

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6**

COMCAST CABLE COMMUNICATIONS :  
MANAGEMENT, LLC :  
and :  
INTERNATIONAL BROTHERHOOD OF :  
ELECTRICAL WORKERS, LOCAL 712, AFL-CIO: :  
: :  
: :

CASE NO. 06-CA-198724 and  
06-CA-199538

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**REPLY IN SUPPORT OF MOTION OF RESPONDENT COMCAST CABLE  
COMMUNICATIONS MANAGEMENT, LLC TO DISMISS ALLEGATIONS IN THE  
CONSOLIDATED COMPLAINT FOR LACK OF JURISDICTION**

**I. INTRODUCTION**

On November 16, 2017, Respondent Comcast Cable Communications Management, LLC ("Comcast") moved to dismiss certain allegations in the Complaint issued by Region 6 of the National Labor Relations Board ("NLRB" or the "Board") on September 29, 2017 and amended on October 4, November 2, and December 22, 2017 (the Complaint and subsequent amendments are hereinafter referred to as the "Consolidated Complaint"). As fully briefed in Comcast's moving papers, Paragraphs 7 through 12 of the Consolidated Complaint should be dismissed because they violate the National Labor Relations Act ("NLRA" or "Act") as they have no factual nexus to the boilerplate legal conclusions framed as an unfair labor practice charge in Case No. 06-CA-199538 and constitute an unlawful exercise of independent authority to initiate unfair labor practice proceedings.

## II. ARGUMENT

### A. The Supreme Court Precedent Cited in the Board's Opposition Papers Supports Comcast's Motion to Dismiss.

Relying on Supreme Court cases from the 1940s and 1950s, the General Counsel argues that the Board's powers of broad inquiry must allow its Consolidated Complaint to proceed despite the boilerplate language in the Charge. However, the cases cited by the General Counsel do not obviate the statutory requirement that an underlying charge include at least some factual allegations that a later filed complaint must relate to in order for jurisdiction to exist.

In *National Licorice v. NLRB*, 309 U.S. 350 (1940), the Supreme Court stated that the Board may "deal[] adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is before the Board."<sup>1</sup> The charge at issue in *National Licorice* set forth specific factual allegations. Indeed, it stated that the petitioner "had coerced and attempted to coerce its employees into signing individual contracts with said company; in that the said company has called meetings of its employees and has compelled said employees to attend said meetings, and has attempted to compel said employees to form committees, not of their own choosing, to bargain collectively with the said company." *Id.* at 368. The subsequent complaint "elaborated the charge..." and included allegations related to the charge, but not specifically included in the charge. *Id.* In its Opposition, the Board argues that its Consolidated Complaint complies with *National Licorice* because the Board may plead in a complaint "the same class of violations as those set up in the charge" and to treat "the whole sequence as one." *Id.* at 369. However, the Board ignores the fact that the charge in *National*

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<sup>1</sup> Notably, the Court in *National Licorice* specifically declined to "consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it." *Id.*

*Licorice* specified facts which related to what was alleged in the complaint. This is in stark contrast to the instant case, in which the Board did not set forth any facts in the underlying charge. It was therefore impossible for the Board to apply a relation back test to the initial charge in the Consolidated Complaint, as there were no facts on which to apply the test. Contrary to the Board's assertions in its Opposition, therefore, *National Licorice* does not give the Board the right to assert only legal conclusions in a charge without any factual basis whatsoever.

The Board also relies on *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308 (1959), which upholds *National Licorice* and states that the Board is not limited to "precise particularizations of a charge" in its investigations. *Fant Milling* requires that issues uncovered in the Board's investigation of a charge be "related to the conduct alleged in the charge and developed as one aspect of that conduct..." *Id.* at 307 (internal quotations omitted). This holding was possible in *Fant Milling* because the charge included specific facts that could be expanded upon in an investigation. In *Fant Milling*, the original, fact based, charge stated that the employer "refused to bargain collectively with the authorized agents of [the union]" and that the employer "on or about the dates set opposite their respective names below, by its officers agents and employees, terminated the employment of Tony Polk April 23, 1954, Clyde Gordon April 23, 1954, W.M. Morris April 24, 1954, Onnie Ray April 24, 1954 because of their membership and activities in behalf of [the union]" and "at all times since such dates it has refused . . . to employ the above named employees." *NLRB v. Fant Milling*, 258 F.2d 851 at fn 6 (5th Cir. 1958) (reversed by *Fant Milling Co.*, 360 U.S. 301) In finding that the Board's complaint related back to the factual allegations in the charge, the Court limited its holding to state, "[h]ere 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." *Fant Milling*, 360 U.S. at 308. The Court's holding, however, was specifically limited: "[w]hat 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.'**" *Id.* (emphasis added). Again, the charge at issue in *Fant Milling* set forth specific facts that the later filed complaint related back to – it was not mere boilerplate legal conclusions bereft of any facts. Applying *Fant Milling*, Paragraphs 7 through 12 of the Board's Consolidated Complaint must be dismissed. The Board has pointed to no facts in the charge which may properly be expanded upon in an investigation and complaint – indeed, the Board has offered no factual basis whatsoever in the underlying charge. To allow the Board to merely include boilerplate legal conclusions in a charge, absent any facts, would allow the Board "carte blanche to expand the charge as they might please" in direct violation of *Fant Milling*.

Finally, Comcast does not argue that the Board's Consolidated Complaint must be dismissed because it fails to measure up to the pleading standards of a private lawsuit. Comcast argues only that the Board is bound by its statutory limitations, which were upheld in both *National Licorice* and *Fant Milling*, that the underlying charge must allege at least some facts that a later filed complaint must "relate back" to. The charges in *National Licorice* and *Fant Milling* both included factual allegations that were investigated and later expanded upon in complaints. Comcast does not allege that such a scenario is improper. However, the Board has failed to do that here – the underlying charge does not allege a single fact. It is therefore impossible for the Board to expand on the facts in the charge or to treat the facts in the charge as the beginning of a "sequence" that may be investigated. Under the very law cited by the Board

in support of its Consolidated Complaint, therefore, Paragraphs 7 through 12 of the Board's Consolidated Complaint must be dismissed.

**B. The Board Admits that the Underlying Charge is Devoid of Fact.**

As explained above, Comcast is not seeking dismissal of Paragraphs 7 through 12 of the Consolidated Complaint because of a failure to meet a civil litigation pleading standard, nor does Comcast argue that the General Counsel must plead all of its evidence in the charge. Comcast seeks dismissal of Paragraphs 7 through 12 of the Complaint for the General Counsel's failure to allege any fact whatsoever in the charge and its subsequent failure to relate the allegations of its complaint back to the factually deficient charge.<sup>2</sup>

Indeed, the General Counsel admits in its Opposition that the charging party failed to include facts in its underlying charge, stating "the Region's Paragraphs 7 through 12 [in the Consolidated Complaint] simply provide the facts related to Respondent's alleged violations of law." Opposition Papers at 9. The Region thus admits that the facts appear first in the Complaint and not in the underlying Charge. The Board's opposition also notes that the charge only listed "the types of alleged unlawful conduct by Respondent . . ." *Id.* For the reasons argued in Comcast's moving papers, this is insufficient for an application of the relation back test as required by the Act under *Nickels Bakery*, 296 NLRB 927 (1989) and *Redd-I*, 290 NLRB 1115 (1988). There is simply no way to apply a relation back test to conclusory allegations of the "potential" 8(a)(1) violations entirely devoid of any factual basis. Thus, the Board's arguments run contrary to the mandates of *Nickels Bakery*.

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<sup>2</sup> The Board's attempt to rely on *Columbia University*, 250 NLRB 1220 (1980) and *Brookville Glove*, 116 NLRB 1282 (1956) for the proposition that it may lawfully rely on unsupported 8(a)(1) allegations in its charge when pleading a later complaint runs afoul of the requirements of *Nickels Bakery*, 296 NLRB 927 (1989) and *Redd-I*, 290 NLRB 1115 (1988), which mandate that a valid charge must include more than vague and conclusory 8(a)(1) allegations unsupported by any facts.

Furthermore, as fully briefed in Comcast's moving papers, *Lotus Suites v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994), squarely addresses the issue: "A fortiori, when the charge contains no factual allegations at all, as in the instant case, there can be no nexus and a complaint cannot properly issue."<sup>3</sup> The Board's attempts to distinguish *Lotus Suites* are not persuasive. The underlying charges in the Consolidated Complaint and in *Lotus Suites* cannot be distinguished: both allege boilerplate 8(a)(1) allegations, unsupported by any fact. In *Lotus Suites* the charge vaguely stated that the employer "discriminated in regards to hire and tenure of employment and to the terms and conditions of employment of its full time and part time employees." Similarly, in the instant case, the underlying charge vaguely stated that Comcast improperly made "threats," "promises of benefits," incidents of "interrogation" or "solicitation[s] of grievances." Neither charge alleges a single fact in support of these vague, boilerplate legal allegations. That here the charging party alleged more vague boilerplate allegations does not distinguish the instant charge from the *Lotus Suites* charge, as suggested in the Opposition. The *Lotus Suites* analysis applies: the Board was without authority to initiate an investigation and issue a complaint based on a charge's allegation that is "utterly lacking in factual specificity" because the charge is so lacking 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." *Id.* at 591-592.

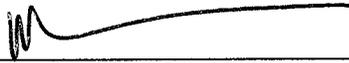
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<sup>3</sup> The Board's assertion that it is not bound by the D.C. Circuit is incorrect. The Board's reliance on a 2001 ALJ opinion that cites no law in support of the statement that the Board is not bound by the D.C. Circuit and has never been cited for the premise that the Board is not bound by the D.C. Circuit is specious, at best. As Board decisions are subject to review and reversal by the D.C. Circuit, it absurd for the General Counsel to essentially disavow that court as a legitimate source of law related to NLRB cases.

**III. CONCLUSION**

For the foregoing reasons, in addition to those set forth in Comcast's moving papers, Respondent Comcast Cable Communications Management, LLC respectfully requests that its Motion to Dismiss be granted and the allegations in paragraphs 7 through 12 of the Consolidated Complaint be dismissed.

Respectfully submitted,



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Daniel V. Johns  
Mary Cate Gordon  
BALLARD SPAHR LLP  
1735 Market Street, 51st Floor  
Philadelphia, PA 19103-7599  
Telephone: 215.665.8500  
Facsimile: 215.864.8999

*Attorneys for Respondent, Comcast Cable  
Communications Management, LLC*

Date: January 16, 2018

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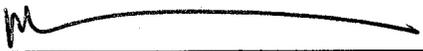
**AFFIDAVIT OF SERVICE**

I, Mary Cate Gordon, hereby certify that, on this day, Comcast Cable Communications Management LLC's Reply in Support of its Motion to Dismiss in the above-captioned matter was filed electronically with the Board and served via e-mail on:

International Brotherhood of Electrical Workers, Local 712, AFL-CIO  
Michael McGee, Organizer  
217 Sassafras Lane  
Beaver, PA 15009  
mmcgee@ibew712.org

Emily M. Sala  
National Labor Relations Board  
Region 6  
William S. Moorhead Federal Building  
1000 Liberty Ave., Room 904  
Pittsburgh, PA 15222  
Emily.Sala@NLRB.gov

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\_\_\_\_\_  
Mary Cate Gordon  
Ballard Spahr LLP  
1735 Market Street, 51<sup>st</sup> Floor  
Philadelphia, PA 19103  
856.761.3464