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

AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS' BRIEF IN REPLY TO DEFENDANTS' OPPOSITION

Defendants, in their Opposition, argue *Amicus*' Brief should be rejected as it is "unprecedented." This argument is patently absurd. *Amicus*' argument is unprecedented only to the extent Defendants' actions are themselves unprecedented in the arena of government interference. Accordingly, for the EEOC to now stand behind the shield that *Amicus*' argument is unprecedented is the logical equivalent of a killer convicted of murdering his parents asking a court's leniency as he is now an orphan. Defendants cannot invent new and creative ways to skirt or elide the United States Constitution and at the same time quibble that they are now forced to respond for the legal consequences of such actions.

Compensable employee time directly taken from Plaintiffs emphatically constitutes an intangible property interest, and courts have recognized that such interests can be the subject of a government taking. *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1578, note 2 (Fed. Cir. 1995); *Connolly v. Pension Benefit Guar. Corp.* 475 U.S. 211, 223, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-1004, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984). Such is the case here, and contrary to Defendants' assertion, one need not

engage in speculation or the creation of new facts to reach this conclusion. Accordingly, Defendant's contention that *Amicus*' argument is "unprecedented" is wholly without merit and should be rejected.

Defendants erroneously cite *FTC v. Standard Oil of California*, 49 U.S. 232, 233 (1980) and *St. Mary's Parish v. EEOC*, 2005 WL 2347096 (W.D. Wash.) for the proposition that the EEOC should be given carte blanche to take an employer's time as a cost associated with the "social burden of living under government." Opposition at 5-6. Both cases are inapposite. The "disruption" at issue in *Standard Oil* was not a wholesale misappropriation of employees' time, but was rather the FTC's issuance of a complaint against Standard Oil. *Standard Oil*, 449 U.S. 234. As Plaintiffs explain in their Memorandum in Opposition to Defendants' Motion to Dismiss, this is analogous to the EEOC issuing a cause determination, which is remedied by a defense on the merits. Pl. Mem. At 13-14. Indeed, this analogy was recognized in *St. Mary's Parish*, which actually did involve an EEOC cause determination. 2005 WL 2347096 at *3 (comparing the FTC determination in *Standard Oil* to a cause determination). *Neither* case dealt with a direct taking of employees' time which was not recompensed, and *neither* case dealt with the unprecedented level of disruption that Defendants caused in the present case with their email blast. Moreover, neither case considered whether the direct taking of an employee's time in such a manner would violate the Fifth Amendment's Takings Clause.

Incredibly, Defendants also argue that an employer does not have a cognizable interest in the time it pays its employees to work, in part because "[i]f a business owner sells the business, the employees cannot be required to work for the new owner." This argument is specious as well as inapplicable. *Amicus* does not and has not suggested that employers have a property interest in the *employee* or the ability to control the *future work* of employees. Rather, the relevant

property interest is in the *work* employees presently perform for which they are being compensated by their employer. For this reason, employees who do not work during the hours for which they are being compensated are often terminated for *theft of time*. *See, e.g., Young v. Dillon*, 468 F.3d 1243 (10th Cir. 2006); *Montgomery v. Yellow Freight System, Inc.*, 671 F.2d 412 (10th Cir. 1982); *Costello v. St. Francis Hosp.*, 258 F. Supp. 2d 144, 155-156 (E.D.N.Y. 2003). In this sense, the property interests at issue are indeed analogous to traditional property concepts.

Furthermore, it is without question that the compensated time Plaintiffs' employees spent responding to the surveys in question was not spent in the interest or on behalf of the employer. The time was used for Defendants' purposes. Accordingly, this time retained no economic value and was thus categorically taken by Defendants. *See, e.g., Maritrans Inc. v. U.S.*, 342 F.3d 1344, 1351 (Fed. Cir. 2003). Therefore, Defendant's argument that the taking at issue was neither regulatory nor categorical in nature fails as well.

Here, Defendants justify their blatant theft on what they call the "social burden of living under government." Defendants forget, evidently, that the government of which they speak is the United States government, one whose authority is expressly and implicitly circumscribed—not a monarchy, oligarchy or totalitarian form of government where the property interests of employers may be impaired at the whim of those wielding authority. The United States Constitution "created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This design was made with one purpose: to prevent the abuse of an overly powerful and intrusive Federal Government. *Id.* at 459. *See also* The Federalist No. 28 (Alexander Hamilton) (explaining how a system of Federalism protects against "the attempts of the government to establish a tyranny.")

The Fifth Amendment to the Constitution also prohibits the takings of private property for public use without just compensation. U.S. Const. amend. V. In short, our entire system of government was established to prevent precisely the type of theft or conversion Defendants are attempting to effect. This, however, has not dissuaded Defendants.

Defendants go to great lengths to attempt to minimize the extent of their taking, referring to the survey which they forced upon Plaintiffs' employees during working hours as "brief" nine distinct times in their nine-page Opposition. However—by the Defendants' logic—the length of such a survey is irrelevant: even major interruptions are the accepted social burden an employer must bear for the privilege of "living under government." Opposition at 5-6.

Importantly, Defendants fail to articulate *any limiting principle whatsoever* regarding their appropriation of employee working time. Nor do they acknowledge any limit on appropriating Plaintiffs' email network without consent or court supervision and absent a protective order or other standard privacy safeguards. With no limiting principal to curb it, the EEOC would have free reign to burden employers as it so chooses. The EEOC would be entitled to determine how much compensated employee time it may convert to its own use. The EEOC (or other federal agency) would stand, in essence, as the sole judge of what constitutes an acceptable conversion of employee time. The EEOC, without notice to or permission from an employer—indeed without any lawful process whatsoever—could intrude upon compensated employee time as the agency deems necessary to further its mission.

Defendants unquestionably took thousands of dollars in labor from Plaintiffs in conducting this "brief" survey. Moreover, should the EEOC or any other federal agency seek to perform a similar investigation at a large-scale employer, even a brief survey can amount to a taking of enormous magnitude. For example, a "brief" ten minute survey directed toward a large

company's 100,000-employee workforce results in a taking of over ***sixteen thousand working hours***: ***the equivalent of eight full-time employees indentured exclusively to the EEOC for an entire year.*** The proportionate impact on smaller employers is equally profound.

These costs are not a regular part of doing business. Moreover, it is offensive to our philosophy of government to suggest that such actions are attendant to "living under the social burden of government." Defendants actions represent a significant taking of Plaintiffs' property for which they must be compensated. The fact that such tactics are likely to be repeated in the future underscores the national impact of this case to all employers as they respond to the increased *ultra-vires* actions of the Defendants and other federal agencies. Accordingly, *Amicus* respectfully urges this Court to deny Defendants' Motion to Dismiss and consider this case on the merits.

Dated: January 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014 I caused the foregoing *Amicus Curiae National Association of Manufacturers' Motion for Leave to Reply to Defendants' Opposition to Brief in Support of Plaintiffs* to be served through the Court's ECF filing system on the following counsel of record:

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