UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LEWIS FOODS OF 42ND STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS, 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.
13-CA-106490, et al.
20-CA-132103, et al.
25-CA-114819, et al.
31-CA-127447, et al.

ORDER GRANTING THE PETITIONS TO REVOKE McDONALD'S USA, LLC'S SUBPOENAS *DUCES TECUM* SERVED UPON MINTZ GROUP, LLC, LR HODGES & ASSOCIATES, LTD., BERLIN ROSEN, LTD. AND NEW YORK COMMUNITIES FOR CHANGE, INC.

The Consolidated Complaint and Notice of Hearing in this matter alleges that McDonald's USA, LLC ("McDonald's"), as a joint employer with its franchisees (the "Respondent Franchisees" or "Franchisee Respondents"), committed various violations of Sections 8(a)(1) and (3) of the Act in response to their employees' protected concerted and union activities. McDonald's and the Franchisee Respondents filed Answers denying the Consolidated Complaint's material allegations.

In and around mid-February 2015, McDonald's served Subpoenas *Duces Tecum* on non-parties the Mintz Group, LLC ("Mintz Group"), LR Hodges & Associates, Ltd. ("LR Hodges"), Berlin Rosen, Ltd. ("Berlin Rosen"), and New York Communities for Change, Inc. ("NYCC").[1] Subsequently, Mintz Group, LR Hodges, Berlin Rosen, and NYCC filed Petitions to Revoke, and McDonald's filed a consolidated Opposition.

The non-parties petitioning to Revoke the Subpoenas herein were retained by, or worked with, the Charging Parties in connection with their campaign to organize employees at McDonald's and the Franchisee Respondent's restaurants. The Mintz Group is a private investigative firm which provides litigation assistance to law firms and their clients, which has been engaged since 2013 by James & Hoffman, PC, counsel to

[1] For the sake of convenience, I will at times refer to these entities collectively as "the Non-Parties."

Service Employees International Union ("SEIU"), in anticipation of the instant case and other potential litigation, to investigate indicia of joint employment. The Mintz Group states in its Petition to Revoke that it has acted under the direction and control of James & Hoffman, which established the objectives of its investigation and monitored its work. LR Hodges was also retained by James & Hoffman to provide similar investigative and consulting services in anticipation of this litigation. Berlin Rosen is a firm specializing in public affairs and strategic communications, which was hired by SEIU in connection with the union's campaign to organize low-wage and fast food workers. NYCC is a nonprofit advocacy organization, which has collaborated with the Fast Food Workers Committee in order to organize fast-food workers and improve their working conditions.

I find here that the materials sought by McDonald's in its Subpoenas to the Non-Parties are not relevant to the issues raised by the Consolidated Complaint's allegations. I further find that, under the Federal Rules of Civil Procedure, McDonald's has not established that it has a substantial need for information which constitutes privileged work product and cannot obtain its substantial equivalent by other, more convenient and less burdensome means. As a result, the Petitions to Revoke McDonald's Subpoenas *Duces Tecum* filed by the Non-Parties are granted.

A. The Standard for Subpoenas Issued to Non-Parties

Under Section 102.31(b) of the Board's Rules and Regulations, documents sought via subpoena should be produced so long as they relate to any matter in question, or can provide background information or lead to other potentially relevant evidence. See also *Perdue Farms*, 323 NLRB 345, 348 (1997), *aff'd. in relevant part*, 144 F.3d 830, 833-834 (D.C. Cir. 1998) (information need only be "reasonably relevant"). Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, which the Board has referred to for guidance in deciding such issues, information sought in a subpoena must only be "reasonably calculated to lead to the discovery of relevant evidence." See *Brinks, Inc.*, 281 NLRB 468 (1986).

The Federal Rules of Civil Procedure restrict attempts to obtain information in a cumulative or duplicative manner, and which would burden non-parties to the litigation. Rule 26(b)(2)(C)(i) states that "the court must limit the frequency of extent of discovery otherwise allowed" where "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." See also *Brinks, Inc.*, 281 NLRB at 468-469. Rule 45(d)(3)(A)(iv) requires the federal courts to "quash or modify a subpoena" which "subjects a person to undue burden." As a result, the courts have delineated "a heightened regard for the burden to be imposed on a third party" in determining whether to quash a subpoena served upon a non-party to the case. *In re Subpoena to Goldberg*, 693 F.Supp.2d 81, 88 (D.D.C. 2010); *Schaaf v. Smithkline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005). In particular, the federal courts have quashed subpoenas to third parties when the information sought would be available from parties to the litigation. *See, e.g. Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 412, fn. 6 (C.D. Cal. 2014).

These principles are pertinent here. McDonald's has also served Subpoenas *Duces Tecum* on SEIU, the Fast Food Workers Committee, and the other Charging Parties in this matter. As the Non-Parties argue, the Subpoenas served on them by McDonald's seek information which is materially identical to the information McDonald's seeks in its Subpoena served on SEIU, a party to the proceeding. Other information sought by McDonald's from the Non-Parties is also the subject of subpoenas served on the Fast Food Workers Committee and the other Charging Parties. As a result, I find that the majority of the information sought by McDonald's in its Subpoenas to the Non-Parties, to the extent it is to be produced at all, can be obtained from another source – namely SEIU and the other Charging Parties. In particular, I find that the Charging Parties would be a more convenient, less burdensome source for the information sought. The Subpoenas issued by McDonald's to the Non-Parties, which reiterate demands for materials also directed to SEIU and the other Charging Parties, are therefore cumulative and duplicative in nature. Pursuant to this standard, the Subpoenas present an undue burden on the Non-Parties, and their Petitions to Revoke on this basis are granted.[2]

B. Work Product Privilege

In addition to the arguments regarding the burdensome nature of the Subpoenas as served upon non-parties to the proceeding, the Mintz Group and LR Hodges argue that the materials sought by McDonald's constitute protected work product. Rule 26(b)(3)(A) provides that materials prepared by a party's representative in anticipation of litigation are protected from discovery unless the party seeking production "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[3] The Board has utilized Rule 26(b)(3) to determine the existence of a work product privilege as well. *Central Telephone Co. of Texas*, 343 NLRB 987, 988-990 (2004) (human resources specialist's notes of interviews with union officers and employees, taken during investigation of their alleged misconduct, constituted protected work product). It is well-settled that this protection for work product in anticipation of litigation extends to materials prepared by investigators assisting attorneys, as well as the attorneys themselves. *U.S. v. Nobles*, 422 U.S. 225, 238-239 (1975).

I find that the investigative files prepared and maintained by the Mintz Group and LR Hodges constitute protected work product. There is no dispute that these two non-parties were retained by James & Hoffman to gather information pertinent to the joint employer relationship, if any, between McDonald's and the Franchisee Respondents in

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[2] McDonald's contends that the Non-Parties admit in their Petitions to Revoke that they do have some documents which may not be in the possession of SEIU. To the extent that this is the case, I find that such documents in possession of the Mintz Group and JR Hodges would be subject to work product privilege as discussed in Section B, and would otherwise be irrelevant for the reasons discussed in Section C.

[3] The materials must also be discoverable under Rule 26(b)(1).

anticipation of this litigation, and other cases in which the issue might arise. The materials McDonald's seeks are therefore privileged work product.

As a result, McDonald's must show that it has a substantial need for the materials it seeks by Subpoena from the Mintz Group and LR Hodges, and cannot obtain their substantial equivalent without undue hardship. For the reasons discussed in Sections A and C, I find that McDonald's has not satisfied these criteria.[4] The Petitions of the Mintz Group and LR Hodges to Revoke McDonald's Subpoenas on this basis are therefore granted.

C. Relevance

In its consolidated Opposition to the Petitions to Revoke, McDonald's gives scant attention to the Non-Parties' arguments regarding their burden as third parties in responding to subpoenas, the cumulative or duplicative nature of the Subpeonas, and the applicability of the work product privilege. Instead, McDonald's focuses on an argument that the information sought in its Subpoenas is necessary in order for it to present a defense to the Consolidated Complaint's allegations regarding joint employer status.

As I have discussed in previous Orders, two separate entities constitute joint employers of a single group of employees where the evidence establishes that they "share or codetermine those matters governing the essential terms and conditions of employment," or "meaningfully affect[]" employment issues such as hiring, firing, discipline, supervision and direction of work. *CNN America, Inc.*, 361 NLRB No. 47, at p. 3 (2014), quoting *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324, 325 (1984); see also *Computer Associates Int'l*, 332 NLRB 1166, 1167-1168 (2000). The Board and the courts have also considered the putative joint employer's involvement in determining the number of available jobs and setting wage rates and total overtime hours, and its participation in the collective bargaining process, as well as job descriptions, quality improvement, training, staffing levels, and workers compensation insurance. See *CNN America, Inc.*, 361 NLRB No. 47, at p. 3, fn. 7; see also *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991); *Moderate Income Management Co.*, 256 NLRB 1193, 1194 (1981); *Pacific Mutual Door Co.*, 278 NLRB 854, 858-859 (1986); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1162 (1989). In addition, General Counsel contends here that McDonald's coordinated or directed the Franchisee Respondents' conduct in connection with the employees' protected and union activities in a manner which tends to prove that McDonald's "share[s] or codetermine[s] those matters governing the essential terms and conditions of employment," or "meaningfully affects" employment issues at the Franchisee

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[4] I also note that the investigations conducted by the Mintz Group and LR Hodges were directed toward obtaining information regarding McDonald's own management procedures and operations with respect to its franchises and employees at the Franchisee Respondent locations. As the Mintz Group and LR Hodges argue, McDonald's has ample access to this information without the materials it seeks via Subpoena. The Mintz Group also notes that McDonald's has the same access to public records and to its former employees as did the investigators. See *In Re Student Finance Corp.*, 2006 WL 3483487 at *14-15 (E.D. Pa. 2006).

Respondents' locations. Thus, General Counsel argues that McDonald's response to the employees' activities at the Franchisee Respondents' locations, and to other aspects of the Charging Parties' organizing campaign, is relevant on this basis.[5]

McDonald's articulates a convoluted theory based upon this particular assertion of General Counsel's in order to argue that the vast array of information it seeks is relevant under the rubric of the established joint employer analysis. McDonald's argues that the Charging Parties' campaign, comprised in part of the employees' protected concerted and union activities, in fact constituted an assault against its brand.[6] McDonald's contends in its Opposition that pursuant to the joint employer theory advanced by the General Counsel, McDonald's had the right to engage in coordinated actions to protect the integrity of its brand. Therefore, any coordination or direction of the Respondent Franchisees' activities in response to Charging Parties' purported "brand attack" does not constitute evidence of a joint employer relationship. McDonald's apparently contends that the materials it seeks via Subpoena from the Charging Parties and the Non-Parties are necessary for it to prove that the Charging Parties' activities constituted an actual as opposed to a merely perceived "brand attack." An actual assault on its brand would, according to McDonald's depiction of General Counsel's position, divest any evidence of its coordinated response of relevance in the context of the joint employer analysis.

At the hearing, however, General Counsel disavowed McDonald's characterization of his position, and the interpretation of the case law on which it is based. General Counsel stated that in previous cases addressing the alleged joint employer status of a franchisor and franchisee, the Board had found that certain aspects of the the franchisor's control over franchisee operations were intended to ensure a standardized product or customer association, and were therefore not pertinent to joint employer status. For example, in *Love's Barbeque Restaurant*, the ALJ found that materials prescribing the recipes for food preparation and the sizes and portions of the menu items offered ultimately did not tend to establish joint employer status, as they "relate to the image, the historical image, of [the franchisor's] chain," as opposed to labor relations. 245 NLRB 78, 120 (1979). However, General Counsel stated that he only interpreted the cases as holding that in those particular instances such evidence did not tend to establish joint employer status. General Counsel stated that he did not glean from the Board's previous joint employer cases involving franchise

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[5] McDonald's raised nine Affirmative Defenses in its Answers. McDonald's contends that the Complaints contained inadequate conclusory allegations regarding joint employer status which provided it with insufficient notice and deprived it of procedural due process. McDonald's also contends that the NLRB lacks authority to depart from the common law of agency in its joint employer analysis and that, pursuant to *Capitol EMI Music*, 311 NLRB 997 (1993), McDonald's neither knew nor should have known of the Franchisee Respondents' unlawful conduct. McDonald's other Affirmative Defenses assert that the General Counsel abused his prosecutorial discretion and deprived it of due process in the consolidation of charges, that the NLRB lacks jurisdiction, that the unfair labor practices were untimely pursuant to Section 10(b) of the Act, and that an inherent statutory conflict between the Lanham Act and the National Labor Relations Act precludes the NLRA's applicability.

[6] McDonald's apparently does not contend that the activities of the employees at the Respondent Franchisee locations lost the protection of the Act on this basis.

relationships a general rule exempting everything related to the franchisor's "brand identity" or other intangibles from the purview of the National Labor Relations Act. Therefore, McDonald's characterization of the position of General Counsel from which it constructed its "brand assault" theory is inaccurate.

In addition, the distinction McDonald's seeks to draw between an actual and perceived attack on its brand – which it purportedly requires the information sought in its Subpoenas to elucidate – is effectively meaningless given the overall joint employer analysis. In the context of General Counsel's argument, the salient information is the evidence pertaining to McDonald's coordination or direction of its franchisees' activities, in and of itself, in response to the employees' protected concerted and union activities and the other activities of the Charging Parties. Evidence of McDonald's conduct in this regard either will or will not tend to establish that it shares, co-determines, or meaningfully affects the terms and conditions of employees at the Respondent Franchisee locations, regardless of the manner in which McDonald's construed the Charging Parties motivations', let alone the Charging Parties' actual intent.[7] Furthermore, the motivations of parties engaged in protected concerted or union activity are irrelevant when it is the employer's response that is the matter "in question" in the case. For example, the Board has squarely held that employees' motivation for engaging in protected concerted or union activity is completely irrelevant in the context of an allegation that their employer retaliated against them on that basis. See *Bettie Page Clothing*, 359 NLRB No. 96, at p. 1-2 (2013), 361 NLRB No. 79 (2014) (ALJ properly rejected employer's "conspiracy theory" that employees allegedly discharged in retaliation for their protected concerted activity "schemed to entrap their employer into firing them").[8] I find McDonald's "brand assault" theory analogous in this respect to the "entrapment" theory asserted by the employer and rejected by the Board in *Bettie Page Clothing*. Thus, the motivations of the SEIU and the Charging Party Workers Committees are irrelevant to whether the named discriminatees were engaged in protected concerted or union activity, and whether McDonald's and the Franchisee Respondents, as a joint employer, took certain adverse employment actions against them as a result. The Charging Parties' motivations are also irrelevant to whether McDonald's generally coordinated or directed the conduct of the Franchisee Respondents in connection with the Charging Parties' campaign.[9]

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[7] Indeed, the Fast Food Workers Committee and other Charging Parties argue that McDonald's arcane "brand assault" theory was devised for the express purpose of justifying the sweeping inquiry into the Charging Parties' and Non-Parties' activities being attempted via the Subpoenas. See *Flaum Appetizing Corp.*, 357 NLRB No. 162, p. 5 (2011).

[8] In addition, there is no equitable "unclean hands" defense cognizable under the National Labor Relations Act. See *Staffing Network Holdings*, 362 NLRB No. 12, p. 11 (2015); *Woodworkers Local 3-433 (Kimtruss Corp.)*, 304 NLRB 1 (1991).

[9] Nor is there any relevance to the other accusations of misconduct and nefarious intent on the part of the Charging Parties and Non-Parties contained in McDonald's Opposition, given the Consolidated Complaint's allegations. Again, it is the conduct of McDonald's and the Franchisee Respondents that is at issue here; SEIU and the other Charging Parties are not respondents in this matter. Although McDonald's Opposition is replete with claims of misconduct on the part of SEIU, the Workers Committees, and some Non-Parties, no charges alleging that any of them violated Section 8(b) of the Act were ever filed.

For all of the foregoing reasons, I find that the information sought in McDonald's Subpoenas *Duces Tecum* is not relevant to the issues raised by the Consolidated Complaint's allegations. I therefore find that McDonald's has not established a "substantial need" for the materials it seeks in order to prepare its defense in order to overcome the work product privilege. The lack of relevance also militates in favor of granting the Petitions to Revoke, given the burden on Non-Parties considered under the Federal Rules of Civil Procedure and the fact that McDonald's has served Subpoenas on the Charging Parties seeking substantially the same information.

D. Issues Specific to NYCC's Petition to Revoke

McDonald's Subpoena served on NYCC seeks additional materials regarding NYCC's general operations, employees, funding, and strategies and processes for organizing employees (¶¶ 9, 10, 11, 13, 20). I find that such information is irrelevant to the Consolidated Complaint's allegations that McDonald's and the Respondent Franchisees violated Sections 8(a)(1) and (3) of the Act.[10] See *Interstate Builders*, 334 NLRB 835, 841-842 (2001), rev'd. in part 351 F.3d 1020 (10th Cir. 2003) (revoking subpoena seeking materials regarding union's internal operations and "organizing practices or 'salting' program" as irrelevant to the alleged discriminatory refusal to hire the employees in question); *Burns Security Services*, 278 NLRB 565, 565-566 (1986) (revoking subpoena requiring the production of documents regarding union's general operations to purportedly establish that union was affiliated with a non-guard labor organization, and could not be certified pursuant to Section 9(b)(3)). And these materials have absolutely no relevance to the contention that McDonald's coordination or direction of its franchisees' conduct in response to the employees' protected concerted and union activities evinces a joint employer relationship. I therefore find that these materials are not pertinent to the issues raised by the Consolidated Complaint's allegations, and NYCC's Petition to Revoke these paragraphs on this basis is granted.

E. Additional Considerations

I further find, as argued by the Non-Parties, that the Subpoenas served on them would, by virtue of the breadth of the demands for information, result in a chilling effect upon the Section 7 activities of the employees. Where information sought by subpoena or in testimony would disclose the identities of employees engaged in union activity who are not named as alleged discriminatees in a complaint, the Board has held that their confidentiality interests, which are of "overriding concern," must be balanced against the Respondent's right to conduct a comprehensive cross-examination. *National Telephone Directory Corp.*, 319 NLRB 420, 421-422 (1995); *see also Manorcare Health Services-Easton*, 356 NLRB No. 39, at p. 33-35 (2010), *enf'd*, 661 F.3d 1139 (D.C.Cir. 2011). Although some paragraphs contained in the Riders to McDonald's Subpoenas specifically state that the names of employees engaged in protected activity should not

[10] McDonald's contends that these paragraphs do not seek materials regarding organizing strategy, because no petition for a representation election has been filed. However, the actual filing of a petition is not necessary in order for organizing, or concerted and union activity protected by Section 7, to have taken place.

be disclosed in the documents produced, other, broader paragraphs contain no such limitation. Given the Subpoenaed materials' lack of relevance to the issues raised by the Consolidated Complaint's allegations, as discussed above, and the importance of the employees' confidentiality interests as articulated by the Board, I find that the potential chilling effect of disclosure on employees' protected concerted activity outweighs the necessity of the information sought to McDonald's defense.

Finally, I find that a number of paragraphs contained in the Rider to the Subpoenas are overbroad, in that they seek information regarding businesses other than McDonald's, which have absolutely no relevance to the issues raised by the Consolidated Complaint's allegations. Thus, for example, the Subpoenas seek materials – including communications with the Charging Parties, government agencies and officials, and the media, documents regarding the engagement of contractors, and research, studies, and publications – regarding not only McDonald's and its franchisees, but any "franchised and/or fast food businesses." The Subpoenas also require the production of documents pertaining to communications between the Charging Parties and with current and former employees of McDonald's and the Franchisee Respondents, to public filings, and to firms engaged in perform work. Furthermore, although the Charging Parties assert that the campaign began in late 2012, and the earliest violation contained in the Consolidated Complaint is alleged to have occurred in September of that year, McDonald's Subpoenas seek materials beginning in 2009.

For all of the foregoing reasons, the Petitions of non-parties the Mintz Group, LLC, LR Hodges & Associates, Ltd., Berlin Rosen, Ltd., and New York Communities for Change, Inc. to Revoke the Subpoenas *Duces Tecum* served by McDonald's USA, LLC are granted.

Dated: New York, New York
April 9, 2015

Lauren Esposito
Administrative Law Judge

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Pages: 27 (including 2 cover pages)

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