IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NEW HOLLAND, INC., and CNH AMERICA LLC, Plaintiffs, v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CHETAN PATEL, Defendants.	Civil Action No. 1:13-cv-01176-RBW

BRIEF OF AMICUS CURIAE,
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF EMPLOYER

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I. INTERESTS OF THE AMICUS CURIAE

The National Association of Manufacturers ("NAM," or the "Association") is the largest manufacturing association in the United States, representing small and large employers in every industrial section and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major private-sector industry, and accounts for the lion's share of private-sector research and development. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The Association and its affiliates rely on the efficiency of its workforce to remain economically viable in a competitive global marketplace. To this end, NAM is vitally interested in ensuring that time spent at work by its employees is spent productively, and has not been misappropriated without notice or consent by a federal agency for the sole purpose of assisting that agency achieve a desired, if dubious, legal outcome. Preventing such arbitrary intrusions and misappropriations of the workforce is a matter of vital importance to NAM, and indeed is an interest common to all employers nationwide.[1] Accordingly, the National Association of Manufacturers urges this Court to deny the motion to dismiss of the United States Equal Employment Opportunity Commission (the "EEOC") and consider this case on the merits.

II. QUESTION PRESENTED

On June 5, 2013, the EEOC sent a blast of emails to over 1,000 email accounts accessed by the employees of Plaintiffs Case New Holland, Inc. and CNH America LLC ("Plaintiffs"). (Complaint at ¶18). The email accounts were maintained by Plaintiffs, supported by Plaintiffs' network architecture, and accessed using Plaintiffs' computers; a computer system which exists

[1] *See, e.g.*, the November 12, 2013 letter from the Chamber of Commerce of the United States of America to Chair Jacqueline A. Berrien of the EEOC regarding the actions that formed the basis of this case (Attached as Exhibit "A").

for the sole purpose of completing work on Plaintiffs' behalf. The emails, calculated to be read at the beginning of Plaintiffs' employees' work day, informed Plaintiffs' employees that Plaintiffs were being investigated by the EEOC, and to respond to the "official inquiry" "as soon as possible." *Id.* at ¶19, 21. Thus, although Plaintiffs were actively paying their employees to conduct business, this time was not spent conducting business. Rather, the time was spent for the EEOC's use and to further the EEOC's goal of gathering evidence to be used as the basis for potential future class action litigation. *Id.* at ¶35. Plaintiffs were not compensated or reimbursed for the time spent responding to the EEOC's inquiry. Moreover, the EEOC has not ruled out the possibility of conducting similar inquiries in the future. *Id.*

The overarching question to be answered by this Court is whether the EEOC should be permitted unfettered access to Plaintiffs' employees during working hours, at the expense of Plaintiffs, without the notice or consent of Plaintiffs, and without compensating Plaintiffs for the time spent. For the reasons set out in Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss ("Plaintiffs' Memo"), they should not. However, in addition to the reasons set out in Plaintiffs' Memo, NAM respectfully submits that an additional question is necessary to a full resolution of this issue: whether the EEOC's actions constitute a taking of the time Plaintiffs' pay their employees to conduct work in violation of the Fifth Amendment. NAM maintains that the answer to that inquiry is, unequivocally, "yes," and that Plaintiffs' Complaint states a claim to be considered by this Court.

III. ARGUMENT

NAM adopts all arguments set out by Plaintiffs in Plaintiffs' Memo. In addition to the arguments set out therein, the Association urges this Court to recognize that the EEOC's underlying actions constitute a taking without just compensation in violation of the Fifth

Amendment of the Constitution. As correctly stated in Plaintiffs' Memo, the EEOC's actions do indeed constitute a taking in that they constitute a trespass to their chattels – namely, their computers and computer network – without just compensation or notice. In addition to this taking, however, the actions constitute a taking to a much more quantifiable and costly piece of Plaintiff's property: the time it pays its employees to work and the product of such work. As such, the Complaint states a claim and must not be dismissed.

A. Employers Have a Property Interest in the Time For Which they Compensate their Employees and the Employees' Work Product.

The Fifth Amendment of the U.S. Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "When the government … takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 152 L. Ed. 2d 517, 122 S. Ct. 1465 (2002); citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 95 L. Ed. 809, 71 S. Ct. 670 (1951).

As a threshold matter, it must be established that Plaintiffs have a "cognizable property interest in the subject of the alleged taking for the purposes of the Fifth Amendment, *i.e.* whether the claimant possessed a 'stick in the bundle of property rights.'" *Adams v. United States*, 391 F.3d 1212, 1218 (Fed Cir. 2004) citing *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000). Should the court determine such a cognizable property interest exists, it must then determine whether the government's action amounted to a taking of that property interest. *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011); *See also Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1364 (Fed. Cir. 2009).

"In determining whether a party has asserted a cognizable property interest for Fifth Amendment purposes, a court must look to 'existing rules and understandings and background

principles derived from an independent source, such as state, federal, or common law, that define the dimensions of the requisite property rights for purposes of establishing a cognizable taking.'" *Klamath*, 635 F.3d at 511; citing *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

The actions at issue represent an inexcusable foray by the government into a brave new world of arbitrary and unauthorized interference in employer operations. Accordingly, this presents an issue of first impression. While no court has ever ruled on the issue of whether an employer has a cognizable property interest in the time it pays its employees to work – in large part because the government has not, heretofore, engaged in the type of conduct complained of in the present case – it is well settled that "[i]ntangible interests, including those created by contracts, have been found to be property for the purposes of the Fifth Amendment Takings Clause." *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1578, note 2 (Fed. Cir. 1995). *See also Connolly v. Pension Benefit Guar. Corp.* 475 U.S. 211, 223, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986) ("Contracts may create rights of property"). Moreover, the Supreme Court has held that other intangible employer interests can constitute property. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-1004, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984) (finding that trade secrets can constitute property for the purposes of the Fifth Amendment).

While the concept of ownership of time and work product may at first blush seem abstract and esoteric, the time an employer pays its employees to work is indeed quite quantifiable when compared to other intangible property interests such as the value of trade secrets. Employees are paid a defined wage in exchange for completing work. The amount of this wage is usually expressed in terms of the employee's rate of pay in exchange for time, as when an employee is paid an hourly wage. In the case of salaried employees, such a defined

wage can easily be calculated by dividing an employees' weekly pay by his or her hours worked. In this sense, the time an employer pays its employees to work is indeed a more concrete and quantifiable property interest than more traditional interests, such as the taking of a portion of a parcel of real property. *See, e.g., Tahoe-Sierra Pres. Council, Supra.*

As noted above, the Supreme Court has also recognized that contractual rights may give rise to a cognizable property interest. *See Connolly, supra*. Although Plaintiffs employ workers on an at-will basis, the relationship between Plaintiffs and their employees is analogous to one of contract: the employer agrees to pay an employee a set wage in exchange for the employee's work and work product as directed by the employer. Should an employee fail to work during the time he or she is being paid to work, his employment is subject to termination on the basis of *theft* from the employer. *See, e.g., Montgomery v. Yellow Freight System, Inc.*, 671 F.2d 412 (10th Cir. 1982) (an employee sleeping on the job constituted theft of employer's time); *Costello v. St. Francis Hosp.*, 258 F. Supp. 2d 144, 155-156 (E.D.N.Y. 2003) (an employee's representation that she was working when she hadn't been working constituted theft of time, a dischargeable offense). Here, however, it was not the employees who were stealing from the employer. Rather, it was *the EEOC* that was stealing time and work product from the employer, or at the very least coercing the employees to steal time on its behalf. Therefore, in light of the prior decisions, there can be little doubt that when, as here, a government agency forces employers to pay for employees to do work on the agency's behalf, an intrusion upon a cognizable employer interest has occurred.

B. The Time Misappropriated by the EEOC Represents a Significant Taking For Which Plaintiffs Were Not Compensated.

As stated above, the EEOC sent an "email blast" to over 1,000 workplace email addresses of Plaintiffs' employees in a fishing expedition for evidence to be used as the basis of class

action litigation against Plaintiffs themselves. This extraordinary action, taken without notice and without consent, was done using Plaintiffs' work email system: an email system established for the sole purpose of doing work, and which will only be accessed by an employee who is attempting to conduct work. Accordingly, it is without question that these actions were taken by a method that resulted in the employees' attention being diverted from their work to attend to the EEOC's inquiry; an inquiry, which as noted previously, was worded in such a manner as to infer that response and compliance was mandatory and should be completed quickly. It is therefore also without question that the EEOC's actions took significant time and work product from Plaintiffs in several respects.

First, and most easily quantified, the EEOC's actions deprived Plaintiffs of the time it took for its employees to read the EEOC's email and respond to the inquiry. It is unknown precisely how much time each employee individually spent reading and responding to his or her respective inquiry. However, even assuming a very conservative estimate of ten minutes per email to read and digest it and formulate a response results in hundreds of hours of employee manpower taken from Plaintiffs without notice or consent. Given that the EEOC has not ruled out additional similar email blasts, there is no ceiling on the amount of time (and money) which could potentially be misappropriated from Plaintiffs, *Amicus*, and employers nationwide. Moreover, should the EEOC's action be allowed to stand, there will be no barrier to other federal agencies replicating such conduct.

In truth, however, the direct time spent reading and responding to the EEOC email represents a mere fraction of the time taken from Plaintiffs. To fully ascertain the impact of the EEOC inquiry, it is also necessary to account for the effect on employee productivity from this unexpected, shocking, and therefore distracting email. Indeed, it is quite unlikely that an

employee could immediately learn his or her company was under federal investigation, take an active part in the investigation at the EEOC's urgent request, and then immediately resume work as if nothing had happened. Quite the contrary, it is likely that the great majority of employees spent some additional time reflecting on the surprising inquiry they received. Some may have reflected quietly. Others may have discussed the inquiry with coworkers. Still others may have questioned whether they should seek new employment in light of the federal investigation. Regardless of individual actions taken, additional time, quite possibly in excess of that spent directly responding to the EEOC's inquiry, was lost as a result of this negative consequence that inevitably flows from the underlying action.

Furthermore, given that the EEOC's communication to Plaintiffs' employees gave no indication that Plaintiffs were not guilty of discrimination, the EEOC has placed Plaintiffs in a false light in the eyes of its employees. This, coupled with the urgent content of the communications and the unprecedented nature of the inquiry, lead to the conclusion that a negative effect on employee morale will unquestionably result from the inquiry. It is a well-known maxim that employee productivity inevitably suffers when morale declines. *See, e.g.*, *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 165 (D.C. Dist. 1976) (Finding a deterioration in morale leads to a decrease in productivity and therefore constitutes a substantial competitive injury). Moreover, "[d]emoralized employees are likely to leave their jobs, which would result in the loss of the investment of the companies in these employees and the additional expense of recruiting and training new employees." *Id.* In light of this reality, a full and fair accounting of the EEOC's taking would include time lost as a result of lost productivity due to weakened morale and employee replacement as well.

It is without question that Plaintiffs had a cognizable property interest in the time and work product for which they compensated their employees to work. It is also without question that the EEOC transferred ownership of some of this time through its actions, both directly and indirectly through the predictable but inevitable costs which flow from the underlying action. The EEOC's actions constitute a taking (indeed, a theft) of this time, and therefore the government has a "categorical duty to compensate" Plaintiffs for the time taken. *Tahoe-Sierra Pres. Council*, *Supra.* Since no such compensation has occurred, the EEOC's actions stand in clear violation of the Fifth Amendment. U.S. Const. amend. V.

IV. CONCLUSION

The underlying actions that form the subject of the present action constitute a clear taking of time from Plaintiffs in violation of the Fifth Amendment. Moreover, as the EEOC has not ruled out similar unannounced raids in the future, the present case presents an issue much greater than the lone taking that occurred to Plaintiffs. The consequences of dismissing the Plaintiffs' Complaint are nothing short of allowing the federal government unfettered access to all employees during working hours at the cost of their employers, without consent or notice of employers. As this case presents an issue of great importance to all employers nationwide, *Amicus* respectfully submits that Plaintiffs' Complaint states a claim and urges this Court to deny Defendants' Motion to Dismiss and consider this case on the merits.

Dated: November 14, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2013, I caused the foregoing *Brief of Amicus Curiae, National Association of Manufacturers in Support of Employer* to be served through the Court's ECF filing system on the following counsel of record:

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Exhibit A

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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SENIOR VICE PRESIDENT
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November 12, 2013

Chair Jacqueline A. Berrien
U.S. Equal Employment Opportunity Commission
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Dear Chair Berrien:

I write on behalf of the U.S. Chamber of Commerce and its members to ask that you and your fellow Commissioners take prompt action to end the EEOC's abusive investigation and litigation tactics and, particularly, that the EEOC repudiate and remedy promptly the investigative actions described by Case New Holland, Inc. and CNH America LLC (collectively "CNH"), in a complaint pending in the United States District Court for the District of Columbia, *Case New Holland, Inc. v. EEOC*, No. 13-cv-1176.

We understand that in connection with an investigation under the Age Discrimination in Employment Act ("ADEA"), an investigator from the EEOC's Philadelphia District demanded massive amounts of information from CNH. After it produced the requested information voluntarily in January 2012, CNH heard nothing from the EEOC for 18 months until the EEOC—without any prior notice—sent an email to more than 1,300 CNH employees' business email addresses.

We further understand that the email announced a "federal investigation" of CNH and claimed to be "an official inquiry" of employees. It was sent early on a weekday morning, ostensibly so that it would be one of the first items in employees' inboxes. It had a link to a questionnaire to be completed "as soon as possible," without any mention of the recipient's right not to complete the questionnaire and without any regard for the job demands of CNH's employees. We further understand that the EEOC admits that the email was sent as part of an effort to troll for potential class action plaintiffs against CNH.

With this ambush, the EEOC created confusion and disrupted CNH's work place. CNH asked EEOC officials to address these problems, including the Trial Attorney assigned to the investigation, the Regional Attorney of the Philadelphia District Office, the Philadelphia District Director, the Director of the Office of Field Programs, and all

EXHIBIT A

five Commissioners. All refused to assure the Company that the EEOC would not undertake another mass email distribution, use the responses against CNH, or turn over the responses to third parties.

This investigative approach betrays the responsibility entrusted to the EEOC. The EEOC's email tactic was neither "necessary" nor "appropriate" for an effective ADEA investigation. 29 U.S.C. § 626(a). The mass email further violated the EEOC's own requirement that interviews should be conducted with the prior knowledge and consent of the respondent. *See* EEOC Compliance Manual, § 23.6(a). And to the extent lawyers are involved, the EEOC's mass-email inquiry implicates ethical prohibitions against contacting a represented party or causing another to contact a represented party. *See, e.g.*, D.C. R. PROF'L CONDUCT 4.2. By standing by its actions here, the EEOC seems to take the position that there are no limits on its investigative authority and that it can do whatever it wants during an investigation. But that is simply not the law, nor should it be.

Nor is this an isolated instance of the EEOC's overreach. Rather, it reflects a disturbing trend of inappropriate conduct by the EEOC, which the Chamber has documented in other forums.[1] For instance, during an investigation by EEOC's Atlanta District Office, investigators showed up unannounced at a small employer's office, conducted a warrantless "raid" of the business, intimidated the staff, and rifled through confidential personnel and patient files. The district court found this reckless misconduct "highly inappropriate," and determined that EEOC's "search and seizure operation" was a "misuse of its authority." *EEOC v. Homenurse, Inc.*, No. 13-cv-02927, 2013 WL 5779046, *1, *16 (N.D. Ga. Sept. 30, 2013). The court properly refused to enforce EEOC's administrative subpoena and scolded the Commission, noting that "[t]he federal courts stand as a bulwark to protect this nation's citizens from powerful government agencies that seek to run roughshod over their rights." *Id.* at *17. Serving precisely that function, several other federal courts have recently dismissed all or significant parts of EEOC's cases as a sanction for EEOC's serious misconduct.[2] That misconduct even warranted sanctions of hundreds of thousands of dollars in some cases

[1] *See, e.g.*, Letter from U.S. Chamber of Commerce to the Hon. Tim Walberg (June 6, 2013), http://www.uschamber.com/sites/default/files/USCC%20EEOC%20Oversight%20Letter%206-6-13.pdf

[2] *See, e.g.*, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); *EEOC v. Swissport Fueling*, 916 F. Supp. 2d 1005 (D. Ariz. 2013); *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, 918 F. Supp. 2d 1171 (D. Colo. 2013); *EEOC v. American Samoa Government*, No. 11-cv-525, 2012 WL 4758115 (D. Haw. Oct. 5, 2012); *Arizona v. Geo Group, Inc.*, No. 10-cv-1995, 2012 WL 8667598 (D. Ariz. Apr. 17, 2012), *appeal docketed*, Nos. 13-16081 & 13-16292 (9th Cir. 2013); *EEOC v. Dillard's, Inc.*, No. 08-cv-1780, 2011 WL 2784516 (S.D. Cal. July 14, 2011).

and millions of dollars in at least one.[3] The EEOC's taxpayer-funded resources would have been better used by following proper procedures.

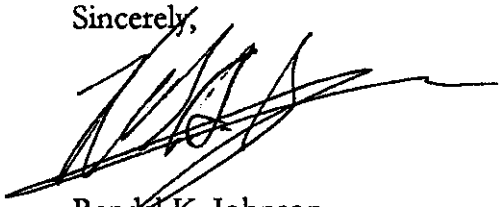
The EEOC has not said a word, in its Strategic Enforcement Plan or elsewhere, about what it is doing to end these abuses; or even whether it is doing anything at all. Several months ago, EEOC published "Draft Principles" for its "Quality Control Plan," but those "Principles" do not give any meaningful direction to investigators and litigators, and consist of empty recitations. For instance, the "Principles" define a "quality investigation" as one in which the Commission "applies the law to facts" but say nothing about the limits on EEOC's investigative authority. Indeed, in the Chamber's comments to the EEOC on its draft Plan, we advised that the EEOC should revise the Plan to impose greater controls to prevent abusive investigative and litigation practices—advice that the Commission unfortunately has not followed.[4]

This lack of oversight leading to the dismissal of many lawsuits has badly damaged the EEOC's credibility and does not serve either the public interest or equal employment opportunity. The Commission's silence in the face of the consequences of EEOC misconduct suggests an agency that is both out of control and out of touch.

One of the nation's chief civil rights law enforcement agencies should not be trampling on the rights of its investigative targets. This is wrong, and the EEOC must increase its oversight of the field so that investigations and litigation are conducted in compliance with the Commission's statutory limits, its own internal principles, the rules of professional conduct, and due process of law. In particular, the EEOC should immediately cease the investigative method used against CNH of sending blanket or mass emails directly to employees without first consulting with their employer.

We are available to discuss this matter further at your convenience.

Sincerely,



Randel K. Johnson

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[3] *See, e.g., EEOC v. PeopleMark, Inc.*, 732 F.3d 584 (6th Cir. 2013); *EEOC v. Bloomberg LP*, No. 07-cv-8383, 2013 WL 4799150 (S.D.N.Y. Sep. 9, 2013); *EEOC v. CRST Van Expedited, Inc.*, No. 07-cv-95, 2013 WL 3984478 (N.D. Iowa Aug. 1, 2013).

[4] *See, e.g.*, Letter from U.S. Chamber of Commerce to the Office of the Executive Secretariat, EEOC (Sept. 18, 2012), http://www.uschamber.com/sites/default/files/comments/SEP%20USCC%20Comments%209-18-12%20FINAL.pdf.

cc: Constance S. Barker, Commissioner
Chai Feldblum, Commissioner
Victoria A. Lipnic, Commissioner
Jenny Yang, Commissioner
Rep. John Kline, Chairman, House Committee on Education and the Workforce
Rep. George Miller, Ranking Member, House Education & Workforce Committee
Sen. Tom Harkin, Chairman, Senate Committee on Health, Education, Labor and Pensions
Sen. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor and Pensions