

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

**FDRLST MEDIA, LLC**

**and**

**Case No. 02-CA-243109**

**JOEL FLEMING, an Individual**

**REPLY BRIEF IN SUPPORT OF THE GENERAL COUNSEL’S CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I. RESPONDENT FAILED TO ESTABLISH THE HEARSAY AFFIDAVITS WERE  
ADMISSIBLE UNDER FED. R. EVID. 807**

Hearsay is inadmissible unless a federal statute, Supreme Court rules, or the Federal Rules of Evidence state otherwise. Fed. R. Evid. 802. Respondent implicitly concedes the affidavits it offered constitute hearsay—since Respondent argues the statements are admissible under the residual hearsay exception of Fed. R. Evid. 807<sup>1</sup>—and does not contend any federal statute or Supreme Court rule warrants admission of the affidavits from Ben Domenech, Emily Jashinsky, and Madeline Osburn. Respondent further admits that neither Rule 804 nor Rule 803 applies.<sup>2</sup> In short, Respondent recognizes that if the requirements of Fed. R. Evid. 807 are not met, the affidavits are inadmissible. Because Respondent failed to establish that the affidavits were more probative than any other evidence Respondent could have obtained through reasonable means, as required by Fed. R. Evid. 807(a)(2), the residual hearsay exception does not apply and the affidavits are inadmissible.

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<sup>1</sup> R. Answ. Brf., p. 4 (“The affidavits fall under the residual hearsay exception”). Even if Respondent did not so admit, however, it is clear the affidavits constitute hearsay, since they are clearly statements made out of court and Respondent is offering them for the truth of the claims contained in them, such as the untested assertion that Respondent has no employees in New York, (R. Answ. Brf., p. 3), a statement that appears to be contradicted by Respondent’s own web site, which describes affiant Ben Domenech as “divid[ing] his time between Virginia and New York” and lists David Marcus as Respondent’s “New York Correspondent.” <https://thefederalist.com/contributors/> (retrieved July 21, 2020).

<sup>2</sup> R. Answ. Brf., p. 3 (“Rule 804 is inapplicable”) and p.4, n.4 (“Respondent also agrees that the affidavits do not fall within any of Rule 803’s enumerated exceptions”).

In particular, Respondent did not even represent, much less submit evidence, that it took any steps to have any of the affiants testify in person.

The residual exception provided by Rule 807 applies only in exceptional circumstances and is very narrow. *U.S. v. Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979) (relying on legislative history for Fed. R. Evid. 803(24), the predecessor version of 807); *Fong v. American Airlines, Inc.*, 626 F.2d 759, 763 (9<sup>th</sup> Cir. 1980); *U.S. v. Washington*, 106 F.3d 983, 1001–1002 (D.C. Cir. 1997) (residual hearsay is “extremely narrow” and “proponent of the statement bears the heavy burden to come forward with indicia of both trustworthiness and probative force”). As noted in General Counsel’s initial brief in support of his cross-exceptions, in-person testimony, subject to cross-examination, would unquestionably be more probative than the out-of-court statements offered. *U.S. v. Mathis*, 559 F.2d 294, 298–299 (5<sup>th</sup> Cir. 1977) (holding live testimony to be more probative than transcribed statement and holding trial court erred in admitting transcription when witness could have been called to stand). The burden was thus on Respondent to show it could not have obtained the in-person testimony of the affiants through reasonable means.

Respondent simply did not do that. Indeed, the record does not reflect Respondent even *asked* any of the witnesses to testify in person. While Respondent makes a tortured claim it could not have enforced subpoenas against any of the three affiants, claiming that “the ALJ could not exercise personal jurisdiction over [the affiants]... and Respondent could not compel their appearances,”<sup>3</sup> that argument is speculative, irrelevant, and incorrect. Respondent’s claim is speculative and irrelevant because Respondent did not establish it made any attempt to procure the three individuals’ attendance. Having failed to ask the witnesses to testify and having failed to serve subpoenas on them, it is impossible to say their testimony could not have been obtained through reasonable efforts. Since that showing—the impossibility of obtaining live testimony from

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<sup>3</sup> R. Answ. Brf., pp. 3 and 5.

the affiants—is a precondition to the application of Rule 807 in this context, the Rule does not apply. Respondent is incorrect because, should enforcement have become necessary, the General Counsel could have enforced any subpoena issued by it on behalf of the Respondent in any district court within the jurisdiction of the inquiry or in “*which said person guilty of contumacy or refusal to obey is found or resides or transacts business.*” National Labor Relations Act, Section 11(2) (providing for enforcement of subpoenas in district courts), 29 U.S.C. § 161(2) (emphasis added); see also Board’s Rules and Regulations, Sec. 102.31(a) (requiring Board to provide subpoenas to any party to an action who requests such) and (d) (providing for General Counsel to initiate enforcement proceedings on behalf of requesting party where there is a refusal to obey), 29 C.F.R. § 102.31(a) and (d). Indeed, Section 11 of the Act makes it plain there would have been no impediment to enforcing subpoenas issued to Domenech, Osburn, or Jashinsky, had Respondent bothered to request those subpoenas and serve them, since that portion of the statute specifically provides that “[A]ttendance of witnesses and the production of such evidence may be required from *any place in the United States or any Territory or possession thereof, at any designated place of hearing.*” Act, Sec. 11(1), 29 U.S.C. § 161(1) (emphasis added). The geographic limitations on subpoenas issued by district courts under Federal Rule of Civil Procedure 45(c) are wholly inapplicable to the Board’s subpoenas. *Longshoremen’s Asssoc., Local No. 307*, 257 NLRB 880, 883 n.3 (1981). Thus, Respondent’s argument that the affiants could not be called as witnesses<sup>4</sup> is not only unsupported but once again misconstrues the statutory structure of the Act.

Respondent’s failure to meet the requirement of Fed. R. Evid. 807(a)(2) bars admission of the affidavits under the residual hearsay exception. But the proffered hearsay statements also fail to meet the requirement of trustworthiness imposed by Fed. R. Evid. 807(a)(1). In order to have the requisite indicia of trustworthiness, “a court must find that the declarant of the prior statement was

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<sup>4</sup> R. Answ. Brf., p. 3.

particularly likely to be telling the truth when the statement was made.” *U.S. v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017) (citations and internal quotation marks omitted). Such indicia of trustworthiness must be “equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history.” *Rivers v. U.S.*, 777 F.3d 1306, 1314 (11<sup>th</sup> Cir. 2015). The declarant’s truthfulness should be “so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.” *Idaho v. Wright*, 497 U.S. 805, 820 (1990). Plainly, no such circumstances attach to the hearsay affidavits offered by Respondent in this case. See *Mission Foods*, 350 NLRB 336, 348 (2007) (rejecting affidavit from witness unwilling to obey subpoena as lacking “sufficient guarantees of trustworthiness”); contrast *Seven Seas Union Square, LLC*, 368 NLRB No. 92, slip op. at 38, n.18 (2019) (finding sufficient guarantees where “the record contains admissible non-hearsay corroborative evidence” and “Respondents made no attempt to dispute statements in [the admitted] affidavit”).

In short, the hearsay statements of the three affiants are not admissible under any rule of evidence and the Judge therefore abused his discretion in admitting them.

## **II. THE BOARD HAS LONG RECOGNIZED THAT NOT ALL PROTECTED ACTIVITY IS THE SAME**

Respondent does not address General Counsel’s points that (i) the recommended order of Judge Chu suggests Respondent’s threat came in response to employee activity, (ii) the proposed order is unspecific about the employee conduct which Respondent threatened *would* be met with retaliation, and (iii) Judge Chu’s proposed posting does not specifically indicate the violation found. Instead, Respondent asserts that the remedy sought by the General Counsel “in all practicality is the same remedy already ordered by the ALJ.” If the remedy sought by General Counsel is in fact the same as that prescribed by Judge Chu, then Respondent has no basis to object. If the differences identified by General Counsel are substantive, however, Respondent provides no argument why those

differences do not call for modification of Judge Chu's order and notice, so as to conform to the Board's standard remedial practices, as argued in General Counsel's initial brief.

Instead, Respondent violates Sec. 102.46(d) of the Board's Rules and Regulations, which explicitly require that "answering brief must be limited to the questions raised in the cross-exceptions," and continues the arguments Respondent raised in its own exceptions to claim that Respondent's threatening Tweet did not constitute an unfair labor practice. Those arguments were meritless then and are even more so where they do not bear upon the issue.

### **III. CONCLUSION**

For the reasons above and in General Counsel's initial brief in support, the General Counsel respectfully requests that the Board grant the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge.

DATED at New York New York, this 27<sup>th</sup> day of July 2020.

Respectfully submitted,

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#### IV. CERTIFICATE OF SERVICE

I hereby certify that copies of General Counsel's Reply Brief in Support of the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge were served on the 27<sup>th</sup> day of July 2020, on the following parties by the methods indicated below:

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