UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO

MCDONALD'S USA, LLC, A JOINT EMPLOYER, et al.	**Cases 02-CA-093893, et al.** **04-CA-125567, et al.** **13-CA-106490, et al.** **20-CA-132103, et al.** **25-CA-114819, et al.** **31-CA-127447, et al.**
and	
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.	

CHARGING PARTIES' CONSOLIDATED OPPOSITION TO THE GENERAL COUNSEL'S MOTIONS TO WITHDRAW COMPLAINT ALLEGATIONS PURSUANT TO SETTLEMENT AGREEMENTS

On January 15, 2020 the General Counsel filed thirty (30) identical motions requesting approval from the Administrative Law Judge ("ALJ") to withdraw each of the complaints in this consolidated case pursuant to informal settlement agreements executed between the General Counsel, Respondent McDonald's USA, LLC and the Franchisee Respondents in this proceeding.

Charging Parties hereby oppose each and every one of the General Counsel's motions to the ALJ[1] in light of our currently pending motion to the Board (filed January 7, 2020) (copy attached hereto as Exhibit 1) seeking reopening, reconsideration and stay of the Board's decision in *McDonald's USA, LLC*, 368 NLRB No. 134 (Dec. 12, 2019).

In addition to presenting compelling grounds for the Board to reopen the record, admit and consider newly discovered evidence, and reconsider and vacate its rulings in this case,

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[1] Charging Parties file this single, consolidated opposition rather than thirty separate oppositions pursuant to our understanding of the longstanding practice in this consolidated case of avoiding unnecessary duplication and repetitive filings.

Charging Parties have provided sound justification for the Board to stay its December 12, 2019 Order pending disposition of their January 7, 2020 motion.

Those same reasons warrant the ALJ's immediate denial, or at least a stay and deferral, of the General Counsel's current motions. Rather than risk having to reinstate the thirty (30) individual complaints at a later date, it would be manifestly appropriate to defer any consideration of their withdrawal at this time given the ongoing Board proceedings seeking reconsideration and reversal of the Board's December 12, 2019 Order.

Accordingly, Charging Parties respectfully submit that the ALJ should deny the General Counsel's January 15, 2020 motions to withdraw complaints, or in the alternative, should immediately stay settlement implementation and defer consideration of the General Counsel's withdrawal requests pending disposition of Charging Parties' motion to the Board for reopening and reconsideration.

Dated: January 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathy L. Krieger, affirm under penalty of perjury that on January 16, 2020 I caused a true and correct copy of the foregoing document to be filed electronically with the Division of Judges of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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EXHIBIT 1

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.** **13-CA-106490, et al.** **20-CA-132103, et al.** **25-CA-114819, et al.** **31-CA-127447, et al.**
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FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.	

CHARGING PARTIES' MOTION
TO REOPEN THE RECORD AND FOR RECONSIDERATION

In accordance with Section 102.48(c) of the NLRB's Rules and Regulations, 29 C.F.R. § 102.48(c), Charging Parties Fast Food Workers Committee and Service Employees International Union move the Board to reopen the record underlying its December 12, 2019 Decision and Order (hereafter "Decision")[1] to admit the document captioned "Board Member William Emanuel Supplemental Recusal List," attached hereto as Exhibit A.

As demonstrated below, the Supplemental Recusal List is newly discovered material evidence that became available only after the close of the last hearing in this matter. 29 C.F.R. § 102.48(c)(1). This internal Agency document bears directly on the proceedings before the Board, comprising Respondents' and General Counsels' special appeal requests and accompanying appeals together with Charging Parties' motion for recusal of NLRB Chairman Ring and Member Emanuel. Accordingly, the Board should summarily admit Exhibit A to the record. Alternatively, if the Supplemental Recusal List was in fact taken into consideration when

[1] *McDonald's USA, LLC,* 368 NLRB No. 134 (Dec. 12, 2019) (vacating Administrative Law Judge's July 17, 2018 decision rejecting proposed global settlement agreements in the consolidated Unfair Labor Practice proceedings against Respondents McDonald's and its franchisees (Appendix), and ordering remand with instructions to approve the McDonald's Settlements).

addressing the recusal motion and appeals in this case, then the Board should say so and issue an order confirming that the attached document is already part of the record, thereby eliminating uncertainty in any subsequent review proceeding under 29 U.S.C. § 160(f).

Charging Parties concurrently move for reconsideration under § 102.48(c) of the Rules because the disposition of this case, including Charging Parties' recusal motion, involved pervasive "material error[s]" that were fatal to the Board's Decision. 29 C.F.R. § 102.48(c)(1). Those material errors include, *inter* alia, failure to consider and comply with the Supplemental Recusal List.

In accordance with 29 C.F.R. §§ 102.24(a) and 102.48(c)(3), Charging Parties further ask the Board to order a stay of its Decision pending disposition of this motion.

ARGUMENT

A. The Board Should Reopen the Record and Admit the Supplemental Recusal List.

1. Section 102.48(c)(1) of the Board's Rules provides for reopening of the record to admit at least three kinds of evidence, listed in the disjunctive: "newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing." 29 C.F.R. § 102.48(c)(1). The attached Supplemental Recusal List satisfies both of the first two criteria: it is "newly discovered," and it became "available only since the close of the hearing."

In particular, the document attached as Exhibit A first came to light only a few months ago, when a commercial journal disclosed the (apparently leaked) Agency record in a July 2019 news article reporting as follows: "An internal "Supplemental Recusal List" dated Feb. 9, 2018, and obtained by Bloomberg Law *lists the McDonald's case as one of several that Emanuel*

should sit out because of ethics concerns."[2] That public disclosure came long after the final hearing in this matter, which closed on April 5, 2018,[3] and well after completion of all briefing in the ensuing appeal and recusal proceedings before the Board.

The Supplemental Recusal List did not become "available" through other avenues before July 2019, despite its earlier creation date.[4] Although the Supplemental Recusal List expressly flags "McDonald's (including franchisees)" as one of four cases requiring Member Emanuel's recusal, *see* Exhibit A, this document was neither served on the parties here nor posted on the docket.[5] And it did not appear among the notices, memos and other administrative materials contemporaneously published on the NLRB's website.

In short, the Supplemental Recusal List unquestionably qualifies for admission to the record as both "newly discovered evidence" and "evidence which has become available only since the close of the hearing" in this case. 29 C.F.R. § 102.48(c)(1).

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[2] Hassan A. Kanu, *NLRB's Emanuel Should Sit Out McDonald's Case, Leaked Records Say*, BNA Daily Labor Report (July 9, 2019) (emphasis added), available at https://news.bloomberglaw.com/daily-labor-report/nlrbs-emanuel-should-sit-out-mcdonalds-case-leaked-records-say (embedding link to the full "Supplemental Recusal List," posted online at https://src.bna.com/JKM).

[3] *See McDonald's USA*, 368 NLRB No. 134 (Appendix), slip op. at 26 (procedural history underlying ALJ's July 17, 2018 decision rejecting the McDonald's settlement agreements).

[4] *See* Exhibit A (caption showing "Date: Last updated on February 9, 2018").

[5] As discussed below, the fact that the Supplemental Recusal List was maintained internally, but not docketed or served in a given case, supports the assumption that this document was deemed inherently available and applicable within the Agency, as an official document of record, and was in fact taken into consideration by the Board when addressing the special appeal and recusal motions in this case involving "McDonald's (including franchisees)". That assumption would be manifestly reasonable here, given the notoriety and broad impact of this proceeding as the NLRB's lead case testing the alleged joint-employer status of McDonald's and its franchisees nationwide—as well as the expressed understanding that the Settlement Agreements at issue here would serve as the "template" for settling any and all other cases alleging a joint-employer relationship between McDonald's and a franchisee. *See McDonald's USA*, 368 NLRB No. 134 (Appendix), slip op. at 26. If that assumption is correct, Charging Parties seek express confirmation that the Supplemental Recusal List is already part of the record in this case. *Supra* at 1-2; *infra* at 6.

2. Charging Parties also satisfy Section 102.48(c)(1)'s instructions that a motion to reopen the record must "state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result." 29 C.F.R. § 102.48(c)(1).

First, our motion not only identifies but attaches the documentary evidence we ask the Board to include in the record. Second, the discussion above adequately explains why that document was not presented before the 2018 close of hearings or the 2018 completion of briefing to the Board in this case: the Supplemental Recusal List was unavailable and undiscovered before July 2019. *Supra* at 3-4. As for the third element, Charging Parties demonstrate in Part B, below, how inclusion of the Supplemental Recusal List in the record would require a different result upon reconsideration. *Infra* at 7-10.

3. Finally, this motion is timely, filed within 28 days of service of the Board's December 12, 2019 Decision as prescribed in 29 C.F.R. § 102.48(c)(2). The Board cannot plausibly reject or deny it on the ground that Charging Parties should have moved to reopen at an earlier date. As explained below, there was no reason to suspect, before issuance of the Board's Decision, that the Supplemental Recusal List would not be taken into consideration here as an official document of record, and would not be honored in the disposition of this case. *See* n.5, *supra*.

Notably, the Supplemental Recusal List contains only four items, making it almost impossible to overlook any one of them. The first recusal case or category listed is "McDonald's (including franchisees)[,]" and the present case fits that description precisely. Indeed, this closely watched joint-employer ULP case likely prompted that very recusal listing. As the largest and most prominent NLRB proceeding involving "McDonald's (including franchisees)" at the time

the Supplemental Recusal List issued, it potentially affected all participants in the McDonald's Franchise System—including the "*many . . . franchisees*" represented by the Littler law firm.[6]

Most significantly, all such franchisees —whether or not party to the present case—had a direct and continuing interest in the approval or rejection of the McDonald's Settlement Agreements at issue before the Board. As the ALJ explained, those Agreements were intended not just to resolve this one consolidated case, but to serve as the "template" for settling any and all other NLRB cases alleging a joint-employer relationship between McDonald's and a franchisee. *See* n.5, *supra; McDonald's USA*, 368 NLRB No. 134 (Appendix), slip op. at 26 ("McDonald's contends in its Briefs that General Counsel has represented that the proposed Settlement Agreements will serve as a 'template' for settlement of other cases involving an allegation that McDonald's constitutes a joint employer with one of its franchisees, which were never consolidated with the cases at issue here.").

Of further note is the Board's straightforward implementation of the Supplemental Recusal List even before its public disclosure, which reinforced the assumption that it would likewise be honored in this case. For example, the second item on the Supplemental Recusal List was a review proceeding involving Novelis Corporation in which "*Littler filed an amicus brief with the 2nd Circuit*". Exhibit A (emphasis in original). Consistent with that recusal flag, the Board's 2018 decision on remand specified that "Member Emanuel is recused and took no part in the consideration of this case." *Novelis Corp.*, 367 NLRB No. 47, slip op. at 1 n.2 (December 7, 2018). Months later, when the Supplemental Recusal List surfaced publicly, its import and

[6] *See* Exhibit A (noting that "*Littler represents many of the franchisees*") (emphasis in original). That explicit reference in the Supplemental Recusal List is especially pertinent here given that Littler's documented retention by McDonald's to provide on-call legal guidance to its franchisees nationwide—entailing establishment of an attorney-client privileged relationship upon each such consultation—was a major predicate for the Charging Parties' recusal motion in this case. *See infra* at 8-9 and n.10.

expected application to the hallmark *McDonald's* proceeding seemed clear based on the ready compliance evidenced in *Novelis*.

In summary, the objective circumstances here foreclosed any earlier suggestion that the Board would or could ignore the Supplemental Recusal List when deciding this major case. Only when the Decision issued—with a recusal ruling that flatly defied the Supplemental Recusal List and, indeed, failed even to acknowledge its existence—did the Board give reason for concern that this clearly relevant Agency document may have been excluded from consideration.

Accordingly, the Board should reopen the record and summarily admit the Supplemental Recusal List attached as Exhibit A, or, if that document is already part of the record in this case, should issue an order so stating.

B. The Board Should Grant Reconsideration, Comply with the Supplemental Recusal List, Vacate its Decision and Issue a Final Order Granting Charging Parties' Recusal Motion in Full and Denying the Appeals in this Matter.

Section 102.48(c)(1) of the Board's Rules, provides that "a motion for reconsideration must state with particularity the material error claimed . . . ." 29 C.F.R. § 102.48(c)(1). Charging Parties contend that extraordinary circumstances and multiple material errors, including the following, require the Board to reconsider and vacate its December 12, 2019 Decision.

1. First, the Board erred materially by failing to consider and comply with the attached Supplemental Recusal List in its disposition of Charging Parties' motion for recusal and Respondents' and General Counsel's appeals. *McDonald's USA*, 368 NLRB No. 134, slip op. at 1 and n.2. As shown above, Exhibit A on its face calls for Member Emanuel's recusal from cases involving "McDonald's (including franchisees)[,]" and the present case falls squarely within that recusal category. *Supra* at 4-5. Yet the Board's December 12, 2019 Decision fails even to acknowledge the existence of the Supplemental Recusal List, much less to address and honor its requirements here. Those omissions compel the Board to vacate its Decision. As controlling

authority makes clear, the absence of "reasoned decisionmaking" establishing the Board's consideration of all relevant factors—and confirming *compliance with the Agency's own self-imposed requirements*, as well as external law—renders its ruling inherently arbitrary, capricious and untenable.[7]

2. The required outcome upon reconsideration of the December 12, 2019 ruling is Member Emanuel's recusal from this case. That result is compelled by the Supplemental Recusal List, together with all the grounds previously presented by Charging Parties in their August 2018 recusal motion filings (incorporated here by reference).[8]

As previously explained, Board Members are bound by the Standards of Ethical Conduct for Employees of the Executive Branch, set forth in Title 5 of the Code of Federal Regulations, as well as by Executive Order 13770, which prohibits them, for a period of two years from their date of appointment, from "participat[ing] in any particular matter involving specific parties that

[7] *See, e.g., Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (2018) ("The Board's analysis . . . must be grounded in the complete record and must grapple with evidence that 'fairly detracts from the weight of the evidence supporting [its] conclusion.'") (quoting *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999)); *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017) ("[R]easoned decisionmaking" requires showing that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made"; NLRB decisions are arbitrary and capricious when they "evidence[] a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence") (citing and quoting *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *ABM Onsite Servs.-West, Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (Board's failure to explain its reasoning violates "the cardinal rule" that "an agency may not act in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") (citations and quotations omitted); *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (It is "axiomatic" that "an agency is bound by its own regulations" and "is not free to ignore or violate [them] while they remain in effect.") (citations omitted).

[8] *See* Charging Parties' Motion for Recusal of Chairman Ring and Member Emanuel (Aug. 14, 2018); Charging Parties' Reply to McDonald's Opposition to Motion for Recusal of Chairman Ring and Member Emanuel (Aug. 28, 2018).

is directly and substantially related to [their] former employer."[9] These ethics rules require NLRB appointees to "avoid any actions *creating the appearance* that they are violating the law or the ethical standards set forth in [Title 5 Part 2635 of the Code]." 5 C.F.R. § 2635.101(b)(14) (emphasis added). Thus, among other restrictions, they must refrain from participation in any matter 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[.]" 5 C.F.R. § 2635.502(a).

Because Member Emanuel was a Littler Mendelson shareholder before assuming his position on September 26, 2017, relevant ethics standards and rules barred him from participating in any pending NLRB matter involving a Littler client. This particular case was already well underway and well known when Member Emanuel's term began, and it indisputably involved important Littler clients, i.e., McDonald's and its franchisees.

In particular, the trial record in this case specifically identified Littler Mendelson as the law firm retained by McDonald's itself—*while Emanuel was still a Littler Mendelson partner*—to represent any and all McDonald's franchisees, on demand, in connection with the conduct at

[9] *See* Ex. Order 13770, 82 Fed. Reg. 9333 (Jan. 28, 2017). A matter is "[d]irectly and substantially related" if "the appointee's former employer or a former client is a party or represents a party." *Id.* "Former employer" includes any person "for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner[.]" *Id.* The Code's parallel restrictions entail a one-year look-back period. *See* 5 C.F.R. § 2635.502(a) (appointee's obligations where "a person with whom he has a covered relationship is or represents a party to such matter"), and § 2635.502(b)(iv) (defining "covered person" to include "any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee"). In addition, although 29 U.S.C. § 455 does not by its terms cover NLRB Members, that judicial recusal standard has served as a relevant source of guidance in Board proceedings. *See, e.g., Pomona Valley Hospital Medical Center*, 355 NLRB 234, 239 (2010); *Detroit Newspapers*, 326 NLRB 700, 710-13 (1998).

issue in the ULP litigation.[10] That evidence of Littler's national retention and representation was introduced to prove substantive elements of joint-employer liability here—including McDonald's controlling role in "formulating" and "coordinating" the implementation of a "coherent [labor relations] strategy," as well as McDonald's and the Franchisee Respondents' "perceive[d] . . . mutual interest in warding off union representation" at the franchise locations. *McDonald's USA*, 368 NLRB No. 134 (Appendix), slip op. at 37. Moreover, as the NLRB's leading joint employer case, encompassing McDonald's operations nationwide, this proceeding was closely followed and widely publicized for its potential impact on every participant in the McDonald's franchise system. At the very least, those circumstances would give any rational observer ample reason to question Member Emanuel's impartiality. Accordingly, this case clearly belonged on Member Emanuel's recusal list from the very outset.

As it turns out, this very case was in fact listed for recusal not long after Member Emanuel's installation. The February 9, 2018 "Board Member William Emanuel Supplemental Recusal List" correctly flagged all matters involving "McDonald's (including franchisees)" for recusal, emphasizing that "*Littler represents many of the franchisees*[.]" Exhibit A (emphasis in original). Notably, that internal recusal list bears the same date as the extraordinary February 2018 report by the NLRB Inspector General, highlighting serious ethical problems in connection

[10] *See* Charging Parties' Reply at 6-7 and Reply Exhibit A (documenting Littler Mendelson's retention by McDonald's and establishment of national hotline providing on-call legal counseling by Littler to McDonald's franchisees nationwide, including Franchisee Respondents in this case, in response to the Charging Parties' national "Fight for $15" campaign). By way of example, a September 2014 bulletin from McDonald's to one of the Franchisee-Respondents in this case explained as follows: "McDonald's has arranged for the employment law firm of Littler Mendelson to answer questions specifically about solicitation issues. The Littler Hotline provides quick access to an experienced labor attorney who can answer questions regarding solicitation and can help you understand the legal rights and limits which apply to your situation, without charge for the telephonic advice. To utilize the Littler Hotline, please call **855-MCD-LAWS (855 623-5297)** and identify yourself as an owner/operator." *Id.*

with the Board's (including Member Emanuel's) controversial joint employer ruling and case handling in *Hy-Brand*.[11] Though the Supplemental Recusal List flagging McDonald's matters remained secret until recently, once it became publicly known there was no discernible justification for Member Emanuel and the Board to defy this Agency document and its categorical disqualification. *Supra* at 4-6 and n.6.

In short, disclosure of the attached Supplemental Recusal List has reinforced Charging Parties' original motion and highlighted the Board's error in denying it. Given the system-wide implications of this joint employer case and the direct interest of all McDonald's franchisees in the principal issue before the Board, i.e., the viability of the "template" McDonald's Settlement Agreements, recusal is essential here to forestall actual violations as well as the appearance of impropriety. *Supra* at 5, 3 n.5. Failure to grant reconsideration and comply with the Supplemental Recusal List now would unavoidably taint the Board's disposition of this case and undermine public confidence in the integrity and impartiality of Agency processes.

3. The December 12, 2019 Decision further erred by denying recusal on the specific ground that "Member Emanuel no longer has a covered relationship" with Littler Mendelson at this time. *McDonald's USA*, 368 NLRB No. 134, slip op. at 1 n.2. Charging Parties filed their motion for recusal on August 14, 2018, when Member Emanuel had not yet completed even the first year of his term. At the very least, therefore, his "covered relationship" existing as of that

[11] *See* IG's report to the Board entitled "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter" (Feb. 9, 2018), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-5976/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf; *Hy-Brand Indust. Contractors*, 365 NLRB No. 156 (Dec, 14, 2017) (*Hy-Brand I*) (overruling *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015)), vacated 366 NLRB No. 26 (Feb. 26, 2018) (*Hy-Brand II*), reconsideration denied, 366 NLRB No. 93 (June 6, 2018) (*Hy-Brand III*).

August 2018 filing date must govern in deciding Charging Parties' original recusal motion and our current motion for reconsideration. To rule otherwise would enable Board Members to avoid their ethics obligations simply by holding such motions while time passes.

More generally, we submit that the Littler-based disqualification Member Emanuel faced in a case pending at the outset of his term should remain in force no matter how long it takes to resolve such a case. A contrary interpretation, under which an NLRB appointee "ages out" of original disqualification in every aging case, would allow the Agency to nullify controlling ethics standards and rules routinely, just by letting the clock run out. While innumerable factors can affect the trajectory of a given case at the NLRB—including complexity, delay, heavy caseloads and competing priorities—mere passage of time cannot remove an ethical conflict like that presented here. As demonstrated above, a reasonable person with knowledge of the circumstances triggering recusal would have an equally strong basis to question Member Emanuel's impartiality throughout the pendency of this McDonald's litigation, whether on the day he was sworn in or the days and weeks after his second anniversary as a Board Member.

4. Failure to address and grant Charging Parties' well-founded recusal motion with respect to Chairman Ring was also material error. *McDonald's USA*, 368 NLRB No. 134, slip op. at 1 n.2 (denying motion as moot). As Charging Parties demonstrated in their prior submissions (*supra* n.8), Chairman Ring was and remains disqualified on the same basis as Member Emanuel because this case involves clients of his former law firm, Morgan Lewis. In particular, McDonald's indisputably retained Morgan Lewis to create and implement a national training program for McDonald's franchisees in response to the Charging Parties' "Fight for $15" organizing activities. And, just as with the Littler firm, McDonald's retention of Morgan Lewis to help formulate and implement its system-wide labor relations strategy bears directly on

McDonald's alleged joint employer status with its franchisees. *See supra* at 9. As of the date when Chairman Ring joined the Board, the trial record in this case established, without contradiction, that Morgan Lewis had conducted over 230 such trainings for McDonald's franchisees throughout the country, and that all participants—including Respondents party to this case—were required to sign a joint defense/common legal interest agreement with Morgan Lewis prior to receiving training.[12]

Notably, the Board's issuance of an unexplained "correction" on December 16, 2019, changing its originally published decisional rationale with respect to Chairman Ring, raises further, unanswered questions regarding disposition of that recusal issue. The original December 12, 2019 Decision denied Charging Parties' motion for recusal of Chairman Ring as "moot" with the explanation that "Chairman Ring *is not a member of the panel and neither he nor any members of his staff participated* in the consideration of this case." *McDonald's USA*, 368 NLRB No. 134, slip op. at 1 n.2 (second paragraph) (emphasis added). The Board's subsequent "Correction" summarily replaced paragraph 2 of footnote 2 to provide a revised "mootness" rationale: "*Chairman Ring took no part* in the consideration of this case." *McDonald's USA*, 368 NLRB No. 134, Correction (Dec. 16, 2019) (emphasis added).

Upon reconsideration, Charging Parties' motion for recusal of Chairman Ring should be addressed on the merits and granted for all the reasons presented in their prior submissions. As discussed above, the passage of time since August 2018 must not be allowed to defeat any grounds for recusal that applied when our original motion was filed.

[12] *See, e.g.*, Charging Parties' Motion to Recuse at 2-4, 6-7; Charging Parties' Reply at 1-2 and Reply Exhibit A.

5. Material errors here would also include any use of the Board's November 19, 2019 Ethics Recusal Report[13] to deny Charging Parties' recusal motion, which had been pending for over a year when the Report issued. Before that date, a Board Member was presumably disqualified automatically from a given case that appeared on a recusal list issued by the NLRB Executive Secretary or the Agency's Ethics Officer.[14] The new Ethics Recusal Report indicates the Board seeks to change recusal practice by, among other things, placing responsibility with individual Board Members in "appearance of conflict" cases, and deeming the Ethics Officer's decisions no longer self-enforcing. Nonetheless, after deferring a ruling on Charging Parties' August 2018 recusal motion until after issuance of the Report, neither the Board nor a challenged Board Member may invoke that Report now to bless participation in this case despite its prior inclusion on a recusal list. Instead, the Charging Parties' motion should be decided based on the recusal standards and automatic disqualification in force at the time they filed their original recusal motion.

6. Finally, Charging Parties contend that the Board erred materially in granting special permission to appeal, granting the Respondents' and General Counsel's appeals, and setting aside the Administrative Law Judge's thorough, well-reasoned July 17, 2018 Order Denying Motions to Approve the Settlement Agreements ("July 17 Order"). Although the Board was required to sustain the July 17 Order absent abuse of discretion by the ALJ, the Board erroneously reviewed the McDonald's Settlement Agreements on a *de novo* basis, rejecting

[13] National Labor Relations Board's Ethics Recusal Report (Nov. 19, 2019), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7831/nlrb-ethics-recusal-report-november-19-2019.pdf.

[14] *See Hy-Brand Indust. Contractors*, 366 NLRB No. 26 (Feb. 26, 2018) (*Hy-Brand II*) (vacating Dec. 14, 2017 decision reported at 365 NLRB No. 156 (*Hy-Brand I*)), reconsideration denied, 366 NLRB No. 93 (June 6, 2018) (*Hy-Brand III*). *See also* Ethics Recusal Report, Appendices 1 and 2.

Judge Esposito's rationale out of hand. Upon reconsideration, the Board must vacate its Decision and deny the appeals because, as Charging Parties argued in their August 2018 Opposition, the ALJ did not abuse her discretion in denying approval of the proposed McDonald's Settlements.[15] Further, there can be no participation by either Chairman Ring or Member Emanuel, as explained above.

Application of the proper standard of review manifestly requires a different outcome here. The ALJ systematically analyzed and rejected the McDonald's Settlements because they do not meet the criteria for approval under the Board's admittedly controlling precedent, *Independent Stave Co.*, 287 NLRB 740 (1987). Judge Esposito fully explained her reasoning and justified her conclusions in the July 17 Order, cataloguing and addressing in detail the Settlement Agreements' multiple deficiencies in both substance and form. Those inadequacies were also argued at length in Charging Parties' briefing to the ALJ and to the Board on appeal, and were discussed most recently in Member McFerran's dissent to the panel's December 12 Decision. It is unnecessary to repeat here those compelling grounds for rejecting the McDonald's Settlement Agreements under extant Board law. Rather, for purposes of reconsideration the Board is bound by and must apply the correct legal standard in reviewing and sustaining the ALJ's July 17 Order.

[15] Charging Parties' prior briefing to the Board in defense of the ALJ's July 17 Order expressly highlighted the correct standard of review on appeal, abuse of discretion. *See* Charging Parties' Opposition to Respondent McDonald's USA, LLC's and the General Counsel's Requests for Special Permission to Appeal at 1, 21 and 38 (Aug. 20, 2018). *See also* General Counsel's Special Appeal at 5, 6, 31 (Aug. 14, 2018) (emphasizing that the standard of review of the ALJ's ruling is abuse of discretion).

C. The Board Should Stay its December 12 Decision Pending Disposition of this Motion for Reopening and Reconsideration.

Recognizing that a motion to reopen and reconsider does not automatically stay the Board's December 12, 2019 Decision, Charging Parties hereby ask the Board to issue an order staying its Decision during the pendency of this motion.[16]

This requested stay would merely continue longstanding conditions on the ground, without prejudice to any party. Among other things, the McDonald's ULP trial was placed on hold more than two years ago; the status of the contested global settlement proposal remained in limbo for nearly a year and a half following review and rejection by the ALJ; and throughout the pendency of the Respondents' and General Counsel's special appeal requests there were no complaints of urgency or other circumstances requiring expedited handling by the Board. Charging Parties have not been informed of any new developments, since December 12, requiring immediate implementation of the Board's Decision.

By contrast, because Charging Parties' motion for reopening and reconsideration presents the prospect of a different outcome in this case, it would be inefficient and wasteful of Board resources to mobilize all relevant Regional Offices and all named Franchisee Respondents for immediate implementation of the contested Settlement Agreements, before the Board has ruled on this motion. As the ALJ's July 17 Order makes clear, and as the record before the Board plainly confirms, the proposed McDonald's Settlement Agreements are a complex and novel undertaking at the very least, aside from disputes over their legal propriety. It makes most sense to stay the Decision temporarily rather than risk having to undo settlement implementation measures down the road.

[16] Charging Parties do not object to Chairman Ring's and/or Member Emanuel's participation in ordering a stay.

CONCLUSION

For all the foregoing reasons, the Charging Parties' motion should be granted in full and the Board's December 12, 2019 Decision should be vacated in its entirety. In particular, the record should be reopened and the attached Supplemental Recusal List (Exhibit A) should be admitted summarily (or an order should issue expressly confirming that this document is already part of the record in this case); Member Emanuel and Chairman Ring should be recused from all participation in this case; and the Respondents' and General Counsel's special appeals of the ALJ's July 17, 2017 Order should be denied.

January 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathy L. Krieger, affirm under penalty of perjury that on January 7, 2020 I caused a true and correct copy of the foregoing document to be filed electronically with the Executive Secretary of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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EXHIBIT A

Board Member William Emanuel Supplemental Recusal List

Source: Prepared by the ES Office based on on-going feedback received regarding recusal cases

Date: Last updated on February 9, 2018

McDonald's (including franchisees) – *Littler represents many of the franchisees*

Novelis Corporation v. NLRB, 2nd Circuit, Nos. 16-3076 et al., Board Case Nos. 03-CA-121293 et al., 364 NLRB No. 101 (2016) – *Littler filed an amicus brief with the 2nd Circuit*

Hy-Brand Industrial Contractors, LTD

Whole Foods Market, Inc. – *Littler represents its parent corporation, Amazon*