

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**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.**

**McDONALD'S USA, LLC'S OPPOSITION TO CHARGING PARTIES' REQUEST TO
STRIKE MCDONALD'S OCTOBER 9, 2018 SUBMISSION IN WHOLE OR IN PART**

McDonald's USA LLC's October 9, 2018 filing was a proper response to Richard W. Painter's *amicus* letter in support of the Charging Parties' Motion For Recusal. In the Response, the Company demonstrated that Painter's opinions regarding the controlling ethics rules are without merit. It showed that Painter ignored the rules' structure and text and that, in some instances, he misquoted the text.¹ It also showed that Painter presented the Board with an incomplete description of his background. McDonald's USA filled in the gaps, citing matters of public record including Painter's "publicly stated" positions (Request to Strike at 1) and one of his senate campaign advertisements. This full picture allows the Board to draw its own conclusion as to Painter's biases, which inform the weight (if any) that his opinions carry.

The SEIU and other Charging Parties now move to strike the Company's Response, which they say contains "facially irrelevant, inflammatory *ad hominem* attacks." (*Id.* at 1.)

¹ In his October 1, 2018 letter, Painter opined that "[r]ecusal is required if, whether or not there are two separate matters, the present NLRB matter has a direct and substantial effect on the Executive Branch employee's former law firm." Painter Letter at 3. The "matter" before the Board, however, is the Company's special appeal in the above-captioned case. Morgan Lewis and Littler are not counsel of record in the matter, and they have not appeared or communicated to the Board in connection with it. That is fatal to the SEIU's recusal bid, since the rules apply to situations in which a member's former firm represents a party by "knowingly making, with the intent to influence, any *communication to* or *appearance before* any . . . agency." 18 U.S.C. § 207(a)(1) (emphasis added). Further, contrary to Painter's claims, there will be no adjudication here of the lawfulness or validity of any firm's "advice or guidance." Whether a settlement satisfies *Independent State* does not implicate any firm's legal advice.

Charging Parties are wrong. As an *amicus*, Painter was obliged to set forth “the bases of [his] interest in the case and why [his] brief will be of benefit to the Board.” NLRB Rules & Regs., 102.46(i). McDonald’s USA, in turn, was entitled to respond to Painter’s recitation.² In doing so, the Company was entitled to accurately describe Painter’s full background because it informs his interest in this matter and the weight of his opinions. Likewise, the Company was entitled to argue bias, and, as a matter of hornbook law, citing the public record in arguing bias is not an improper *ad hominem* attack. *See, e.g.*, 4 Weinstein’s Fed. Evid. § 607.04 (2018) (“Since bias of a witness is always significant in assessing credibility, the trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness to determine whether a modification of testimony reasonably could be expected as a probable human reaction.”).³

In its October 9, 2018 filing, the Company did no more than complete the record, and no more than any litigant would do when challenging an *amicus* opinion letter. Charging Parties’ motion to strike is frivolous, and the Board should dismiss it.⁴

² Note, however, that Painter’s October 17, 2018 filing was not permitted by Board rules, which state that an *amicus* may not file a reply brief. *Cf.* NLRB Rules & Regs. § 102.46(i)(4) (“[r]eplies to an answering brief will not be permitted”).

³ *Int’l. Bhd. of Painters & Allied Trades*, 327 NLRB 1020 (1999) provides no support for Charging Parties’ position. There, the Board struck an “*ad hominem* references to the Charging Party.” *Id.* at 1025 n.1. The Board never suggested that a party is prohibited from presenting an accurate description of an *amicus*’ background, based on public record evidence, particularly when the *amicus* provided a substantially incomplete description.

⁴ The real issue before the Board – which the SEIU hopes to obscure with its attempts to weaponize the recusal process – is whether the ALJ erred in rejecting a settlement that far exceeds the requirements of the *Independent Stave*. We urge the Board to resolve the recusal issue promptly and to reverse the ALJ’s decision.

Dated: October 23, 2018

Respectfully submitted,

s/Willis J. Goldsmith

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CERTIFICATE OF SERVICE

The undersigned, an attorney, affirms under penalty of perjury that on October 23, 2018, he/she caused a true and correct copy of McDonald's USA, LLC's Opposition to Charging Parties' Request to Strike McDonald's October 9, 2018 Submission in Whole or in Part to be electronically filed using the National Labor Relations Board's Internet website and to be served upon counsel for the Parties by e-mail at the following addresses designated for this purpose:

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