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October 17, 2018

Office of the Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, DC 20570-0001

Re: *McDonald's USA, LLC, A Joint Employer, et al.* Cases 02-CA-093893, et al.

To whom it may concern:

I submit this letter to address the October 9, 2018 Response filed by counsel for McDonald's.

The particular party matters at issue

For purposes of this letter I have assumed that the factual allegations made in pages 2 and 6-7 of the Charging Parties' Reply Brief on Recusal, are correct. In sum, this matter arose from the response by McDonald's USA and its franchisees to the nationwide "Fight for 15" organizing campaign among fast food workers, and it involves alleged Unfair Labor Practices committed in reaction to that campaign. Before their appointments to the NLRB, Chairman Ring and Member Emanuel were partners or shareholders in the law firms Morgan Lewis and Littler Mendelson, respectively. These two firms, retained by McDonald's, provided legal advice and guidance for all McDonald's restaurants on how to react to the "Fight for 15" campaign. McDonald's and other Respondents in this case are or were clients of both Chairman Ring's and Member Emanuel's most recent law firms, and were represented by those firms with respect to the "Fight for 15" campaign, which is the subject matter of this case.

As pointed out in the Reply Brief, pp. 6-7:

> McDonald's retained the legal services of Morgan Lewis to provide a comprehensive national training program for Franchisee Respondents in reaction to the Fight for $15 organizing campaign, for which Respondent Franchisees were required to sign joint-defense agreements. During the same period, McDonald's retained Littler Mendelson to provide the Franchisee Respondents with a national hotline service providing legal crisis-counselling in response to the Fight for $15 organizing campaign.

In addition, it is extremely likely that Ring and Emanuel both shared in the profits from these representations, and as partners of their law firms had a personal responsibility for making sure that these representations were carried out in accordance with the Rules of Professional Conduct.

Based upon these facts, I conclude that this Proceeding is the same matter as the matter in which Morgan Lewis and Littler Mendelson have represented, and may continue to represent McDonald's – the fight of McDonald's and its franchisees against the "Fight for 15" campaign. Determining when two particular party matters are one and the same is sometimes difficult, but should not be so in this case. The parties are virtually the same – McDonald's and its franchisees on the one hand vs. unions and workers seeking higher wages and better working conditions. And the underlying dispute is about the same issue – whether McDonald's employees will be able to organize freely and effectively to seek $15 per hour. There are of course multiple legal issues – some substantive and some procedural – that arise out of this underlying dispute, as there are multiple legal issues in any particular party matter centering around a particular dispute, whether a divorce case or a complex class action. But the underlying subject matter of the dispute (and the reason the parties are before the NLRB as well as the reason McDonalds was represented by these two firms) is the same. Despite the effort of McDonald's counsel to dice and slice this particular party matter into different matters -- one a client counseling matter and the other a litigation matter – McDonald's cannot avoid the obvious fact that the advice and the litigation before the NLRB are about the same dispute between the same parties and involve application of the same law – labor law administered by the NLRB – to that dispute. The two matters are one and the same.

The Pledge

The rule contained in the ethics pledge reads:

"16. I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

2(d) "Directly and substantially related to my former employer or former clients" shall mean matters in which the appointee's former employer or a former client is a party or represents a party.

Notwithstanding McDonalds' insistence that the definition in 2(d) narrows the language of the rule, it does not. The definition specifically applies in circumstances in which the employees' former law firm represents a client in the same matter that is before the government. If the matters are the same, the rule requires recusal for two years.

As pointed out above, these two matters – the client counseling matter and the litigation matter -- are the same. The fact that McDonald's chose to use a different law firm for this

proceeding before the NLRB does not negate the nearly identical overlap in the parties to the two matters and the fact that the underlying dispute between the parties is the same.

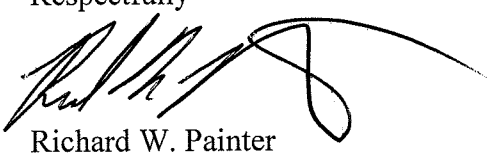
And lest there be any doubt about whether the two matters are in fact the same (the issue I address above) the very text of the rule refers to a "substantial relationship." This language is not taken out of thin air but is drawn upon one of the most important tests used in lawyers' ethics for conflicts in numerous rules, including DC Bar Rule 1.9 (private client conflicts) and Rule 1.11 (conflicts for lawyers moving between government and private practice). These bar ethics rules discern prohibited conflicts when matters in which a lawyer represented one client are substantially related to another matter in which the lawyer seeks to represent another client (or the government). The "substantial relationship" language also inserted in the Pledge clearly implies that even if one could argue that two matters were not exactly the same (perhaps because a matter such as this dispute was passed off to different litigation counsel before the NLRB) the two matters are to be treated as the same under the Pledge if they are substantially related. As pointed out above that is clearly the case here.

What is at issue in this case is whether a party to a NLRB proceeding shall, simply because that party chose different litigation counsel in that proceeding, be permitted to claim that the proceeding is an entirely different matter than the core dispute giving rise to the proceeding. If so, the party could hire one or two law firms to advise it in the underlying dispute, pass the NLRB litigation over that same matter on to different counsel, and then have two lawyers who were partners of the first two firms sit on the NLRB and decide the same matter. That result is not only unconscionable – and very likely would have justified a recusal motion on bias grounds notwithstanding the ethics Pledge – but is directly contrary to the text of the rule set forth in the Pledge.

Improper advocacy

The first page of McDonalds' letter contains personal attacks and irrelevant and inaccurate information about me. This material, having nothing to do with the merits of the recusal motion is improper advocacy and strongly implies that members of the Board should weigh my opinions about ethics rules and a recusal motion based upon my political activity and my opinions about President Trump. This not only reflects very poorly on McDonalds's counsel, but very poorly on the Board if the Board does not take the minimal corrective action of ordering McDonald's counsel to redraft its formal submission to address only the merits of the recusal motion and my letter, and not make false and irrelevant assumptions about my reasons for submitting my letter.

Respectfully



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CERTIFICATE OF SERVICE

I, Stephanie Bream, affirm under penalty of perjury that on October 17, 2018, I caused a true and correct copy of the foregoing letter to be filed electronically with the Executive Secretary of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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