UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

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

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

McDONALD'S USA, LLC'S SPECIAL APPEAL FROM THE ADMINISTRATIVE LAW JUDGE'S JULY 17, 2018 ORDER DENYING MOTIONS TO APPROVE SETTLEMENT AGREEMENTS

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INTRODUCTION

McDonald's USA, LLC's[1] Special Appeal presents the only question that should have guided the Administrative Law Judge below: whether the settlement in this case satisfies *Independent Stave*. The controlling *Independent Stave* standards allow parties to "accept a compromise rather than risk receiving nothing or being required to provide a greater remedy." *Independent Stave Co.*, 287 NLRB 740, 742 (1987); *see also id.* at 741 (recognizing the Board's "longstanding policy of encouraging the peaceful, nonlitigous resolution of disputes") (internal cites and quotes omitted). Applying them, the Board approves all reasonable settlements, considering factors such as the risk of litigation and expected length of remaining proceedings. *See id.* at 742 (rejecting the presumption that "the General Counsel would prevail on *every* violation alleged in the complaint coupled with [the] requirement that the settlement agreement must remedy *every* violation alleged").

This case is more than ripe for settlement. There simply is no case like this one, substantively or procedurally, which exponentially increases the risks of litigation and the expected length of the remaining proceedings. On the merits, this case involves an unprecedented claim that McDonald's USA is liable as a joint employer and an unprecedented attempt to change the law on joint employment, thereby guaranteeing appellate review. In the

[1] Hereinafter, "McDonald's USA" or "the Company."

60-plus years that McDonald's USA has franchised restaurants, neither the Board[2] nor the Courts[3] have found the Company to be a joint employer under *any* standard.[4]

Procedurally, this case involves the largest consolidation of substantive unfair labor practice claims in the 80-plus year history of the Act. It has been vigorously contested, and the Board has recognized that it "could last for decades" should it "proceed all the way to finality." *UPMC*, 365 NLRB No. 153 at *5 n.7 (2017). The outcome of this case remains highly uncertain. The Charged Franchisees have strongly denied the substantive claims against them. Even to the extent the Board were to find liability, a Court of Appeals could well deny enforcement based upon administrative delay alone. *See, e.g.*, *Emhard Indus. v. NLRB*, 907 F.2d 372, 379 (2nd Cir. 1990) (refusing to enforce due to the lengthy "passage of time between the company's action and the board's remedy"). Further, the Administrative Law Judge made multiple, egregious errors in trial rulings throughout the matter. This tendency would likely continue unabated absent settlement, casting even more doubt as to the advisability of continuing this matter. *See, e.g.*, *McDonald's USA, LLC*, 362 NLRB No. 168, at *1 (2015) (Miscimarra,

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[2] *Compare Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part,* 640 F.2d 1094 (9th Cir. 1981); *cf. also Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 158 (2012) (applying no deference where an agency's "announcement of its interpretation [was] preceded by a very lengthy period of conspicuous inaction"); *Dong Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (7th Cir. 2007) (noting that while it may be "possible for an entire industry to be in violation of [a statute] for a long time without the [enforcing agency] noticing," the "more plausible hypothesis" is that the statute does not prohibit the practice at issue).

[3] *See, e.g*., *Ochoa v. McDonald's USA, LLC,* 133 F. Supp. 3d 1228, 1241 (N.D. Cal. 2015); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1089-90 (10th Cir. 1991); *Cropp v. Golden Arch Realty Corp.*, No. 2:08-cv-96, at 18 (D.S.C. March 30, 2009); *Mosley v. McDonald's Corp.*, No. 05-CV-7290 (N.D. Ill. Dec. 06, 2006); *Alberter v. McDonald's Corp*., 70 F. Supp. 2d 1138, 1144 (D. Nev. 1999); *Dotson v. McDonald's Corp.*, 1998 U.S. Dist. LEXIS 4676, at *8-9 (N.D. Ill. Mar. 31, 1998); *Kennedy v. McDonald's Corp*., 610 F. Supp. 203, 205 (S.D.W.Va. 1985); *Whitfield v. McDonald's,* No. 08-118582-NO (Mich. Cir. Ct. July 28, 2010); *Hall v. McDonald's Corp*., No. 84-270803 (Mich. Cir. Ct. June 22, 1986).

[4] Presently, the Board is "considering rulemaking to address the standard for determining joint-employer status under the National Labor Relations Act." *See* https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard (last visited August 13, 2018). As such, even if the General Counsel were someday to obtain a joint employment finding against McDonald's USA under existing standards – which itself is highly uncertain – there is a substantial risk that the finding would have minimal precedential value underscoring the reasonableness of resolving this matter now.

dissenting) (warning that this case could be reversed based on procedural issues alone, wasting "years of litigation" in this "large consolidated case").

Against this backdrop, the settlement presented here is more than reasonable. It provides immediate, certain, and complete relief on all substantive allegations in the underlying complaints. This relief mirrors what the General Counsel would hope to obtain if he ultimately prevailed on all his substantive allegations – robust notice postings and full monetary remedies for all alleged discriminatees. The settlement does not ask McDonald's USA to admit joint employer status or otherwise act as if it were a joint employer. (If that were the General Counsel's demand, there would have been no settlement.) As a compromise, though, it requires the Company to take meaningful action to help ensure that the Charged Franchisees – the entities accused of violating the Act – meet their obligations. This settlement fully satisfies *Independent Stave*, and the Board should approve it.

The Administrative Law Judge believes otherwise, but her findings were flawed in multiple respects. For example, as the Courts of Appeals have repeatedly recognized, it is clear reversible error for an agency decisionmaker to purport to claim adherence to controlling precedent while actually applying different standards to achieve a desired result.[5] That is exactly what happened below. The Judge invoked *Independent Stave*, conceding that the settlement satisfies two prongs of its test. Nevertheless, the Judge failed to assess whether the parties' compromise is reasonable under *Independent Stave* under the circumstances presented. Instead,

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[5] *See, e.g.*, *MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 821 (8th Cir. 2017) (noting that the underlying decision "purport[ed] to apply" controlling precedent but "migrated to a severely constrained interpretation of that decision"); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 795 (2d Cir. 2016) (remanding where regional director "merely recit[ed]" applicable standards without performing the required analysis); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 871 (9th Cir. 2011) (rejecting "attempt to veil . . . argument in procedural formalities"); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997) (finding assertion that the agency applied controlling precedent "disingenuous"); *In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982) (concluding that while the decisionmakers "purport[ed] to follow the rule," they "replace[d]" it with one of their own making), *aff'd sub nom. NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

the Judge gave controlling weight to whether the settlement "approximate[s] the remedial effect of a finding of joint employer status." Order at 20.[6] That is completely contrary to prevailing law. In *Independent Stave* itself, the Board rejected the Judge's brand of full-remedy analysis. *See* 287 NLRB at 742-43 ("By operating on a rigid requirement that the settlement must mirror a full remedy, we would be ignoring the realities of litigation."). And while in recent years the Agency briefly applied a full-remedy test,[7] the Board has since expressly rejected that counterproductive form of analysis. *See UMPC*, 365 NLRB No. 153 at *4 (2017) (reinstating *Independent Stave*, calling full-remedy "an ill-advised standard less likely to effectuate the purposes of the Act than the Board's longstanding approach."). Perhaps the Administrative Law Judge preferred the inapposite full-remedy standard. But, the Judge's assessment of the settlement under an incorrect standard – albeit under the guise of applying *Independent Stave* – warrants reversal standing alone.

The Judge made a similar mistake in insisting that settlements in joint employment cases must include a specific term: a performance guarantee by the alleged joint employer. *See* Order at 23 (citing *UPMC*, 365 NLRB No. 153 at *8, noting that "there is no guarantee by McDonald's of the Franchisee Respondent[s'] performance whatsoever"). *UPMC* and *Independent Stave* do not establish bright line *rules* for the content of settlement agreements. Instead, they prescribe multi-factor *standards* by which the Board assesses the reasonableness of the parties' compromise. This direction from the Board was deliberate, and it was plain error for the Judge to contend otherwise. *See Independent Stave*, 287 NLRB at 743 ("It is, of course, impossible to anticipate each and every factor which will have relevance to our review of non-Board settlement

[6] The Judge's July 17, 2018 Order Denying Motions to Approve Settlement Agreements (hereinafter, "Order") is attached as Exhibit ("Ex.") 1.

[7] *See U.S. Postal Serv.*, 364 NLRB No. 116 (2016), *overruled by UMPC*, 365 NLRB No. 153 at *4 (2017).

agreements."); *cf*. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 139-41 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) ("Many legal arrangements cannot feasibly be cast in the form of a rule, however inchoate. And often another form is deliberately chosen.").

The Judge's misreading of *UPMC* as requiring a guarantee is particularly incongruous on the facts presented. The settlement that the Court rejected here is objectively better than the one the Board approved in *UPMC*, which provided no substantive relief whatsoever. Further, the Judge's misreading embodies the very leap in logic that the Board criticized in *UPMC*. There, the Board not only reaffirmed *Independent Stave*, it rejected the notion that the Agency had ever applied a full-remedy standard before 2016. In *UPMC*, the Board specifically rejected the assertion that *Local 201, Elec. Workers (General Electric)*, 188 NLRB 855 (1971) set out a full-remedy test. The *UPMC* Board noted that *General Electric* had merely affirmed as reasonable a settlement that provided a full remedy – it never stated that the Agency "would *only* approve . . . settlement agreements that provide a full remedy." *UMPC,* 365 NLRB No. 153 at *6 (noting that "a high jumper [who] clears the bar by a foot would also clear it if he had jumped 6 inches lower"). Just as *General Electric* never held that all future settlements must provide full relief, *UPMC* – in reinstating the *Independent Stave* reasonableness standard – did not hold that a guarantee now is required in any future class of settlements. The Judge read *UPMC* as setting the bar for joint employer settlements at the level of a guarantee. There is no such thing. And the reasoning the Court relied upon in this regard was specifically rejected in *UPMC* in favor of a return to the *Independent Stave* factors.

These were by no means the Administrative Law Judge's only errors, and arguably not even her worst. The Judge's assertion, Order at 37, that the parties were "literally days before

the close of the monumental record in this case" has no basis in reality. As this Board previously noted, absent settlement, this case "could last for decades." *UPMC*, 365 NLRB No. 153 at *5 n.7. The same is true of the Judge's contrived "significant doubt" as to whether the signatories "actually reached agreement." Order at 2. Likewise, the Judge's insistence, *id.* at 39, that the General Counsel spend additional years chasing what she perceives as the "case's ultimate purpose" – at the expense of the alleged discriminatees, all substantive remedies, the parties, and taxpayer dollars ("not a compelling counterweight") – reflects a fatal failure to accept the differences between her role and the role of the General Counsel. All this, along with the Judge's digressions into entirely irrelevant matters (including her lengthy, highly one-sided recitation of the supposed procedural history of the case and her evident disappointment that the former General Counsel never charged McDonald's USA with violating the Act), raise serious questions as to the Judge's impartiality. *See Independent Stave*, 287 NLRB at 741 ("settlements constitute the 'life blood' of the administrative process"); 29 U.S.C. § 153(d) (providing that the General Counsel has "final authority . . . in respect of the prosecution of . . . complaints before the Board").

The issue presented, however, is not so much the magnitude of the Administrative Law Judge's errors, but whether the settlement satisfies *Independent Stave*. Indeed, if this settlement, which provides full make-whole relief and otherwise provides remedies over and above that which the General Counsel could achieve in litigation is unreasonable, then no party – employer, labor organization, individual – could ever be confident that any settlement with the General Counsel would be acceptable to an administrative law judge. The settlement is reasonable, the Board should approve it, and this litigation should finally end.

BACKGROUND

A. The Charges And Complaints

In fall 2012, Charging Parties launched a nationwide "Fight for $15" campaign. The campaign included protests in support of demands that federal, state, and local governments increase the statutory minimum wage, as well as demands that employers in the quick service restaurant industry increase wages to at least $15 per hour regardless of statutory minimums. The campaign also involved direct attacks on the McDonald's brand, including the publication of dubious studies created by SEIU-funded consultants and various other tactics designed to harm the brand's pubic image and good will.

In December 2012, the SEIU and its affiliates began filing charges against certain McDonald's franchisees, generally alleging minor violations of the Act. Many of the charges included allegations that McDonald's USA is vicariously liable as a joint employer. In late 2014, the former General Counsel issued a number of complaints. He never alleged that the Company violated the Act, only that it was liable as a joint employer. *See* General Counsel's Motion for an Order Requiring Immediate Production of Certain Documents (hereinafter, "General Counsel 4/26/16 Motion"), at 20 ("McDonald's, by contrast, is not accused of having committed any unfair labor practices: Its liability here would be vicarious, as opposed to the direct liability the franchisees face."), attached as Ex. 2.

At the time of the Complaints, application of NLRA joint employment law in the franchisor/franchisee context had been settled for decades. *See, e.g.*, *Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981). Nevertheless, the former General Counsel brought the case as a vehicle to change joint employment law. *See* Tr.

21254:12-16 (noting the objective "to update Joint Employer law within the Board context").[8] There has never been a contention in this case, nor could there be, that a joint employment finding would add to the potential substantive relief. To the contrary, the Charging Parties never sought a bargaining order against McDonald's USA. *See* Tr. 21253:21-21254:1 (noting that the Agency "has never sought an order in this case requiring that McDonald's and the Franchisee Respondents have an obligation to bargain with the Charging Party Union"); Tr. 21300:25-21301:10 (similar concession from Charging Parties).

B. The Extended Litigation

With the joint employment allegations serving as the roadblock to settlement, formal proceedings began. The Administrative Law Judge asserts that those proceedings were marked by a "history of antagonism" and "ceaseless objections and procedural objections and florid motion practice." Order at 2 (arguing that the case's procedural history is a reason to deny settlement). Unsurprisingly, the matter was hard fought, like any major litigation. Unfortunately, the Judge's case management decisions were rife with error as often as not. *See, e.g.*, *McDonald's USA, LLC*, Case No. 02-CA-093893, NLRB Order at *2 (Order Jan. 16, 2018)[9] (holding unanimously that "the judge abused her discretion in requiring an unwarranted discovery procedure"). The Judge's continued missteps[10] thus needlessly served to extend the matter, exacerbate points of contention, and increase the risk of appellate reversal of any decision she may ultimately render.

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[8] All excerpts from the trial transcript are attached as Ex. 3.

[9] Available at https://www.nlrb.gov/cases-decisions/unpublished-board-decisions.

[10] McDonald's USA has no intention of detailing each of the Administrative Law Judge's material missteps during the proceedings. The Company reserves the right to raise exceptions regarding those errors in further proceedings as necessary if the Board withholds settlement approval.

That said, the parties reached any number of mutually-agreed stipulations[11] throughout this matter, many in hopes of limiting the damage resulting from the Judge's errors. For example, over McDonald's USA's objection, the Judge consolidated 71 unfair labor practice charges, alleging 176 separate violations of the Act against 30 different independent franchisees located across the country and McDonald's USA as a putative joint employer. *See* ALJ's Order Denying Respondents' Motions to Sever (Feb. 19, 2015), attached as Ex. 10. This was perhaps the largest consolidation in NLRB history. To attempt to manage it, the Judge then instituted an unprecedented Case Management Plan under which proceedings would begin in New York, travel to Chicago, move to Los Angeles, and then return to New York. *See* ALJ's Case Management Order, at 8 (Mar. 3, 2015), attached as Ex. 11. Parties located outside the Region where the Judge was live at the time would participate by videoconference, making arguments and objections, questioning witnesses, and interacting with the Judge and other parties remotely. *Id.* at 10. Remote parties would present exhibits over the internet. *Id.*

McDonald's USA objected that the consolidation and attendant trial procedures would never work – and the Judge continues to criticize the Company for those objections, *see* Order at 4-7, despite the inconvertible evidence demonstrating that its concerns were wholly justified. *See, e.g.*, McDonald's USA, LLC's Motion to Sever (Jan. 15, 2015) ("[T]he logistical challenges

[11] *See, e.g.,* ALJ Order Approving Stipulation Between McDonald's USA, LLC, Respondent Franchisees, the Charging Parties, and General Counsel of the National Labor Relations Board as to Modification of the Case Management Order (Mar. 14, 2016), attached as Ex. 4; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to the Authenticity of Certain Documents (Mar. 17, 2016), attached as Ex. 5; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to an Exception to the Rule Against Hearsay for Certain Documents (Mar. 29, 2016), attached as Ex. 6; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to the Admissibility of Certain Documents (May 25, 2016), attached as Ex. 7; ALJ Order Approving Stipulation Between McDonald's USA, LLC and the General Counsel Regarding Transcript Amendments (Sep. 12, 2016), attached as Ex. 8; ALJ Order Approving Stipulation Between McDonald's USA, LLC and General Counsel of the National Labor Relations Board as to the Admissibility of Certain Documents (June 21, 2016), attached as Ex. 9.

of consolidation would almost certainly cause the hearing in this case to go on for years."), attached as Ex. 12. In particular, during trial runs, McDonald's USA *and* the General Counsel agreed that effective remote participation by Charged Franchisees was impossible because the videoconferencing and internet systems at the courthouse were not up to the herculean task ordered by the Judge.[12] So, just days before opening statements, McDonald's USA, the General Counsel, the Charged Franchisees, and Charging Parties reached a stipulation that eliminated the need for remote participation. *See* ALJ Order Approving Stipulation Between McDonald's USA, LLC, Respondent Franchisees, the Charging Parties, and General Counsel of the National Labor Relations Board as to Modification of the Case Management Order (Mar. 14 2016), attached as Ex. 4. Under the stipulation, remote Parties could raise written, deferred objections to any testimony or evidence after reviewing transcripts of the proceedings making unnecessary trial by videoconference. *Id.* at 4.

The General Counsel's case-in-chief began in March 2016, but by the fall of that year he had not presented a single merits witness. At that point, McDonald's USA and the General Counsel reached an agreement to sever certain cases. *See* ALJ's Order Severing Cases and Approving Stipulation, at 5 (Oct. 12, 2016) ("[The parties' estimates of hearing times] lead to the conclusion that hearing of all of the consolidated cases together is impossible"), attached as Ex. 14. The stipulation called for the severance of the complaints in Regions 13, 20, 25 and 31

[12] *See, e.g.*, McDonald's USA, LLC's Motion to Sever Due to Technological Difficulties (Feb. 25, 2016) at 12 (citing Tr. 612:1-613:1) (counsel in a remote location stating, "I cannot see you, Your Honor. I cannot see the witness stand . . . . I cannot see faces . . . . If I were examining a witness, I would not be in a position to do so effectively because I can't read their body language. I can't see their. . . I can't see their facial expressions."); *id.* at 12-13 (citing Tr. 616:4-12) (counsel in remote location noting that he could not see counsel in Region 2 because they appeared as "Lilliputians . . . little ants on the screen"); *id.* at 13 (citing Tr. 825:19-25) (Counsel for the General Counsel noting that the "small desktop monitors that we have in the courtroom here are blinking . . . [due to] a hardware failure . . . ."); *id.* at 14 (citing Tr. 638:23-639:1) (counsel in remote location stating that the sound feed was "cutting in and out"); *id.* at 5 (citing Tr. 543:8-14) (counsel in Region 2 unable to connect to General Counsel-provided internet to exchange exhibits); *id.* at 6 (citing Tr. 575:1-5) (counsel in remote Regions unable to connect to General Counsel-provided internet to exchange exhibits), attached as Ex. 13.

("Severed Cases")[13] from the complaints in Regions 2 and 4 ("the New York and Philadelphia Cases").[14] *See id.* at 5. The Judge's continuing protests about the Company's objections to the structure of the trial are not only difficult to fathom, but entirely at odds with her own October 12, 2016 order.

The Court then placed the Severed Cases – two-thirds of the total consolidated cases – in abeyance pending a Board decision on the New York and Philadelphia Cases.[15] *See id.* at 6. The New York and Philadelphia Cases, however, continued before the Administrative Law Judge. To date, the proceedings in those matters have generated 142 hearing days, 123 witnesses, 3,035 admitted exhibits, and 21,190 transcript pages. The General Counsel alone presented 86 witnesses over 102 hearing days before resting on May 23, 2017. *See* Order at 10. McDonald's USA, which began its affirmative case on October 30, 2017, presented 15 witnesses over 14 trial days when the hearing adjourned on December 13, 2017. *See* Order at 11, 37.

If this matter proceeds, and after the record in the New York and Philadelphia Cases finally closes, the Charged Franchisees in the Severed Cases will have 20 days to submit

[13] The "Severed Cases" are Case Nos. 13-CA-106490; 13-CA-106491; 13-CA-124812; 13-CA-131143; 13-CA-106493; 13-CA-131141; 13-CA-107668; 13-CA-113837; 13-CA-115647; 13-CA-119015; 13-CA-123916; 13-CA-124813; 13-CA-131440; 13-CA-118690; 13-CA-123699; 13-CA-129771; 13-CA-124213; 13-CA-129709; 13-CA-131145; 13-CA-117083; 13-CA-118691; 13-CA-121759; 20-CA-132103; 20-CA-135947; 20-CA-135979; 20-CA-137264; 25-CA-114819; 25-CA-114915; 25-CA-130734; 25-CA-130746; 31-CA-127447; 31-CA-130085; 31-CA-130090; 31-CA-132489; 31-CA-135529; 31-CA-135590; 31-CA-128483; 31-CA-129024; 31-CA-129027; 31-CA-133117; 31-CA-129024; 31-CA-130239; 31-CA-131697; 31-CA-132913; 31-CA-132915; 31-CA-134473; 31-CA-134474; 31-CA-134478; 31-CA-134479; 31-CA-134514; 31-CA-134480; 31-CA-135729; 31-CA-137102; 31-CA-137150; 31-CA-129982; and 31-CA-134237.

[14] The "New York and Philadelphia Cases" are Case Nos. 02-CA-093893; 02-CA-098662; 02-CA-093895; 02-CA-097827; 02-CA-093927; 02-CA-098659; 02-CA-094224; 02-CA-098676; 02-CA-094679; 02-CA-098604; 02-CA-103771; 02-CA-112282; 02-CA-098009; 02-CA-103384; 02-CA-103726; 02-CA-106094; 04-CA-125567; 04-CA-129783; and 04-CA-133621.

[15] The New York and Philadelphia Case and the Severed Cases are not the only ones at issue. Various Regions issued complaints on over 80 other unfair labor practice charges filed against McDonald's franchisees who are not parties here. Those "Abeyance Cases" were all held indefinitely pending the outcome of the cases here. At this point, however, the Charging Parties have withdrawn the joint employer allegations in all but four of the Abeyance Cases. Based on representations from Counsel for the General Counsel, McDonald's USA expects that the settlement here will be the template for settlement in the few remaining Abeyance Cases where McDonald's USA is still a party alleged to be a joint employer.

deferred objections, and the General Counsel will have ten business days to respond. *See* ALJ Order on Time for Submission of Deferred Objections (Jan 18, 2017), attached as Ex. 15. After the Judge rules on the deferred objections, which likely will be voluminous given the size of the record, the parties would begin post-hearing briefing in the New York and Philadelphia cases. Counsel for the General Counsel has moved for six months to file opening post-hearing briefs. *See* General Counsel's Request For An Extension Of Time To File Briefs To Administrative Law Judge Lauren Esposito (Jan. 12, 2018), attached as Ex. 16. As such, even if the New York and Philadelphia cases were to resume today, it is unlikely that they would be fully briefed to the Administrative Law Judge before well into 2019. Once the Judge issues a decision, the New York and Philadelphia cases are all but certain to be appealed to the Board, and then the Circuit Court of Appeals, who may remand them to the Board at any time. If, after all of that, the New York and Philadelphia alleged discriminatees are awarded relief, there remains the possibility of compliance hearings.

Even that, however, would not resolve the more than 50 Severed Cases, which are even farther from completion. There, the General Counsel has not put on a single witness regarding the merits allegations, nor have the Charged Franchisees put on any rebuttal witnesses. Assuming an average of even three witnesses per Severed Case, there would be then 150 additional trial witnesses – all before years of briefing, exceptions and appeals. *See UPMC*, 365 NLRB No. 153, at *8 n.7 (noting that if the McDonald's litigation were to "proceed . . . to finality, [it] could last for decades").[16] The parties were "literally days before the close of the

[16] In her Order, the Administrative Law Judge asserted that the matter was near completion at the time of settlement. *See* Order at 37. As the foregoing makes clear beyond any question, that assertion is not only utterly at odds with the Board's prior statements, but also with any fair and objective assessment of the posture of this case.

monumental record in this case"? Order at 37. Perhaps the trial record in the New York and Philadelphia Cases, but obviously not the litigation in its entirety.

C. The Settlement Discussions

On December 8, 2017 – before the Board's issuance of its decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) – McDonald's USA contacted the General Counsel regarding the possibility of settlement without a concession on the joint employment issue.[17] Facing years of additional litigation, the General Counsel agreed to talk. On January 17, 2018, the General Counsel moved for a 60-day stay of proceedings to allow for settlement discussions.[18] The Administrative Law Judge agreed, urging the parties to use best efforts to resolve the matter:

> [I]t is my sincere hope that during the requested stay the parties will make an assiduous and good faith effort toward conclusively resolving this case, the severed cases, and the other pending charges involving McDonald's.

ALJ Order Granting General Counsel's Motion to Stay Proceedings, at 2 (Jan. 19, 2018), attached as Ex. 19.

During the stay, the General Counsel, McDonald's USA, and the Charged Franchisees engaged in extensive, arms-length, good-faith negotiations.[19] Charging Parties made a strategic decision to sit out the negotiations, although the General Counsel kept them apprised of the discussions. *See* Tr. 21201:21-23. McDonald's USA and the General Counsel focused on common terms for the agreements (such as the agreements' default provisions and non-

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[17] *See* Letter from W. Goldsmith to P. Robb (Dec. 8, 2017), attached as Ex. 17.

[18] *See* General Counsel's Motion To Stay Proceedings (Jan. 17, 2017), attached as Ex. 18.

[19] McDonald's USA appreciates and commends the professionalism that Counsel for the General Counsel displayed during settlement discussions, particularly given the lengthy, difficult and hard-fought nature of the proceedings in this matter. Further, as indicated, McDonald's USA agrees with the General Counsel's thorough and accurate presentation regarding the settlement agreements at the April 5, 2018 hearing. *See* Tr. 21259:6-16; *see also* Tr. 21237:12-21258:23.

admissions clause), while the Charged Franchisees and the General Counsel focused on remedial issues (such as language of the notice postings and backpay amounts). In short, and as the Judge ordered, the General Counsel, McDonald's USA, and Charged Franchisees made an "assiduous and good faith effort toward conclusively resolving" the entirety of this matter. The result of this process are the settlement agreements[20] now before the Board.

D. The Settlement Agreements

The settlement agreements globally resolve the New York and Philadelphia Cases, as well as the Severed Cases.[21] They settle all substantive unfair labor practice claims and claims that McDonald's USA is a joint employer with the respective Charged Franchisees. *See* GC.Ex.Settlement 1-30, attached as Exs. 20-49. Each Charged Franchisee is party to a separate settlement agreement, and the General Counsel and McDonald's USA are parties to all. The Charging Parties have refused to sign any agreement.

The agreements are similarly structured, though each is tailored to the specific claims against the signatory Charged Franchisee. Each provides complete relief on the covered substantive claims. All agreements provide for robust notice posting. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Posting and Mailing of Notice" and approved Notice), attached as Exs. 20-49. Each Charged Franchisee will post notices at the restaurants named in the cases pertaining to them, and, at their own expense, will mail notices to former employees who worked at those restaurants during a specified time frame. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Posting and Mailing of Notice" and approved Notice), attached as Exs. 20-49. Further, to provide make-whole relief to alleged discriminatees, the agreements provide for full backpay

[20] The settlement agreements, admitted as GC.Ex.Settlement 1-30, are attached as Exs. 20-49.

[21] They also form the basis for settlement in the few remaining Abeyance Cases involving McDonald's USA. *See supra* at 11 n.15.

as calculated by the General Counsel, including excess tax and interest. *See* Order at 14; *see also* GC.Ex.Settlement 1-3, 5, 15, 16, 20, 22, 23, and 27-29 (paragraph entitled "Backpay"), attached as Exs. 20-22, 24, 25, 39, 41, 42, and 46-48. In addition, they provide that the three discriminatees[22] alleged to have been unlawfully terminated will receive front pay in lieu of reinstatement. *See* Order at 14; *see also* GC.Ex.Settlement 1, 2, and 3 ("Backpay"), attached as Exs. 20-22.[23] The Charged Franchisees have already provided to the Regions funds sufficient to cover these backpay obligations. *See* GC.Ex.Settlement 1 – 30 attached as Exs. 20-49.

The obligations of the Charged Franchisees are backed by several enforcement provisions. As an initial matter, each settlement agreement includes standard NLRB default language. In the event of an uncured breach by a Charged Franchisee, this language permits the General Counsel to seek default on the substantive unfair labor practice allegations against that entity. Though the Administrative Law Judge purported to find the settlement agreements complicated and confusing, Order at 27, the Judge understood them sufficiently to describe them clearly and correctly:

> [T]he Franchisee Respondent shall have fourteen days to remedy the violation [following notice]. In the event that the Franchisee Respondent fails to do so, the Regional Director may issue what the Settlement Agreements refer to as a 'Merits Complaint' against that Franchisee Respondent only, containing all of the allegations pertinent to the Franchisee Respondent in the instant case except for the allegations that McDonald's is a joint employer with the Franchisee Respondent of the Franchisee Respondent's employees.

[22] The remaining "17 [discriminatees] were allegedly suspended for one day, assigned reduced work hours, and sent home early at various time . . . ." Order at 14.

[23] These alleged discriminatees have waived reinstatement. *See* Order at 14, 14 n.22; *see also* GC.Ex.Settlement 1 (statement in Notice that "Sean Caldwell . . . has waived reinstatement"), attached as Ex. 20; GC Exhibit Waiver 2 (Caldwell agreement "waiv[ing] . . . reinstatement" in exchange for frontpay), attached has Ex. 50; GC.Ex.Settlement 2 (statement in Notice that "Tracee Nash . . . has waived reinstatement"), attached as Ex. 21; GC Exhibit Waiver 1 (agreement by Tracee Nash that she "waive[d] . . . reinstatement" in exchange for frontpay), attached as Ex. 51; GC.Ex.Settlement 3 (statement in Notice that "Quanisha Dupree . . . has waived reinstatement"), attached as Ex. 22; GC Exhibit Waiver 3 (agreement by Quanisha Dupree that she "waive[d] . . . reinstatement" in exchange for frontpay), attached as Ex. 52.

> General Counsel may then file a motion for a default judgment with the Board on the allegations of the Merits Complaint.

Order at 15.

To help ensure franchisee compliance, the settlement agreements also contain additional mechanisms over and above the standard default language. For example, as the Administrative Law Judge noted, McDonald's USA has pledged to support franchisee compliance through the issuance of "Special Notices" in the event of an uncured breach by a Charged Franchisee. *See* Order at 15; *see also, e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Performance" and Special Notice), attached as Ex 20. In the event of an uncured breach by a Charged Franchisee, McDonald's USA will mail Special Notices to the last known addresses of Charged Franchisee employees. *See id.* These Special Notices contain language agreed upon by McDonald's USA and the General Counsel, and they would inform recipients of the General Counsel's determination that the Charged Franchisee was in breach and of their general rights under the Act. *See id.*

Further, as the Judge also noted, the agreements "provide for a Settlement Fund of $250,000 contributed by the Franchisee Respondents." Order at 16 (quoting, *e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20). The fund is available "for the benefit of any and all potential discriminatees who may be entitled to a monetary remedy" as a result of a future Section 8(a)(3) violation by a Charged Franchisee that the General Counsel determines to be an uncured breach of a settlement agreement. *Id.* Payment from the fund would be triggered by McDonald's issuance of Special Notice. As the Judge once again clearly and correctly explained:

> If McDonald's notifies the Regional Director that it will issue a Special Notice . . . the alleged discriminate in question may choose between two options. The alleged dicriminatee may waive reinstatement and receive a payment from the Settlement Fund

> equal to 500 hours of pay plus backpay running from the date of the violation through the date that the Regional Director provides written notice of the breach. The alleged discriminatee may in the alternative elect to receive a payment from the Settlement Fund equal to the pay they would have earned form the date of the violation through the date of the Regional Director's written notice of the breach. If the alleged discriminatee elects to waive reinstatement, the payment from the Settlement Fund shall be in lieu of any other remedies, the charges will be dismissed, and General Counsel will take no further action. If the alleged discriminatee chooses not to waive reinstatement, General Counsel may issue a complaint [against the Charged Franchisee] based on the violation alleged, but will not pursue default proceedings against McDonald's based on the violations.

Order at 16. Under the terms of the agreements, McDonald's USA is responsible for collecting Charged Franchisees' contributions to the Settlement Fund and delivering them to the Regions. *See, e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20. The Company is also responsible for distributing the unused balance of the fund to the Charged Franchisees at the end of the settlement's compliance period. *Id.*

McDonald's USA is subject to default proceedings – on the joint employment allegations – if it breaches the settlement agreements by failing to comply with its Special Notice obligations. As the Administrative Law Judge correctly recognized:

> The Settlement Agreements . . . provide that if *both* McDonald's and the Franchisee Respondent fail to cure the breach of the Agreements identified by the Regional Director, the Regional Director may amend the Merits Complaint to include McDonald's as a Respondent and include the allegations pertinent to joint employer status. . . . General Counsel may file a motion for a default judgment with respect to its allegations.

Order at 15 (emphasis in original).

Finally, each agreement is clear that neither it nor any actions taken in connection with it are an admission of liability or joint employment status:

> Neither this Agreement nor any conduct taken in connection with this Agreement is an admission by the Charged Parties that they

> are or have ever been joint employers or liable under the Act, and shall not be considered, offered, or admitted as evidence of joint employer status between McDonald's USA, LLC and any of its franchisees.

See, e.g., GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20.

E. The Administrative Law Judge's Rejection Of The Settlement

On March 19, 2018, the General Counsel and McDonald's USA presented the settlement agreements to the Court for approval. *See* Tr. 21196:7-21200:18; 21211:11-21212:7; 21214:25-21216:5. At that hearing, Charging Parties stated preliminary objections to settlement, including an objection that alleged discriminatees did not understand the settlement and/or accepted only under duress. *See* Tr. 21200:23-21204:7. The Court scheduled an *Independent Stave* hearing for April 5, 2018 to allow Charging Parties to fully support their objections. *See* Tr. 21226:24-21227:5.

At the *Independent Stave* hearing, however, Charging Parties failed to present a single witness or introduce a single piece of evidence. Tr. 21236:12-14. Instead, they presented what amounted to an extended closing argument with their spin on the trial evidence presented to date. Tr. 21264:21-21302:12. The Judge ordered the Parties to brief their positions. *See* Tr. 21325:3-6. On July 17, 2018, after the receipt of briefs,[24] the Judge issued an Order denying settlement approval. Pursuant to the Judge's Order (at 40), given McDonald's USA's filing of this Request for Special Permission to Appeal within the 28 days directed by the Judge, additional trial days will not be scheduled.

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[24] McDonald's USA, LLC's Supplemental Brief in Support of Its Motion to Approve Settlement Agreements (hereinafter, McD's 4/27/18 Supp. Br.) is attached as Ex. 53. General Counsel's Brief in Support of His Motion to Approve the Settlement Agreements (hereinafter, 4/27/18 GC. Br. at 9) is attached as Ex. 54.

ARGUMENT

A. The Settlement Agreements Satisfy *Independent Stave*

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), Settlements, § 10124.1 (2018). The Board settles an extraordinarily high percentage of cases. *See* NLRB, Performance & Accountability Report (FY2017), at 5 (statement of former General Counsel Griffin, reporting that "our settlement rate reached 95%," and that through these settlements "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").

Here, because the record has opened, the settlement among the General Counsel, Charged Franchisees, and McDonald's USA requires Board approval. *See* NLRB Statements of Procedure, § 101.9(d). In evaluating the settlement, the Board "examines all the surrounding circumstances to determine whether the settlement is reasonable." *UPMC*, 365 NLRB No. 153 at *11 (2017) (citing *Independent Stave Co.*, 287 NLRB 740, 743 (1987)). Four factors are particularly relevant:

> (1) whether the charging parties, the respondents, and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in the litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Independent Stave, 287 NLRB at 743. The settlement here more than satisfies each.

1. <u>There is Substantial Agreement to Be Bound</u>

The first *Independent Stave* factor weighs in favor of approval. *See Independent Stave*, 287 NLRB at 743 ("whether the charging parties, the respondents, and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement"). All Charged Franchisees, McDonald's USA, and the General Counsel have agreed to be bound by the terms of the settlement agreements. *See* Exs. 18-47. Moreover, the three alleged discriminatees who elected frontpay in lieu of reinstatement have agreed to be bound. *See* Exs. 18-20, 48-50. Charging Parties failed to present a shred of evidence that other alleged discriminatees – who will receive full backpay under the terms of the agreement – are any less supportive of the settlement.

Charging Parties have refused to join the settlement agreements. Their refusal is no basis to deny approval to a reasonable settlement supported by all other parties. *See, e.g.*, *Southeast Stevedoring Corp.*, 2014 WL 2422492, at *1 n.1 (NLRB May 29, 2014) (rejecting charging party's objection that approval "after the Charging Party has litigated the case and submitted its post-hearing brief" would "unfairly deprive[] it of a decision"); *Group Health, Inc.*, 325 NLRB No. 49, at *3 (1998), *aff'd sub nom*, *Bloom v. NLRB*, 209 F.3d 1060 (8th Cir. 2000) (approving settlement agreement "although the Charging Party opposes"); *Shine Building Maint., Inc.*, 305 NLRB 478, at *1 (1991) (approving settlement that "will effectuate the purposes and policies of the Act" over the union's objection); *James Bros. Coal Co.*, 191 NLRB 209, 210 (1971) (rejecting charging party's objection because "[t]he only relevant question is whether this settlement . . . effectuates the policies of the Act."); *cf. UPMC*, 365 NLRB No. 153, at *12 (2017) (approving consent order noting that "Charging Party's opposition . . . is outweighed by countervailing factors").

2. The Settlement is Reasonable in Light of the Alleged Violations, Risk of Litigation, and Stage of the Case

The second *Independent Stave* factor also favors settlement. *See Independent Stave*, 287 NLRB at 743 ("whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in the litigation, and the stage of the litigation"). The substantive allegations in the New York and Philadelphia Cases and the Severed Cases involve entirely garden-variety violations of the Act – the vast majority of which are wholly remedied through Notice Postings. Of the 20 alleged discriminatees, only three were allegedly unlawfully terminated. The remaining "17 [discriminatees] were allegedly suspended for one day, assigned reduced work hours, and sent home early at various time . . . ." Order at 14. The settlement provides assured, complete relief on all substantive unfair labor practice claims in the New York and Philadelphia Cases and the Severed Cases. Additionally, it provides for enforcement both through standard default language and additional, creative means of facilitating the Charged Franchisees' continued compliance with the Act. *See, e.g.*, GC.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20. Further, McDonald's USA has committed to specific support of the remedies in the Agreement – and it is bound by the threat of default proceedings if it does not meet its obligations. *See id.* (paragraphs entitled "Performance" and "Settlement Fund" and Special Notice).

This relief – notice postings covering all allegations, mailing of notices to former store employees, rescinding of policies and rules alleged to be unlawful, full make-whole relief on all Section 8(a)(3) allegations, creative mechanisms to help facilitate future Charged Franchisee compliance – is more than reasonable for purposes of *Independent Stave*. Though "complete relief" is no longer the touchstone for NLRA settlements, *see UPMC*, 365 NLRB No. 153, at *1 (2017) ("we overrule *Postal Service*"), the agreements provide just that with respect to all

substantive allegations. The agreements do so notwithstanding the inherently uncertain nature of litigation, and the highly unlikely possibility that the General Counsel would have prevailed on all 176 merits claims at trial. *See UPMC*, 365 NLRB No. 153, at *7 ("It is never certain that the General Counsel will prevail on any complaint allegation, let alone all of them"); *see also Nat'l Tel. Servs*., 301 NLRB No. 1, at *7 (1991) (approving settlement, noting that "[t]he risk of litigation includes not only the risk of losing, but the loss of time in litigation"); *Monongahela Power Co.*, 1992 WL 1465777 (NLRB Div. Judges, Apr. 30, 1992) (approving settlement, noting that the alleged discriminatee "gets his money now" and that the settlement "avoids the risk that the General Counsel might fail to prove the violation"); *BE&K Constr. Co.*, 1992 WL 1465848 (NLRB Div. Judges, June 5, 1992) (approving settlement, noting that "[a]ny initial decision might be subject to lengthy appeals and perhaps a backpay or compliance proceeding").

Further, a joint employment finding against McDonald's USA – which would not be final for years and, at best, would involve fewer than 0.25% of the Company's franchisees – would not provide a bargaining order[25] or any other material addition to this relief. Tr. 21312:9-10 (General Counsel's statement that the settlement agreements provide "100 percent plus relief here, 100 percent plus"). Again, however, there is no guarantee that the General Counsel would obtain a joint employment finding even if this litigation continued until conclusion years from now. While the parties can agree to disagree on the strength of their respective cases, in McDonald's USA's view the General Counsel demonstrated only that the Company is a franchisor that takes legitimate (if not legally required) steps to protect its brand and that it provides franchisees with optional tools, resources and advice – all matters legally irrelevant to

[25] Neither the General Counsel nor Charging Parties sought a bargaining order in this litigation. *See* Tr. 21253:21-21254:1 (General Counsel); Tr. 21300:25-21301:10 (Charging Parties). In any event, they did not present evidence that would even remotely justify a bargaining order against any party.

joint employment status under the NLRA. *See Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981). In any event, there can be no dispute that the General Counsel's chances of prevailing on his joint employment theory before the Board and the Courts are, at a minimum, uncertain.[26] *See Ochoa v. McDonald's USA, LLC*, 133 F. Supp. 3d 1228, 1241 (N.D. Cal. 2015) (rejecting joint employer claim); *Evans v. McDonald's Corp*., 936 F.2d 1087, 1089-90 (10th Cir. 1991) (same); *Cropp v. Golden Arch Realty Corp.*, No. 2:08-cv-96, at 18 (D.S.C. March 30, 2009) (same); *Mosley v. McDonald's Corp*., No. 05-CV-7290 (N.D. Ill. Dec. 06, 2006) (same); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1144 (D. Nev. 1999) (same); *Dotson v. McDonald's Corp.*, 1998 U.S. Dist. LEXIS 4676, at *8-9 (N.D. Ill. Mar. 31, 1998) (same); *Kennedy v. McDonald's Corp.*, 610 F. Supp. 203, 205 (S.D.W.Va. 1985) (same); *Whitfield v. McDonald's*, No. 08-118582-NO (Mich. Cir. Ct. July 28, 2010) (same); *Hall v. McDonald's Corp*., No. 84-270803 (Mich. Cir. Ct. June 22, 1986) (same). Further, the Board has announced that it is "considering rulemaking to address the standard for determining joint-employer status under the National Labor Relations Act." *See* https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard (last visited August 13, 2018). Thus, even were the General Counsel to succeed at the trial level, at the Board, and on all appeals, that decision may have no precedential value – another litigation risk.

[26] The General Counsel concedes – as any reasonable prosecutor would – that the outcome of extended joint employment litigation is uncertain at best:

> [T]he uncertainty of the outcome is worth stressing. The General Counsel is confident in the strength of its case . . . General Counsel presumes, however, that McDonald's and franchisees are equally competent in their defenses. The point is regardless of the General Counsel's confidence he'd win, the outcome is uncertain. Even if General Counsel wins before Your Honor, the Board may take a different view of the evidence or the legal standard to apply to that evidence.

Tr. 21242:17-21243:3.

The stage of the litigation does not make the agreements any less reasonable. The Board and administrative law judges regularly approve settlements reached during trials or even after the conclusion of trials. *See, e.g.*, *Southeast Stevedoring Corp.*, 2014 WL 2422492, at *1 n.1 (approving settlement after parties "submitted…post-hearing brief[s]"); *APL Logistics*, 2008 WL 2128153 (NLRB Div. Judges, May 16, 2008) (approving "verbal settlement" during trial); *BE&K Constr. Co.*, 1992 WL 1465848 (approving settlement after "26 days of trial . . . close to 100 witnesses . . . more than 300 exhibits . . . and over 5,000 pages of transcript"); *Kimtruss Corp.*, 304 NLRB 1, 3 (1991) (approving settlement after the hearing closed, rejecting argument that "the element of judicial economy [was] absent"); *James Bros. Coal Co.*, 191 NLRB at 210 (noting authority to approve settlements even "after hearing or after findings have been made"). Here, the parties are more than five years into the case. The Board – unlike the Administrative Law Judge – has already correctly recognized that the case is nowhere near completion, absent settlement. *See UPMC*, 365 NLRB No. 153 at *5 n.7 ("Should it proceed all the way to finality, the McDonald's litigation could last for decades.").

Further, while the trial phase in the New York and Philadelphia Cases may be nearing completion, that is manifestly the wrong focus. *See UPMC*, 365 NLRB No. 153 at *5 (describing the entire gamut of the "lengthy litigation process," including "exceptions with the Board" and "court appeals," all of which can "consume[] substantial time and, too often, cause[] unacceptable delays before any Board-ordered relief becomes available to the parties"). After the completion of witnesses in the New York and Philadelphia Cases, the Charged Franchisees in the Severed Cases would submit Deferred Objections, and the parties would face months of briefing and years of appeals. Additionally, in the more than 50 Severed Cases – two-thirds of the total consolidated cases – again, the parties face all that and much more since no merits

witnesses have yet testified. An average of three witnesses per case would mean that the parties would present more than 150 additional witnesses before beginning months of briefing and years of appeals. The General Counsel summed up the situation correctly in his Motion to Stay Proceedings:

> Although the trial in this proceeding has extended for a very long period of time, allowing time for settlement discussions now will, if settlement is achieved, facilitate far more prompt and immediate remedial relief for the employees impacted by the alleged unfair labor practices. Continued litigation of this matter would likely result in issues remaining unresolved for years on appeal and potentially impede resolution of other cases outside of the scope of this proceeding. Finally, a global settlement would clearly save all parties vast additional expenses otherwise incurred from continued litigation of this matter.

Ex. 18, at 1-2; *see also UPMC*, 365 NLRB No. 153, at *13 (approving settlement that "eliminate[s] both the delay and the uncertainty" that would result from "years" of Board proceedings and court appeals).

3. <u>The Settlement Is Not The Product of Fraud, Coercion, or Duress</u>

The third *Independent Stave* factor favors settlement. *See Independent Stave*, 287 NLRB at 743 (whether there was "fraud, coercion, or duress . . . in reaching the settlement"). Even the Charging Parties concede as much. *See* Tr. 21297:25-21298:5 ("[w]e're not claiming that any individual discriminatees were necessarily defrauded by anybody"). In any event, there is absolutely no evidence of fraud, duress or coercion here. That is because none exists.

4. <u>The Signatories Have No History of Act Violations or Settlement Breach</u>

The final *Independent Stave* factor also favors settlement. *See Independent Stave*, 287 NLRB at 743 ("whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes"). As the General Counsel noted, "[t]here's no history of breached settlement agreements . . . [or] proven

or admitted violations of the [Act]" by either McDonald's USA or the Charged Franchisees. Tr. 21239:13-16.

B. The Judge's Contrary Conclusion Is Without Merit

In rejecting settlement, the Administrative Law Judge conceded that *Independent Stave*'s third and fourth factors favor settlement. *See* Order at 39-40. But the Judge withheld approval, noting that Charging Parties "vehemently oppose" the settlement, *id.* at 18, and the settlement does not "approximate the remedial effect of a finding of joint employment status," *id.* at 20. The Board should reverse.

1. The Judge is Wrong About the First *Independent Stave* Factor

The Administrative Law Judge claimed that the first *Independent Stave* factor was inconclusive. *See* Order at 19 ("I find that the parties' positons with respect to the proposed settlement do not militate in favor of approval"). Here, the Judge misconstrued the record and failed to provide any reasoned justification for her prioritization of the Charging Parties' position over the position of every other party and the alleged discriminatees.

First, the Administrative Law Judge erred in concluding that the positions of General Counsel and McDonald's USA are entitled to no "substantial weight" because there was no meeting of the minds between them. Order at 19. In her view, these parties "made contradictory representations on the record and in their Briefs regarding the Settlement Agreements' positons and McDonald's obligations." Order at 19. The purportedly "conflicting statements," the Judge claims, raise "significant doubt as to whether they have actually reached agreement." This is nonsense. The General Counsel, McDonald's USA, and the Charged Franchisees spent weeks in intense negotiation and they executed clear written documents. The Judge's *own descriptions* of key components of the settlement agreements make that clear. Order at 14-17. The signatories

to the settlement fully understand what they executed. The Judge's contrary view is based on a misreading of the record so transparent that it suggests outcome-oriented bias.

For example, the Administrative Law Judge contends that the General Counsel "appears to have significantly misunderstood the scope of McDonald's responsibilities under the default provisions." Order at 28. In reaching that plainly mistaken conclusion, however, the Judge ignores the General Counsel's motion for settlement approval, which accurately describes the Company's obligation in the event of a uncured breach by the Charged Franchisees. *See* 4/27/18 GC. Br. at 9 ("McDonald's is required . . . to cure any franchisee breaches by issuing 'Special Notices.'"), attached as Ex. 54; *see also, e.g.*, GC.Ex.Settlement 1 ("[I]n case of non-compliance with any of the terms of this Agreement by [Charged Franchisee] . . . the Regional Director . . . [w]ill . . . provide 14 day to McDonald's USA, LLC to mail the approved Special Notices . . . .") (paragraph entitled "Performance"), attached as Ex. 20. Similarly, the Judge also ignores the General Counsel's statements at the April 5, 2018 *Independent Stave* hearing, which were equally clear. *See* Tr. 21246:23-24 (describing the Company's duty to "mail the special notice"). Instead, the Judge relies on her *own gloss* on what the "General Counsel represented on March 19, 2018" – a date nearly a month prior to the *Independent Stave* hearing – on which the General Counsel provided a summary, oral description of the settlement. Order at 28. To say the least, that is not a legitimate basis to conclude that the highly experienced counsel for the General Counsel did not understand the provisions he negotiated and the agreement he signed.

The Administrative Law Judge also contends that "[t]he parties have made contradictory representations regarding the establishment and workings of the Settlement Fund." *Id*. The Judge contends that, at the April 5, 2018 *Independent Stave*, hearing McDonald's USA contradicted the General Counsel by "den[ying] that the company was 'coordinating

logistically . . . the contributions to and the operations of the settlement fund.'" *Id.* (citing Tr. 21318). This is another example of the Administrative Law Judge's disingenuous gloss on the record. In the very record passage the Judge cites, the Company accurately explained that McDonald's USA's issuance of Special Notice triggers payment, which is precisely what the settlement provides, *see, e.g.*, Gc.Ex.Settlement 1 (paragraph entitled "Settlement Fund"), attached as Ex. 20, and precisely what the General Counsel also indicated, *see* Tr. 21251-21253. The full text of the exchange between McDonald's USA and the Judge reads as follows:

> JUDGE ESPOSITO: Okay. But you are sort of coordinating logistically the operations of the contributions to and the operations of the settlement fund?
>
> MR. GOLDSMITH: Well, [the franchisees are] making the contributions and the Regional Directors are disbursing the funds. We don't have anything to do with it.
>
> JUDGE ESPOSITO: I'm sorry, I thought that the – I thought it was triggered by McDonald's providing the special notice.
>
> MR. GOLDSMITH: No, that was – McDonald's provides a special notice if the franchisee doesn't cure, if you will, on its own.
>
> JUDGE ESPOSITO: No, what I mean is that it says disbursement from the settlement fund to the alleged discriminatees will be triggered when McDonald's U.S.A. notifies the Regional Director that McDonald's U.S.A. will issue the special notice.
>
> MR. GOLDSMITH: Right and that directs the Regional Director to handle the funds and make a judgment about whatever the back pay is if that's what's at issue and all we do is say. . . what the facts were.
>
> JUDGE ESPOSITO: Okay. Thank you.

Tr. 21318:6-21219:3. Likewise, in their subsequently filed papers, McDonald's USA and the General Counsel each represented that the Company is responsible for collecting and delivering the Charged Franchisees' contributions to the Settlement Fund, as well as redistributing any remainder. *Compare* McD's 4/27/18 Supp. Br. at 11 ("McDonald's USA has already delivered

to the Regions the Charged Franchisees' contributions to the Settlement Fund, and the Company will be responsible for distributing the balance of the fund back to the Charged Franchisees"), attached as Ex. 53, *with* 4/27/18 GC. Br. at 9 n.23 ("McDonald's was obligated to collect and deliver the $250,000 being placed in the fund and has the responsibility for deciding whether and when to trigger any disbursement from the fund."), attached as Ex. 54.

Finally, the Judge claims that "General Counsel's description of McDonald's authority with respect to disbursements from the Settlement Fund as essentially discretionary . . . contradicts the Parties' statements describing such authority as mandatory in the context of the default process." Order at 29. There is no such contradiction. If a situation arises in which the Company has a contractual obligation to issue a Special Notice and trigger disbursements from the Settlement Fund, McDonald's USA indeed will have a choice to make: comply with the settlement agreement it negotiated and executed, or not comply with that agreement. If the Company chooses the latter, it risks default. *See* GC.Ex.Settlement 1 (paragraph entitled "Performance"), attached as Ex. 20. Once again, there is no such "discrepancy" and no "uncertainty." Order at 30. The Administrative Law Judge's contrary position reflects, however, a concerted and transparent effort to find no meeting of the minds when obviously there was one.

<u>Second</u>, the Administrative Law Judge's unwillingness to acknowledge the position of the alleged discriminatees is unreasonable given the refusal of the Charging Parties to provide any witness testimony or other evidence in support of their positions. The Judge acknowledged that three alleged discriminatees agreed to the settlement, but noted that "there is no evidence regarding the positons of the other 17 alleged discriminatees receiving backpay." Order at 18. True enough, but the consequences of that lack of evidence fall squarely on the Charging Parties.

When the parties first presented the settlement agreements to the Judge on March 19, 2018, Charging Parties affirmed that the alleged discriminatees were witnesses within their control, and they based their opposition, in part, on the supposed position of at least some alleged discriminatees. *See* Tr. 21201:2-6 (claiming that "[e]mployees had been coming to us telling us that they didn't know what they were giving up and so on"); Tr. 21202:15-22 (claiming that "we were scrambling, obviously, to get in touch with these workers" and noting a "Spanish speaking woman" who "didn't really seem to understand what had happened"). At the April 5, 2018 *Independent Stave* hearing, however, Charging Parties could not scrounge up even a single alleged discriminatee willing to testify that he or she preferred endless litigation to immediate, complete payment. The Judge is well aware of the adverse inference rule. *Compare Sparks Rest.*, 366 NLRB No. 97 at *1, *10 (2018) (affirming Judge Esposito's adverse inference "based upon a party's failure to call a witness within its control having particular knowledge of the facts pertinent to an aspect of the case"). She should have applied it here against the Charging Parties.

Third, the Administrative Law Judge's deference to the Charging Parties' position on whether to end this matter – over the opposing desire of the prosecutor and all other interested parties – not only reveals her bias, but is reversible error in and of itself. Regardless of whether Charging Parties "vehemently oppose approval of the Settlement Agreements," Order at 18, Congress assigned the General Counsel "authority . . . in respect of the prosecution of . . . complaints before the Board." 9 U.S.C. § 153(d). When he seeks to end a matter as prosecutor, deciding that the Act would be better served if he directed his office's limited resources to other matters, his discretion is particularly broad. He has the unlimited right to withdraw a complaint at least up to the point that "evidence on the merits has been introduced." *Boilermakers Union Local 6 v. NLRB*, 872 F.2d 331. 334 (9th Cir. 1988). His hand is not as free when it comes to

settlement, *see* NLRB Statements of Procedure, § 101.9(d), but when he wants to finally resolve a prosecution through reasonable settlement, his interests as prosecutor necessarily outweigh any contrary wishes of the charging party. *See Boilermakers Union*, 872 F.2d at 334 (concluding that, in continuing a case that the General Counsel seeks to end, "the ALJ must either severely compromise the prosecutorial independence of the General Counsel or in effect convert the proceeding into a two-party private litigation," results that are "inconsistent with Congress's clear intent"). The positions of the parties strongly favor settlement approval.

2. The Judge Erred in Assessing the Second *Independent Stave* Factor

The Administrative Law Judge next ran through a series of reasons why she believes the settlement is not "reasonable in light of the nature of the alleged violations, the inherent risks of litigation, and the stage of the litigation involved." Order at 20. Here, the Judge's misapplication of controlling precedent not only more than merits reversal, but it also once again suggests bias in favor of the Charging Parties' position.

a. *A Reasonable Settlement Need not Provide Full Relief on all Allegations*

The Judge fundamentally erred by requiring that a settlement provide essentially the same relief on all issues as a complete General Counsel victory, including on highly uncertain joint employment claims that would extend this litigation well into the next decade if not resolved. The Judge acknowledged that the settlement here provides "full back pay for the 20 alleged disciminatees, and even front pay for three employees . . . who were allegedly unlawfully discharged." Order at 39. Likewise, the Judge noted that the settlement provides for "the posting of a Notice in English and any additional language that the Regional Director determines to be appropriate." *Id.* at 14. Nevertheless, the Judge faulted the settlement because it does not "approximate the remedial effect of a finding of joint employment status." *Id.* at 20; *see also 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 not comparable in any way, shape, or form to joint and several liability"); *id.* at 32 ("[T]he obligations incumbent upon McDonald's . . . do not in any way approximate the remedial effect of a finding of joint employer status."); *id.* at 39 (acknowledging that the settlement "would result in immediate relief for the alleged discriminatees," but finding the "remainder of the proposed settlement . . . paltry and ineffective").

That is not an application of *Independent Stave*, but an attempt to circumvent the teachings of that case. For good reasons, the Board has rejected the position that "settlement must mirror a full remedy." *Independent Stave*, 287 NLRB at 742-43; *see also UPMC*, 365 NLRB No. 153 at *3 ("In *Independent Stave*, the Board made clear that the 'substantial remedy' factor was not to predominate over all other factors."). Unlike the Administrative Law Judge, the Board recognizes as a "reality of litigation" that settlement requires compromise, not complete capitulation by one party on every issue:

> Each of the parties to a non-Board settlement recognizes that the outcome of the litigation is uncertain and that he may ultimately lose; thus, the party in deciding to settle his claim without litigation compromises in part, voluntarily foregoing the opportunity to have his claim adjudicated on the merits in return for meeting the other party on some acceptable middle ground. The parties decide to accept a compromise rather than risk receiving nothing or being required to provide a greater remedy.

Independent Stave, 287 NLRB at 743. Rejecting compromise, on the other hand, subjects the parties to unwanted and unnecessary litigation, contrary to the purposes of the Act:

> 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.

In *Independent Stave*, the Board approved a settlement that "fail[ed] to provide for the posting of a notice*."* *Id.* at 740. Since then, cases applying its standards have approved any number of reasonable settlements that did not "approximate" full relief. *See, e.g.*, *U.S. Postal Ser.,* Case No. 7-CA-166361 at *1 n.1 (NLRB Order July 27, 2016) (finding that "the settlement agreement comports with the standards set forth in *Independent Stave*" despite the "absence of an enforcement mechanism"); *Mckenzie-Willamette Med. Ctr.*, 361 NLRB 54, 56 (2014) (settlement reasonable in Section 8(a)(5) information request case even though "Respondent [was] not immediately required to provide the requested information to the Union," it did not contain a "cease and desist" provision, and it did not "require the Respondent to post a remedial notice"); *Monongahela Power Co.,* 1992 WL 1465777, at *2 (NLRB. Div. of Judges Apr. 30, 1992) (settlement reasonable even though it lacked "a full remedy with a notice posting and a cease-and-desist order").

b. *Independent Stave Does not Remotely Require That McDonald's USA "Guarantee" Charged Franchisee Performance*

The Administrative Law Judge committed much the same error in concluding that settlement of a joint employer case is allowed *only* if the putative joint employer guarantees performance of the other parties to the case. *See* Order at 22-23 (objecting that McDonald's obligations are "not comparable in any way, shape, or form . . . to the guarantee of performance"). In support of this position, the Judge invoked *UPMC*, 365 NLRB No. 153 (2017). That case, as noted, reestablished *Independent Stave* as the controlling standard for settlements. *See id.* at *1 ("Today, we return to the Board's prior practice of analyzing all settlement agreements . . . under the reasonableness standard set forth in *Independent Stave*"). Additionally, it approved as reasonable a settlement in which a parent company guaranteed the

performance of a subsidiary. *See id.* at *7-*9. But nothing in it suggests that the Board intended to establish bright line rules regarding the content of particular settlements. *Compare id.* at *3 (concluding that it is "impossible to anticipate each and every factor that will have relevance"). Nor is there even a suggestion in that case that the *only* settlement that the Board would have found reasonable in *UMPC* was the one actually presented. *Compare id.* at *6 (noting that "a high jumper [who] clears the bar by a foot would also clear it if he had jumped 6 inches lower").

A comparison of the settlement here and the one in *UPMC* underscores these points. The settlement in this case is substantially *stronger*. The *UPMC* settlement did not provide any substantive remedies or end the overall litigation. While UPMC (the parent company) agreed to guarantee any eventual remedies in that case, it is "contingent" upon the outcome of subsidiary UPMC Presbyterian Shadyside's continuing objections to the underlying unfair labor practice claims. *UPMC*, 365 NLRB No. 153, at *10. Substantial litigation risk remains there because if the subsidiary is successful, UPMC's guarantee will amount to nothing. Here, by contrast, the settlement ends the litigation by providing full and immediate substantive relief. It also contains multiple provisions – not present in *UPMC* – that foster performance by the Charged Franchisees. These include, but are not limited to, provisions under which Charged Franchisees have already deposited funds to cover back pay obligations, default provisions applicable to the Charged Franchisees, provisions creating McDonald's USA's Special Notice obligations, and provisions related to the Settlement Fund. *See* GC.Ex.Settlement 1 (paragraphs entitled "Backpay," "Performance," "Settlement Fund," and Special Notice), attached as Ex. 20. To the General Counsel's credit, he achieved a better result in this case than he did in *UPMC*, particularly from the perspective of the alleged discriminatees. Rejecting this settlement because

it does not contain a guarantee has no basis at all in either *Independent Stave* or *UPMC* and turns both on their heads.

Even if the Administrative Law Judge were correct that *UPMC* established some sort of settlement template, and the Judge is not, the Judge failed to explain why that template would apply here.[27] This case involves joint employer allegations against a franchisor and its franchisees. *UPMC* involved "single employer" allegations against a parent corporation and its subsidiary. *UPMC*, 365 NLRB No. 153, at *1. As the Administrative Law Judge is well aware, single employer cases are subject to different legal standards and involve different legal risks than cases involving joint employer claims. *Compare Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981) *with Alcoa Inc.*, 363 NLRB No. 39 (2015). Moreover, it is beyond dispute that parent corporations are inherently able to choose to control the terms and conditions of employment at subsidiaries, which is certainly not the case between McDonald's USA and its franchises.[28]

c. *The Prior General Counsel's Policy Objectives are Irrelevant Under Independent Stave*

Doubling down on her erroneous full-remedy and guarantee positions, the Judge points to the prior General Counsel's policy objectives in filing the Complaints underlying this litigation almost five years ago. *See* Order at 39 (noting that he wanted "a finding that McDonald's USA, LLC was joint and severally liable" and to "clarify the relationship between

[27] At most, the Judge faulted McDonald's USA for not "cit[ing] any other Board decision directly addressing a settlement in lieu of a finding of single or joint employer status." Order at 23 n.34. That, however, is not an explanation of how or why the structure of a single employer settlement is germane to the settlement of a joint employer case. Further, McDonald's USA did cite the controlling case as to settlement in the joint employer context: *Independent Stave*.

[28] In negotiations, McDonald's USA made clear that there would be no settlement if the General Counsel insisted on a guarantee. *See* Tr. 21317:16-21318:5 (noting that "we rejected" the concept of a guarantee). The Company is not a joint employer, it does not control terms and conditions of employment in franchisee restaurants, and it is in no position to somehow guarantee performance of independent franchisee business.

franchisor and franchisee in the context of Board law regarding joint employer status"). A settlement that does not fully achieve that "ultimate purpose" is unreasonable, asserts the Judge. *Id.* But, again, *Independent Stave* does not allow settlement only where one party or the other achieves everything it originally set out to accomplish. Rather, it encourages reasonable compromises that bring about industrial peace. *See Independent Stave*, 287 NLRB at 743 (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 Judge's position again usurps the General Counsel's prosecutorial duty to continually assess whether on-going litigation serves the purposes of the Act, regardless of when a matter began and/or who instituted it. *Cf. Boilermakers Union*, 872 F.2d at 334 (suggesting "that the General Counsel always exercises nonreviewable prosecutorial discretion when he withdraws a complaint because he no longer believes the evidence supports it"). Assessing both the status of this case and its expected length, the General Counsel has reasonably concluded that immediate and full relief on the underlying substantive allegations is preferable to a near-endless fight that may – or may not – effectuate a change in joint employment law years into the future. *See Emhart Indus. v. NLRB*, 907 F.2d 372, 376 (2d Cir. 1990) ("[R]emedies for unfair labor practices 'must be speedy in order to be effective.'") (quoting *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966)). The Board, similarly, has determined that "notice-and-comment rulemaking" is the more appropriate vehicle for assessing potential changes to joint employment law. *See* https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard (last visited August 13,

2018). The Judge provides no explanation as to why the motives for launching this matter supposedly outweigh the General Counsel's current considerations.

d. *The Judge Improperly Discounts the Agreements' Settlement Fund and Special Notice Provisions*

With a slightly different take on the same theme, the Administrative Law Judge assails the agreements' Settlement Fund and Special Notice provisions as "paltry and ineffective." Order at 39. The Settlement Fund, the Judge claims, is "not a significant deterrent to future conduct or a meaningful remedial measure." *Id.* at 30. Similarly, the Special Notices are "insubstantial compared with the Notice typically required pursuant to standard NLRB informal settlement agreements." *Id.* at 31. The Judge once again misses the point. The settlement provides for robust notice posting to remedy the unfair labor practice allegations that underlie the complaints. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Posting and Mailing of Notice" and approved Notice), attached as Exs. 20-49. The settlement contains standard default language to ensure compliance. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Performance"), attached as Exs. 20-49. The Settlement Fund and Special Notice provisions are *additional* measures designed to foster compliance, and give McDonald's USA a role in supporting that compliance. *See* GC.Ex.Settlement 1-30 (paragraph entitled "Performance," "Settlement Fund" and Special Notice), attached as Exs. 20-49.

McDonald's USA believes that this is the first settlement that includes these additional compliance measures over and above the Board's standard default language. If the Judge is correct that the settlement is deficient because the *additional* measures do not go far enough, the Board should never have approved any prior settlement under *Independent Stave*.

e. *The ALJ Misapprehends the Stage of the Litigation and Litigation Risks*

The Administrative Law Judge faulted the timing of the settlement. *See, e.g.*, Order at 37 ("General Counsel's decision to pursue a settlement, and accept the Settlement Agreements literally days before the close of the monumental record in this case is simply baffling"); *id.* ("General Counsel decision to settle . . . without hearing the testimony of McDonald's expert . . . is incomprehensible"); *id.* at 38 (faulting the General Counsel for "continuing to pursue settlement" after the Board "vacated its decision in *Hy-Brand*"). While McDonald's USA does not dispute that it would have been preferable had this matter ended earlier, that is no basis for withholding settlement approval now.

As noted, the Board encourages reasonable settlement at *any* point in a case. *See* NLRB Casehandling Manual (Part One), Postcomplaint, § 10126.3 ("Settlement efforts should, of course, continue at all stages of the proceeding, including after the hearing opens."); *see also supra* at 24. All that is "baffling" and "incomprehensible" is not that the parties engaged in settlement talks, but the Judge's suggestion that this matter is near completion. It is years from completion. As the Judge's own orders make abundantly clear, the record is still open in the New York and Philadelphia Cases. The parties have not filed deferred objections, post-hearing briefs, exceptions to the Board, or appellate papers. In the Severed Cases, which constitute two-thirds of the cases involved in the settlements, the parties have not even put on a single merits witness. *See supra* at 24-25.

Equally erroneous is the Administrative Law Judge's treatment of litigation risk. She mentions it in passing, when dismissing the interests of the alleged discriminatees. *See* Order at 39 ("The effect of the uncertainty of litigation on the relief the alleged discriminatees would obtain through the proposed settlement is therefore not a compelling counterweight"). Leaving

aside the Judge's cavalier treatment of the wishes of the alleged discriminatees to receive immediate and full backpay, the General Counsel faces substantial litigation risk both as to his substantive claims and on the joint employment issue. *See supra* at 22-23, 23 n.26.

The Judge does engage in an extended discussion of *Capitol EMI Music,* 311 NLRB 997 (1993) and the General Counsel's allegation that McDonald's USA "coordinated and directed the activities of its franchisees' response to the Fight for $15 campaign." Order at 33-36. To the extent that discussion is intended to address litigation risk on the joint employment issue, it fails. It, however, does illuminate the Judge's prejudgment of the merits of this case – including of the Severed Cases that are two-thirds of the total consolidated cases in which the Judge has not heard any merits evidence at all.

First, the Administrative Law Judge concedes that the General Counsel "does not allege that McDonald's independently committed any unfair labor practices." Order at 33. While the Judge may be disappointed with former General Counsel Richard Griffin's decision not to charge the Company with violating the Act, because of that decision there is no possibility in this case that the Company will be found to have violated the Act. *See, e.g.*, *Roadway Express, Inc*., 355 NLRB 197, 201 n.16 (2010) ("The General Counsel controls the theory of the case, which the charging party is powerless to enlarge upon or otherwise change"), *enf'd*, 427 Fed.Appx. 838 (11th Cir. 2011); *Zurn/N.E.P.C.O.*, 329 NLRB 484, 484 (1999) (refusing "to pass on either of the Charging Party's theories" of liability, which varied from the General Counsel's asserted theory, because it is well settled that a charging party may not "enlarge upon or change the General Counsel's theory of the case").

Second, *Capitol EMI* addresses a defense against shared liability that a company may assert *after* it has been found a joint employer. *See* 311 NLRB at 1001 ("Accordingly, we

conclude that [joint employer] Graham is not liable for Capitol's unlawful discharge of employee A.V. Harris."). The case is inapposite to the General Counsel's litigation risk in attempting to prove joint employment status in the first instance.

Third, despite the Judge's Order, McDonald's USA has no intention of converting this paper into a merits brief. Nevertheless, the Company vehemently disagrees with any suggestion that the General Counsel has demonstrated that it somehow directed or controlled the Charged Franchisees' response to the Fight for $15 campaign. The evidence overwhelmingly demonstrates that franchisees are responsible for the terms and conditions of employment in their restaurants, and McDonald's USA merely provides them with advice and optional resources that they may take or leave.[29] Franchisees control their own labor relations and their responses to the Fight for $15 campaign. Irrespective of the Administrative Law Judge's prejudgment of the merits of the joint employment issue, there is a substantial risk that the Board and the Courts will view the matter differently.

[29] *See*, *e.g.*, Tr. 14827:14-24; 14829:12-15; 14830:2-9 (testimony from Owner-Operator's store manager that he was "responsible" for "deciding how many people to employ"); Tr. 17362:4-24 (testimony from Owner-Operator that McDonald's USA has no involvement in "deciding whether [her restaurant] should use a particular employment policy"); Tr. 18149:3-20 (testimony from Owner-Operator's store manager that McDonald's USA played no role in his "decision to hire someone"); Tr. 18188:11-13 (testimony from Owner-Operator's store manager that McDonalds' USA had "no role" in the "day-to-day operations of [his] restaurant"); Tr. 18461:11-14 (similar testimony from Owner-Operator's store manager that McDonald's USA "didn't play any role" in "day-to-day operations"); Tr. 18667:4-21 (testimony from Owner-Operator that he alone "determined what wages to pay to employees"); Tr. 19365:11-18 (testimony from Owner-Operator's store manager that he did not "consult or discuss . . . employee discipline" or "employee termination" with McDonald's USA); Tr. 13456:6-23 (testimony from Owner-Operator that his restaurant does not use the "dynamic shift positioning tool"); Tr. 17292:5-25 (testimony from Owner-Operator that crew are positioned according to a restaurant-created "battle plan" and that McDonald's USA had no "role . . . in the creation" of the plan); Tr. 17376:11-21 (testimony from Owner-Operator that her store "did not" use the Dynamic Shift Positioning Guide because she considered it "one of the most useless pieces of paper McDonald's has ever designed"); Tr. 18190:16-19 (testimony from Owner-Operator's store manager that he had hired "maybe one" individual who submitted an application through Hiring to Win"); Tr. 18189:19-24 (testimony from Owner-Operator's store manager that he "never" used the "Hiring to Win interview guide"); Tr. 20029:20-20030:18 (testimony from Owner-Operator that she did not "implement RDM" because she found "it was too complicated, time consuming").

f. *The Judge's Fear That the Settlement will not Conclusively Resolve This Matter is Misplaced*

The Administrative Law Judge also argues that the settlement should be denied because the parties have vigorously litigated this matter. That is, the Judge suggests that the settlement cannot be approved because there may be disputes between the parties over agreement terms, given that the parties have disagreed over issues in the past. *See* Order at 2 ("[T]he parties' evident confusion and history of antagonism, virtually guarantee that the settlements will not definitively end the case"); *id.* ("[E]ven in the event that a genuine meeting of the minds exists the Settlement Agreements are not likely to definitively resolve the case, and will instead very possibly engender additional litigation").

The Judge's assertion is incorrect. The settlements are the product of extensive, complex, and good-faith negotiations. *See supra* at 13-14. Of course there is *some* risk that the parties could later disagree over the meaning or application of an agreement term. That is so with any settlement, especially a large and complex one. Ironically, the Judge's "solution" to this "problem" is to deny approval of the settlement and thereby *absolutely guarantee* that the parties will be embroiled in litigation for years to come.

g. *The Judge is Wrong on the Issue of Electronic Posting*

The Judge also contends that settlement is unreasonable because the agreements provide for physical posting and mailing of notices, but not electronic posting. *See* Order at 31-32. That does not make the settlement unreasonable. *See, e.g.*, *Independent Stave*, 287 NLRB at 740 (approving settlement that "fail[ed] to provide for the posting of a notice"). Even when cases are litigated to completion, the Board requires electronic posting only when "that is the customary means of communicating with employees." *J. Picini Flooring*, 356 NLRB No. 9, at *1 (2010). Here, there is no evidence of that. *See* Tr. 21243:23-21244:14 (statement from the General

Counsel that he considered, but did not include, electronic posting in the settlement because "there is no evidence" that the Charged Franchisees regularly communicated with employees through electronic means).

h. *The Judge's Position Regarding a Formal Settlement is Incorrect*

Similarly, the Judge finds that the settlement is unreasonable because it is an informal settlement, rather than a formal one. *See* Order at 25. Contrary to the Judge's suggestions, nothing in *Independent Stave* prohibits informal settlements after a complaint issues. To the contrary, it is well-settled that the General Counsel may enter into a reasonable informal settlement at any point. *See* NLRB Div. of Judges, BENCH BOOK § 9–410 (Jan. 2018 Wedekind ed.) (hereinafter "BENCH BOOK") (noting that "[e]ither type of settlement may be utilized at any time after a charge has been filed").[30]

i. *The Judge is Wrong About Successors and Assigns Language*

The Administrative Law Judge contends that the settlement is unreasonable because the agreements omit "the typical language binding a respondent's 'officers, agents, successors, and assigns.'" Order at 27. Nothing in *Independent Stave* requires this. Charging Parties themselves entered multiple settlement agreements in the Abeyance Cases, *see supra* at 7 n.9, that contain no such language. *Cf. UPMC*, 365 NLRB No. 153, at *12 n.14 (striking successors and assigns language, and finding charging party's argument regarding such language "abstract").

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[30] The Administrative Law Judge suggests that a formal settlement is necessary because McDonald's USA and the Charged Franchisees are "repeat offenders." Order at 25. It is impossible to reconcile that assertion, an assertion having no basis in the record evidence, with her later, correct conclusion that "[t]he record does not establish . . . a history" of Act violations by any party. Order at 39.

j. *The Settlement Agreements are not Unreasonable Because They "Prematurely" Withdraw Complaints*

The ALJ claims that the settlement is unreasonable because it would have the General Counsel withdraw the Complaints prior to the completion of compliance. *See* Order at 26-27. *Independent Stave* does not dictate that a case must or even should remain open once a reasonable settlement is approved. The General Counsel was well within his rights to enter a settlement under which complaints are dismissed immediately upon approval, particularly when the settlement calls for a full substantive remedy *and* a number of steps associated with that remedy (such as delivery of funds to the Regions) have already occurred. *See* BENCH BOOK § 3–140 (noting instances in which "withdrawal of the complaint allegations [is] approved by the judge pursuant to approval of a settlement agreement").

3. The Administrative Law Judge's Conduct Throughout This Matter Underscores the Need for the Board to End it

Finally, the Administrative Law Judge devotes considerable pages in her Order to her perceptions[31] regarding McDonald's USA's litigation of this matter. *See* Order at 2-14. The Company has contested this matter zealously, but entirely appropriately. Contrary to the apparent positon of the Judge, that should not be surprising. This is not only one of the largest cases in the history of the Act, it implicates the structure of franchising and decades of settled

[31] Because they are immaterial to *Independent Stave*, McDonald's USA will not present a point-by-point refutation of the Judge's baseless criticisms of its approach to the litigation. As a representative sample, however, consider the Judge's assertion that McDonald's USA is the reason this case has not yet concluded. *See* Order at 12 ("McDonald's had deliberately prolonged the presentation of its case"). Nonsense. The Board recognized the scope and expected length of this case long ago, and it recognized that the Company was not to blame. *See McDonald's USA, LLC,* 362 NLRB No. 168 at *1 (2015) (Miscimarra, dissenting) (warning that this "large consolidated case" will involve "years of litigation"). The Company did not even begin its direct case in the New York and Philadelphia Cases until October 30, 2017, and since then it presented 15 witnesses over 14 trial days. *See* Order at 11, 37. As would any party in any matter, particularly a major matter, the Company and its lawyers based decisions regarding the presentation, order, and scope if its witness presentation solely on the evidence needed to rebut the General Counsel's case and the exigencies of the witness' schedules. But even if McDonald's USA had not put on a *single witness* in the New York and Philadelphia cases, this matter would still be years from completion. *See supra* at 11-13.

law. *See, e.g.*, *Love's Barbeque Rest. No. 62*, 245 NLRB 78 (1978), *enf'd. in rel. part*, 640 F.2d 1094 (9th Cir. 1981).

Unfortunately, a significant cause – if not principle cause – of the "history of antagonism" in this matter has been the Administrative Law Judge's mishandling of it. The Board has already reversed the Judge once. *See* Order at 13 (reversing the Judge's unprecedented order "require[ing] [McDonald's USA] to provide an expert's report"). In other instances – such as with the Judge's order on remote, videoconference participation and her unworkable consolidation order – the parties reached agreements to blunt the on-going impact of the Judge's errors. *See supra* at 9. Yet, the record still is littered with trial-management mistakes from the Judge – clear errors on subpoena issues, clear errors on admissibility issues, clear errors on constitutional issues – that would justify reversal by a Court of Appeals were this matter to be litigated to completion. *See, e.g.*, *McDonald's USA, LLC*, 362 NLRB No. 168 at *1 (2015) (Miscimarra, dissenting) (warning that this "large consolidated case" that would involve "years of litigation" could be reversed on procedural issues alone). Avoiding that very real risk is yet another reason that the Board should approve the settlement.

CONCLUSION

For the foregoing reasons, the July 17, 2018 Order Denying Motions to Approve Settlement Agreements should be reversed and the settlement agreements approved.

Dated: August 13, 2018

Respectfully submitted,

s/ *Willis J. Goldsmith*

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CERTIFICATE OF SERVICE

The undersigned, an attorney, affirms under penalty of perjury that on August 13, 2018, he/she caused a true and correct copy of McDonald's USA, LLC's Special Appeal of the Administrative Law Judge's July 17, 2018 Order Regarding Denying Motions to Approve Settlement Agreements 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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