



Region 15 complaint (“Complaint”) is attached as Exhibit A. On December 1, 2015, Respondent McDonald’s USA, LLC (“McDonald’s”) filed a motion in Region 15 seeking a bill of particulars or, alternatively, for dismissal of the joint employer allegations in the Complaint. A copy of the motion filed in Region 15 (“Motion”) is attached as Exhibit B. The General Counsel responds to the Motion filed by McDonald’s by filing this Opposition.

A bill of particulars is justified only when the complaint is so vague that the party charged is unable to respond to the General Counsel’s case. *N. Am. Rockwell Corp. v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968); *Am. Newspaper Pub. Ass’n v. NLRB*, 193 F.2d 782 (7th Cir. 1952), *affd.* 345 U.S. 100 (1953).<sup>1</sup> The Complaint alleges the existence of a franchising relationship between McDonald’s and various other entities—thereby complying with the suggestion of Section 300.5(b) of the National Labor Relations Board Pleadings Manual section (cited by McDonald’s at Motion, p. 4 as Section 300.3(b)) to include a description of the business—and asserts that McDonald’s “possesse[s] and/or exercise[s] control over the labor relations policies of” the other named entities, i.e., its franchises.<sup>2</sup> This is sufficient notice to satisfy due process concerns. See e.g., *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990)(In evaluating whether Respondent was afforded sufficient notice to satisfy due process, the court observed that “[n]otice does not mean a complaint necessarily must state the legal theory upon which the General Counsel intends to proceed.”); *Swift & Co. v. NLRB*, 106 F.2d 87, 91 (10th Cir. 1939); *Bakery Wagon Drivers v. NLRB*, 321 F.2d 353, 356 (D.C. Cir.

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<sup>1</sup> McDonald’s attempts to impose a more stringent standard by selectively quoting *Soule Glass and Glazing Co v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981), which in turn quotes *J.C. Penney Co. v. NLRB*, 384 F.2d 479 (10th Cir. 1967), a case in which the court refused to enforce “a finding which was neither charged in the complaint nor litigated at the hearing,” *id.* at 482. The full quote is “Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet *and provide a full hearing upon the issue presented* is, of course, to deny procedural due process of law.” *Id.* at 483. The inapplicability of both the holding and the quotation to the current situation should be plain.

<sup>2</sup> The General Counsel maintains she has satisfied her pleading obligations; however, to the extent McDonald’s argues the Complaint does not comply with the Board’s Casehandling or Pleading Manuals, the General Counsel notes the Manuals contain guidelines, not requirements. *Benjamin H. Realty Corp.*, 361 NLRB No. 103, n.1. (2014).

1963)(Board complaints need not conform to the technicalities of common law pleading: “[i]t is sufficient if respondent ‘understood the issue and was afforded full opportunity to justify its actions’” (citing *NLRB. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938)). Moreover, because no one is in a better position to know what facts support or undermine that allegation than McDonald’s itself, McDonald’s is fully able to respond to that allegation. Thus, no bill of particulars is justified and the motion must be denied.

Similarly, the Complaint meets the requirements of Section 102.15 of the Board’s Rules and Regulations, which provides in relevant part: “The complaint shall contain. a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed.” Every act alleged by the Complaint to constitute an unfair labor practice, viz., paragraphs 10-20, identifies the approximate dates and places of those acts along with the identities of the actors.

McDonald’s fails to cite any authority in support of its claim that the Complaint violates McDonald’s Fifth Amendment rights, Motion at 3. McDonald’s also fails to address the well-established import of the section of the Administrative Procedures Act upon which it relies, viz., 5 U.S.C. § 554(b)(3). As numerous courts have held, the requirements of that statute are met when the party is apprised of the issues in controversy and not misled. See e.g., *Intercontinental Indus., Inc. v. Am. Stock Exch.*, 452 F.2d 935, 941 (5th Cir. 1971), cert. denied 409 U.S. 842 (1972); *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1158 (10th Cir. 1997); *L.G. Balfour Co. v. FT*, 442 F.2d 1, 19 (7th Cir. 1971); *Boston Carrier, Inc. v. ICC*, 746 F.2d 1555, 1560 (D.C. Cir. 1984); *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972)(“[T]he purpose of the [Administrative Procedure] Act is satisfied, and there is no due-

process violation, if the party proceeded against understood the issue and was afforded full opportunity to justify its conduct”); internal quotation marks omitted), cert. denied 412 U.S. 918 (1973). Because McDonald’s has been informed that the General Counsel seeks to impose liability upon it for conduct committed by certain of its franchises by virtue of its status as a joint employer of employees of those franchises, McDonald’s has been given plain notice of the issue in controversy.

Finally, Respondent’s argument for a bill of particulars, which appears to be grounded on the false premise that there is no precedent for the joint employer allegations, misses the point. Respondent, like the General Counsel, is free to argue its theory of joint employer liability without expressing those theories in its pleadings. The question posed by a Motion for a Bill of Particulars is still whether the complaint is so vague that McDonald’s is unable to respond to the Complaint.<sup>3</sup> For the reasons already discussed, McDonald’s fails that test. For this and the other reasons cited above, McDonald’s motion should be denied in its entirety.

Dated: December 29, 2015 at Little Rock, Arkansas

  
Jacqueline Rau, Counsel for the General Counsel  
National Labor Relations Board, Region 15  
425 West Capitol Ave, Suite 1615  
Little Rock, AR 72201-3401

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<sup>3</sup> The fact that McDonald’s has filed an answer suggests that the Complaint was not so deficient as to preclude an effective response, McDonald’s statement that by filing an answer it has not waived its right to a bill of particulars notwithstanding (See e.g. McDonald’s Answer par. 6(b) and(c)). The issue is not one of waiver, but whether as a factual matter McDonald’s has sufficient notice of the allegations in the complaint to respond.

**CERTIFICATE OF SERVICE**

I hereby certify that on December 29, 2015, a copy of Counsel for the General Counsel's Opposition to Respondent McDonald's USA, LLC's Motion for a Bill of Particulars was filed by e-filing with the Division of Judges on the Board's website.

I further certify that on December 29, 2015, a copy of Counsel for the General Counsel's Opposition to Respondent McDonald's USA, LLC's Motion for a Bill of Particulars was served by e-mail on the following:

Thomas L. Henderson, Esq.  
Audrey M. Calkins, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, PC  
6410 Poplar Ave., Suite 300  
Memphis, TN 38119-4867

Email: thomas.henderson@ogletreedeakins.com  
audrey.calkins@ogletreedeakins.com

Anza Becnel, Organizer  
Memphis Workers Organizing Committee  
1000 Cooper St.  
Memphis, TN 38104

Email: anzabstloc@gmail.com

Steve A. Miller, Esq.  
James M. Hux Jr., Esq.  
Craig R. Annunziata, Esq.  
Fisher & Phillips LLP  
10 South Wacker Dr., Suite 3450  
Chicago, IL 60606-7592

Email: smiller@laborlawyers.com  
jhux@laborlawyers.com  
cannunziata@laborlawyers.com

John-Michael Ryall, Esq.  
Goodwin, Morris, Laurzeni & Bloomfield, PC  
50 North Front St, Suite 800  
Memphis, TN 38103

Email: jmryall@gmlblaw.com

Phillip Kaplan, Esq.  
Bonnie Johnson, Esq.  
Williams & Anderson, PLC  
111 Center St, Ste 2200  
Little Rock, AR 72201

Email: pkaplan@williamsanderson.com  
bjohnson@williamsanderson.com

Latoya Jemes  
3599 Bellbranch Dr.  
Memphis, TN 38116

Email: latoya\_jemes@yahoo.com

Willis J. Goldsmith, Esq.  
Doreen S. Davis, Esq.  
Matthew W. Lampe, Esq.  
Jones Day  
222 East 41st St.  
New York, NY 10017-6702

Email: [wgoldsmith@jonesday.com](mailto:wgoldsmith@jonesday.com)  
[ddavis@jonesday.com](mailto:ddavis@jonesday.com)  
[mwlampe@jonesday.com](mailto:mwlampe@jonesday.com)

Jonathan M Linas, Esq.  
Michael S. Ferrell, Esq.  
Andrew G. Madsen, Esq.  
Jones Day  
77 West Wacker Dr., Suite 3500  
Chicago, IL 60601-1692

Email: [jlinas@jonesday.com](mailto:jlinas@jonesday.com)  
[mferrell@jonesday.com](mailto:mferrell@jonesday.com)  
[amadsen@jonesday.com](mailto:amadsen@jonesday.com)

Deborah Godwin, Esq.  
Godwin, Morris, Laurenzi & Bloomfield, PC  
50 Front St., Suite 800  
Memphis, TN 38103-2328

Email: [dgodwin@gmlblaw.com](mailto:dgodwin@gmlblaw.com)

Colleen A. Youngdahl, Esq.  
Tinsley & Youngdahl, PLLC  
300 South Spring St., Suite 614  
Little Rock, AR 72201

Email: [colleen@tyattorney.com](mailto:colleen@tyattorney.com)

I further certify that on December 29, 2015, a copy of Counsel for the General Counsel's Opposition to Respondent McDonald's USA, LLC's Motion for a Bill of Particulars was served by regular mail on the following:

Mid-South Workers Organizing Committee  
438 North Skinker Rd.  
St. Louis, MO 63130



Jacqueline Rau, Counsel for the General Counsel  
National Labor Relations Board, Region 15  
425 West Capitol Ave, Suite 1615  
Little Rock, AR 72201-3401



filed by Mid-South Workers Organizing Committee, herein called Charging Party Mid-South Workers, against DiMichele Enterprises, Inc., herein called Respondent DiMichele, and McDonald's USA, LLC, herein called Respondent McDonald's, are consolidated with Cases 15-CA-113531 and 15-CA-128323 filed by Memphis Workers Organizing Committee, herein called Charging Party Memphis Workers, against Century Management, LLC, herein called Respondent Century, and Respondent McDonald's, and Case 15-CA-118304 filed by Latoya Jemes, an Individual, herein called Charging Party Jemes, against Anderson Enterprises, herein called Respondent Anderson, and Respondent McDonald's, collectively called Respondents (Respondent Century, Respondent Anderson, Respondent DiMichele, and Respondent McDonald's are all herein collectively called Respondents), in which a Second Order Consolidating Cases, Second Consolidated Complaint and Notice of Hearing issued on February 13, 2015.

This Third Order Consolidating Cases, Third Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 151 *et seq.* (the Act) and Section 102.15 of the Board's Rules and Regulations and alleges Respondents have violated the Act as described below:

1. The charges in the above cases were filed by the respective Charging Parties, as set forth in the following table, upon the respective Respondents on the dates indicated:

<i>Case No.</i>	<i>Amendment</i>	<i>Charging Party</i>	<i>Respondent</i>	<i>Date Filed</i>	<i>Date Served</i>
15-CA-113531		Charging Party Memphis Workers	Century and McDonald's	September 16, 2013	September 17, 2013

15-CA-113531	First Amended	Charging Party Memphis Workers	Century and McDonald's	November 7, 2013	November 7, 2013
15-CA-113531	Second Amended	Charging Party Memphis Workers	Century and McDonald's	December 30, 2013	December 30, 2013
15-CA-128323		Charging Party Memphis Workers	Century and McDonald's	May 9, 2014	May 9, 2014
15-CA-118304		Charging Party Jemes	Anderson and McDonald's	December 3, 2013	December 4, 2013
15-CA-118304	First Amended	Charging Party Jemes	Anderson and McDonald's	January 22, 2014	January 24, 2014
15-CA-118304	Second Amended	Charging Party Jemes	Anderson and McDonald's	February 24, 2014	February 24, 2014
15-CA-142857		Charging Party Mid-South Workers	DiMichele and McDonald's	December 15, 2014	December 15, 2014
15-CA-142857	First Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	December 19, 2014	December 19, 2014
15-CA-142857	Second Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	February 19, 2015	February 19, 2015
15-CA-142857	Third Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	April 1, 2015	April 1, 2015
15-CA-142857	Fourth Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	April 29, 2015	April 29, 2015
15-CA-144399		Charging Party Mid-South Workers	DiMichele and McDonald's	January 14, 2015	January 14, 2015

15-CA-144399	First Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	March 24, 2015	March 24, 2015
15-CA-144399	Second Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	April 1, 2015	April 3, 2015
15-CA-144399	Third Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	April 29, 2015	April 30, 2015
15-CA-144399	Fourth Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	May 18, 2015	May 19, 2015
15-CA-144542		Charging Party Mid-South Workers	DiMichele and McDonald's	January 15, 2015	January 16, 2015
15-CA-144542	First Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	February 19, 2015	February 19, 2015
15-CA-144542	Second Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	April 1, 2015	April 3, 2015
15-CA-144583		Charging Party Mid-South Workers	DiMichele and McDonald's	January 16, 2015	January 16, 2015
15-CA-144583	First Amended	Charging Party Mid-South Workers	DiMichele and McDonald's	April 1, 2015	April 1, 2015
15-CA-151221		Charging Party Mid-South Workers	DiMichele and McDonald's	April 29, 2015	April 30, 2015

2(a) At all material times, Respondent Century, a corporation with an office and place of business in Memphis, Tennessee, has been engaged in the operation of quick-service

McDonald's restaurants in the Memphis, Tennessee area, including one at 1472 South Trezevant Street, Memphis, Tennessee, herein called the Trezevant Street Restaurant.

(b) During the past year, in conducting its business operations described above in subparagraph (a), Respondent Century has:

- (i) received gross revenues in excess of \$500,000, and
- (ii) purchased and received at the Trezevant Street Restaurant goods valued in excess of \$5,000 directly from points outside of Tennessee.

(c) At all material times, Respondent Century has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3(a) At all material times, Respondent Anderson, a corporation with an office and place of business in Memphis, Tennessee, has been engaged in the operation of quick-service McDonald's restaurants in the Memphis, Tennessee area, including one at 905 Union Avenue, Memphis, Tennessee, herein called the Union Avenue Restaurant.

(b) During the past year, in conducting its business operations described above in subparagraph (a), Respondent Anderson has:

- (i) received gross revenues in excess of \$500,000, and
- (ii) purchased and received at the Union Avenue Restaurant goods valued in excess of \$5,000 directly from points outside of Tennessee.

(c) At all material times, Respondent Anderson has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4(a) At all material times, Respondent DiMichele, a corporation with an office and place of business in Sherwood, Arkansas, has been engaged in the operation of quick-service

McDonald's restaurants in the Sherwood, Arkansas area, including one at 8400 Warden Road, Sherwood, Arkansas, herein called the Warden Road Restaurant.

(b) During the past year, in conducting its business operations described above in subparagraph (a), Respondent DiMichele has:

(i) received gross revenues in excess of \$500,000, and

(ii) purchased and received at the Warden Road Restaurant goods valued in excess of \$5,000 directly from points outside of Arkansas.

(c) At all material times, Respondent DiMichele has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5(a) At all material times, Respondent McDonald's has been a Delaware limited liability company with an office and place of business in Oak Brook, Illinois, and various restaurant and franchise locations throughout the United States, and has been engaged in the operation and franchising of quick-service restaurants.

(b) During the past year, in conducting its business operations described above in subparagraph (a), Respondent McDonald's has:

(i) received gross revenues in excess of \$500,000, and

(ii) purchased products, goods, and materials valued in excess of \$5,000 directly from points outside the State of Illinois.

(c) At all material times, Respondent McDonald's has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. At all material times, Respondent McDonald's has:

(a) Had a franchise agreement with Respondent Century, Respondent Anderson, and Respondent DiMichele;

(b) Possessed and/or exercised control over the labor relations policies of Respondent Century, Respondent Anderson, and Respondent DiMichele; and

(c) Been a joint employer of the: Respondent Century employees employed at the Trezevant Street Restaurant, Respondent Anderson employees employed at the Union Avenue Restaurant, and Respondent DiMichele employees employed at the Warden Road Restaurant.

7(a) Charging Party Memphis Workers is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, and terms and conditions of employment.

(b) At all material times, based on the facts described above in paragraph 7(a), Charging Party Memphis Workers has been a labor organization within the meaning of Section 2(5) of the Act.

8(a) Charging Party Mid-South Workers is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, and terms and conditions of employment.

(b) At all material times, based on the facts described above in paragraph 8(a), Charging Party Mid-South Workers has been a labor organization within the meaning of Section 2(5) of the Act.

9(a) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent Century within the meaning of Section 2(11) of the Act and/or agents of Respondent Century within the meaning of Section 2(13) of the Act:

- (i) Nancy Brown - Supervisor
- (ii) Casey Cox - Assistant Manager
- (iii) Janice Logan - Manager
- (iv) Sheila Read - General Manager

(b) At all material times, Jeremy Walker held the position of Respondent Century's shift manager and has been an agent of Respondent Century within the meaning of Section 2(13) of the Act.

10. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent Anderson within the meaning of Section 2(11) of the Act, and agents of Respondent Anderson within the meaning of Section 2(13) of the Act:

- (a) Georgia Harwell - Assistant Manager
- (b) Tamra Hodges - Area Supervisor
- (c) April McKinney - Overnight Manager
- (d) Letha Rivers - Assistant Manager
- (e) Rochelle Triplett - General Manager
- (f) Capri Walker - General Manager

11. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent DiMichele within the meaning of Section 2(11) of the Act and agents of Respondent DiMichele within the meaning of Section 2(13) of the Act:

- (a) Dean DiMichele - Owner
- (b) Nichole DiMichele - Owner
- (c) Tamby Gilley - General Manager

12. About August 29, 2013, Respondent Century, by Manager Janice Logan, at the Trezevant Street Restaurant, by taking pictures and/or video footage, engaged in surveillance of employees engaged in union activities.

13. About August 29, 2013, Respondent Century, by Shift Manager Jeremy Walker, at the Trezevant Street Restaurant, threatened employees with job loss because they engaged in protected concerted activities.

14. Since about November 9, 2013, Respondent Century has maintained the following rules:

(a) Employees who have finished work are requested to leave the premises as soon as possible. Off-duty employees are not permitted to distribute literature or to solicit or otherwise interfere with or disturb working or other off-duty employees. Incidents of any of the foregoing should be reported to management immediately.

(b) Employees are prohibited from holding unauthorized meetings on company property.

15. About August 29, 2013, Respondent Anderson, by Area Supervisor Tamra Hodges, at the Union Avenue Restaurant, by taking pictures and/or video footage, engaged in surveillance of employees engaged in union activities.

16. About September 18, 2013, Respondent Anderson, by General Manager Capri Walker, at the Union Avenue Restaurant, told employees that they would not be promoted to the position of manager because they engaged in union activities.

17. Since about July 16, 2014, Respondent DiMichele has maintained the following rules in its employee handbook:

(a) In addition to normal store policies, the below guidelines will apply to all employees. Employees found to have violated any of these guidelines will be subject to discipline. Depending upon the severity of the offense, this may result in a warning, a disciplinary suspension or dismissal. The guidelines are:

(i) *No solicitation-No Littering* - There shall be no distribution of literature or solicitation of employees by other employees in our working areas during working times or in areas open to the public at any time. Furthermore, persons other than our employees shall not be permitted to distribute literature or solicit our employees at any time on company property. Employees who have finished work are requested to leave the premises as soon as possible. Off duty employees are not permitted to loiter on store premises during off duty hours, to distribute literature, to solicit, or otherwise interfere with or disturb working employees.

(ii) Fighting or attempting bodily injury to another employee threatening to do the same, engaging in horseplay, scuffling, throwing things, or causing confusion by shouting or demonstrations.

18. About December 2014, a more exact date being unknown to the General Counsel at this time, Respondent DiMichele, by oral announcement, promulgated and since then has maintained a rule prohibiting employees from wearing jackets at work that bear union insignia.

19. Respondent DiMichele, by General Manager Tamby Gilley, at the Warden Road Restaurant:

(a) In about December 2014, a more exact date being unknown to the General Counsel at this time, directed employees to come to Respondent with questions about unions.

(b) In about December 2014, a more exact date being unknown to the General Counsel at this time, promised its employees a promotion if the employees ceased engaging in union activity.

(c) About January 2, 2015, threatened its employees with unspecified reprisals because they engaged in union activity.

20(a) About January 2, 2015, Respondent DiMichele enforced the unlawful rule described above in paragraph 18, by instructing its employee Trenton Williams (Williams) to remove a jacket he was wearing that bore union insignia.

(b) By the conduct described above in paragraph 20(a), Respondent caused the termination of its employee Williams.

(c) About January 3, 2015, Respondent DiMichele discharged its employee Williams.

(d) About January 7, 2015, Respondent DiMichele refused to reinstate its employee Williams.

(e) Respondent DiMichele engaged in the conduct described above in paragraphs 20(a)-(d) because the named employee of Respondent DiMichele assisted the Union (Charging Party Mid-South Workers) and engaged in concerted activities, and to discourage employees from engaging in these activities.

21. By the conduct described above in paragraphs 12 through 14, Respondents Century and McDonald's, as joint employers, have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

22. By the conduct described above in paragraphs 15 and 16, Respondents Anderson and McDonald's, as joint employers, have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

23. By the conduct described above in paragraphs 17 through 19, Respondents DiMichele and McDonald's, as joint employers, have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

24. By the conduct described above in paragraph 20, Respondents DiMichele and McDonald's, as joint employers, have been discriminating in regard to the hire or tenure or terms or conditions of employment of their employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

25. The unfair labor practices of Respondents described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

As part of the remedy for the unfair labor practices alleged above in paragraphs 18 through 20, the General Counsel seeks an Order requiring that at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent DiMichele's representative Dean DiMichele read the notice to the employees in English during worktime in the presence of Respondent DiMichele's supervisors and agents identified above in paragraph 11, and in the presence of a Board agent or, alternatively, video record the reading for later viewing by the Compliance Officer of NLRB Region 15, New Orleans, Louisiana. Alternatively, the General Counsel seeks an order requiring that Respondent DiMichele promptly have a Board agent read the notice to employees during worktime in the presence of Respondent DiMichele's supervisors and agents identified above in paragraph 11.

As part of the remedy for the unfair labor practices alleged above in paragraph 20, the General Counsel seeks an order requiring that Respondents DiMichele and McDonald's reimburse Trenton Williams for all search-for-work and work-related expenses regardless of whether Williams received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

The General Counsel further seeks all relief as may be just and proper to remedy the unfair labor practices alleged.

## ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before December 2, 2015, or postmarked on or before**

**December 1, 2015.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to [www.nlr.gov](http://www.nlr.gov), click on **E-File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

**NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT on a date to be determined, at 9:00 a.m., in the hearing room, National Labor Relations Board, 80 Monroe Avenue, Suite 350, Memphis, Tennessee, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: November 18, 2015

/s/

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**M. KATHLEEN McKINNEY  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 15  
600 S MAESTRI PL, FL 7  
NEW ORLEANS, LA 70130-3414**

Attachments

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15

**CENTURY MANAGEMENT, LLC, a  
McDONALD'S FRANCHISEE, and  
McDONALD'S USA, LLC, Joint Employers**

**Cases 15-CA-113531  
15-CA-128323**

**and**

**MEMPHIS WORKERS ORGANIZING COMMITTEE**

**ANDERSON ENTERPRISES, a McDONALD'S  
FRANCHISEE, and McDONALD'S USA, LLC,  
Joint Employers**

**Case 15-CA-118304**

**and**

**LATOYA JEMES, an Individual**

**DIMICHELE ENTERPRISES, INC., a  
McDONALD'S FRANCHISEE, and  
McDONALD'S USA, LLC,  
Joint Employers**

**Cases 15-CA-142857  
15-CA-144399  
15-CA-144542  
15-CA-144583  
15-CA-151221**

**and**

**MID-SOUTH WORKERS ORGANIZING  
COMMITTEE**

**MCDONALD'S USA, LLC'S MOTION FOR A BILL OF PARTICULARS OR,  
IN THE ALTERNATIVE, TO STRIKE THE JOINT EMPLOYER ALLEGATION  
AND DISMISS THE COMPLAINT**

Pursuant to Section 102.24 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent McDonald's USA, LLC ("McDonald's"), by and through its undersigned counsel, hereby moves for an order requiring the Regional Director of Region 15 to specify with particularity in the Third Order Consolidating Cases, Third Consolidated Complaint and Notice of Hearing ("Third Consolidated Complaint") the factual basis upon which he relies in alleging that McDonald's is a joint employer with the entity named

in the Third Consolidated Complaint, DiMichele Enterprises, Inc. d/b/a McDonald's ("DiMichele Enterprises"). With respect to the joint employer allegations against McDonald's and its independent franchisees Century Management, LLC ("Century") and Anderson Enterprises ("Anderson"), the same allegations were included in the Region's first Consolidated Complaint issued on December 19, 2014, and were both previously addressed in McDonald's December 29, 2014 "Motion for a Bill of Particulars or, in the Alternative, Motion to Strike Joint Employer Allegations and Dismiss the Complaint." McDonald's incorporates herein by reference and renews its December 29 Motion for a Bill of Particulars with respect to the joint employer allegations involving independent franchisees Century and Anderson.<sup>1</sup>

In a case with far-reaching consequences for McDonald's, its independent franchisees, as well as other franchise businesses throughout the country, and where the General Counsel apparently seeks to change the Board's established legal standard for determining joint employer status under the National Labor Relations Act ("NLRA" or the "Act"), the Third Consolidated Complaint contains only the three vague, conclusory allegations regarding the purported joint employer relationship between DiMichele Enterprises and McDonald's. Specifically, the Complaint alleges only: (1) the existence of a franchise agreement between McDonald's and DiMichele Enterprises; (2) that McDonald's "possessed" and "exercised control over the labor relations policies" of DiMichele Enterprises and "administered common labor policies" with DiMichele Enterprises at the McDonald's brand franchise restaurant at the Sherwood, Arkansas location identified in the Complaint (the "Franchisee Restaurant"); and (3) a legal conclusion that McDonald's is therefore a joint employer with DiMichele Enterprises of employees working at the Franchisee Restaurant. *See* Third Consolidated Complaint ¶ 6(a) – (c). The Regional

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<sup>1</sup> The General Counsel filed its response in opposition to McDonald's Motion for a Bill of Particulars on January 15, 2015. McDonald's filed a reply in support on January 23, 2015.

Director's bare-bones, conclusory allegations provide insufficient notice to McDonald's of the factual and legal bases for the alleged joint employer status, depriving McDonald's of its fundamental right to due process under the Fifth Amendment to the U.S. Constitution. In order for McDonald's to have a full and fair opportunity to answer the Third Consolidated Complaint and prepare for its defense at trial, the Regional Director must first specify with particularity the underlying factual and legal bases as to the joint employer allegation in the Third Consolidated Complaint.

If the Regional Director does not describe with particularity the basis or bases for the joint employer allegation in Paragraph 6 of the Third Consolidated Complaint as mandated by the Administrative Procedure Act, Section 102.15 of the Board's Rules and Regulations, Paragraph 10266 of the Board's Casehandling Manual, and Section 300.3 of the NLRB Pleadings Manual-Complaint Forms, then McDonald's moves that such paragraph be stricken and the Complaint against McDonald's be dismissed for failure to state a claim.

### **THE JOINT EMPLOYER ALLEGATION**

To satisfy due process, the Regional Director is obligated "to clearly define the issues and advise an employer charged with a violation of the specific complaint he must meet [and the failure to do so] is to deny procedural due process of law." *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981); *see also, SFTC, LLC d/b/a Santa Fe Tortilla Company*, 360 NLRB. No. 130 at 2 n. 9 & 10 n. 6 (June 13, 2014) (affirming dismissal of allegations where the Administrative Law Judge ("ALJ") explained that: "[Respondent] is entitled to due process. That is, it is entitled to know ahead of time what alleged violations it must defend. It is, after all, a simple matter to prepare or amend a complaint that does so.")

The Administrative Procedure Act, the Board's Rules and Regulations, and the Board's Casehandling Manual demand that the Complaint notify a respondent of the facts and law at issue so the respondent has a full and fair opportunity to prepare a defense. *See, Administrative*

Procedure Act, 5 U.S.C. § 554(b)(3) (“Persons entitled to notice of an agency hearing shall be timely informed of the matters of *fact and law* asserted”); NLRB Rules and Regulations, Rule 102.15 (“The complaint shall contain a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed”); NLRB Casehandling Manual § 10268.1 (The Complaint “sets forth the facts relating to the alleged violations by the respondent(s)”). Moreover, the NLRB Pleadings Manual-Complaint Forms also encourages descriptive pleading for joint employer allegations. See, NLRB Pleadings Manual § 300.3(b) (suggesting drafter of a complaint containing a joint employer allegation should “[i]nset [a] description of [the] business venture. For example, Employer A utilizes the referral services of Employer B when hiring employees for its facility located at \_\_\_\_\_.”)

“The test for joint-employer status is whether two entities ‘share or codetermine those matters governing the essential terms and conditions of employment.’” See *Flagstaff Med. Ctr., Inc.*, 357 NLRB No. 65, 2011 WL 4498271, at \*11 (Aug. 26, 2011) (quoting *Laerco Transportation*, 269 NLRB 324, 325 (1984)). The mere existence of a franchise agreement does not weigh in favor of a finding of joint employer status. Nor does the Third Consolidated Complaint point to any provision of the franchise agreement that does so. Finally, the Third Consolidated Complaint does not identify with any particularity how McDonald’s allegedly possesses and/or exercises control over the labor relations policies of DiMichele Enterprises, and/or administers common labor policies with DiMichele Enterprises, at the Franchisee Restaurant, much less identify the labor relations policies at issue.

It is no secret that the General Counsel intends to pursue a more expansive theory of joint employer against McDonald’s and its independent franchisees than the Board has previously adopted in any other context. However, here, the Third Consolidated Complaint contains only a

conclusory joint employer allegation that fails to satisfy the requirements that have either been traditionally applied or those applied in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015).<sup>2</sup> Paragraph 6 of the Complaint refers to the existence of a franchise agreement between McDonald's and DiMichele Enterprises, and then goes on to allege generally that McDonald's somehow "possessed" and "exercised control over" unspecified "labor relations policies" of DiMichele Enterprises and "administered" unspecified "common labor policies" with DiMichele Enterprises, followed by the legal conclusion that McDonald's has therefore "been a joint employer of the employees" at the Franchisee Restaurant operated by DiMichele Enterprises. Even in *Browning-Ferris* the Board required that, as an initial matter, a common-law employment relationship must exist between the putative joint employer and the employees. *Id.* at 2. Moreover, where such common-law employment relationship is found to exist, the Board will then limit the scope of any recognizable joint employer relationship under the Act to those essential terms and conditions of the employees' employment over which the putative joint employer possesses sufficient authority to control so as to permit meaningful collective bargaining. *Id.* at 2, 16.

Here, the General Counsel does not in first instance even allege that McDonald's is a common-law employer of DiMichele Enterprises' employees at the Franchisee Restaurant, let alone that McDonald's possesses sufficient authority to control specific essential terms and conditions of their employment to permit meaningful bargaining as a joint employer. Nor does the General Counsel attempt in the Third Consolidated Complaint to tie any purported (albeit unspecified) control by McDonald's "over the labor relations policies" of DiMichele Enterprises to the unfair labor practices alleged in the Third Consolidated Complaint, even though the Board

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<sup>2</sup> Moreover, McDonald's hereby preserves its position that the new standard articulated in *Browning-Ferris* is ambiguous, impermissibly vague, and improperly ignores decades of precedent. Any attempt to impose a new, broader joint employer standard on McDonald's is improper and should be dismissed.

observed in *Browning-Ferris* that the extent of such authority to control marks the limits of any recognizable joint employment relationship under the Act. *Id.* As such, the bare-bones, conclusory allegations contained in Paragraph 6 of the Third Consolidated Complaint are plainly insufficient under the applicable legal standard(s) for determining that a joint employer relationship exists and/or its scope. Even more glaring, the allegations are seemingly unrelated, as there is no explanation as to any correlation between the franchise agreement and DiMichele Enterprises' labor relations policies, let alone McDonald's alleged control over them.

These paltry allegations do not provide McDonald's with notice of the charges against it, nor do they identify a particular standard of conduct that McDonald's allegedly engaged in to make it a purported joint employer with DiMichele Enterprises. Accordingly, McDonald's cannot answer the Third Consolidated Complaint or fairly prepare for its own defense at trial. Thus, the Regional Director should be ordered to provide the particulars of the joint employer allegation, which is the sole basis for naming McDonald's as a Respondent in the Third Consolidated Complaint. Alternatively, should the Regional Director fail or be unable to provide such particulars, then Paragraph 6 of the Third Consolidated Complaint should be stricken and the Third Consolidated Complaint dismissed as to McDonald's.

**WHEREFORE**, having demonstrated that Paragraph 6 of the Third Consolidated Complaint is insufficient under the Fifth Amendment to the U.S. Constitution, the Administrative Procedure Act, the Board's Rules and Regulations, the Board's Casehandling Manual, and the Board's Pleading Manual-Complaint Forms by virtue failing to specify the factual basis for the joint employer allegation against McDonald's and DiMichele Enterprises, McDonald's requests that:

(1) the Regional Director be ordered to promptly provide the specifics and particulars of the joint employer allegation contained in Paragraph 6 of the Third Consolidated Complaint; and

(2) upon the Regional Director's failure or inability to provide such specific and particular information to support the allegations in Paragraph 6 of the Third Consolidated Complaint, those allegations should be stricken and the Third Consolidated Complaint dismissed as to McDonald's.

Dated: December 1, 2015

Respectfully submitted,

*s/ Willis J. Goldsmith*

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Willis J. Goldsmith  
Doreen S. Davis  
Ilana R. Yoffe  
JONES DAY  
222 East 41st Street  
New York, New York 10017  
Tel: 212.326.3939  
Fax: 212.755.7306  
wgoldsmith@jonesday.com  
ddavis@jonesday.com  
iyoffe@jonesday.com

Michael S. Ferrell  
Jonathan M. Linas  
JONES DAY  
77 West Wacker Drive  
Chicago, Illinois 60601  
Tel: 312.782.3939  
Fax: 312.782.8585  
mferrell@jonesday.com  
jlinas@jonesday.com

**CERTIFICATE OF SERVICE CERTIFICATE OF SERVICE**

The undersigned, an attorney, affirms under penalty of perjury, that on December 1, 2015, he/she caused a true and correct copy of McDonald's USA, LLC's Motion for a Bill of Particulars or, in the Alternative, to Strike the Joint Employer Allegation and Dismiss the Complaint, to be served upon counsel for the parties by email (where indicated) and otherwise first-class mail in a postage-prepaid, properly addressed envelope at the following addresses designated for this purpose:

Anza Becnel  
Organizer  
Memphis Workers Organizing Committee  
1000 Cooper St  
Memphis, TN 38104

Thomas L. Henderson  
Audrey M. Calkins  
OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, PC  
6410 Poplar Ave, Suite 300  
Memphis, TN 38119-4867  
thomas.henderson@ogletreedeakins.com  
audrey.calkins@ogletreedeakins.com

LaToya Jemes  
c/o Sam Morris  
GODWIN, MORRIS, LAURENZI AND  
BLOOMFIELD, PC  
50 North Front St, Suite 800  
Memphis, TN 38103  
dgodwin@gmlblaw.com

Deborah Godwin  
Sam Morris  
GODWIN, MORRIS, LAURENZI AND  
BLOOMFIELD, PC  
50 North Front St, Suite 800  
Memphis, TN 38103  
dgodwin@gmlblaw.com

Philip E. Kapan  
Bonnie Johnson  
Williams & Anderson PLC  
111 Center St., Suite 2200  
Little Rock, AR 72201-4402  
pkaplan@williamsanderson.com  
bjohnson@williamsanderson.com

James M. Hux Jr.  
Craig R. Annunziata  
Steve A. Miller  
FISHER & PHILLIPS LLP  
10 S Wacker Dr, Suite 3450  
Chicago, IL 60606-7592  
jhux@laborlawyers.com  
cannunziata@laborlawyers.com  
smiller@laborlawyers.com

Mid-South Workers Organizing Committee  
438 N Skinner Rd  
St. Louis, MO 63130

Colleen A. Youngdahl  
TINSLEY & YOUNGDAHL, PLLC  
300 South Spring St, Suite 614  
Little Rock, AR 72201  
colleen@tyattorney.com  
Karen Fernbach  
Regional Director  
National Labor Relations , Region 02

M. Kathleen McKinney  
Regional Director  
National Labor Relations Board, Region 15

600 S Maestri Pl, Floor 7  
New Orleans, LA 70130-3414  
kathleen.mckinney@nlrb.gov

26 Federal Plaza, Suite 3614  
New York, NY 10278-3699  
Karen.Fernbach@nlrb.gov

Geoffrey Dunham  
Leah Z. Jaffe  
National Labor Relations Board, Region 02  
26 Federal Plaza, Suite 3614  
New York, NY 10278-3699  
geoffrey.dunham@nlrb.gov  
leah.jaffe@nlrb.gov

*s/ Michael S. Ferrell*  
\_\_\_\_\_  
An Attorney for McDonald's USA, LLC

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