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August 28, 2018

FILE NO:

Roxanne Rothschild  
Deputy Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
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Re: *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

Dear Ms. Rothschild:

This amicus letter is being submitted in the above referenced case on behalf of the following trade groups: Coalition for a Democratic Workplace; American Hotel & Lodging Association; Associated Builders and Contractors; Chamber of Commerce of the United States of America; HR Policy Association; Independent Electrical Contractors, Inc.; International Foodservice Distributors Association; International Franchise Association; the National Association of Manufacturers; National Association of Wholesaler-Distributors; National Federation of Independent Business; National Retail Federation; Restaurant Law Center; Retail Industry Leaders Association and the Society for Human Resource Management (the "Trade Groups"). The Trade Groups respectfully request that this amicus letter be filed and circulated to the Board members sitting on this case. We certify that a copy of this letter has been sent to all persons and entities shown as being copied below.

The Trade Groups each have an abiding interest not only in the proper development of the law under the National Labor Relations Act, but also in the efficient operation of the National Labor Relations Board, unhindered by unfounded and legally unsupported attempts to prevent the Board from making decisions in cases of national importance.

The Trade Groups wholly endorse the arguments made by McDonald's USA, LLC ("McDonald's USA"), in its opposition to the Motion to Recuse Chairman Ring and Member Emanuel filed by the Service Employees International Union ("SEIU" or "Union"). McDonald's

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USA's arguments are well-founded and ineluctably lead to the conclusion that there is no basis whatsoever for either Chairman Ring or Member Emanuel to recuse themselves in this case, or in any case where any of the Board members are similarly situated as to the parties and law firms involved here.

McDonald's USA correctly interprets the two relevant ethics provisions regarding recusal and the specific limits they seek to impose. Both Executive Order 13770 and 5 C.F.R. § 2635.502 apply only to matters involving a party that a Member personally represented, or matters in which the Member's former employer actively represented the party before the Board.<sup>1</sup> Neither Chairman Ring nor Member Emanuel personally represented any of the parties in this matter during the two years prior to their appointments to the Board. Neither of their former law firms served as counsel of record, or had any communications with the Board, on behalf of any parties in this matter. The plain text of these policies and the policy justifications behind them do not require—or even suggest—recusal would be an appropriate course for either Member.<sup>2</sup>

The Union ignores these reasonable limitations on the scope of the recusal obligation. It advocates for a standard that would drastically and unjustifiably expand the scope of the rules. Here, the Union contends that where a Member's former law firm represented a party in a different but related capacity, that Member cannot decide a matter involving that party without the appearance of bias. This standard is irreconcilable with the text of the Executive Order and federal regulations, and unmanageable as a practical matter.

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<sup>1</sup> See, e.g., 82 Fed. Reg. 9333 (appointees should abstain from “any particular matter involving specific parties that is directly and substantially related to [a] former employer or former clients”). Matters are “directly and substantially related” if they are “matters in which the appointee's former employer or former client is a party or represents a party.” *Id.* at 9334. A “former client” is “any person for whom the appointee *served personally* as . . . attorney.” *Id.* (emphasis added).

<sup>2</sup> McDonald's USA is also correct that the Union has waived any right it may have had to seek Member Emmanuel's recusal. The Board has held that parties cannot wait until after a Board Member has participated in a case to seek that member's recusal if it was aware of the purported grounds for recusal prior to the Member's participation. See, e.g., *Somerset Valley*, Case No. 22-RC-131139, Order at \*3 (NLRB Nov. 16, 2011). Member Emmanuel has already issued rulings in the instant proceeding and the Union surely knew where he worked long before he joined the Board.

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The specific time limits and definitions included in the rules are there to prevent the uncertainty that inevitably would follow subjective attempts to determine the types of prior client relationships that might call into question a Board Member's impartiality. Given the number of law firms retained at any given time by large employers, adopting the Union's position on recusal would incentivize frivolous recusal arguments in any matter involving a large employer. This would not only pervert the purpose of the recusal rules, but could also prevent the Board from efficiently deciding many of the matters it confronts.

Taken to its logical conclusion, the standard urged by the Union could create a plausible basis for the recusal of virtually any Board Member if their former employer had any dealings with a party at some point, on some arguably similar legal issue. Such a standard would in effect preclude Board Members drawn from private practice—and organized labor, for that matter—from participating in a wide range of issues that come before the Board. The effect would be to fundamentally alter the functioning of the Board and impede its ability to decide important questions of law. This is untenable.<sup>3</sup>

Adopting the Union's proffered interpretation would also further confuse the already muddled state of affairs on this issue generally, given NLRB Inspector General David Berry's unprecedented—and legally unsupportable—recent opinion that Member Emmanuel should have recused himself from the Board's decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), because his former firm represented a party in the *Browning-Ferris* matter. See National Labor Relations Board Office of Inspector General Memorandum, February 9, 2018. As many have noted since the issuance of his opinion, General Berry's reasoning is inherently flawed. See, e.g., Thomas Jipping, "National Labor Relations Board Inspector General and Ethics Officer Employ Erroneous Ethics Standard," The Heritage Foundation (August 7, 2018). Entertaining the Union's effort to distort the ethics rules even further, for obvious political and tactical reasons, would stretch the rules far beyond their intended purpose. The Board should strongly reject its attempt to capitalize on the confusion created by General Berry's report.

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<sup>3</sup> As McDonald's USA notes, Craig Becker, the SEIU's former Assistant General Counsel and current General Counsel for the AFL-CIO, decided a matter involving the SEIU almost immediately after his appointment to the Board, and rejected calls that he recuse himself from that matter. See *SEIU, Nurses Alliance, Local 121 RN*, 355 NLRB 234, 242 (2010) (stating that a "'reasonable person' appearing before the Board will distinguish between the roles I played as an advocate and a scholar in the past and the position I now hold as a member of the NLRB"). The potential for genuine concern regarding impartiality was far greater in the case of former Member Becker than it is here.

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The Board should deny the Union's motion for recusal because it is legally dubious and would set an unnecessary and unworkable precedent. McDonald's USA's opposition is based on historic Board practice, which provided fair and consistent outcomes to past recusal disputes. While there is no doubt that impartial and disinterested Board members are vital to the legitimacy of the Board's decisions, motions like the one filed by the Union in this matter attempt to manipulate that legitimate aim to gain a political advantage in a single matter. Surely, if granted, the SEIU may benefit in the short term, but it would also open the door for the same type of petty maneuvering in future cases. That is not why the ethics rules exist.

Finally, we urge the Board to issue a decision that will not only govern in this case, but will be broadly drafted to strongly discourage parties in other and future cases from filing similarly unfounded motions to recuse.

Very truly yours,



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