the Region lacks jurisdiction to prosecute the uncharged Complaint allegation.<sup>3</sup>

Here, the CGC studiously ignores the first and third factors and stretches the second factor beyond the limits of logic or common sense. Not surprisingly then, the CGC completely ignores the Board’s on-point authority in *Ivy Steel & Wire, Inc.*, a case that squarely rejected the CGC’s untenable closely-related argument. 346 NLRB 404, 421-22 (2006).

In that case, the charging party alleged that an employer unlawfully suspended and discharged an employee for engaging in protected activity. At the hearing, the General Counsel moved to amend the complaint to add an allegation that the employer denied the employee *Weingarten* rights in the suspension/discharge meeting. *Id.* at 421. The ALJ denied the Complaint amendment (which the Board affirmed, noting no exceptions) because the uncharged *Weingarten* allegation did not closely relate to the charged suspension and discharge conduct. *Id.* at 404 n.1, 421-22. The ALJ first found that the allegations did not involve the same legal

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<sup>3</sup> The Board applies the same *Redd-I* “closely-related” test to determine jurisdiction under § 10(b)’s charge-filing requirement as it does to determine whether otherwise untimely allegations relate back to a timely-filed charge under § 10(b)’s additional six month statute of limitations. *Compare Redd-I, Inc.*, 290 NLRB at 1116 (analyzing whether the Board could pursue allegations outside the 6-month 10(b) period), *with Towne Ford, Inc.*, 327 NLRB at 199 (applying *Redd-I* to determine whether the underlying charge supported new, uncharged allegations in a complaint), *and Precision Concrete*, 334 F.3d at 90-93 (same).

theory. The suspension/discharge allegation required application of the *Wright Line* burden shifting analysis. *Id.* at 421. In contrast, “to establish a *Weingarten* violation, the General Counsel need only show that an employee was subjected to an investigatory interview that he or she reasonably believed could lead to discipline, and that the employee asked for but was denied union representation during that interview.” *Id.* To prove a *Weingarten* violation, the General Counsel did not need to show that the employee engaged in protected activity or that the employer refused the employee’s request because of the employee’s protected activity. *Id.* Here, the CGC does not even mention the required first factor, tacitly acknowledging that the Region’s *Weingarten* allegation does not and cannot meet the “same legal theory” requirement.

The ALJ next found that the employer would not have raised similar defenses to the allegations. *Id.* at 422. To defend against the *Weingarten* allegation, the employer would have to show that the meeting at which it denied the employee union representative “was a disciplinary, not investigatory meeting,” or that the employee never in fact asked for union representation. *Id.* However, to defend against the unlawful suspension/discharge allegation, the employer would have to show that the employee did not engage in protected activity or that it would have suspended and discharged the employee even if he had not engaged in such activity. *Id.* The ALJ thus found it “patently clear” that the defense to the suspension/discharge allegation “ha[d] no bearing on, and [was] wholly irrelevant to, the question of whether [the employee’s] *Weingarten* rights were violated, and vice-versa.” *Id.* Here, again, the CGC does not even mention the third factor, tacitly acknowledging that the Region’s *Weingarten* allegation does not and cannot meet the “similar defenses” test.

As to the second “arise from the same factual circumstances” factor, the CGC makes two arguments; one involving the September and December alleged witness requests [Complaint ¶¶

4(a)-(f)] and a second one involving the “nationwide policy” allegation [Amendment to Complaint ¶ 4(g)].

Regarding the discrete September and December *Weingarten* allegations, the CGC argues simply – and wrongly – that those uncharged Complaint allegations closely relate to the withdrawn discharge claim: “It is hardly a stretch to find a sufficient factual relationship between Respondent denying Mr. Cook’s request for a witness in two investigatory interviews, in late September and on December 21, 2015, as alleged in the Complaint [¶¶ 4(a)-(f)], and *the withdrawn allegation involving Mr. Cook’s discharge* during the second of those two interviews.” [Opp. at 9.] As discussed above, uncharged Complaint allegations cannot closely relate to a withdrawn, “deceased” allegation, as a matter of undisputed law (and common sense). Accordingly, the CGC’s attempt to establish the second factor of the closely-related test as to the uncharged September and December *Weingarten* allegations fails.

With respect to the uncharged nationwide policy allegation [¶ 4(g)], the CGC first plows familiar terrain, arguing that “a sufficient factual relationship may be established here, to show that *the withdrawn allegation that Respondent discharged Cook* because he engaged in protected concerted activities and the remaining [boilerplate language] *relate* to an overall plan by Respondent to undermine its employee’s Section 7 activity”; apparently referring to the nationwide policy allegation. [Opp. at 8-9 (citing *The Carney Hosp.*, 350 NLRB 627, 630 (2007)).] That argument fails as do all the CGC’s other arguments relying on the withdrawn discharge allegation.

It also fails because the CGC miscites *Carney Hospital*. In that case, contrary to the CGC’s assertion, the Board held that the CGC *could not* establish the “same factual circumstances” factor simply by showing the uncharged and charged allegations arose out of the

same “overall plan to undermine the union activity.” The Board specifically held: “*We do not suggest, however, that the second prong of Redd-I can be satisfied only by a showing that alleged violations during a union campaign were part of an overall employer plan to undermine union activity.*” *Carney Hosp.*, 350 NLRB at 630 (emphasis added). Rather, the Board required some additional connection, either (1) “similar conduct, usually during the same time period with a similar object,” or (2) “a causal nexus between the allegations *and* they are [(a)] part of a chain or progression of events, or [(b)] they are part of an overall plan to undermine union activity.” *Id.* (emphasis added). Here, the uncharged *Weingarten* allegations and the withdrawn discharge allegation do not involve “similar conduct”; nor do they involve any “causal nexus” as Cook does not claim that Walmart discharged him (for falsifying time clock records to get paid for time he did not work) because he allegedly asked for a witness at the discharge meeting.<sup>4</sup>

The CGC then doubles down on the untenable “overall plan” theory by arguing not only that the nationwide policy allegation (the overall plan) relates directly to the withdrawn discharge allegation, but it also relates to the individual uncharged *Weingarten* allegations. Sort of like a relation by marriage to a second cousin. Specifically, the CGC argues, “In other words, just as some employers might devise an ‘overall plan’ to thwart a union organizing campaign,

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<sup>4</sup> According to the CGC, Cook originally claimed (before he withdrew his charge) that Walmart discharged him “because he engaged in protected concerted activities, including by discussing with his coworkers and raising complaints at team meetings and with individual supervisors, issues relating to *poor supervision, safety equipment, time requirements for services, work area conduct/maintenance, and other terms and conditions of employment.*” [GC 1(p) (EAJA letter) at Tab 2, p. 1 (emphasis added).] Thus, contrary to the CGC’s first-time-ever suggestion, Cook never alleged any causal connection between purportedly asking for a witness at two isolated meetings (months apart) and his discharge for stealing time. Likewise, contrary to the CGC’s first-time claim, Cook did not assert that he engaged in protected activity by “repeatedly encouraging his coworkers to do the same thing during *their* investigatory interviews with Respondent,” and the Complaint does not contain any such allegation. [Opp. at 9 (incorrectly citing GC Ex 1(c) (the Complaint)).]

Respondent has devised an ‘overall plan’ to thwart its employees’ attempts to secure witnesses in their investigatory interviews, and that overall plan was employed against Mr. Cook’s campaign to secure witnesses for his interviews and to encourage his coworkers to do the same. Respondent’s overall plan is best manifested by its nationwide policy . . . .” [Opp. at 9.] That argument fails on its face as the CGC cannot establish any element of the closely-related test by comparing one uncharged Complaint allegation to another uncharged Complaint allegation. Likewise, the CGC makes the claim that Cook engaged in a “campaign to secure witnesses” and “to encourage his coworkers to do the same” for the first time in the Opposition. As noted above, that claim appears nowhere in the charge, the EAJA letter, or the Complaint.

Nor can the CGC legitimately claim that “Respondent’s [purported] denials of the requests of Mr. Cook, its other Gilbert, Arizona employees, and, in fact, *all* of its employees nationwide, reveals an overall plan by Respondent to undermine its employees’ Section 7 activity by isolating Mr. Cook, and its other employees nationwide, from each other at times when they believe their livelihoods are in peril and they need to reach out to each other for support.” [Opp. at 9 (emphasis in original).] The CGC keeps forgetting that the Act does not give non-unionized employees *Weingarten* rights per *IBM Corp.*, 341 NLRB 1288, 1289 (2004). As an avowed defender of the public good (discussed further below), the CGC cannot legitimately argue that Walmart “broke the law.” All parties understand that the General Counsel wants the Board to change the law, but the Board has not done so.

Finally, even if Cook’s withdrawn discharge allegation could somehow live on (or come back to life) for purposes of the “same factual circumstances” test, his personal, discrete, and isolated original claim of discharge due to alleged work-related complaints in no way arose out of the same factual circumstances as the CGC’s hyperbolic – and completely unsupported –

claim of Walmart “isolating Mr. Cook, its other Gilbert, Arizona employees, and, in fact, *all* of its employees nationwide . . . from each other at times when they believe their livelihoods are in peril and they need to reach out to each other support.” [Opp. at 9.] Cook did not make any such allegations in his withdrawn charge. Nor does the Complaint make any such allegations. The CGC’s rhetoric does not count.

Thus, the CGC’s attempt to analogize Walmart’s lawful conduct to “an overall employer plan to undermine the union activity” for purposes of the “same factual circumstances” factor fails. The CGC did not even attempt to argue that the uncharged *Weingarten* Complaint allegations meet the first or third factors of the required “closely related” test. Accordingly, the CGC’s attempt to meet the CGC’s burden of proving § 10(b) jurisdiction by comparing the uncharged Complaint allegations to the withdrawn discharge claim fails, independent of the undisputed authority cited above holding that a withdrawn charge ceases to exist and cannot support an uncharged Complaint allegation.

**III. SECTION 10(b) JURISDICTION DOES NOT REST ON THE CONCEPT OF “NOTICE”; IT RESTS ON A STATUTORY CHARGE-FILING/RELATEDNESS MANDATE.**

Notwithstanding the lack of any *Weingarten* charge, and notwithstanding the lack of a close (or any) relation between the uncharged *Weingarten* Complaint allegations and the pending boilerplate charge language (or even the withdrawn discharge claim), the CGC suggests in passing at various points in the Opposition that the Act conferred statutory jurisdiction on the Region under § 10(b) because the Region gave Walmart notice of the September and December *Weingarten* allegation in the Region’s EAJA letter. [Opp. at 3-5, 13-14 (*e.g.* (at 14): “Moreover, Respondent knew precisely what Mr. Cook was alleging in his charge when the Board agent sought its evidence and argument about his [according to the Region, but unsupported by any

charge] *Weingarten* allegations, and Respondent obliged by providing its position regarding these same *Weingarten* allegations later pled in the Complaint.”.)] Notably, the Region never gave Walmart any pre-Complaint notice of the “national” *Weingarten* allegation.<sup>5</sup>

The CGC cites no authority for the proposition that the Region can meet the § 10(b) charge-filing requirement by the Region (not a charging party) giving notice of an uncharged allegation. None exists. Indeed, if a Region could confer § 10(b) charge-filing jurisdiction on itself simply by giving notice of new, uncharged allegations in correspondence to a charged party, there would be no need for the “closely related” analysis (comparing uncharged Complaint allegations to charged claims), and the Regions would have “carte blanche” to issue Complaints on their own initiative. But, of course, the Board specifically holds that it (through the General Counsel and the Regions) shall “not originate complaints on its own initiative.” *Nickles Bakery*, 296 NLRB at 928; *see also NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959) (Board does not have “carte blanche to expand the charge as [it] might please”). And, of course, the Supreme Court in *Fant Milling* interpreted § 10(b) as requiring that any uncharged Complaint allegation “relate to . . . and grow out of” a charge (discussed below). And nothing in the applicable *Redd-I* “closely related” analysis turns on any “notice” provided outside the charge.

The CGC’s misdirected argument arises from the equitable by-product of the § 10(b) charge-filing requirement, sometimes discussed in § 10(b) cases. Section 10(b) mandates that the Board may issue a Complaint *only* after a party files a charge and *only* as to “the charges in that respect.” The “charges in that respect” requirement ensures that the charged party knows what’s coming and can prepare for it, based on what the *charging party* says, not what the Region wants to say. Thus, ALJs, the Board, and courts often times note that a charge allegation

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<sup>5</sup> If the *Weingarten* allegations emanated from Cook (“his *Weingarten* allegations”), and not the Region, why didn’t the Region obtain a charge amendment from him?

does or does not give the charged party notice of the allegations to be litigated in the context of the “closely related” analysis because a charge that gives no notice of an allegation to be litigated very likely does not meet the “closely related” test. Thus, as the CGC notes in her Opposition at 12, the ALJ in *KLB Industries, Inc.*, 357 NLRB 127, 162-163 (2011), *enfd.* 700 F.3d 551 (D.C. Cir. 2012) noted that “[t]here is no evidence that it was intended to allege any of the allegations the General Counsel seeks to add to the complaint by amendment.” But the “it” the ALJ refers to is “The charge, filed March 12,” not some separate letter from the Region. *Id.* And the ALJ’s reference to “it” comes in the context of the ALJ’s comprehensive analysis of the *Redd-I* “closely related” analysis, comparing the *charge* allegations and the proposed uncharged Complaint amendment. *Id.* The same holds true for the CGC’s reference to *Desert Springs Hospital*, 363 NLRB No. 185 (2016). [Opp. at 11-12 (seeking to distinguish *Desert Springs* because the ALJ noted “there is no evidence that the Respondent was provided with any specifics of the unpled allegations against them”).] There, again, the ALJ made his “no specifics” comment – rejecting any boilerplate language argument – in the context of his “closely related” comparison between uncharged Complaint allegations and the *charge* allegations, not some separate letter from the Region. *Id.* (“On the other hand, *nothing in the charge* would have provided the Respondent with any kind of reasonable notice [of the uncharged Complaint allegations].”) (emphasis added).<sup>6</sup>

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<sup>6</sup> The CGC further attempts to distinguish the *KLB Industries* and *Desert Springs Hospital* holdings that § 10(b) will not allow Complaint amendments based on boilerplate language. The CGC argues that other portions of the “closely related” discussions in those cases describe scenarios analogous to this one. But that analogy fails because the CGC – once again – predicates her argument on the patently wrong claim that the uncharged *Weingarten* Complaint allegations here closely relate to the *withdrawn* discharge claim. [Opp. at 11 (discussing *Desert Springs*: alleged witness requests “were some of the protected activities he alleged to have resulted *in his discharge*, and the interviews . . . formed part of a sequence of events that culminated *in his discharge*”); Opp. at 12 (discussing *KLB*: alleged witness requests were

Any “notice” discussions in § 10(b) cases necessarily come, by statute, in the context of uncharged and *charged* allegations, because § 10(b) requires “*charges* in that respect,” not “notice from the Region in that respect.” Ultimately, the § 10(b) charge-filing requirement, and the “closely related” analysis that evolved from it, flow from the Congressional mandate that an aggrieved party – not the Region – must name alleged violations, and a Region can only prosecute those allegations that are either named – or relate to and grow out of the named – alleged violations. *Fant Milling* (discussed in detail below); *The Carney Hosp.*, 350 NLRB at 628 (“[T]he General Counsel and Board lack independent authority to initiate unfair labor practice proceedings in the absence of a charge filed by an outside party. In this respect, Section 10(b) operates as a jurisdictional limitation, under which the Board (through the General Counsel) may investigate and prosecute conduct only in response to the filing of a charge.”) (internal citations omitted); *Precision Concrete v. NLRB*, 334 F.3d at 90 (“[T]he Board, which here acts through the General Counsel, may investigate and prosecute conduct only in response to the filing of a ‘charge,’ that is, a formal allegation made (by a union, an employer, or an employee) against a union or an employer.”).

That charge-filing mandate does not turn on whether a Region notifies a charged party of a potential Act violation identified by the Region where the Region’s notice does not involve a new allegation closely related to an existing, pending charge allegation. As discussed above, if a Region identifies some different allegation during its investigation, it must seek and obtain a charge amendment to litigate that different allegation. The Region did not do that here.

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“closely related to his *withdrawn discharge allegation* for the reasons discussed herein”).] (Emphasis added.) The CGC’s repeated attempts to compare the uncharged *Weingarten* Complaint allegations to the withdrawn discharge claim is a legal “dog that just won’t hunt.”

**IV. NATIONAL LICORICE AND FANT MILLING DO NOT CONFER AUTHORITY ON THE REGION TO “FILL IN THE BLANKS” ON ITS OWN INITIATIVE.**

The CGC argues that the Supreme Court in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), gives the Region broad authority to issue a Complaint on any putative Act violation it identifies during an investigation because “once Mr. Cook invoked the Board’s jurisdiction by filing his charge, the Board was tasked with examining the issues raised by the charge and growing out of the charge in order to ensure that the public rights of employees under the Act are vindicated.” [Opp. at 7; *see also* Opp. at 1 (invoking *National Licorice* and *Fant Milling* as authority for “the issuance of the Complaint and the ultimate issuance of an Order against Respondent based on the Complaint”), and Opp. at 15 (“The public interest in righting unfair labor practices demands that the Regional Director include in complaints all allegations growing out of the specific allegations of a charge . . .”).] While one cannot doubt the CGC’s zeal as a defender of the public interest, the CGC misstates the holding of *National Licorice* and *Fant Milling* and, in the process, once again forgets that – as a matter of *Board law* – Walmart committed no unfair labor practice here.

The CGC’s reliance on *National Licorice* and *Fant Milling* fails in the first instance because neither case focused on the specific question (presented here) of whether an uncharged Complaint allegation sufficiently relates to a charged allegation to meet the § 10(b) “charge-filing” requirement. Instead, the Court in both cases (1940/1959) focused on the threshold – and now rudimentary – question of whether the Board could issue a complaint on uncharged ULP allegations “after the charge was lodged with the Board and after its complaint was served on petitioner.” *National Licorice*, 309 U.S. at 357; *see also Fant Milling*, 360 U.S. at 302 (“The question presented by this case is the extent to which the Labor Board may, in formulating a complaint and in finding a violation of this section of the Act, take cognizance of events

occurring subsequent to the filing of the charge upon which the complaint is based.”). In both cases, the Court interpreted § 10(b)’s charge-filing requirement and affirmed the rule that the Board can prosecute allegations occurring after a party files a charge, but *only* those that “are related to those alleged in the charge and which grow out of them.” *National Licorice*, 309 U.S. 369; *Fant Milling*, 360 U.S. at 308 (“What has been said is not to imply that the Board is, in the words of the Court of Appeals, to be left ‘carte blanche’ to expand the charge as they might please, or to ignore it altogether. Here we hold only that the Board is not precluded from dealing adequately with unfair labor practices *which are related to those alleged in the charge and which grow out of them* while the proceeding is pending before the Board.”) (emphasis added).

Second, we know that *National Licorice* and *Fant Milling* did not create some prophylactic authorization for Regions to issue Complaints on any putative Act violation newly discovered during investigations (untethered to the underlying charge), because if the Court did so in those cases, the Board would never have developed the 1988 *Redd-I* “closely related” test and would never have had occasion to rule in *Nickles Bakery* (1989; citing *Fant Milling*) that generic boilerplate charge language cannot support a Complaint allegation. To the contrary, *National Licorice* and *Fant Milling* both made clear that a Region cannot issue a Complaint on uncharged allegations that do not “relate to . . . and [] grow out of” the underlying charge. That requirement from the Supreme Court (and § 10(b)) formed the foundation of the Board’s long-used, black-letter-law “closely related” requirement.

Third, the CGC’s reliance on *National Licorice* and *Fant Milling* fails because both of those cases involved uncharged allegations that related to and grew out of the charged allegations. *National Licorice*, 309 U.S. 369 (“The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to

secure the contracts alleged in the charge.”); *Fant Milling*, 360 U.S. at 308 (“The [unalleged] wage increase was related to the conduct alleged in the charge and developed as one aspect of that conduct . . . .”) (emphasis added). Here, the CGC tries to analogize this case to scenarios in *National Licorice* and *Fant Milling* by claiming that “The allegations that Respondent denied Mr. Cook’s request to have a witness present during two interviews closely preceding his discharge are encompassed by the broad language of Mr. Cook’s charge and are *closely related to the allegation related to his discharge.*” [Opp. at 6.] But, again, no “discharge” allegation exists to compare to (and if it did, it does not closely relate to uncharged *Weingarten* allegations). No matter how many times the CGC repeats it, the CGC cannot compare uncharged *Weingarten* Complaint allegations to the legally non-existent and withdrawn discharge allegation for purposes of the closely-related test. Notably, the CGC does not invoke *National Licorice* or *Fant Milling* to suggest that uncharged *Weingarten* allegations closely relate to generic boilerplate charge language, barren of any factual allegations.

**V. SINCE 1994, THE BOARD CONSISTENTLY APPLIES NICKLES BAKERY – AND ONLY NICKLES BAKERY – TO “MEANINGLESS” BOILERPLATE.**

At the very end of the CGC’s Opposition, the CGC cites *Embassy Suites Resort*, 309 NLRB 1313 (1992), *enf. denied* 32 F.3d 588 (D.C. Cir. 1994), arguing that it requires the ALJ to deny the Motion to Dismiss. [Opp. at 13-14.] Notably, the CGC did not cite *Embassy Suites* in the CGC’s initial brief in opposition to Walmart’s Motion to Dismiss (dated August 4, 2016). Nor did the CGC cite that case in the CGC’s opposition to Walmart’s petition to revoke subpoenas (also dated August 4, 2016), in which Walmart raised the same jurisdictional objection. The CGC presumably did not previously rely on *Embassy Suites* because the Board does not rely on it, and – to Walmart’s knowledge – the Board has never relied on it. *Embassy*

*Suites* is a “one off” case that subjected the Board to a rather pointed rebuke by the D.C. Circuit Court of Appeals.

Since then, the Board approves and adopts ALJ decisions analyzing § 10(b) jurisdictional challenges involving boilerplate charge allegations under *Nickles Bakery*. Indeed, in the one post-*Embassy Suites* Board case where an ALJ *tried* to rely on *Embassy Suites* to approve an uncharged Complaint allegation based on what the ALJ described as “boilerplate” charge language, the Board took pains to say, No, the Board *did not* rely on *Embassy Suites*. (Discussed below).

Consequently, as described here, the ALJ must apply the rule laid down by the Supreme Court in *Fant Milling*, holding that the General Counsel can only litigate an uncharged Complaint allegation if it is “related to those alleged in the charge and which grow out of them.” 360 U.S. at 308. The Board cited to, adopted, and applied the *Fant Milling* rule in *Nickles Bakery* to require that all 8(a)(1) Complaint allegations comply with the Board’s “closely related” formulation of the Court’s “related to . . . and which grow out of” requirement. There can be no legitimate dispute here that the uncharged *Weingarten* Complaint allegations in this case cannot possibly meet that “closely related” test. Thus, the ALJ should grant the Motion to Dismiss; particularly given that the CGC did not obtain a charge amendment after a six month investigation as required by Board rules and established procedures. If the CGC then wants to ask the Board on special appeal to affirmatively embrace the one-off *Embassy Suites* “who wrote it” rationale (in contravention of *Fant Milling*, the D.C. Circuit, and all subsequent Board authority), the CGC can do so. All the Board’s decisions in the past twenty years indicate that the Board has effectively abandoned *Embassy Suites* for the reasons so pointedly stated by the D.C. Circuit.

**A. Relying On *Fant Milling*, The Board Held In *Nickles Bakery* That Boilerplate Language Cannot Support An Uncharged Complaint Allegation Per § 10(b).**

After Cook withdrew his discharge claim, the charge contained nothing but the following generic language: “During the last 6 months, the above-named Employer by its officers, agents, and supervisors has discriminated against its employees. By the above and other acts the Employer has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights under the National Labor Relations Act.” The CGC cannot argue that the generic “has discriminated against its employees” language gives any support, even under *Embassy Suites*, to the uncharged *Weingarten* Complaint allegations as the *Weingarten* claim does not involve differing treatment (*i.e.*, discrimination) as between employees who engage in protected activity and those who do not. *See Embassy Suites*, 309 NLRB at 1314 at n.11 (“If, for example, the charge alleges an 8(a)(5) unilateral change, this would not give the General Counsel ‘carte blanche’ authority to allege an unrelated independent 8(a)(1) violation.”). Thus, the only language that the CGC can (and does) point to for § 10(b) jurisdiction in this case is the boilerplate “by the above and other acts” language. [*See, e.g.*, *Opp.* at 8-9 (“[T]he remaining Complaint allegations that Respondent ‘interfered with, restrained, and coerced employees in the exercise of their Section 7 rights’ relate to an overall plan . . . .”)].

*Nickles Bakery* unequivocally holds that such boilerplate language, barren of any factual allegations, cannot support § 10(b) jurisdiction. *Nickles Bakery*, 296 NLRB at 928 (using “boilerplate ‘other acts’ language to support uncharged 8(a)(1) complaint allegations contravenes 10(b)’s mandate that the Board ‘not originate complaints on its own initiative’”). *Nickles Bakery* expressly holds that boilerplate 8(a)(1) language cannot support specific uncharged Complaint allegations because “we can find no sufficient basis in law or policy for continuing to exempt 8(a)(1) complaint allegations from the requirements of the traditional ‘closely related’ test. . . .

[S]uch an approach virtually renders meaningless the specificity required by Section 102.21(d) of the Board’s Rules and Regulations that a charge contain a ‘clear and concise statement of the facts’ constituting the alleged unfair labor practices affecting commerce. . . . Obviously, nothing in our decision today limits in any way a charging party’s ability to file a timely new or amended charge.” *Id.* The Board in *Nickles Bakery* predicated its ruling in the very first instance on the Supreme Court’s requirement in *Fant Milling* that an uncharged Complaint allegation must be “related to those alleged in the charge and . . . grow out of them . . . .” *Id.* at 927.

The CGC does not dispute the rule of *Nickles Bakery* or attempt to distinguish it.

**B. In One Case, One Time, The Board (With The Chairman Dissenting) Pointed To A “Who Wrote It” Distinction.**

Three years after *Nickles Bakery*, the Board in *Embassy Suites* addressed an argument that *Nickles Bakery* should not apply to boilerplate language that the charging party writes on the charge form as distinguished from identical boilerplate language preprinted on the form. 309 NLRB at 1313-1315. Two members of the Board panel agreed, noting, “We recognize that the sole difference between this case and *Nickles Bakery* is that, in this case, the broad language has been typed by the Union in the body of the charge form in addition to having been preprinted by the Board on the bottom of it.” *Id.* at 1315. The Board panel went on to decide that “who wrote it” makes a difference because if the charging party writes it, the Board is not initiating the uncharged Complaint allegations on its own initiative in violation of § 10(b). *Id.* Not surprisingly, the D.C. Circuit found the panel’s “who wrote it” distinction wholly without merit.

**C. The D.C. Circuit Rebuked The Board; Emphasizing That “Who Wrote It” Does Not Vitiating The 10(b) “Relatedness” Requirement.**

On appeal, the D.C. Circuit found that “the Board lacked jurisdiction over the complaint because the Charge upon which it was based was devoid of factual specificity.” *Lotus Suites v.*

*NLRB*, 32 F.3d 588, 589 (1994). The Court granted Respondent’s petition for review, denied the Board’s cross-petition for enforcement, and set aside the Board’s order. *Id.* at 589-92. The Court reasoned, in pertinent part, as follows:

[W]hen the Board issues a complaint, it does not have “*carte blanche* to expand the charge as [it may] please, or to ignore it altogether.” Therefore, if in a complaint “the Board ventures outside the strict confines of the charge, it must limit itself to matters sharing a significant factual affiliation with the activity alleged in the charge.” . . . The complaint in this case cannot possibly meet the *Nickles Bakery* standard that “the complaint allegation be factually related to the allegation in the underlying charge” because the underlying charge alleges no facts. . . . An undaunted Board argues that its decision in this case is not inconsistent with *Galloway* or *Nickles Bakery* because in those cases the complaint rested only upon the preprinted language on the charge form, whereas in this case, the Union typed the allegations on the charge form. (This distinction calls to mind Truman Capote’s remark about Jack Kerouac’s book *On the Road*: “That is not writing-it’s typing.”) Therefore, we are told, the Board complied with *Galloway*’s requirement that the “agency ... not act[ ] on its own initiative, but instead ... tailor[ ] its ‘activities to those matters shown to be of concern’ to the charging party.” What, pray, were the matters of concern to the Union? Why, any violations of § 8(a)(1) that the Board might turn up in its investigation. Nothing more specific appears in the charge, anyway. *It hardly matters who filled in the blank space on the charge form if the box remains so lacking in content that it is not possible sensibly to apply the test of “substantial relation” between the factual allegations in the charge and those in the complaint.* Indeed, if the Board’s point were accepted, then a charging party could, in effect, cause the Board to do what the Congress prohibited it from doing, *viz.*, embarking upon an unbounded inquiry into any and all possible violations of the Act.

*Id.* at 591–92 (internal citations omitted) (emphasis added).

The Court concluded that “the Board was without authority to initiate an investigation and issue a complaint in this case based upon an unfair labor practice charge containing only a boilerplate allegation that the Employer violated § 8(a)(1) that was utterly lacking in factual specificity.” *Id.* at 592. The Court further noted that, “[t]o allow the Board to issue a complaint based upon a charge containing only a boilerplate § 8(a)(1) allegation, however, unbounded by any specific facts, is ‘tantamount to allowing the Board to enlarge its jurisdiction beyond that given by Congress,’” a finding that the court traced back (through its prior decision in *G.W.*

*Galloway Co. v. NLRB*) to the Supreme Court’s rule in *Fant Milling* that § 10(b) requires that uncharged Complaint allegations “relate to . . . and grow out of” charged allegations. *Id.* at 592.

Tellingly, the CCG here does not attempt to apply the Board’s undeniably controlling *Redd-I* three part “closely related” test to the uncharged *Weingarten* allegations as compared to the left-over boilerplate “by this and other acts” charge language. As the D.C. Circuit noted, it is impossible to do so.

**D. Since Then, The Board Has Never Relied On Embassy Suites And Affirms Decisions Relying On Nickles Bakery.**

Since the D.C. Circuit’s rebuke in the *Embassy Suites* case, the Board has never relied on that case when evaluating § 10(b) challenges to Walmart’s knowledge. Instead, the Board affirms relevant ALJ decisions applying *Nickles Bakery*.

For example, in *Towne Ford, Inc.*, 327 NLRB at 193, the Board (Liebman, Fox, and Brame) affirmed the ALJ’s findings and conclusions based on *Nickles Bakery* that general boilerplate Charge allegations did not support certain specific Complaint allegations, warranting dismissal of those allegations. In that case, the ALJ noted the charge’s generic violation language, including generic references to violations under 8(a)(1), (3), and (5), but concluded: “In that amended charge the Union never alleged specifically or generally that Respondent had refused to bargain in good faith . . . Thus the amended charge is lacking in any factual content to support a refusal-to-bargain case. . . . [A]s pointed out in *Galloway*, the proper procedure was to seek an amended charge and in the absence of such an amendment, issue a complaint without the refusal-to-bargain allegations.” *Id.* at 198-99.

In *Seven Seventeen HB Denver Corp.*, 325 NLRB 534 (1998), the Board (Liebman, Gould, and Brame) affirmed the ALJ’s findings and conclusions, including the ALJ’s reliance on both *Nickles Bakery* and the D.C. Circuit’s *Lotus Suites* decision for an analytical framework.

The ALJ's analysis (adopted without comment by the Board) warrants reciting as it applies with equal force here.

Next, I address Respondent's argument that the complaint allegations of interrogation are not supported by a charge. As stated by the United States Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), the Board is not barred from citing in a complaint "unfair labor practices which are related to those alleged in the charge and grow out of them while the proceeding is pending before the Board." However, the Board does not have "carte blanche to expand the charge as [it may] please, or ignore it altogether." *Id.* at 309. The charge must form the basis of the complaint because Section 10(b) states a requirement that the Board "not originate complaints on its own initiative." *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988). In *Galloway* the United States Court of Appeals for the District of Columbia held that the Board had exceeded its authority when it issued a complaint alleging that an employer had threatened to terminate employees picketing in front of its plant, whereas the underlying charge had alleged only that the employer discharged an employee for engaging in protected concerted activity. In *Nickles Bakery*, 296 NLRB 927 (1989), the Board adopted the reasoning of *Galloway* and reaffirmed the three-part test advanced in *Redd-I, Inc.*, 290 NLRB 1115 (1988), to determine whether the allegations of a complaint are sufficiently related to the allegations of the underlying charge. The test requires an analysis of whether: (1) the allegations involve the same legal theory as the allegations of the charge; (2) the allegations arise from the same factual circumstances or sequence of events; and (3) a respondent would raise similar defenses to both allegations. In *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994), the Circuit Court held that an unfair labor practice charge which contained boiler plate language, but stated no facts, could not possibly meet the *Nickles Bakery* standard. As the Court stated, where the charge contains no factual allegations at all, there can be no nexus and a complaint cannot be issued. Applying the *Redd-I* closely related analysis, to the circumstances of this case, the 8(a)(1) allegations are closely related to the timely [detailed and specific] charges to permit their inclusion in the complaint.

*Id.* at 535–36.

Similarly, in *Tasty Baking Co.*, 330 NLRB 560 (2000), *enfd.*, 254 F.3d 114 (D.C. Cir. 2001), the ALJ (affirmed by the Board) relied on and applied *Nickles Bakery* to the Respondent's

§ 10(b) argument. There, the ALJ acknowledged the rule of *Lotus Suites*, and found “the complaint allegations for which the Respondent seeks dismissal are based on specific factual assertions made by the Charging Party in the charges and amended charges filed, and not on standard boilerplate language contained in the Agency’s charge form.” *Id.* In a footnote, the ALJ cited *Nickles Bakery* as authoritative on the legal significance of boilerplate “other acts” language, stating: “In *Nickles Bakery*, the Board held that the *Redd-I* closely-related test also applies to Section 8(a)(1) complaint allegations, not just to other parts of Section 8(a), and that henceforth the ‘other acts’ boilerplate language contained in a charge form would not, without more, suffice to sustain a Section 8(a)(1) complaint allegation.” *Id.* at n. 6.

Likewise, in *KLB Industries Inc.*, 357 NLRB at 162-163, the Board affirmed (without comment) the ALJ’s finding that the General Counsel’s motion to amend the complaint was barred by *Nickles Bakery* despite the inclusion in the charge of “a boilerplate 8(a)(1) allegation that the employer ‘restrained and coerced’ employees in the exercise of their Section 7 rights.” *Id.* at 162-163 & n.41 (“The *Redd-I* ‘closely related’ test did not initially apply to complaint allegations of 8(a)(1) violations, which were deemed covered by any timely charge by virtue of the inclusion of general ‘catch-all’ language in the Board’s preprinted charge form. In *Nickles Bakery*, supra, the Board overruled this practice and held that the *Redd-I* test should also apply to 8(a)(1) allegations.”).

And in *Desert Springs Hospital*, 363 NLRB No. 185 (2016) (a Region 28 case), the respondent requested dismissal of certain Complaint allegations that the charging party did not raise in any charge. The Region contended that the allegations were supported by boilerplate language in the Charge that said: “By these and other actions, the Respondent interfered with, restrained, and coerced employees in violation of Section 7.” The ALJ relied on *Nickles Bakery*

to find that the generic language did not support the Complaint. *Id.* (noting also that “[i]n these circumstances, the General Counsel should have had Van Leer submit an amended charge as per section 10064.5 of the casehandling manual”). The Board affirmed the ALJ’s ruling without comment.

The Board and ALJs repeatedly recognize that *Nickles Bakery* controls the boilerplate-language inquiry on § 10(b) issues. See *Lincoln Ctr.*, 340 NLRB 1100, 1109 (2003) (recognizing that *Nickles Bakery* “held that the ‘by these and other acts’ language in the charge, is not in itself sufficient to meet the closely related test, required by *Redd-I*”); *Int’l Union of Operating Engineers, Local 18*, 360 NLRB No. 113, n. 5 (2014) (“*Nickles Bakery* . . . held that the ‘boilerplate’ statutory language of Sec. 8(a)(1) that is preprinted on a Sec. 8(a) charge form cannot, on its own, support a particularized 8(a)(1) complaint allegation because it would ‘contravene [] 10(b)’s mandate that the Board not originate complaints on its own initiative.”); *The Carney Hosp.*, 350 NLRB at 632 (“The *Redd-I* ‘closely related’ test did not initially apply to complaint allegations of 8(a)(1) violations, which were deemed covered by any timely charge by virtue of the inclusion of general ‘catch-all’ language in the Board’s preprinted charge form. In *Nickles Bakery*, 296 NLRB 927 (1989), the Board overruled this practice and held that the *Redd-I* test should also apply to 8(a)(1) allegations.”).

Indeed, the one time that the Board reviewed an ALJ decision where the ALJ relied on *Embassy Suites*, the Board disclaimed any reliance on *Embassy Suites*. *Reg’l Const. Corp.*, 333 NLRB 313, 313 n.1 (2001). The Board noted that the ALJ relied on *Embassy Suites*, noted that the D.C. Circuit rejected that decision, and then carefully noted, “We find [the Board’s decision in] *Embassy Suites* distinguishable. This case involves more than boilerplate language.” *Id.* So even when given the chance to embrace the rejected *Embassy Suites* “who wrote it” thinking, the

Board declined the opportunity. Consequently, the CGC incorrectly cites *Regional Construction Corp.* for the proposition that the Board follows *Embassy Suites*. [Opp. at 14.] Just the opposite, “We find *Embassy Suites* distinguishable.”

The CGC is also wrong that the Board’s *Regional Construction Corp.* decision “distinguished the D.C. Circuit’s decision in *Embassy Suites Resorts v. NLRB* from cases like this . . . .” In *Regional Construction Corp.*, the underlying “charge referred to the April 2, 1997 date on which the Respondent filed its motion for an amended order in state court [the subject of the Complaint allegations]. Accordingly, the Charging Party supplied specificity as to the action which it was alleging to be unlawful.” 333 NLRB 313 n.1. In this case, the left-over boilerplate language supplies absolutely no specificity. None. Nothing.

**E. In 2007, The General Counsel Notified All Regions That The Board Considers Boilerplate Language “Meaningless.”**

On July 13, 2007, the General Counsel issued Memorandum OM 07-74. That memo attached revised charge forms, and noted in relevant part: “In addition, the CA charge form has been revised to remove the boilerplate language ‘[b]y the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.’ *Board law has explicitly found that this boilerplate language is meaningless.*” (Emphasis added.) Thus, for charges filed post-July 2007, if a Region wanted a charging party to add that boilerplate “other acts” language on the charge form, the Region would have to involve the charging party. But, as noted in the *Desert Springs Hospital* and *KLB* cases discussed above (both post-2007), the involvement of the charging party in adding boilerplate “other acts” language does not change the *Nickles Bakery* analysis, which made generic, catchall language meaningless. The CGC does not address this GC memo in the CGC’s Opposition.

**Conclusion**

For all the reasons discussed here and in Walmart's Motion to Dismiss briefing, the CGC has not established § 10(b) jurisdiction on the undisputed facts. Accordingly, Walmart respectfully requests that the Administrative Law Judge grant the Motion to Dismiss for Lack of Jurisdiction.

RESPECTFULLY SUBMITTED this 26th day of August, 2016.

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ORIGINAL of the foregoing efiled  
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this 26th day of August, 2016.

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