

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INGREDION, INC. d/b/a PENFORD PRODUCTS CO.	)	
	)	
and	)	Case 18-CA-209797
	)	
BAKERY, CONFECTIONARY, TOBACCO WORKERS,	)	
AND GRAIN MILLERS LOCAL 100G	)	

**REPLY TO GENERAL COUNSEL’S OPPOSITION TO  
INGREDION’S MOTION TO AMEND ANSWER**

Pursuant to Section 102.24 of the National Labor Relations Board’s (“Board”) Rules and Regulations, Ingredion Incorporated (“Ingredion”), by counsel, respectfully submits this Reply to General Counsel’s Opposition to Ingredion’s Motion to Amend Answer (“Reply”). In support of this Reply, Ingredion states as follows:

1. On July 9, 2018, counsel for General Counsel filed an Opposition to Respondent’s Motion to Amend Answer (“Opposition”) with the Division of Administrative Law Judges (“Division”). (Exhibit A.) However, Ingredion filed its Motion to Amend Answer (“Motion”) with the Board’s Office of the Executive Secretary, not with the Division. Pursuant to Section 102.23 of the Board’s Rules and Regulations, in the Board’s discretion it can allow a Respondent to Amend its Answer after the hearing has begun. Accordingly, as Ingredion’s Motion was filed with the Board, and not the Division, the Division has no jurisdiction to deny Ingredion’s Motion because it is pending before the Board.

2. In their Opposition, Counsel for the General Counsel argues that Ingredion’s motion is “untimely and raises no new issue of material fact.” Section 102.23 does not condition

the ability to amend an answer to “new issues of material fact.” Moreover, Ingredion’s motion is not untimely, as it was filed on July 2, 2018, a little over a week after the Supreme Court of the United States issued its decision in Lucia v. Securities and Exchange Commission (“SEC”) (June 21, 2018). It is disingenuous to argue that Ingredion should have raised its affirmative defense that the Board’s administrative law judges (ALJs) are not constitutionally appointed at a time when this issue was still unresolved and pending with the Supreme Court. The cases cited by counsel for General Counsel in the Opposition do not stand for the proposition that Ingredion should have raised this affirmative defense while Lucia v. SEC was still pending.<sup>1</sup> Further, although the issue of the constitutionality of SEC’s ALJs has been under litigation in the federal courts, the issue did not involve the Board’s ALJs.

3. Counsel for the General Counsel also argues that granting the motion to amend the answer would be “futile” because Board ALJs are constitutionally appointed. Counsel for General Counsel’s argument is premature since Ingredion’s motion simply requests to be allowed to amend its answer, and does not request the Board make a ruling on the new affirmative defense nor to decide the impact of Lucia v. SEC on Board ALJs. The issue of whether or not the Board’s procedure to appoint its ALJs satisfies the requirement of the Appointment’s Clause pursuant to Lucia v. SEC is not properly before the Board at this time and counsel for the General Counsel should be precluded from arguing the merits of this affirmative defense through its opposition.

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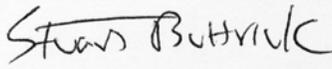
<sup>1</sup> Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015), concerns the respondents’ attempt to bypass the administrative process by bringing an action in federal district court and Bandimere v. SEC, 844 F. 3d 1168 (10th Cir. 2016), concerns the appeal of an SEC decision alleging the ALJ was not constitutionally appointed. These cases do not discuss nor do they concern an argument that respondents cannot raise an affirmative defense based on new case law.

4. Finally, counsel for General Counsel's "fishing expedition" allegation is baseless. Nothing in Ingredion's motion indicates that adding this new affirmative defense would involve engaging in any type of fishing expedition but rather Ingredion, like any respondent, has a due process right to assert any and all available defenses, of which this is one.

WHEREFORE, Ingredion respectfully submits this Reply and reiterates its request that the Board grant its motion to amend Respondent's Answer.

Respectfully submitted,

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Counsel for Ingredion Incorporated

# **Exhibit A**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF ADMINISTRATIVE LAW JUDGES

INGREDION, INC. d/b/a PENFORD PRODUCTS  
CO.

and

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS & GRAIN MILLERS LOCAL 100G

Case 18-CA-209797

**GENERAL COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION TO AMEND ANSWER**

Counsel for the General Counsel (Counsel) respectfully requests that the Administrative Law Judge deny Respondent's Motion to Amend its answer in Case 18-CA-209797. Specifically, in support of this Motion, Counsel avers:

Respondent's Motion to Amend Respondent's Answer to Consolidated Complaint should be denied. The motion is both inexcusably untimely and raises no new issue of material fact warranting a hearing.

As an initial matter, Respondent's effort to inject a new affirmative defense into this case mid-hearing is unexplained. Nothing about this case has changed since the Respondent initially filed its answer, aside from Respondent's evident discovery of a theoretical defense which—although easily available to it given that the issue has been under active debate in the federal courts for several years—it neglected to consider.<sup>1</sup> There is no good cause for permitting such an amendment.

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<sup>1</sup> See, e.g., *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015) (rejecting similar argument as a collateral attack over which the court had no jurisdiction); *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir.

Moreover, such an amendment would be futile, as Respondent's defense would properly be summarily adjudicated against it in any event. The Board itself appoints administrative law judges, and has always done so. The Board is a "Head of Department."<sup>2</sup> And the Board is expressly authorized by Congress to appoint administrative law judges. See 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title"); 29 U.S.C. § 154(a) ("The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties.").<sup>3</sup> This procedure fully satisfies the requirements of the Appointments Clause.

Finally, to the extent that Respondent seeks to turn this case into a fishing expedition into the Board's appointment practices, Board law is clear that such fishing expeditions are impermissible:

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2016) (accepting materially identical argument as to SEC judges because such judges were not appointed by the agency head).

<sup>2</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 511–513 (2010) ("Head of Department" means a freestanding component of the Executive Branch, not subordinate to or contained within another component), and *cf. Lucia v. SEC*, 582 U.S. \_\_\_, 2018 WL 3057893, at \*4 (June 21, 2018) ("the Commission itself counts as a "Head[ ] of Department[ ]").

<sup>3</sup> In 1947, the term "examiner" or "trial examiner" in the NLRA referred to what are now referred to as administrative law judges. Labor-Management Relations Act of 1947, Pub. L. No. 79-101, Title I, 61 Stat. 136, 139, 140, 147. In 1978, Congress codified the shift to the term "administrative law judge," specifying that any law that used the term "hearing examiner" as appointed under Section 3105 of the Administrative Procedure Act shall be deemed to be a reference to an "administrative law judge." Pub. L. No. 95-251, § 3, 92 Stat. 183, 184 (1978). Due to an apparent codification error, although the US Code version of the NLRA duly replaced six instances of the terms "examiner" and "trial examiner" with "administrative law judge" in Sections 3(d), 4(a) and 10(c) of the Act, 29 U.S.C. § 153(d), 154(a), 160(c), a single instance of the term "examiner" in 29 U.S.C. § 154(a) was not updated to read "administrative law judge." This is of no consequence, because it is well settled that errors or stylistic changes made as a result of recodification of the law have no substantive effect. See, e.g., *Fla. Agency for Healthcare Development v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297, 1314 (11th Cir. 2016).

A defense should also be stricken if it is interposed to engage in a “fishing expedition” to discover evidence needed to support the defense. See *Flaum Appetizing Corp.*, 357 NLRB 2006, 2010–2011 (2011) (striking the employer’s affirmative defenses in the backpay proceeding asserting that the discriminatees were undocumented aliens, as the employer failed, in response to motion for particulars, to articulate any factual support, or reason to believe it could obtain such factual support, for the defenses), and cases cited therein.

NLRB Administrative Law Judges Bench Book, § 3-550. Accordingly,

Respondent’s motion should be denied.

Dated: July 9, 2018

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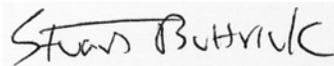
**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply has been served by electronic mail and U.S. mail, on this 13<sup>th</sup> day of July, 2018, upon the following:

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