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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. 13-CA-106490, et al. 20-CA-132103, et al. 25-CA-114819, et al. and 31-CA-127447, et al.

November 10, 2016

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On June 30, 2016, Respondent McDonald's USA, LLC (McDonald's) filed a Request for Special Permission to Appeal the Administrative Law Judge's June 15 Order Granting and Denying in Part General Counsel's Motion for Additional Production of Documents from McDonald's USA, LLC. For the reasons stated below, we grant the request for special permission to appeal, and on the merits, we deny the appeal.

On February 9, 2015, the General Counsel issued a subpoena duces tecum in the above-captioned matter seeking certain information from McDonald's (Subpoena No. B-1-L39K3Z). Thereafter, a dispute arose concerning the Respondent's obligations under that subpoena, and on October 2, 2015, the General Counsel initiated a subpoena enforcement proceeding in the United States District Court for the Southern District of New York (Case No. 1:15-mc-00322-P1).

In accordance with a show cause hearing held on October 30, 2015, U.S. District Court Judge Colleen McMahon ordered that the subpoena be enforced in part. With regard to document custodians covered by the subpoena, Judge McMahon ordered that the subpoena be enforced in full with respect to the 28 custodians initially identified by McDonald's, with respect to the "20" operations consultants¹ who worked with the 29 franchisees during the 3 years covered by the subpoena, and with respect to the person who was McDonald's vice president for USA Franchising for the majority of the 3 years

¹ There are actually 23 operations consultants who worked with the 29 franchisees during the 3 years covered by the subpoena. Judge McMahon's reference to "20" appears to have resulted from a remark by counsel for McDonald's approximating the operations consultants as "20." Nevertheless, Judge McMahon clearly stated that "everybody who was an operations consultant with the 29 franchisees during the relevant period of time" should be included within the scope of the subpoena. Transcript of Show Cause Hearing at 14.

covered by the subpoena.² Judge McMahon also ordered that McDonald's submit all responsive documents without redactions, except for social security numbers. Judge McMahon did not enforce the subpoena with respect to third parties or certain other document custodians sought by the General Counsel.

In the months that followed Judge McMahon's partial enforcement of the subpoena, McDonald's continued to dispute the scope of its obligations under the subpoena as enforced. On April 26, 2016, the General Counsel filed with Administrative Law Judge Lauren Esposito a motion for additional production of documents pursuant to the court enforced subpoena. On June 15, 2016, following the exchange of briefs and an oral argument, Judge Esposito issued an order granting in part and denying in part the General Counsel's motion. Specifically, at pages 15-16 of her order, Judge Esposito requires that McDonald's take the following actions:

1. Repeat its searches for ESI held by the 28 custodians it initially identified, and for the 20 [sic] additional custodians (and Kujawa) identified during the hearing before Judge McMahon.
2. Add Jeanne Hardemion-Kemp to the list of custodians, and search for ESI responsive to the Subpoena in the manner described herein.
3. Search all e-mail addresses used by the custodians described above for work related purposes, regardless of whether those e-mail addresses or accounts were established by McDonald's, or whether the e-mail addresses or accounts were or are "private," personal, or outside McDonald's information technology systems.
4. Search for responsive materials contained in all electronic communications systems, networks, hardware or devices established or provided by McDonald's, and through any other systems, networks, hardware, or devices used by the custodians for work-related purposes.
5. Search all such systems, network, hardware or devices and accounts for text messages responsive to General Counsel's Subpoena.
6. Provide General Counsel with information, including but not limited to the policies described above, regarding McDonald's method or methods of data storage and the accessibility of stored data.

² Judge McMahon did not otherwise limit the scope of the subpoena with respect to the 52 custodians included in her order (the 28 custodians initially identified by McDonald's, plus the 23 operations consultants and the executive added by Judge McMahon). Although Judge McMahon did order McDonald's to review the work emails for the additional custodians within 30 days, she rejected counsel for McDonald's suggestion that she was limiting the subpoena to work emails, stating "[t]hat's not the scope of the subpoena." Tr. at 24.

In its request for special permission to appeal, McDonald's indicates that it has agreed to comply with several aspects of the judge's June 15 order,³ and that it is contesting the following aspects of the judge's order:

- Paragraph 1, ordering McDonald's to repeat searches;
- Paragraph 3, to the extent that it relates to emails or custodians other than current employees who indicated that they used personal email for work and agreed to grant access to McDonald's; and
- Paragraphs 4 and 5, to the extent that they refer to responsive text messages and electronic materials in any "systems, networks, hardware, or devices" other than McDonald's-provided mobile devices.

McDonald's argues, *inter alia*, that an administrative law judge is without authority to either enforce subpoenas or to issue sanctions for noncompliance,⁴ that Judge Esposito erroneously concluded that McDonald's did not fulfill its duty to preserve potentially relevant documents

³ Specifically, at p. 15 of its appeal, McDonald's stated that it agreed to: add Jeanne Hardemion-Kemp to the list of custodians and search her available ESI for documents and data responsive to the subpoena (requirement 2 of the order); attempt to collect and search the personal emails of any current employees who have indicated they used personal email for work purposes (part of requirement 3) and will grant McDonald's access to their personal email; search custodians' McDonald's-provided mobile devices for responsive text messages and data (part of requirement 4); and supply General Counsel with information regarding its methods of data storage and the accessibility of stored data (requirement 6).

⁴ We find it unnecessary to address McDonald's argument that an administrative law judge does not have the authority to issue "sanctions" because the judge did not order sanctions here. In any event, for the reasons Judge Esposito discussed in her order, we find that she correctly determined that she has authority to make rulings regarding McDonald's document production pursuant to the court-enforced subpoena. Further, the absence of sanctions here moots McDonald's argument that a prejudice analysis must precede the imposition of sanctions.

McDonald's argues that Judge Esposito effectively sanctioned it by requiring duplication of searches already conducted. However, contrary to McDonald's arguments on appeal, we do not read paragraph 1 of Judge Esposito's order as requiring McDonald's to repeat the same searches it has already performed and produce the same information again. The General Counsel did not request this relief, nor would it likely be appropriate. When viewed in the context of McDonald's failure to search all sources for all custodians within the scope of the court-enforced subpoena, Judge Esposito's order simply requires that McDonald's conduct searches of all identified sources for the initial 28 custodians, as well as for the additional operations consultants and the executive added in the district court proceeding, and produce any responsive information in unredacted form. McDonald's is not required to repeat any search that it has previously conducted and from which it has produced all responsive materials.

in this matter,⁵ that Judge Esposito failed to consider the burdensomeness of compliance with the subpoena, and that Judge Esposito exceeded her authority in ordering relief that conflicts with Judge McMahon's order.

Contrary to McDonald's arguments, we find that the portions of Judge Esposito's order challenged on appeal fully comport with the scope of the subpoena as enforced by Judge McMahon, and that Judge Esposito had the authority to rule on the General Counsel's motion. In this regard, the court-enforced subpoena requires McDonald's to search various sources for responsive materials, including personal emails, text messages, and other sources listed in Judge Esposito's order.⁶

Further, McDonald's is mistaken in arguing that Judge McMahon limited the scope of the subpoena with respect to the potential sources of information, such as with respect to certain email or other communication on personal accounts or devices. Judge McMahon declined to enforce the subpoena with respect to third parties and certain document custodians sought by the General Counsel, but she did not otherwise limit the scope of the subpoena with respect to the 52 custodians included in her order. Moreover, because the documents named in Judge Esposito's order are consistent with what Judge McMahon has already ordered McDonald's to produce, we do not believe that McDonald's may properly raise burdensomeness; nor, in any event, do we believe that McDonald's has established the undue burdensomeness of Judge Esposito's production order as we have herein construed her order (i.e., not to require the duplication of previously conducted searches).

⁵ Although Judge Esposito and the parties discuss at length the question of when the duty to preserve evidence first arose and whether McDonald's litigation holds were adequate, we do not find it necessary to reach that issue in resolving this appeal. Here, the record shows that McDonald's has not yet searched all sources available to it within the scope of the court-enforced subpoena with respect to the 52 custodians included in Judge McMahon's order. Judge Esposito correctly concluded that McDonald's is obligated to search those additional sources for all custodians and produce any responsive documents and ESI. Until such efforts are completed, it will not be possible to assess the overall adequacy of the documents produced; therefore it is currently premature to decide whether McDonald's preservation efforts have been sufficient and, if not, what further actions would be appropriate.

⁶ On pp. 4–5 of Judge Esposito's June 15, 2016 order, she states:

Finally, McDonald's argues that some of the relief General Counsel requests here was denied by Judge McMahon, and therefore contradicts her order enforcing the Subpoena. However, my rationale for ordering relief that Judge McMahon declined to impose during the subpoena enforcement proceedings is based upon information that was not available at that time, as discussed below.

Notwithstanding Judge Esposito's comment, we find that the portions of Judge Esposito's order challenged on appeal are within the scope of the subpoena as enforced by Judge McMahon, and are not contrary to Judge McMahon's rulings.

For the reasons explained above, we find that McDonald's USA, LLC has not established that the judge abused her discretion in granting the General Counsel's motion in part and determining that the court-enforced subpoena requires McDonald's to search for and produce the additional information specified in her order.

Dated, Washington, D.C. November 10, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

This case involves whether McDonald's USA, LLC (McDonald's) is a joint employer liable for unfair labor practices (ULPs) allegedly committed by 30 franchisee employers.¹ Although McDonald's is not alleged to have committed any ULPs, the unusual structure of this massive consolidated case—which originated as 61 unfair labor practice charges filed in six NLRB Regions alleging 181 ULPs attributed to the 31 separate respondents—is based on the allegation that McDonald's has joint-employer liability. I have previously expressed my view that the decisions made to date in this consolidated proceeding will result in extraordinary costs and delays,² and

¹ The respondents include 30 franchisee-respondents who own or operate a McDonald's restaurant, plus McDonald's Restaurants of Illinois, Inc. (which is not alleged to be a franchisee of McDonald's, nor is McDonald's alleged to be a joint employer of McDonald's Restaurants of Illinois, Inc.'s employees). Each of these separate respondents is distinct and has no operational interchange with other respondents.

² The Board's prior procedural rulings in this case outline its extraordinary and unprecedented nature. See *Lewis Foods of 42nd Street, LLC*, 362 NLRB No. 132 (2015) (finding that judge properly denied McDonald's request to have a transcript of a telephonic conference addressing scheduling and production of documents subpoenaed by the General Counsel); *McDonald's USA, LLC*, 362 NLRB No. 168 (2015) (finding that judge properly denied McDonald's motion for a bill of particulars regarding General Counsel's alternative theory of joint-employer status, about which the consolidated complaints are silent); *McDonald's USA, LLC*, 363 NLRB No. 91 (2016) (finding that judge properly denied motions filed by McDonald's and New York franchisees to sever consolidated cases based on alleged prejudice to the respondents and the alleged denial of due process); *McDonald's USA, LLC*, 363 NLRB No. 92 (2016) (denying appeals by McDonald's and New York franchisees challenging Case Management Order based on objections to the structure of multiple-city hearings and the order in which evidence must be presented); *McDonald's USA, LLC*, 363 NLRB No. 144 (2016) (denying McDonald's appeal from judge's order

the worst burdens will be imposed on two groups: (i) the alleged discriminatees (since they will be denied relief until the completion of lengthy multi-city hearings and subsequent appeals that are likely to involve many more years of litigation than would be required were the cases litigated separately), and (ii) each of the 31 separate respondents (since most of the hearing will be devoted to matters other than each separate respondent's alleged ULPs).

The judge recently decided to retreat from her earlier ruling that approved the consolidation of diverse parties and claims in a single proceeding.³ In this regard, on the 58th day of hearing, the judge learned that the General Counsel intended to present an additional 35 witnesses requiring 38 additional days of hearing merely to complete the General Counsel's case addressing "nation-wide" evidence regarding joint-employer status. Likewise, regarding this single issue, McDonald's intended to present its own evidence estimated to require approximately 60 to 80 hearing days. Under the prior Case Management Order approved by the Board, there would still remain to be introduced (i) the parties' other-than-nationwide evidence regarding joint-employer status pertaining to particular franchisee-respondents, and (ii) evidence as to whether the alleged unfair labor practices were committed. Based on these considerations, the judge has now concluded that "hearing all of the consolidated cases together is impossible," reasoning that if "the evidence is heard with the cases as currently consolidated, the record will not close for years, and a definitive agency ruling with respect to joint employer status will not be made until well into the next decade."⁴

At present, the Board is considering McDonald's appeal from the judge's order granting and denying in part

that prevents McDonald's from obtaining various subpoenaed documents relating to potential "brand protection" defense to alleged joint-employer liability); *McDonald's USA, LLC*, 364 NLRB No. 14 (2016) (finding that judge properly denied Respondent MaZT's motions requesting order addressing the use and administration of the Board's file-sharing technology and for modification of the Case Management Order or, in the alternative, for precise standards for the advance notice of witnesses and the presentation of evidence). I authored dissenting opinions in many of these prior decisions.

³ See *McDonald's USA, LLC*, 363 NLRB No. 91, slip op. at 18–20 (judge's order denying Respondents' motions to sever the consolidated cases). A Board majority denied the Respondents' appeal from the judge's order (id., slip op. at 1–2); I dissented (id., slip op. at 2–8). Following her denial of the motions to sever, the judge issued a Case Management Order governing litigation of the consolidated proceeding. *McDonald's USA, LLC*, 363 NLRB No. 92, slip op. at 10–12. Again, a Board majority denied the Respondents' appeal from the judge's order (id., slip op. at 1–2), and I dissented (id., slip op. at 2–10).

⁴ Order Severing Cases and Approving Stipulation, at 3 (Oct. 12, 2016). At present, neither my colleagues nor I address any question regarding the judge's Order Severing Cases and Approving Stipulation.

the General Counsel's motion for additional production of documents. My colleagues find that McDonald's has not yet searched all available sources within the scope of the subpoena that was enforced by the district court. The majority also finds that the judge did not abuse her discretion in determining that the court-enforced subpoena requires McDonald's to search for and produce the additional information specified in the judge's order. However, the district court was responsible for addressing the extent of McDonald's production obligations pursuant to the subpoena, and it appears clear that the present disputes similarly involve questions regarding the scope of the district court's rulings and whether McDonald's has failed to comply with those rulings. Therefore, I believe these questions should be addressed by the district court and not the Board.⁵

Accordingly, I believe the judge exceeded her authority by issuing the order granting the General Counsel's motion for additional production, and I respectfully dissent.

Dated, Washington, D.C. November 10, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

ORDER GRANTING AND DENYING IN PART GENERAL COUNSEL'S MOTION FOR ADDITIONAL PRODUCTION OF DOCUMENTS FROM MCDONALD'S USA, LLC

On April 26, 2016, Counsel for the General Counsel ("General Counsel") filed a Motion for an Order Requiring Immediate Production of Certain Documents Withheld by McDonald's USA, LLC ("McDonald's") as Privileged and for Additional Production of Documents to Cure McDonald's Failures to Preserve Relevant Evidence, Especially Electronically Stored Information.¹ On May 16, 2016, McDonald's filed an Opposition,

⁵ See NLRA Sec. 11(2), which states: "In case of contumacy or refusal to obey a subpoena issued to any person, *any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order* requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court *may be punished by said court as a contempt thereof*" (emphasis added).

¹ General Counsel initially filed one Motion encompassing both of these contentions and also seeking an order requiring immediate production of documents withheld by McDonald's as privileged. By order dated May 2, 2016, Special Master Jeffrey D. Wedekind declined to

and General Counsel was subsequently granted permission to file a Reply, which it submitted on May 20, 2016. I heard oral argument on the Motion on May 25, 2016, and on May 27, 2016, McDonald's filed a Sur-Reply, which is rejected.

For the following reasons, I find that McDonald's response to the General Counsel's Subpoena *Duces Tecum* has been inadequate. As a result, I find that some, but not all, of the relief requested by General Counsel in the instant Motion to attempt to remedy the incomplete production is appropriate.

A. Background

This particular dispute is only the most recent manifestation of an ongoing conflict between General Counsel, together with Charging Parties, and McDonald's involving the production of documents and electronically stored information ("ESI") pursuant to Subpoenas. In February 2015, General Counsel served a Subpoena *Duces Tecum* on McDonald's, and McDonald's filed a Petition to Revoke, which I denied in an order dated March 18, 2015.² Subsequently, pursuant to my orders, the parties participated in a number of meetings and status conferences to address the production of documents and ESI. In its initial production, McDonald's unilaterally redacted documents responsive to the Subpoena; General Counsel protested, and on June 12, 2015, I issued an Order requiring that McDonald's cease making unilateral redactions to documents and ESI. McDonald's subsequently refused to comply with my Order requiring that it produce unredacted documents, and refused to expand the number of custodians whose ESI it was searching in the event that I issued an Order requiring that it do so.³ As a result, General Counsel initiated a proceeding in the United States District Court for the Southern District of New York to enforce the Subpoena. General Counsel also sought to expand the group of custodians subject to searches for pertinent ESI, obtain unredacted documents, and obtain the documents of entities contracting with McDonald's for certain purposes. At a hearing on October 30, 2015, Judge Colleen McMahan enforced General Counsel's Subpoena, and ordered that McDonald's use its best efforts to produce the work e-mails of twenty additional Operations Consultant custodians requested by General Counsel and executive John Kujawa.⁴ G.C. Motion, Ex. 5, p. 17, 26-27 Alt-

rule on General Counsel's argument that McDonald's failed to preserve evidence, finding that the issue was beyond the scope of the matters referred to him for decision. Subsequently, on May 6, 2016, McDonald's filed a Motion to refer all issues presented in General Counsel's April 26, 2016 Motion to Special Master Wedekind, which I denied on May 17, 2016.

² Charging Party also served a Subpoena *Duces Tecum* on McDonald's encompassing the information sought by General Counsel. McDonald's filed a Petition to Revoke Charging Party's Subpoena, which I denied in part.

³ Early in the process, McDonald's contended that 240 custodians might be in possession of documents and ESI responsive to General Counsel's Subpoenas, but would not disclose their identities to General Counsel. During status conferences, I ordered McDonald's to provide General Counsel with job descriptions for these 240 custodians. Tr. 191, 202. General Counsel states that McDonald's provided job postings for 18 different positions in response to this order.

⁴ Judge McMahan ordered McDonald's to provide unredacted documents, but limited the group of additional custodians General Counsel

though McDonald's has continued to produce documents following the enforcement proceedings, it still asserts that it has not completed its production of documents and ESI responsive to General Counsel's Subpoena *Duces Tecum* served in February 2015, but that its production will be complete shortly.

The parties have also been engaged in an ongoing dispute over privileged documents and the privilege logs provided by McDonald's and the Franchisee Respondents. General Counsel states that McDonald's initial privilege log was comprised of 44 Items. On December 23, 2015, General Counsel filed a Motion for an Order Finding Waiver of Privilege, seeking to preclude McDonald's from withholding additional documents as privileged. On January 4, 2016, I denied this Motion and ordered McDonald's to provide a complete privilege log on or before January 8, 2016; McDonald's submitted a privilege log on that date consisting of 587 Items. A week later, General Counsel filed a Motion for Immediate Production of Certain Documents Withheld by McDonald's as Privileged, and on January 21, 2016, McDonald's filed a revised privilege log consisting of 713 Items. Subsequently the parties agreed to have General Counsel's Motion held in abeyance pending discussions regarding McDonald's assertions of privilege. On February 15, 2016, McDonald's filed another privilege log, relinquishing its privilege assertions with respect to 128 Items. The parties' further discussions and correspondence regarding the privilege logs were unproductive, and on April 26, 2016, General Counsel filed the instant Motion.

B. Authority of an Administrative Law Judge to Award the Relief General Counsel Requests

McDonald's argues as a threshold matter that as an Administrative Law Judge I lack the authority to impose what it construes as "discovery sanctions" requested by General Counsel. This argument is unavailing for several reasons. First of all, the relief sought by General Counsel does not constitute "sanctions" under the Federal Rules of Civil Procedure,⁵ or pursuant to the decisions of the Federal Courts of Appeal which McDonald's contends limit the scope of an ALJ's authority in this respect. Furthermore, the Board has rejected the rulings of the Federal Courts of Appeal cited by McDonald's, and as an ALJ I am bound to follow Board law that has not been overruled by the Supreme Court.

I find that the relief requested by General Counsel does not consist of sanctions pursuant to the Federal Rules of Civil Procedure, but additional discovery ordered in an effort to obviate the necessity for sanctions to be imposed. Federal Rule of Civil Procedure 37(e), amended in 2015 to address failures to preserve ESI, discusses appropriate sanctions to be imposed upon a party which "failed to take reasonable steps to preserve" ESI subsequently lost. The Rule is structured in two parts — to provide for "measures no greater than necessary" to cure any

sought to include in McDonald's search for ESI, and refused to order McDonald's to require that McDonald's attempt to obtain documents from third party entities. G.C. Motion, Ex. 5, p. 10, 16–17, 18–19.

⁵ It is well-settled that while the Federal Rules of Civil Procedure and Evidence are not technically binding, the Board looks to the Rules and federal caselaw interpreting them for "useful guidance." See, e.g. *Brinks, Inc.*, 281 NLRB 468 (1986).

prejudice to another party from the loss of ESI, and to impose specifically enumerated, harsher penalties where the party having lost ESI is found culpable. FRCP 37(e)(1-2). The specific penalties for loss of ESI in the event of a "finding that the party acted with the intent to deprive another party of the information's use in the litigation" include a presumption that the lost information was unfavorable to the culpable party, an instruction that the jury may or must presume that the lost information was unfavorable, or dismissal of the action. FRCP 37(e)(2). However, the measures to be ordered under either component of the Rule are only imposed in the event that the lost information "cannot be restored or replaced through additional discovery." FRCP 37(e).⁶ As a result, the additional discovery ordered here does not constitute a sanction pursuant to FRCP 37(e).

Nor does the relief requested by General Counsel constitute a sanction under the decisions of Federal Courts of Appeal cited by McDonald's pertaining to the authority of NLRB ALJs. *NLRB v. International Medication Systems, Ltd.*, 640 F.2d 1110, 1112-1113, 1116 (1981), discussed by McDonald's in its Opposition, addressed an ALJ's order precluding the respondent's presentation of rebuttal evidence because respondent failed to comply with a subpoena. *NLRB v. Interbake Foods LLC*, 637 F.3d 492, 496-501 (4th Cir. 2011), and *NLRB v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999), involved an ALJ's *in camera* review of documents in order to determine the validity of privilege assertions. Thus, these cases are not pertinent to the order for additional discovery sought in the instant Motion.

Furthermore, the holdings of these cases have been squarely rejected by the Board, which has repeatedly held that ALJs have authority to conduct *in camera* review of documents and to impose sanctions, including limiting the presentation of evidence, upon a party that fails to comply with a subpoena. See *CNN America, Inc.*, 352 NLRB 448, 449, n. 6 (2008) (two-member Board), final decision, 361 NLRB No. 47 (2014) (ALJs empowered to conduct *in camera* review of documents to evaluate assertions of privilege); *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829 (2003) (authorizing ALJ's *in camera* review of document to resolve privilege issue); *Packaging Techniques, Inc.*, 317 NLRB 1252, 1253, n. 4 (1995) (collecting Board and Circuit cases approving ALJ's preclusion of evidence for failure to comply with subpoena). Although, as previously stated, the Federal Rules of Civil Procedure and federal caselaw may provide "useful guidance" in analyzing issues arising pursuant to a Board subpoena, "[i]t has been the Board's consistent policy . . . to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether . . . to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise." *Pathmark Stores, Inc.*, 342 NLRB 378, n. 1 (2004). Because I am bound to "apply established Board precedent which the Supreme Court has not reversed," the limits on ALJ authority articulated in *Interbake*

⁶ The Advisory Committee Note on the 2015 amendment revising Rule 37(e) reiterates that if information is lost "the initial focus should be on whether the lost information can be restored or replaced through additional discovery."

Foods LLC, Detroit Newspapers, and International Medication Systems, Ltd. are not applicable. *Id.*

McDonald's argument that I lack authority to "enforce" the Subpoena by issuing the instant Order is also not persuasive. As set forth above, *NLRB v. International Medication Systems, Ltd.*, discussed by McDonald's in this respect, addressed an ALJ's refusal to permit the presentation of rebuttal evidence, and not an order explicating the parameters of a party's response to a subpoena issued by the agency. As General Counsel discusses, ALJs have been making evidentiary rulings and adjudicating disputes regarding the production of documents and information arising in the context of administrative hearings since the agency's inception.⁷ McDonald's assertion that I have no power to do so here contradicts that lengthy history, and would if generally applied require that the administrative process grind to a halt while every mundane evidentiary ruling or dispute regarding the production of documents is brought before the district court. Finally, McDonald's argues that some of the relief General Counsel requests here was denied by Judge McMahon, and therefore contradicts her order enforcing the Subpoena. However, my rationale for ordering relief that Judge McMahon declined to impose during the subpoena enforcement proceedings is based upon information that was not available at that time, as discussed below.

For all of the foregoing reasons, I find that I have the authority to grant the relief requested by General Counsel and ordered herein.

C. Evidence Establishing that Additional Measures Are Necessary

General Counsel argues that the production of additional documents is warranted given McDonald's failure to preserve ESI in contravention of a duty to do so. It is well-settled that a duty to preserve evidence "arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC ("Zubulake IV")*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003), quoting *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). Delineating the parameters of the duty to preserve in any specific circumstance requires a determination as to when the duty to preserve arose, and "what evidence must be preserved." *Zubulake IV*, 220 F.R.D. at 216 (emphasis in original). Once a duty to preserve exists, the party must "suspend its routine document and retention/destruction policy and . . . put in place a litigation hold." *Id.* at 218.

I concur with General Counsel's contention that assertions of attorney work product privilege are directly relevant to a determination as to when a party had notice or should have known that material may be pertinent to future litigation, engendering a duty to preserve evidence. Thus, an assertion that documents

⁷ As General Counsel argues, both the agency and the federal courts have for many years held that ALJs have authority to rule upon evidentiary issues and disputes regarding subpoenas, including the imposition of evidentiary sanctions. See, e.g., *Bannon Mills*, 146 NLRB 611, 613, n. 4, 633-634 (1964); *McAllister Towing & Transportation*, 341 NLRB 394, 396-397 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005); *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 34 (1st Cir. 1981).

are protected attorney work product in that they were prepared in anticipation of litigation establishes that the party knew or should have known that it was subject to a duty to preserve evidence at the time of their preparation. See *Sinai v. State University of New York at Farmingdale*, 2010 WL 3170664 at *5 (E.D.N.Y. 2010), and see 2011 WL 2580361 at *3 (E.D.N.Y. 2011) (agreeing with party's contention "If [litigation] was reasonably foreseeable for work product purposes . . . it was reasonably foreseeable for duty to preserve purposes"); see also *Lendingtree LLC v. Zillow, Inc.*, 2014 WL 1309305 at *10 (W.D.N.C. 2014); *Sanofi-aventis Deutschland GmbH v. Glenmark Pharmaceuticals, Inc., USA*, 2010 WL 265412 (D.N.J. 2010), *aff'd* in relevant part 748 F.3d 1354, 1361-1362 (Fed. Cir. 2014). McDonald's has offered no authority to contradict this "common sense conclusion." *Sinai*, 2010 WL 3170664 at *5. At oral argument, McDonald's cited *In re Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation*, 299 F.R.D. 502 (S.D.W.Va. 2014), in this regard. However, that case only mentions work product privilege assertions in passing, in the context of determining to what party or parties the duty to preserve is owed. *In re Ethicon, Inc.*, 299 F.R.D. at 514-516, discussing *Point Blank Solutions, Inc. v. Toyobo America, Inc.*, 2011 WL 1456029 (S.D.Fla. 2011). The district court ultimately found that a duty to preserve with respect to one party did not transfer to another party in a completely different action after the initial party's lawsuit was concluded, but did not otherwise address the effect of privilege assertions. *In re Ethicon, Inc.*, 299 F.R.D. at 514-516.

Based upon the foregoing caselaw, I find that McDonald's assertions of work product privilege contending that documents were prepared in anticipation of litigation are substantially meaningful with respect to both the time at which the duty to preserve began and the scope of the evidence to which the duty applied. Thus, I find that McDonald's was anticipating litigation involving its status as a putative joint employer of employees at franchisee locations as of fall 2012 based on assertions of work product privilege contained in its privilege logs. For example, Items 90 through 92 listed in McDonald's February 15, 2016 privilege log⁸ consist of notes of two conference calls and a chart describing "labor organizing activity," created on October 18, 19, and 22, 2012, respectively, being withheld as attorney work product in that they were "prepared at the direction of McDonald's legal counsel . . . because of anticipated and/or pending litigation alleging joint employment, including federal and state court litigation and unfair labor practice charges, by the SEIU and its affiliated organizations and/or individuals." Other Items created during fall 2012 and withheld on this basis include Item 117 (November 28 and 29), Item 121 (October 19), Item 181 (October 25), Item 182 (October 21), Item 183 (October 18), Item 192 (November 29-30), Item 193 (November 30), Item 194 (October 28), Item 343 (December 17 and 19), Item 370 (December 14), Items 381 and 382 (November 29 and 30), Items 392, 393 and 394 (December 4, 5, and 6), and Items 395, 396, and 397 (December 1). Because McDonald's asserts that it was anticipating litigation regarding joint em-

⁸ All of the allegedly privileged Items discussed hereafter appear in McDonald's February 15, 2016 privilege log.

ployer status, including unfair labor practice charges filed by the Charging Parties, as of mid-October 2012, its duty to preserve evidence also arose at that time.

McDonald's contends that it was not under a duty to preserve evidence until General Counsel announced in a July 29, 2014 news release that it would issue complaints against franchisees and McDonald's, as joint employers, alleging violations of the Act.⁹ However, it is well-settled that the duty to preserve evidence arises not when litigation is initiated, but whenever the party "first anticipates litigation." *Sinai*, 2010 WL 3170664 at *6, quoting *Toussie v. County of Suffolk*, 2007 WL 4565160 at *6 (E.D.N.Y. 2007). Furthermore, the distinction McDonald's attempts to draw between filing an unfair labor practice charge — which initiates the agency's investigative process — and General Counsel's issuance of a complaint is not legally tenable.¹⁰ McDonald's contends that because many unfair labor practice charges do not culminate in a complaint, it cannot be construed to have anticipated litigation prior to a complaint's issuance. However, no such precept has arisen out of cases involving the somewhat similar administrative process for employment discrimination claims initiated via charges investigated by the Equal Employment Opportunity Commission or a state agency which enforces an analogous statute. See *Zubulake IV*, 220 F.R.D. at 215-216 (duty to preserve evidence arose "at the latest" when plaintiff filed EEOC charge, where employment discrimination action filed 6 months later); see also *Adomo v. Port Authority of New York and New Jersey*, 258 F.R.D. 221, 228 (S.D.N.Y. 2009).

In fact, during this case McDonald's has repeatedly argued that it has been the target of a multi-faceted nationwide corporate campaign or attack on its brand by SEIU and the other Charging Parties, involving Fair Labor Standards Act litigation and other legal action. Given McDonald's many statements regarding the scope and nature of the Charging Parties' activities to this end, it is simply inconceivable that litigation was not anticipated until the General Counsel formally announced that a complaint would issue. Furthermore, I am not persuaded by McDonald's argument that inevitably "frivolous" charges filed by the Charging Parties in connection with their corporate campaign warrants the creation of an exception to the standard for determining the time at which the duty to preserve attaches. Apart from McDonald's failure to provide any legal support for such a theory, permitting such an exception would exempt a party from one of the ordinary obligations inherent in electronic discovery based upon circumstances likely involving activity that the National Labor Relations Act was intended to protect.

As stated above, McDonald's privilege assertions are also

⁹ It is not clear whether the cases referred to in the July 29, 2014 news release were incorporated into the Consolidated Complaint herein. On December 19, 2014, the agency issued a news release announcing the issuance of the Consolidated Complaint against McDonald's and the Franchisee Respondents in this case, as well as the existence of other complaints in cases that were not consolidated with the instant proceeding.

¹⁰ The Division of Operations-Management Memorandum OM 10-48 to which McDonald's refers involves litigation holds placed by the agency on its own personnel, and does not constitute a policy applicable to the parties before it.

relevant to the scope of the information subject to the duty to preserve as of the dates when the specific ESI was created. Generally, a party must preserve "what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Zubulake IV*, 220 F.R.D. at 217, quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991). Although a large corporate entity which anticipates litigation need not "preserve every shred of paper, every e-mail or electronic document, and every backup tape," it also "must not destroy unique, relevant evidence that might be useful to an adversary." *Id.*

Much of the information withheld as subject to attorney work product privilege here is described as "prepared at the direction of McDonald's legal counsel . . . because of anticipated and/or pending litigation alleging joint employment, including federal and state court litigation and unfair labor practice charges, by the SEIU and its affiliated organizations and/or individuals." As General Counsel states, materials pertinent to the joint employer analysis elucidate the effect of McDonald's policies and practices on the wages, hours, and working conditions of employees employed at the franchisee restaurants. As I have discussed in previous orders, the Board will generally find two separate entities joint employers of a single group of employees where the evidence establishes that they "share or co-determine those matters governing the essential terms and conditions of employment." *BFI Newby Island Recyclery, Inc.*, 362 NLRB No. 186 at p. 2, 15(2015); *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). In addition to involvement in hiring, firing, discipline, supervision and direction of work, the Board considers the impact of the putative joint employer on wages and hours, establishing the number of workers supplied, scheduling, seniority, overtime, assignment of work, and "determining the manner and method of work performance." *BFI Newby Island Recyclery, Inc.*, 362 NLRB No. 186 at p. 15 (citations omitted). Thus, McDonald's personnel in possession of information regarding the impact of McDonald's policies and practices on these aspects of employment at the franchise restaurants would comprise the "key players" having relevant information in the case. *Zubulake IV*, 220 F.R.D. at 218. As General Counsel points out, in a March 29, 2015 letter McDonald's identified Field Service or Operations Consultants, the Field Service Managers to which the Consultants report, and Human Resources Directors as "most likely to possess documents and ESI" responsive to General Counsel's subpoenas. G.C. Motion, Ex. 20.

Furthermore, it is clear from the privilege log that national corporate-level personnel were involved in McDonald's response to the Charging Parties' organizing activities from their inception. For example, Items No. 90-92, notes of October 18 and 19, 2012 conference calls regarding "labor activity in New York Region" were prepared, according to the privilege log, not only by Maggie Calabrese, the Human Resources Director for the New York Region, but also by an HR Director in the East Division, the Division's HR Director, and Danitra Barnett, who was then US Vice President for HR. Items No. 181, 182, and

183, dated October 25, 21, and 18, 2012, respectively, contain notes of conference calls forwarded by Director of HR D. Gillen and Danitra Barnett to Steve Russell, Corporate Senior Vice President. The privilege log also reveals that McDonald's considered the work of its personnel involved in communications, training, and operations to be relevant to issues involving joint employer status. For example, Item No. 121, an October 19, 2012 e-mail and attachment "prepared by counsel because of anticipated and/or pending litigation alleging joint employment," was forwarded to the New York Region's Director of Communications, Training and Deployment Managers, Director of Operations, Operations Manager, Field Service Manager, and Operations or Business Consultants. Item No. 192, e-mails attaching information regarding organizing and demonstrations dated November 29-30, 2012, was also sent to the Vice President and QSC Vice President of the New York Metro Region, as well as to Russell (identified in these entries as "Senior Vice President — Chief People Officer") and Barnett. Items No. 381 and 382, e-mails regarding labor activity dated November 29 and 30, 2012, were created or forwarded not only to Barnett and Russell, but to Corporate Vice President — Strategic Alignment M. Smoot, US Vice President — Restaurant Support Office — East Division D. Roberts, and Director of Operations M. Quesada. Item No. 397, e-mails dated December 1, 2012 regarding labor activity, were also forwarded to Smoot, and to the New York Region's Marketing Director, Field Service Manager, Finance Director, Operations Director, and General Manager and Vice President.

Privilege log entries also establish that not long after the Charging Parties' activities began in New York, information regarding activities elsewhere was being gathered and disseminated, sometimes to personnel outside the Region involved. For example, Item No. 380, described above, contends that a December 31, 2012 e-mail was created in anticipation of litigation involving joint employer status and addressed "labor activity at New Jersey owner-operator." Item No. 370 consists of a December 14, 2012 e-mail to Craig Cary, HR Director in the Chicago Region, Home Office Security Manager Richard Martinez, and Central Division HR Officer J. Parks involving "collection of information re demonstrator at owner-operator Karavites and Lubeznik's stores by McDonald's regional personnel," created in anticipation of litigation "by the SEIU and its affiliated organizations and/or individuals." Item 642, a December 13, 2012 e-mail regarding "labor protest activity in the Chicago area," was forwarded to Field Service Managers, a Senior Director of Communications and Directors of Media Relations and Brand Trust, the Regional Security Manager, and the Operations Director in the Chicago Region. Items No. 381 and 382, described above, also involved "labor organizing activity in various regions." Item No. 635 consists of e-mails regarding a "labor organization presentation" to take place on January 6, 2013 in the Philadelphia Region. Item No. 343, e-mails dated December 17 and 19, 2012 regarding a log describing "labor organizing activity in various regions" was prepared by Tracy Vargas, then an HR Development Director working in New York, and sent not only to Calabrese and the East Division HR Director, but to Cary in the Chicago Region. All of these Items refer to the litigation anticipated and/or pending as in-

volving contentions of joint employer status in federal and state litigation and unfair labor practice charges.

McDonald's argues that it complied with any preservation obligations by instituting a series of litigation holds.

...
[Redacted pursuant to protective seal]

Based upon the foregoing, I find that the scope of McDonald's litigation holds was inadequate in terms of both the time of their origin and the personnel they encompassed.

...
[Redacted pursuant to protective seal]

Similar considerations apply with respect to the duty to preserve information relevant to the Chicago and Philadelphia Regions. As discussed above, allegedly privileged materials involving labor activity at Chicago franchisee restaurants, including those of Franchisee Respondents in this case, are dated from December 13, 2012. The privilege log asserts that these Items are being withheld as work product prepared in anticipation of litigation involving joint employer status, including unfair labor practice charges. The first unfair labor practice charge was filed in Chicago on June 4, 2013.

...
[Redacted pursuant to protective seal]

The inadequate scope of McDonald's preservation efforts is also evident from the ESI provided to General Counsel in response to his Subpoena and introduced as evidence during the hearing thus far. There is no evidence contradicting General Counsel's contention that McDonald's initially produced no responsive documents whatsoever from Danitra Barnett or Steve Russell, despite indications from the information contained in the privilege log that they were involved with responding to labor activity beginning in mid-December 2012 and were identified by McDonald's as individuals "most likely to possess" relevant documents and ESI. G.C. Motion, Ex. 20. However, during the hearing numerous e-mails either sent or received by Barnett and eventually produced by McDonald's were introduced into evidence. See, e.g., G.C. Exs. HR 69, HR 70, HR 75, HR 76, HR 77, HR 78, HR 79, HR 81, HR 82, HR 90, HR 132. Some of these e-mails originated from an office "distribution" e-mail address that McDonald's admits in its Opposition was never searched in connection with its response to General Counsel's Subpoena.¹⁶ See, e.g., Tr. 1832, 1897-1898, 1914-1915; G.C. Exs. HR 70, HR 77, HR 78, HR 79, HR 81, HR 82, HR 128; Opposition at p.26, fn. 15. Similarly, McDonald's produced only two documents from Tracy Vargas and 29 documents from Craig Cary, both of whom sent or received numerous e-mails responsive to General Counsel's Subpoena. All of these witnesses appeared on the initial list of 28 personnel identified by McDonald's as most likely in possession of relevant materials. Indeed, according to its representations to Judge McMahon, McDonald's intended, by the close of 2015, to have searched the personal e-mails, telephones, and text messages of

¹⁶ I note that in a January 6, 2016 letter to McDonald's, General Counsel pointed out that Barnett used "two separate McDonald's e-mail accounts," yet McDonald's still failed to search the distribution address account. G.C. Reply, Ex. 1, p. 2.

this group, in addition to their office e-mail accounts.¹⁷

McDonald's contends in its Opposition that the relatively small amount of ESI produced for such custodians is attributable to deduplication. However, this explanation is inadequate. Deduplication may result in an electronic document's being produced once despite it's having been sent to, say, several different custodian recipients within the McDonald's system. However, deduplication cannot account for the number of documents produced by Franchisee Respondents which should have been produced by McDonald's as well but were not. Virtually every witness testifying thus far has identified communications responsive to General Counsel's Subpoena which should have been produced by McDonald's, but were only produced by a Franchisee Respondent. See, e.g., G.C. Exs. HR 444 (e-mail from HR Director Tory Wozny to Philadelphia Region Owner/Operators regarding pay cards); HR 366 (e-mail from HR Director Kenneth Sanders to Indianapolis Region Owner/Operators and staff regarding labor demonstrations in the New York Metro Region). General Counsel contends in its Motion that as of April 26, 2016, 145 of the 568 documents admitted into evidence were provided by the Franchisee Respondents but not produced by McDonald's, and McDonald's does not directly dispute that calculation. McDonald's failure to produce materials responsive to the Subpoena which were instead produced by the Franchisee Respondents contradicts its contention that deduplication accounts for the paltry ESI produced from its 28 "key player" custodians, and further illustrates the inadequacy of McDonald's preservation and production efforts.

The evidence also establishes that McDonald's personnel used alternate e-mail addresses outside McDonald's own information technology systems which contain relevant information, and must be searched. New York Metro Region HR Director Maggie Calabrese appears to have explicitly directed Franchisee Respondents to use e-mail addresses outside of the McDonald's system to communicate with her regarding labor activity. In an e-mail produced by Franchisee Respondent McConner Street Holding LLC, one Franchisee Respondent representative informs another regarding "union workshops" being sponsored by the New York Metro Region and "guidelines we should use with the handling of the alleged union activities in our restaurants." The representative states, "I spoke with Maggie Calabrese today . . . She does not want us to use McDonald's email addresses as a form of communication with you or her about this topic," and "please note she used her private email to send me this information." G.C. Motion, Ex. 21. HR Director Craig Cary also used at least one e-mail address outside the McDonald's corporate communication system to forward materials pertaining to labor activity. G.C. Motion,

¹⁷ At the October 30, 2015 hearing before the District Court, McDonald's represented to Judge McMahon that it was searching "the personal e-mails and the telephones and the text messages" of the initial 28 custodians, which included Barnett, Russell, Vargas and Cary, and expected to be finished within 2-3 weeks. G.C. Motion, Ex. 5, p. 22. Judge McMahon restricted production to work e-mails only with respect to the additional 20 Operations Consultant custodians for whom General Counsel was seeking production during the enforcement proceeding. G.C. Motion, Ex. 5, p. 26.

Exs. 22, 23. These e-mails indicate that McDonald's personnel did not confine their pertinent communications to McDonald's information technology systems, or to McDonald's-established accounts, and that "personal" e-mail addresses likely contain relevant information.

It is also evident that McDonald's personnel identified as "key players" used text messaging for work-related purposes to an extent which requires the production of such ESI. As General Counsel contends, Operations Consultant Sheila Capua conducted a number of "Recaps" or summaries of the results of visits to restaurants operated by Franchisee Respondent Faith Corp. by text message. G.C. Motion, Ex. 24. Craig Cary also communicated with Franchisee Respondents regarding labor activity associated with the Charging Parties by text message. G.C. Motion, Ex. 25. Barnett, Wozny, and HR Director Eric DeLuna testified that they communicated regarding work-related matters by text message.¹⁸ Tr. 2018, 3710-3711, 3978. Although McDonald's represented to Judge McMahon that it had searched their text messages, the text messages referred to by Capua and Cary in the materials attached to General Counsel's Motion were apparently not produced. I note as well that Items 656 through 658 listed in McDonald's privilege log consist of e-mails dated March 15, 2013 and March 19, 2013, entitled in part "texts retrieval," and are described as "reflecting confidential communication between counsel and client for the purpose of giving legal advice regarding IT collection for anticipated and/or pending litigation alleging joint employment, including federal and state court litigation and unfair labor practice charges, by the SEIU and its affiliated organizations and/or individuals." These e-mails were sent by McDonald's internal counsel, Calabrese, and Field Service personnel in the New York Metro Region to various Regional QSC, Operations, and Field Service Managers and Consultants, as well as a Corporate VP and Global CISO. These e-mails indicate that "text retrieval" was considered an issue sufficiently critical to warrant the involvement of counsel in connection with the instant charges as early as March 2013. Yet, according to General Counsel, McDonald's has not produced a single text message from the group of 28 personnel initially identified as likely to possess relevant information.

For all of the foregoing reasons, the record establishes that McDonald's litigation holds were not imposed in a timely fashion and were inadequate in scope. The record further establishes that McDonald's personnel in possession of information directly relevant to the Consolidated Complaint's allegations used e-mail addresses and text messages to communicate pertinent information both within and outside of McDonald's Own information technology systems that were not encompassed by McDonald's document and ESI preservation efforts. The record also establishes that McDonald's, despite its representations to Judge McMahon, failed to provide relevant ESI for the initial 28 custodians from all sources. I therefore find that McDonald's document preservation and retrieval efforts have been inadequate.

¹⁸ I note as well that Barnett and Wozny testified that they regularly deleted text messages, which could have included information responsive to the Subpoena. Tr. 2018, 3978.

D. The Specific Additional Measures Requested by General Counsel

I now turn to the specific relief requested by General Counsel. In his Motion, General Counsel requests an order requiring that McDonald's: (i) identify and search additional e-mail accounts maintained or used by or on behalf of all relevant custodians; (ii) search back-up tapes and other devices where relevant evidence which was not preserved may be stored; and (iii) search additional devices such as McDonald's-issued employee smart phones for text messages and other relevant communications responsive to the Subpoena. In addition, at oral argument General Counsel requested that any order add Jeanne Hardemion-Kemp, HR Director for the Southern California Region, to the list of ESI custodians. For the following reasons, I decline to order McDonald's to search its back-up tapes for electronic information. I will, however, order that McDonald's repeat its searches with respect to all previously identified custodians and add Hardemion-Kemp to the list of custodians, order the other relief requested by General Counsel, and order McDonald's to provide information regarding its use of back-up tapes and other methods of data storage for possible future search and production.

I find that an order requiring a search of back-up tapes and other storage mechanisms is premature at this time. Additional information regarding the manner of storage and the accessibility of the stored data, which I will order McDonald's to produce, is necessary in order to further evaluate the reasonableness of McDonald's preservation efforts and the cost of retrieving information against the utility of information which can potentially be recovered. In addition, as discussed previously, Rule 37(e) and its accompanying Advisory Committee Note envision resort to additional discovery to restore or replace ESI lost as a result of the failure to take reasonable steps to preserve it, prior to the imposition of sanctions. Thus, I decline to order that McDonald's conduct a search of its back-up tapes or other stored data at this time.

Instead, I hereby order that McDonald's repeat its searches for the 28 custodians it initially identified, and for the 20 additional custodians (and Kujawa) identified during the hearing before Judge McMahon. I order that McDonald's search all e-mail addresses used by those custodians for work-related purposes, regardless of whether those e-mail addresses or accounts were established by McDonald's (including individual and "distribution" e-mail addresses and accounts on McDonald's systems), or whether the e-mail addresses or accounts were or are "private," personal, or outside McDonald's systems. I further order that McDonald's search for responsive materials contained in electronic communications systems, networks, hardware or devices established or provided by McDonald's, and through other systems, networks, hardware, or devices used by the custodians. I order that McDonald's search all such systems, network, hardware or devices and accounts for text messages responsive to General Counsel's Subpoena. I further order that McDonald's add Jeanne Hardemion-Kemp to the group of custodians, and to perform searches for responsive ESI with respect to Hardemion-Kemp during the period January 1, 2012 through December 31, 2014, in the manner described above.

McDonald's argues in its Opposition that an order to search

personal e-mail addresses and text messages contradicts Judge McMahon's order and directions during the October 30, 2015 hearing. I do not agree. At the hearing before her, Judge McMahon did not have access to the documents and ESI subsequently produced by McDonald's and the Franchisee Respondents. These materials, as discussed above, establish that McDonald's personnel, including the initial 28 "key player" custodians identified by McDonald's itself, used "personal" e-mail addresses outside of McDonald's electronic records systems to communicate regarding work-related issues, including matters directly relevant to the joint employer issue and the alleged unlawful conduct. The materials subsequently produced and the testimony of witnesses, including "key player" custodians, further establish that these same personnel engaged in work-related communications by text message, with the Franchisee Respondents and others.¹⁹ Nor was Judge McMahon aware of the Items listed in McDonald's privilege log, dated mid-March 2013, regarding the retrieval of text messages pertinent to joint employer status and the unfair labor practices. As a result, I find it appropriate to order that McDonald's extend its searches and production of responsive information to e-mail addresses and text messages, in addition to hardware and devices, outside of McDonald's own systems for electronic communication.

Finally, McDonald's is ordered to produce information to General Counsel and Charging Parties pertaining to its policies and practices in effect during the period January 1, 2012 through December 1, 2014 regarding the retention, destruction, preservation and retrieval of ESI, including but not limited to the following policies

. . .

[Redacted pursuant to protective seal]

McDonald's is also ordered to provide its policies, procedures, and other information regarding its specific method or methods of data storage and the accessibility of its stored data, including, but not limited to, its policies and practices regarding the use of back-up tapes.

E. Order

McDonald's is hereby ordered to do the following with respect to its production of documents and ESI responsive to General Counsel's Subpoena *Duces Tecum*:

1. Repeat its searches for ESI held by the 28 custodians it initially identified, and for the 20 additional custodians (and Kujawa) identified during the hearing before Judge McMahon.

2. Add Jeanne Hardemion-Kemp to the list of custodians, and search for ESI responsive to the Subpoena in the manner described herein.

¹⁹ I further note that when asked by Judge McMahon during the October 30, 2015 hearing whether McDonald's had found "a single work-related communication" while searching the personal e-mails and telephones and text messages for the initial 28 custodians, McDonald's counsel responded, "Oh, yes," and stated that responsive information was "coming from all manner of electronic sources. They are certainly coming from work e-mails, they are coming from other sources." G.C. Motion; Ex. 5, p. 22. This response may indicate that McDonald's located responsive information in the initial 28 custodians' personal e-mails, telephones and text messages.

3. Search all e-mail addresses used by the custodians described above for work-related purposes, regardless of whether those e-mail addresses or accounts were established by McDonald's, or whether the e-mail addresses or accounts were or are "private," personal, or outside McDonald's information technology systems.

4. Search for responsive materials contained in all electronic communications systems, networks, hardware or devices established or provided by McDonald's, and through any other systems, networks, hardware, or devices used by the custodians for work-related purposes.

5. Search all such systems, network, hardware or devices and

accounts for text messages responsive to General Counsel's Subpoena.

6. Provide General Counsel with information, including but not limited to the policies described above, regarding McDonald's method or methods of data storage and the accessibility of stored data.

Dated: New York, New York June 15, 2016

LAUREN ESPOSITO, Administrative Law Judge.