UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

LA JOMAC GROUP, INC., JAG PREMIER, INC.,
DATA PROCESSING SPECIALISTS, INC.,
GURO ENTERPRISES, LLC, AND
BOLLINGER SHIPYARDS, INC., Joint Employers

and Cases 15-CA-137333
15-CA-137337

CHARLES LEBLANC, An Individual

BOLLINGER SHIPYARDS, INC.'S
MOTION TO DISMISS COMPLAINT

COMES NOW, Respondent Bollinger Shipyards, Inc. ("Bollinger") and pursuant to 29 C.F.R. § 102.24 submits the following Motion to Dismiss the above-captioned unfair labor proceedings in their entirety on the grounds that the allegations as related to Bollinger are untimely under Section 10(b) of the National Labor Relations Act ("the Act") and fail to state a claim against Bollinger upon which relief can be granted. As further grounds for and support of this Motion, Bollinger states:

I. INTRODUCTION

This is a run of the mill salting case, claiming that an unspecified employer failed to hire Charging Party and other union members because of their union membership or support. The initial unfair labor practice charges ("the Charges") in Case Nos. 15-CA-137333 and 15-CA-137337 were filed solely against La Jomac Group, Inc. ("La Jomac") and Jag Premier, Inc. ("Jag"), respectively on September 23, 2014. The Charges were then modified numerous times, adding and deleting respondents at Charging Party's whim and apparently with Region 15's consent. It was not until July 31, 2017, nearly three years later, that the ***Fifth*** Amended Charges were filed,

adding Bollinger as a named respondent in this matter. Bollinger denied any wrongdoing in this matter but nonetheless, on November 15, 2018, the Regional Director for Region 15 issued a Consolidated Complaint in this matter.

Ignoring the fact that the first time Bollinger was alerted to the allegations in the Consolidated Complaint was more than two years after the alleged misconduct occurred, the Consolidated Complaint alleges that Bollinger is a joint employer with the other named respondents and therefore, liable for the failure to hire as alleged. The action in this matter against Bollinger cannot stand where the Fifth Amended Charge was untimely with respect to Bollinger and until that time, Bollinger had no notice that it might be added as a party to this action. Permitting this case to proceed against Bollinger would deny Bollinger its right to due process.

Moreover, even assuming the allegations in the Consolidated Complaint were true, they fail to state a claim *against Bollinger* upon which relief can be granted. Namely, the Consolidated Complaint alleges that La Jomac, Jag, and Guro Enterprises, LLC, temporary staffing agencies, provided employees to Bollinger's facility.[1] The Consolidated Complaint then alleges that Bollinger has exercised control over labor relations policy of La Jomac, Jag, and Guro "***for employees working at Respondent Bollinger's facility.***" (Compl. ¶ 4(d)). The Consolidated Complaint further alleges all the respondents, including Bollinger, have been joint employers for employees of La Jomac, Jag, and Guro "***working at Respondent Bollinger's facility.***" (Compl. ¶ 5).

Despite the explicit acknowledgement in the Consolidated Complaint that Bollinger is only a joint employer with the other alleged respondents for employees actually working at Bollinger's

[1] Because the Region has never explicitly alleged how Bollinger has any liability for the alleged wrongdoing in this matter, Bollinger is not aware which facility is allegedly at issue.

facility, the Consolidated Complaint then makes a conclusory statement that all of the respondents, including Bollinger, unlawfully refused to consider for hire various applicants. (Compl. ¶ 10(b)). On its face, the Consolidated Complaint acknowledges that Bollinger is, at best, only a joint employer with the other alleged respondents with respect to employees already assigned to Bollinger. There is no allegation that Bollinger was involved in either the hiring process generally or the failure to hire Charging Party specifically. There is similarly no allegation that Charging Party worked at Bollinger's facility, thus triggering the joint employer allegation as stated in the Consolidated Complaint. As written, the Consolidated Complaint fails to state any cause of action against Bollinger except for a conclusory statement that Bollinger, along with the other respondents, failed to hire Charging Party.

Requiring Bollinger to continue to defend itself in this matter is an abuse of the Region's authority. Bollinger should not be required to expend its resources to defend against an untimely Charge and the Consolidated Complaint with its tenuous allegations against Bollinger. Accordingly, Respondent Bollinger respectfully asks that the Administrative Law Judge ("ALJ") dismiss the Complaint.

II. MOTION TO DISMISS STANDARD

Pursuant to the 29 C.F.R. § 102.24, Bollinger asks the ALJ to dismiss the allegations in the Consolidated Complaint related to Bollinger. In ruling on motions to dismiss under 29 C.F.R. § 102.24, the Board follows the standard used for motions to dismiss filed under Federal Rule of Civil Procedure 12(b)(6). *See Yale University*, 330 NLRB 246, 247 n. 8 (1999) (the Federal Rules of Civil Procedure guide the Board in reviewing a motion to dismiss). Under that standard, the Board "construes the complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts

in support of his claims that would entitle him to relief." *Detroit Newspapers Agency*, 330 NLRB 524, 525 n. 7 (2000); *see also Parks School of Business, Inc. v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995); *see also Bell Atlantic Corp. v. Twonbly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Even assuming all of the allegations in the Consolidated Complaint are true, the General Counsel cannot establish any basis for liability against Bollinger and the Consolidated Complaint must be dismissed with respect to Bollinger.

III. LEGAL ARGUMENT

A. Bollinger Must be Dismissed From the Consolidated Complaint Where Allegations Were Untimely and Bollinger Was Not Added as a Respondent Until Nearly Three Years After the Unlawful Acts

Section 10(b) of the Act specifically provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ." The Consolidated Complaint specifically alleges that the alleged unlawful failure to hire occurred from January 2014 to December 31, 2014. (Compl. ¶ 10(b)). Despite the alleged misconduct occurring in 2014, the Fifth Amended Charges, adding Bollinger as a respondent for the first time, were not filed until July 31, 2017, more than two years after the statute of limitations expired and nearly three years after the initial Charges were filed. (Compl. ¶ 1). With respect to Bollinger, the allegations are untimely on their face. If Charging Party sought to add Bollinger as a respondent to this action, he must have filed a charge no later than June 30, 2015. He did not. Charging Party cannot be rewarded for his failure to act with any sense of due diligence at the expense of Bollinger's due process rights.

Traditionally, unfair labor practice allegations that are otherwise time-barred may be litigated only if they are "legally and factually 'closely related' to allegations of a prior timely filed

charge." *Carney Hospital*, 350 NLRB 627 (2007). While the Board permits untimely amendments where the allegations "relate back" to the timely allegations, this is where the initial charge "generally informs the ***party charged of the nature of the alleged violations***." *Wells Fargo Armored Service Corp.*, 290 NLRB 936, 939 (1988) (emphasis added). Here, Bollinger had no knowledge of the nature of the violations until nearly three years after the initial Charges were filed. If Charging Party sought to add allegations against La Jomac and Jag which "related back" to the initial charge, he could do so under well-established Board law. However, this is no basis by which Charging Party could add respondents years after the Charges were filed and where Bollinger had no knowledge of the alleged violations prior to the untimely amendments.[2]

Further, there is no allegation that Bollinger is a single employer or alter ego of La Jomac or Jag (or any other respondent) which may allow the General Counsel to impute knowledge of

[2] While it appears the Board has not used the "relate back" theory to add unrelated respondents, the Fifth Circuit (the circuit in which this Region sits), has limited the use of the "relation back" doctrine provided in Federal Rules of Civil Procedure 15(c) to add a party after the limitations period has expired only if the party added had notice that the action would be brought against it within the limitations period. While not binding on the Board, the application of this Rule is instructive in the instant case. There is absolutely no evidence that Bollinger had notice that the action would have been brought against it. While the Fifth Circuit "will infer notice if there is an identity of interest between the original defendant and the defendant sought to be added or substituted," there is no identity of interest in the instant case. *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir.1998), *citing Moore v. Long*, 924 F.2d 586, 588 (5th Cir.1991), and *Kirk v. Cronvich*, 629 F.2d 404, 407–08 (5th Cir.1980). "'Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other.' " *Id.*, *quoting Kirk*, 629 F.2d at 408 n. 4.

Here, there is absolutely no claim that the original respondents (La Jomac and Jag) share any identity of interest with Bollinger. Instead, at most, the Consolidated Complaint alleges that at some times, Bollinger is a customer of La Jomac and Jag. All of La Jomac and Jag's customers could not reasonably believe that they may be added to the pending action. Bollinger had no reason to believe it may be added to the instant proceeding where it had no involvement in the challenged hiring decisions and otherwise is not related to La Jomac or Jag.

the earlier filing upon Bollinger. Similarly, there is no allegation that Bollinger is a "closely related" party to this action. Bollinger was a customer of La Jomac and Jag but nothing more. Bollinger should not be denied its due process right to learn of the existence of allegations against it because Charging Party failed to add it as a party to this action years later. Moreover, the nature of the allegations are not such that Bollinger would have or should have been aware that allegations were being levied against it as well as the other respondents. It was not until the Fifth Amended Charge that Bollinger learned for the first time that it was a target of Charging Party's claims.

To permit the untimely allegations against Bollinger to stand would deny Bollinger due process and is not "just" as required by 29 C.F.R. § 102.17 (permitting amendments "upon such terms as may be deemed just"). It is hardly just to Bollinger (whose interests must be considered in addition to Charging Party's) to permit an amendment to add Bollinger years after the Charges were initially filed and where Bollinger was wholly unaware of the allegations and its need to defend itself prior to that time. *See e.g. Green Construction*, 271 NLRB 1503 (1984) (it would be "unjust" to permit the General Counsel to amend a complaint to add a charged party seven months later where it would cause undue prejudice to the unnamed party).[3] Moreover, neither Charging Party nor the General Counsel provided any rationale for the delay in failing to name

[3] While the hearing has not yet occurred in the instant case, Bollinger has nonetheless been sufficiently prejudiced by the General Counsel's actions in this matter. The General Counsel did not seek an amendment a few months after the statute of limitations expired; instead, it allowed Bollinger to be added as a party to this action *years* after the Charges were filed. The very basis of the Charges is a failure to hire claim. If in fact Bollinger failed or refused to hire Charging Party, he would have been aware of that fact at some point prior to three years later. Yet, no explanation has been given for Bollinger's addition to this matter or the delay in amending the Charges. Instead, as discussed in more detail in Section B, *infra*, there is no basis in fact or law for adding Bollinger, especially where such amendment did not occur until years later. While Bollinger has no knowledge of the alleged wrongdoing in this matter, if the allegations were of a different nature about which Bollinger had direct knowledge, such an untimely amendment deprives a respondent of the ability to respond while memories are fresh and documents are retained.

Bollinger as a Respondent until years later. Instead, it appears Charging party added and removed respondents until he landed on parties with what he believed were sufficiently deep pockets or where he has some interest in future employment.

Because Congress included section 10(b) as part of the statutory scheme embodied by the Act, the limitations period should be enforced. As the Court stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980): "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Undue prejudice is inherent in the undue delay in adding Bollinger to this proceeding years after the operative events. Bollinger should not be unduly prejudiced by Charging Party's delay where it had no knowledge of its potential addition as a party in this matter until well outside the statute of limitations period.

B. The Consolidated Complaint Fails to State a Cause of Action Upon Which Relief May be Granted Against Bollinger and Bollinger Must be Dismissed From the Consolidated Complaint

In addition to being untimely, the Consolidated Complaint fails to state any factual basis for liability against Bollinger. As set forth above, even if the allegations in the Consolidated Complaint were true, which they are not, they do not establish Bollinger had any involvement in the alleged unfair labor practices alleged therein. Instead, the Consolidated Complaint alleges that by virtue of an alleged joint employment relationship between Bollinger and the temporary agencies with respect to employees hired by the temporary agencies and assigned to Bollinger, Bollinger is liable for all actions by the temporary agencies, even those in which it had no role. The Consolidated Complaint fails to state any factual or legal basis on which the Region relies for its allegation that Bollinger is responsible for the alleged failure to hire. The Consolidated

Complaint only describes conduct by Bollinger after employees are hired by the other respondents ***and assigned to Bollinger for work*** yet, the Consolidated Complaint makes a conclusory statement that Bollinger is somehow liable for the failure to hire employees who were never assigned to work at any Bollinger facility. The Consolidated Complaint similarly does not allege that Bollinger was involved in the hiring process or instructed the other respondents regarding hiring practices.[4] The Consolidated Complaint does not even allege that Bollinger would have been the end user of the applicants allegedly not hired.[5]

The Consolidated Complaint fails to state any basis for liability by Bollinger but instead, appears to assert that because Bollinger has some authority over some employees that are assigned to work at its facility, it has authority and liability for all of the actions of the temporary agencies. The Consolidated Complaint does not provide any specific actions by Bollinger to which it objects. The Region contends that Bollinger is not denied due process where Bollinger "has the opportunity to participate in an unfair labor practice hearing before an administrative law judge." (General Counsel's Opp. to Motion to Dismiss, p. 3). Bollinger should not be required to expend the resources to defend itself against an ambush at hearing where the Consolidated Complaint on its

[4] The Answer filed by respondent Guro in this matter denies the existence of any joint employer relationship with Bollinger and similarly fails to establish any liability against Bollinger based on the alleged failure to hire Charging Party.

[5] In response to repeated requests from Bollinger's counsel, to date, the Region has provided only one basis for its belief that Bollinger was in any way involved in the decisions at issue – job orders from the Louisiana Workforce Commission whereby some of the contractors posted available positions in landside construction trades. These job orders do not name Bollinger as the assigned location for the available work, nor do they indicate to the public where any hired individuals may be assigned. In fact, it apparent from the multiple pleadings in this matter, adding and removing multiple respondents, that the Charging Party and the Region were on a fishing expedition in an attempt to add additional respondents to this matter, only adding Bollinger after three years had passed. Moreover, Bollinger is not a necessary party to this action where the other named parties, the contractors themselves, are fully capable of remedying any unlawful conduct which occurred as a result of their alleged unlawful failure to hire applicants.

face fails to state an action against Bollinger and where the Region has repeatedly refused to provide the basis for its claims.

Under the Region's apparent theory, any customer of the temporary agencies could have been added as a respondent in this matter. The Consolidated Complaint does not provide any allegation specific to Bollinger in this matter. It is apparent from the repeated amendments to the Charges that Bollinger was an afterthought in this matter – likely because Bollinger was not actually involved in any of the allegations in this case. Charging Party obviously knew which employers did not hire him – La Jomac and Jag[6] – as based on the initial Charges. Despite this knowledge, the Region has proceeded to permit Bollinger to be added as a respondent, even where there are no allegations in the Consolidated Complaint that would establish any liability for Bollinger.

Reading the Consolidated Complaint, it appears the Region is asserting that a joint employer for one purpose is a joint employer for all purposes. However, the Consolidated Complaint belies the integrity of this theory in the instant case. The Consolidated Complaint specifically alleges a joint employer relationship ***for employees working at Bollinger's facility***. Where Charging Party was never hired and never worked at Bollinger's facility, there is no question Bollinger was not a joint employer with respect to Charging Party and cannot be liable for the alleged violations at issue in the instant case. Moreover, the Board has explained that joint employer status, by its mere existence, does not render both parties liable for <u>all</u> actions of the other. "Liability of joint employers for the commission of unfair labor practices by one of them is confined to the scope of the joint employer relationship." *S. California Gas Co.*, 302 NLRB 456

[6] Notably, the Region did not even serve La Jomac and Jag with the Consolidated Complaint until on or about January 23, 2019, if then, it is unclear if the General Counsel has served La Jomac or Jag.

(1991), *citing Food & Commercial Workers (R & F Grocers)*, 267 NLRB 891, 893 fn. 7 (1983); *see also Aim Royal Insulation*, 358 NLRB 787 (2012)(joint employer not liable for ULP of fellow joint employer unless the first knew of and failed to protest the unlawful acts of the second).

The Consolidated Complaint specifically limits the scope of the joint employer relationship to those employees hired and working at Bollinger's facility. It nonetheless then attempts to hold Bollinger liable for actions beyond the established scope of the alleged joint employment. Even if Bollinger is a joint employer for employees of La Jomac, Jag, and Guro "***working at Respondent Bollinger's facility,***" Bollinger has no liability for the alleged failures to hire. (Compl. ¶ 5). To require Bollinger to expend its resources to defend against the Consolidated Complaint which fails to state any liability against Bollinger is unjust.[7] The allegations against Bollinger set forth in the Consolidated Complaint must be dismissed.

IV. CONCLUSION

For all these reasons, Bollinger respectfully requests that the allegations in the Complaint against it be dismissed with prejudice in its entirety.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

s/Andrew P. Burnside

Andrew P. Burnside (LA Bar No. 14116)
One Shell Square
701 Poydras Street, Suite 3500
New Orleans, LA 70139
Phone (504) 648-2609
drew.burnside@ogletreedeakins.com

Sarah M. Rain
111 Monument Circle, Ste. 4600
Indianapolis, IN 46204
Phone: (317) 916-2167
sarah.rain@ogletreedeakins.com

Attorneys for Bollinger Shipyards, Inc.

[7] This is especially true where the Region has indicated that it anticipates the hearing to last five days, five days for which Bollinger must pay for counsel, have its representatives away from work, and defend itself against a conclusory complaint without any basis in fact or law.

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of April, 2019, the foregoing was filed electronically and is available for viewing and downloading from the National Labor Relation Board's e-filing system, and has been served on all parties as follows:

By Email:

jorgeguerrero1977@hotmail.com
eyoung@bakerdonelson.com
tmcconnell@bakerdonelson.com
mchester@bakerdonelson.com
trange@bakerdonelson.com
tristate2@uanet.org
shaun.abreu@gmail.com
Beauford.Pines@nlrb.gov

By United States Mail:

Ms. Norma Perez
Data Processing Specialists
2390 Central Blvd., Ste. W
Brownsville, TX 78520

s/Andrew P. Burnside
ANDREW P. BURNSIDE

37992777.2