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

**McDONALD'S USA, LLC, A JOINT EMPLOYER, et al.**

**Cases 02-CA-093893, et al.**
**04-CA-125567, et al.**

**and**

**FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.**

# REQUEST TO FILE BRIEF, AND BRIEF OF THE RESTAURANT LAW CENTER, AS *AMICUS CURIAE*

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## I. REQUEST TO FILE BRIEF AS *AMICUS CURIAE* AND STATEMENT OF INTEREST

The Restaurant Law Center (the "Law Center") respectfully requests the Board's permission to file the following brief as *amicus curiae* for the reasons set forth below.

The Law Center is a public policy organization created with the purpose of providing the restaurant and foodservice industry's perspective on legal issues significantly impacting it. The Law Center is affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The restaurant industry is a very labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing almost 15 million people– approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers.

Restaurants are structured in a myriad of ways, with the franchisor-franchisee model one of the more common business arrangements. Franchisors, like McDonald's USA, enter into franchise agreements with unaffiliated small businesses. These agreements are designed to ensure uniformity in food products, to promote consistency in branding, and to protect the franchisor's marks and image. But franchisors *do not* control the hiring, firing, discipline, supervision, direction, or other essential terms and conditions of employment for the individual restaurant employees who are selected and retained by individual franchise owners. Preservation of the franchise model – with a clear delineation between franchisor and franchisee – is a matter of significant interest to the Law Center. Efforts to brand franchisors as "joint employers" when they do not share or codetermine essential terms and conditions of employment (e.g., hiring, firing, discipline, supervision, and direction) are of significant concern to the Law Center and the restaurant industry as a whole.

In addition, like all businesses, restaurants sometimes find themselves named as defendants in charges, lawsuits, and other claims. Regardless of what form they take, such actions require the significant expenditure of time, money, and other resources; they are a distraction from a business's core mission of providing goods and services to the general public; and, perhaps most troubling from a business management perspective, they are rife with the risk of unpredictable outcomes.

These are the reasons why most cases settle. The Law Center has an interest in promoting the peaceful resolution of legal disputes through compromise and settlement. Any ruling that threatens to disrupt and impair the ability of restauranteurs to achieve compromise through peaceful, negotiated settlements is a matter of significant interest to the Law Center.

The ALJ's rejection of this settlement – reached through arms-length negotiation and agreed upon by McDonalds USA, the NLRB General Counsel, and the Franchisee Respondents – is such a decision and is, therefore, a matter of significant interest to the Law Center and the industry we represent. As a matter of public policy, there should be a strong presumption in favor of approving settlements. The ALJ's decision, which elevates the policy goals of a former General Counsel above the policy goals of the current General Counsel, should be overturned and the settlement should be approved.

## II. SUMMARY OF ARGUMENT

The settlement of this matter has been structured to provide full relief to all alleged discriminatees and to provide them – and future discriminatees – with additional benefits that could not have been ordered through an outright victory. The only thing missing from this settlement is that it does not achieve a specific policy objective of the former General Counsel of the NLRB, who wished to use this case as a vehicle for redefining joint employment in the franchisor-franchisee context.

But the former General Counsel is the *former* General Counsel. After former General Counsel Griffith's term ended in October 2017, the policy objectives of the General Counsel's office have changed, and the policy objectives of the Board have changed. The current General Counsel – after evaluating the time, expense, and inherent uncertainty involved in further litigation of this massive case and of all of the Severed Cases – negotiated a settlement that provides the alleged discriminatees with everything they could have obtained through a total victory and more.

Meanwhile, in terms of policy objectives, the Board has decided to use the rulemaking process – not the McDonald's case – as the preferred vehicle for clarifying the meaning of joint employment in the context of franchisor-franchisee relationships.

The ALJ rejected this settlement primarily because it did not achieve the policy objectives that the former General Counsel embraced when he initiated this case in 2012. But that is not the test, nor should it be. The objectives of the former General Counsel when he initiated this case in 2012 are not relevant to determining the reasonableness of a settlement negotiated by the current General Counsel in 2018.

Based on the reasonableness standard of *Independent Stave*, this settlement should be approved easily. Litigants need to know that they can control their expenses, limit their risks, and resume the day-to-day operations of their businesses and lives by settling cases on terms that do not require total capitulation. It is a fundamental goal of the National Labor Relations Act to promote labor peace and to encourage the peaceful, nonlitigious resolution of disputes. The ALJ's rejection of this settlement amounts to a rejection of that well-established goal.

The Board should reverse the ALJ, order the approval of this settlement, allow prompt payment to the alleged discriminatees, and bring this case to a close.

## III. ARGUMENT

### A. It Is and Should Remain the Policy of The Board to Promote, to Encourage, and to Approve Compromise Settlements.

The Board has long recognized settlement as "the most effective means to: 1) improve relationships between the parties; 2) effectuate the purposes of the Act; and 3) permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses." NLRB, *Casehandling Manual, Part One, Unfair Labor Practice Proceedings*, § 10124.1 (2018). The Board settles an extraordinarily high percentage of cases. See NLRB, *Performance & Accountability Rep. FY2017*, at 5 (statement of former General Counsel Griffin, reporting that "our settlement rate reached 95%; thus, we were able not only to promote industrial peace, but also save taxpayer dollars"). Settlements may occur at any point in a matter. See *id*. at 40 ("Settlement efforts continue throughout the course of the litigation").

The Board encourages reasonable settlement at *any* point in a case. *See* NLRB, *Casehandling Manual, Part One*, § 10126.3 ("Settlement efforts should, of course, continue at all stages of the proceeding, including after the hearing opens."); *See Independent Stave Co.*, 287 NLRB 740, 743 (1987) (allowing "compromises" in which parties "voluntarily forego[] the opportunity to have [claims] adjudicated on the merits in return for meeting the other party on some acceptable middle ground").

The controlling *Independent Stave* standard allows parties to "accept a compromise rather than risk receiving nothing or being required to provide a greater remedy." *Independent Stave*, 287 NLRB at 743. The decision in *Independent Stave* embraces the fact that the Board has "long had a policy of encouraging the peaceful, nonlitigious resolution of disputes." *Id.* at 741.

B. The Proposed Settlement in this Case Is Reasonable and Should be Approved.

In *UPMC*, the Board returned to the "reasonableness" standard set forth in *Independent Stave* as the test for approving settlements. 365 NLRB No. 153, *1 (2017). As set forth in the Special Appeal Brief filed by McDonald's, each of the *Independent Stave* factors is satisfied here, and *Amicus* agrees with McDonald's comprehensive analysis of the four factors.

*Amicus* writes separately, however, to call attention to the ALJ's misguided rationale for rejecting this settlement and the potential consequences if the Board were to allow this decision to stand. If upheld, the ALJ's erroneous analysis would erode the statutory authority of the current General Counsel, would impair litigants' ability to negotiate compromise settlements, and would override the Act's policy goal of promoting labor peace.

C. The ALJ Erred by Rejecting this Reasonable, Compromise Resolution.

1. The ALJ Inappropriately Fixated on the Former General Counsel's Supposed "Purpose" in 2012 When He Brought the Lawsuit, Ignoring the Context of the Comment and Ignoring How the Objectives of the General Counsel Have (Obviously) Changed in the Succeeding Six Years.

The ALJ, in explaining why she considered the settlement to be unreasonable, repeatedly faulted the settlement for failing to brand McDonald's USA as a "joint employer" or for soliciting a comparable admission and guarantee from McDonald's USA as if McDonald's USA had been adjudicated to be a joint employer. *See, e.g.,* Order[1] at 20 (opining that "the circumscribed involvement of McDonald's in the informal Settlement Agreements' remedies does not begin to approximate the remedial effect of a finding of joint employer status."); *id.* at 22 ("McDonald's obligations pursuant to the Settlement Agreements do not constitute anything approaching as effective a remedy as a finding of joint employer status."); *id.* ("McDonald's obligations . . . are

[1] "Order" refers to the Judge's July 17, 2018 Order Denying Motions to Approve Settlement Agreements.

therefore not comparable in any way, shape, or form to joint and several liability"); *id.* at 32 ("the obligations incumbent upon McDonald's pursuant to the Settlement Agreements do not in any way approximate the remedial effect of a finding of joint employer status.").

The ALJ opined that despite providing full relief to all alleged discriminatees, the settlement was unreasonable because it would not achieve the former General Counsel's "stated purpose" (her words, not his) in bringing the case. She wrote:

> General Counsel [Griffith]'s stated purpose in initiating this case was obtaining "a finding that McDonald's USA, LLC was jointly and severally liable for all of the alleged unfair labor practices... because of its status as a Joint Employer of the affected workers," and "to clarify the relationship between franchisor and franchisee" in the context of Board law regarding joint employer status. Tr. 21254.

*Id.* at 39.

It is important to place the quoted comment in its proper context because the ALJ has inaccurately characterized the entire exchange. First, the word "purpose" was never uttered – not in the question or in the answer. *See* Tr. 21254. Rather, the question posed by Judge Esposito at the settlement hearing was much narrower than the case's purpose. She asked about remedies.

She asked Mr. Ortiz, an attorney for the General Counsel, "what remedy, when the case was initiated, did the General Counsel envision obtaining if there was a finding of Joint Employer Status?" Tr. 21254:2-4. In response, Mr. Ortiz explained that a finding of joint and several liability was "the outcome hoped for by the General Counsel who initiated this litigation." The judge then asked Mr. Ortiz, "And so the performance section [and] the settlement fund are intended to serve as the remedies in lieu of a finding of Joint-Employer status and joint and several liability?" In response, Mr. Ortiz said, "Yes," thereby confirming that the negotiated remedies in the settlement were intended to ensure full relief to the discriminatees. The ALJ did not ask the purpose of the lawsuit. She asked what remedy the former General Counsel envisioned "when the case was

initiated" six years earlier, under a different General Counsel, under a different Administration, and under a different Board.

Second, the "outcome hoped for" (not "purpose") was offered by Mr. Ortiz at the settlement hearing in 2018 in response to a question from Judge Esposito about the former General Counsel's mindset "*when the case was initiated*" in 2012. Tr. 21254:2-5 (emphasis added). The former General Counsel's mindset when the case was initiated is utterly irrelevant to determining whether this settlement – reached six years later under a different General Counsel – is reasonable under *Independent Stave*. Inexplicably, there was no discussion or follow-up questioning from the ALJ about how the General Counsel's goals may have changed throughout the litigation. Indeed, these goals did change (obviously), which is why the current General Counsel negotiated a settlement.

2. The ALJ Erred by Placing Undue Reliance on the Mindset of the Former General Counsel "When the Case Was Initiated" in 2012, When That Mindset Is No Longer Consistent with the Position of the Current General Counsel or the Board.

Former General Counsel Griffith wanted to make an example of McDonald's USA. He wanted a pound of flesh. But former General Counsel Griffith's goal "when the case was initiated" in 2012 does not set the bar for determining whether any future settlement should be deemed reasonable under applicable Board law. This faux standard is particularly inappropriate given that (1) Mr. Griffith is no longer the General Counsel, and (2) the current General Counsel – who is in charge of handling this case and who negotiated this settlement – does not share Mr. Griffith's objectives.

Perhaps more important, the Board itself has changed its position as to what should constitute joint employment under the NLRA. In other words, *former General Counsel Griffith's initial position with respect to joint employment is obsolete*.

In its Notice of Rulemaking & Request for Comments, published in the Federal Register on September 14, 2018, the NLRB proposed that a new regulation be codified at 29 CFR § 103.40 which – directly contrary to Mr. Griffith's hope "when the case was initiated" – would substantially *narrow* the circumstances under which a franchisor may be deemed a joint employer of employees hired by a franchisee. The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 179 (proposed Sep. 14, 2018) at 46681-46697.[2] The proposed regulation states:

> **§ 103.40: Joint employers.**
> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

*Id*. at 46696-97.

In the Notice of Rulemaking, the Board explains that – contrary to the position taken by former General Counsel Griffith in 2012 – "the Act's purposes would *not* be furthered by drawing into an employer's collective-bargaining relationship, or exposing to joint-and several liability, a business partner of the employer that does not actively participate in decisions setting unit employees' wages, benefits, and other essential terms and conditions of employment." *Id*. at 46686 (emphasis added).

The Board is proposing this new regulation to "foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships," including specifically the relationship between franchisor-franchisee. *Id*. at 46681. The words "franchise," "franchisee," "franchisor," "franchising," and their variants appear 40 times in the Notice of

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[2] https://www.gpo.gov/fdsys/pkg/FR-2018-09-14/pdf/2018-19930.pdf.

Rulemaking, including footnotes, leaving no doubt of the Board's intent in 2018 to clarify the meaning of "joint employment" in the franchisor-franchisee context through rulemaking, not through the McDonald's case.

Thus, the ALJ's fixation on the "outcome hoped for" by the former General Counsel when he filed this case in 2012 is misplaced for this additional reason too. The Board's recent decision to make policy on joint employment through rulemaking, rather than through the McDonald's case, means that even if this settlement were rejected and the parties were forced to litigate to finality, and even if McDonald's USA were ultimately deemed to be a joint employer in this case, the former General Counsel's policy objectives *still* would not be satisfied, since the Board's proposed new regulation likely would have taken effect by then.

3. The ALJ Erred Because Compromise, Not a "Full Remedy," Is the Primary Goal of Settlement under *UPMC* and *Independent Stave*.

There is nothing in *Independent Stave* that would support the ALJ's fixation on wanting the settlement to include the full remedy that the former General Counsel "hoped for" when he filed this case six years ago. To the contrary, the Board in *International Stave* and *UPMC* considered and rejected the "full remedy" requirement that the ALJ erroneously embraced.

In *UPMC*, the Board called the full remedy requirement "an ill-advised standard less likely to effectuate the purposes and policies of the Act than the Board's longstanding approach." *UPMC*, 365 NLRB No. 153 at *6. The Board instead reinstated the "reasonableness" standard set forth in *International Stave*.

Like *UPMC*, *International Stave* rejects any "full-remedy" requirement as impractical and unrealistic, holding: "By operating on a rigid requirement that the settlement must mirror a full remedy, we would be ignoring the realities of litigation." *See* 287 NLRB at 742-43. Full capitulation is not part of the reasonableness analysis. *See id.* at 743. The ALJ's rejection of the

proposed settlement is contrary to *International Stave*. The Board explained: "When we reject the parties' non-Board settlement simply because it does not mirror a full remedy, we are consequently compelling the parties to take the very risks that they have decided to avoid, as well as depriving them of the opportunity to reach an early restoration of industrial peace, which after all is a fundamental aim of the Act." *Id.* at 743.

Instead, *Independent Stave* recognizes the value of settlements as compromises. The hallmark of a reasonable compromise is that parties "voluntarily forego[] the opportunity to have [claims] adjudicated on the merits in return for meeting the other party on some acceptable middle ground." *Id.* at 743.

If full capitulation were required for a settlement to be approved, almost no one would settle. But one of the purposes of the Act, as set forth above, is to encourage settlement. For this additional reason, the ALJ erred when rejecting the proposed settlement.

4. A Finding of Joint Employment Would Provide No Greater Remedy Than the Settlement Provides.

The ALJ's reluctance to deem "reasonable" any settlement that does not include a finding of "joint employment" is, itself, unreasonable. A finding of "joint employment" would provide no greater remedy than the settlement reached. A finding of "joint employment" would not provide any greater compensation to the alleged discriminatees; would not result in a bargaining order; and would not provide any material addition to the relief already being provided through the proposed settlement. See Tr. 21312:9-10 (General Counsel's statement that the settlement agreements provide "100 percent plus relief here, 100 percent plus").

It is undisputed that with approval of this settlement, all alleged discriminatees will receive all available relief (and more). In other words, the discriminatees *cannot* receive any further relief through continued litigation of this case. With continued litigation, they can only receive *the same*

*or less* than they would receive through this settlement, and if they were to receive the same, it would not be until the completion of this litigation and all appeals. It is incontrovertible that the settlement is better for the alleged discriminatees than continued litigation would be. Yet, in spite of that result, the ALJ rejected the settlement because it did not brand McDonald's with the label of "joint employer."

Remember, McDonald's USA has not been alleged to have committed any unfair labor practice in any of the pending charges, nor has McDonald's USA ever been deemed a joint employer by the Board or by any ALJ under any standard. Branding McDonald's a "joint employer" in this case would accomplish nothing of substance. It might make Charging Parties feel good, but that is not the role of the General Counsel when deciding whether to continue litigating a case or to settle, nor is that a goal of the Act.

The settlement provides complete relief and more, without the need to brand McDonald's USA a "joint employer." The absence of this scarlet letter in the settlement does not turn an otherwise reasonable settlement into an unreasonable one.

5. Deference to the Policy Objectives of a Former General Counsel Would Undermine the Authority of the Current General Counsel, Inviting Chaos and Uncertainty into Labor Relations.

The ALJ's focus on providing the former General Counsel with the "outcome [he] hoped for" "when the case was initiated" is misplaced. There is no *Independent Stave* factor requiring consideration of the mindset of a former General Counsel, nor should there be. By statute, the current General Counsel – not the former General Counsel – has "final authority, on behalf of the Board, in respect … of the prosecution of … complaints before the Board." 29 U.S.C. § 153(d).

As the prosecutor, the current General Counsel is in the best position to weigh the strengths and weaknesses of his case, to recognize the inherent uncertainty in the litigation, and to determine the prosecutorial and policy priorities of his office. Indeed, it is his statutory duty to do so. *See*

29 U.S.C. § 153. The General Counsel is also uniquely charged – unlike every other party to the case – "with the responsibility of representing the public interest." *See Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB*, 331 F.2d 720, 734 (6th Cir. 1964).

Thus when a General Counsel decides, after weighing all of these factors, to reach a settlement, such a decision should carry disproportionate weight in favor of approving the settlement.

Showing deference to the policy objectives and prosecutorial goals of a prior General Counsel would undermine the authority of the current General Counsel. Such a practice would be inconsistent with 29 U.S.C. § 153(d). It would also invite disorder, disarray, and unpredictability into labor relations – none of which are in the public interest and none of which are consistent with the purposes of the Act.

The ALJ erred by denying approval of the settlement negotiated by and between the current General Counsel, McDonald's USA, and the Charged Franchisees. Under the reasonableness test set forth in *Independent Stave*, the settlement should be approved and the ALJ's order denying the settlement should be overruled.

D. The Motion to Recuse Chairman Ring and Member Emanuel Should Be Denied, Based on Applicable Law.

The motion seeking the recusal of Chairman Ring and Member Emanuel is a poorly disguised, politically-motivated effort to strip the Board of its duly appointed Republican majority, in the hope that a depleted Board would deadlock 1-1 and would not reverse the ALJ. The motion is based on an improper reading of Executive Order 13770 and 5 C.F.R. § 2635.502, and it should be denied.

1. For the Board to Function Properly, Motions to Recuse Should Be Sparingly Considered, and Conflicts of Interest Must Be Narrowly Construed.

For the Board to fulfill its mission, each of its five members must be highly knowledgeable about the National Labor Relations Act, its procedures, its case law, and its history. While some individuals may gain this knowledge through academic study or service in a federal agency, there is no substitute for having experienced practitioners of labor law on the Board. By tradition and for many practical reasons, experienced practitioners of labor law gain their experience either by representing the major unions or by representing sizable businesses. Accordingly, the most experienced Democratic appointees are likely to be found at the AFL-CIO, the SEIU, the Teamsters, or one of the other major unions, or at the law firms that represent them. Recent examples include former Member Becker[3] (SEIU, AFL-CIO), former Member Hirozawa[4] (represented unions for more than 20 years), former Member Schiffer[5] (UAW, AFL-CIO), and former Member and former General Counsel Griffin[6] (IUOE, AFL-CIO). Similarly, the most experienced Republican appointees are most likely to be found at the major law firms that represent businesses. Current examples include Chairman Ring (Morgan Lewis) and Member Emanuel (Littler Mendelson). That may be simply stating the obvious. But this is reality, and its practical implications cannot be ignored.

If the standard for recusal were that a Member could not participate in a decision that would affect the interests of that Member's former union or former business clients, then no one with the above-described qualifications could serve. If the standard for recusal were that the public might

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3 https://www.nlrb.gov/who-we-are/board/craig-becker
4 https://www.nlrb.gov/who-we-are/board/kent-y-hirozawa
5 https://www.nlrb.gov/who-we-are/board/nancy-j-schiffer
6 https://www.nlrb.gov/who-we-are/general-counsel/richard-f-griffin-jr

perceive the member not to be impartial based on his or her past affiliation, then no one with the above-described qualifications could serve. Almost every case that comes before the Board fits one or both of these descriptions. The pool of qualified lawyers who could serve as Board members would quickly shrivel to near zero.

Fortunately, neither is the standard. Executive Order 13770 and 5 C.F.R. § 2635.502 contemplate recusal only under much more limited circumstances. The SEIU's Motion for Recusal (like Richard Painter's letter in support of recusal) misstates the applicable standards and ignores the definitions that are critical to understanding when recusal is appropriate. The situations requiring recusal are narrow. That is by design, and that is for good reason. Under a plain reading of the Executive Order and the regulation, the circumstances here do not warrant recusal.

2. The Standard for Recusal Under 5 C.F.R. § 2635.502 Is Not Satisfied.

Section 2635.502 states, in relevant part:

> (a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, **and** where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(Emphasis added.)

Some parts of the regulation are plainly inapplicable. For example, there is no allegation that this case involves a financial interest of Chairman Ring or Member Emanuel or a member of their households. Also, neither Morgan Lewis nor Littler Mendelson is a party to the McDonald's case. SEIU's argument for recusal arises solely out of the type of legal work performed by these two firms in their representative capacities.

Excluding the inapplicable parts of the regulation and then separating the remainder of the regulation into its component parts, the result that the employee "should not participate" occurs only when *all three* of the following are true:

> (1) There is a particular matter involving specific parties;
>
> (2) A person with whom the employee has a "covered relationship" is a party to such matter or represents a party in such matter; and
>
> (3) The employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.

Applying the definitions applicable to this test, the circumstances described in part (2) do not exist. Accordingly, there is no basis for recusal under the regulation.

A "covered relationship," as applicable here, is defined in Section 2635.502(b)(1)(iv). A "covered relationship" is a "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." 5 C.F.R. § 2635.502(b)(1)(iv).

Thus, Chairman Ring has a "covered relationship" with Morgan Lewis. As of September 26, 2018, Member Emanuel does *not* have a "covered relationship" with Littler Mendelson or any other law firm. His "covered relationship" with Littler Mendelson expired one year after he was installed as a Member of the Board.

Section 2635.502(b)(3) states that the phrase "particular matter involving specific parties" has the same meaning set forth in Section 2637.102(a)(7). Section 2637.102(a)(7) defines "Particular Government matter involving specific parties" so the word "Government" needs to be modified appropriately, but the definition provided is as follows: "*Particular Government matter involving a specific party* means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or

other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest."

Thus, in the context of the McDonald's case and for purposes of determining whether Chairman Ring or Member Emanuel might need to be recused, the "particular matter involving specific parties" is the McDonald's unfair labor practice case presently before the ALJ. There is no other "proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter" that Chairman Ring or Member Emanuel are being asked to decide.

Returning to part (2) of the recusal test, this part of the test is met only if "[a] person with whom the employee has a 'covered relationship' is a party to such matter or represents a party in such matter."

"Covered relationship" means Morgan Lewis for Chairman Ring. As of September 26, 2018, Member Emanuel has no covered relationship.

"Such matter" means "a particular matter involving specific parties."

"A particular matter involving specific parties" means the McDonald's case currently pending before the ALJ.

Thus, part (2) of the recusal test can be satisfied with respect to Chairman Ring only if Morgan Lewis represents a party in the McDonald's case presently before the ALJ. Part (2) of the recusal test cannot be satisfied with respect to Member Emanuel because he no longer has any covered relationship.

It is undisputed that neither Morgan Lewis nor Littler Mendelson represents any party in the McDonald's case presently before the ALJ.

Therefore, part (2) of the recusal test is not met. The recusal test is a conjunctive three-part test. All three parts must be met for recusal to be appropriate. Because part (2) of the test is not satisfied, there is no basis under 5 C.F.R. § 2635.502 for the recusal of Chairman Ring or Member Emanuel.

3. The Standard for Recusal Under Executive Order 13770 Is Not Satisfied.

The standard for recusal in Executive Order 13770, a/k/a the Trump Ethics Pledge, is also not met. Executive Order 13770 mimics 5 C.F.R. § 2635.502 but imposes a two-year requirement instead of a one-year requirement.

The Executive Order states, in Section 1, paragraph 6, "I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." Exec. Order No. 13770, § 1(6) (2017).

The component parts of the Trump Ethics Pledge, therefore, are:

(1) For a period of 2 years from the date of my appointment

(2) I will not participate in "any particular matter involving specific parties"

(3) That is "directly and substantially related to my former employer or former clients," including regulations and contracts.

Section 2 of the Executive Order includes definitions. Section 2(d) states: "'Directly and substantially related to my former employer or former clients' shall mean matters in which the appointee's former employer or a former client is a party or represents a party."

Thus, the restricted conduct in the Trump Ethics Pledge mimics the restricted conduct in 5 C.F.R. § 2635.502. As applied to the McDonald's case, the Ethics Pledge means that Chairman Ring and Member Emanuel are not to participate in the McDonald's case that is pending before the ALJ if Morgan Lewis or Littler Mendelson, respectively, "represents a party."

As explained above, neither represents a party in this proceeding. Thus, the Trump Ethics Pledge does not provide a basis for recusal of either Member.

4. The Other Arguments for Recusal Offered by SEIU Misstate the Standard.

The SEIU argues that Chairman Ring and Member Emanuel should recuse themselves because their former law firms provided legal training to McDonald's or to franchisees in opposing the Fight for $15 campaign. The SEIU argues that such involvement might cause a reasonable person to question the impartiality of Chairman Ring or Member Emanuel.

Assuming for purposes of argument only that such circumstances (even without any evidence of personal involvement by Chairman Ring or Member Emanuel in their former law firm's efforts) might cause a reasonable person to question the impartiality of Chairman Ring or Member Emanuel, that conclusion alone does not support recusal.

The SEIU cites to 5 C.F.R. § 2635.502(a), but it cites to only a part of the test and ignores the other requirements. As meticulously outlined above, the recusal test is a conjunctive three-part test, not a disjunctive test. The test uses the word "and." All three parts must be met before recusal would be appropriate.

Thus, recusal is appropriate only if Littler Mendelson or Morgan Lewis represent a party in the McDonald's case currently pending before the ALJ ***and*** Chairman Ring or Member Emanuel "determine[] that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." The last part by itself does not support recusal.

The SEIU ignores the rest of the test. Based on the undisputed fact that neither Littler Mendelson nor Morgan Lewis represents a party in the McDonald's case currently pending before

the ALJ, there is no basis under either 5 C.F.R. § 2635.502(a) or Executive Order 13770 for recusal.[7]

## IV. CONCLUSION

The ALJ abused her discretion in disapproving the settlement that was negotiated by and between the General Counsel, McDonald's USA, and the Charged Franchisees. The Board should reverse the ALJ's decision and approve the settlement.

October 25, 2018

Respectfully submitted,

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[7] The argument for recusal offered in the letter submitted by Richard Painter (dated October 1, 2018) also ignores the applicable definitions. Painter argues that the phrase "directly and substantially related to my former employer or former clients" in the Trump Ethics Pledge is intended to be broad and must mean something other than matters in which the appointee's former employer or a former client is a party or represents a party. Painter's argument, however, however, is directly contradicted by the definitional language in the Trump Ethics Pledge. Section 2(d) of the Trump Ethics Pledge states: "'Directly and substantially related to my former employer or former clients' shall mean matters in which the appointee's former employer or a former client is a party or represents a party."

## CERTIFICATE OF SERVICE

The undersigned, an attorney, affirms under penalty of perjury that on October 25, 2018, he caused a true and correct copy of the foregoing Request to File Brief, and Brief of the Restaurant Law Center as *Amicus Curiae* to be electronically filed using the National Labor Relations Board's Internet website and to be served upon counsel for the Parties by e-mail at the following addresses designated for this purpose:

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