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

CHARGING PARTIES' REPLY TO MCDONALD'S OPPOSITION AND IN FURTHER SUPPORT OF THEIR MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION

On January 22, 2020, McDonald's responded to the Charging Parties' January 7, 2020 Motion to Reopen the Record and for Reconsideration ("Motion") by arguing (1) that the Charging Parties' Motion is untimely; and (2) that the "Board Member William Emanuel Supplemental Recusal List" dated February 9, 2018 (attached to Motion as Exhibit A) would not require a different result in *McDonald's USA, LLC,* 368 NLRB No. 134 (Dec. 12, 2019). As we demonstrate below, both arguments are unavailing.

First, the Motion is timely because it was filed within 28 days of the Board's December 12, 2019 Order, when Charging Parties first became aware that the Board had failed to adhere to its own recusal list.

Second, the Board has not indicated whether the Supplemental Recusal List (or any version thereof) was in fact considered in deciding the Charging Parties' original recusal motion. If the Recusal List was considered, the Board must say so, and if not, the Board must reopen the record to address the omitted document. In either case, since the Board's original Decision failed to explain how it dealt with an Agency document categorically demanding Member Emanuel's

recusal, the Supplemental Recusal List compels reconsideration and issuance of a decision different from the Board's December 12, 2019 Decision and Order.

ARGUMENT

A. The Charging Parties' Motion is timely.

McDonald's wrongly argues that the Charging Parties' Motion is untimely because it was filed several months after publication of the Bloomberg article disclosing the previously concealed Supplemental Recusal List. McDonald's Opp. at 2. That contention misapprehends the import of the Supplemental Recusal List and the need to reconsider the Board's prior Order. Notably, the General Counsel refrained from making the same error, and for good reason. Review of the relevant facts easily refutes McDonald's allegation of untimeliness.

As previously discussed, when Bloomberg published the Emanuel Supplemental Recusal List on July 9, 2019, the Charging Parties' motion to recuse Member Emanuel was still pending without a ruling. At that point, Charging Parties had good reason to assume the Supplemental Recusal List's mandate would be honored and their recusal motion would be granted, consistent with the Board's practice of adhering to recusal lists. *See* Motion at 4-6, 8-10; ES Memo 18-1 at 1 (Jan. 30, 2018) (explaining that the NLRB's Ethics Office "uses several methods" including recusal lists "to identify cases in which Board Member recusal *is required*") (emphasis added). That Board recusal policy and practice provides context for viewing Member Emanuel's Supplemental Recusal List, a document "last updated on February 9, 2018" that categorically flags all cases involving "McDonald's (including franchisees)."[1]

[1] *See* Motion at 4-6, 8-10 & n.11 (also noting contemporaneous public ethics controversy, including February 9, 2018 Inspector General's report, arising from Member Emanuel's participation in *Hy-Brand* proceedings).

Moreover, the Board reinforced and amplified its January 30, 2018 recusal policy statement in a subsequent Executive Secretary memorandum, issued shortly after Member Emanuel's Supplemental Recusal List was updated to include McDonald's. ES Memo 18-2 (Apr. 4, 2018). As that memo explains, Board Members are not assigned to cases in the first instance where a party appears on the Member's recusal list. *Id.* at 2 (stating that if the Executive Secretary finds "a recusal conflict" based on review of a member's recusal list "we recuse the Board member" and "[t]he case is not assigned to the recused Board member (either as originating staff or as a panel participant). Nor does the Board member note off on decisions that are to be issued in cases from which he or she is recused.").[2]

Thus, consistent with Board policy at the time, no further action was needed from any party to ensure that Member Emanuel would be recused from this case once it became clear on July 9, 2019 that "McDonald's (including franchisees)" was flagged on Member Emanuel's Supplemental Recusal List. As previously noted, that July 2019 disclosure also confirmed that the Board had followed this automatic recusal policy, just as expected, in the only reported case involving a company named on the Emanuel Supplemental Recusal List. *See* Motion at 5-6 (citing *Novelis Corp.*, 367 NLRB No. 47 (Dec. 7, 2018)).

In short, given the well-justified assumption that Member Emanuel would be recused here as a matter of course, based on the Agency's own internal document, Charging Parties had

[2] The Executive Secretary's memo does specify "[o]ne exception" to the general policy of recusal lists triggering an automatic recusal: "those limited cases that appear only on the 'Emanuel Recusals – Littler Cases Before the Courts July 2017' list." ES Memo 18-2 at 3. For parties appearing "only on" that particular list, Member Emanuel has retained discretion to decide recusal on a case by case basis. *Id.* However, if a party's name is included on any "other recusal lists," recusal is automatic. *Id.* Because the Supplemental Recusal List is not the "Emanuel Recusals – Littler Cases Before the Courts July 2017" list, that lone exception does not apply here and automatic recusal was required.

no reason before December 12, 2019 to seek to reopen the record to admit the Emanuel Supplemental Recusal List. At the very least, Charging Parties reasonably expected that the Board would address the Supplemental Recusal List in ruling on their recusal motion. Only when the Board failed to do so did a dispute arise regarding Member Emanuel's recusal obligations vis-a-vis the Supplemental Recusal List, and only then did a doubt arise as to the status of that Recusal List vis-a-vis the record for purposes of reconsideration and further review—thus making a motion to reopen both ripe and necessary.

The cases that McDonald's cites are plainly inapposite. *See* McDonald's Opp. at 2-4. All involved additional evidence that a party sought to introduce, after the hearing, in support of their position on the merits. None involved a request to (1) admit a Board-created document, already in the Board's possession, or (2) admit a document regarding a Member's ethical responsibilities.

Finally, the Board must summarily reject the argument that Member Emanuel's participation in a January 16, 2018 decision on a McDonald's special appeal gave Charging Parties "every reason . . . to suspect" that the Supplemental Recusal List was not an official Agency document, thus making the present Motion untimely. McDonald's Opp. at 5. That contention makes no sense given that the referenced Emanuel participation *predated* the February 9, 2018 updated Supplemental Recusal List. Clearly, Member Emanuel's conduct in January 2018 says nothing about the objective status and significance of the ensuing February 9, 2018 Supplemental Recusal List, especially as of and after its disclosure in July 2019. As demonstrated above, Charging Parties reasonably assumed that once the Supplemental Recusal List called for Member Emanuel's recusal from this case, that explicit directive would be followed.

Accordingly, the relevant start date for purposes of 29 C.F.R. § 102.48(c)(2)'s filing requirement is December 12, 2019—the date the Board's Decision and Order first made it apparent that Member Emanuel and the Board had ignored the Supplemental Recusal List. Because the Charging Parties' Motion to Reopen the Record and for Reconsideration was filed within 28 days of service of the Order, it is timely.

B. The Supplemental Recusal List requires the Board to explain its actions and to grant a stay.

In arguing that the Supplemental Recusal List has no bearing on the present Motion, McDonald's relies primarily on its previous contention that Member Emanuel faced no ethical bar because he himself never represented any party in this case. McDonald's Opp. at 6, 9. However, the Supplemental Recusal List, on its face, belies that argument by noting that Member Emanuel must be recused from McDonald's matters because his former firm, Littler Mendelson, "represents many of the franchisees." Motion at 7-11 & Exhibit A.

As previously shown, the Board's December 12 Decision fails to acknowledge the existence of the Supplemental Recusal List and fails to abide by that document's comprehensive, unqualified recusal mandate in all cases involving "McDonald's (including franchisees)." *See* Motion at 6-7 & n.7. Even if the Recusal List was in fact considered, the Board's Decision is fatally deficient because it completely omits anything approaching the legally required showing of "reasoned decision making." *Id.* Accordingly, the December 12 Decision, including denial of Charging Parties' recusal motion, must be vacated, and Member Emanuel must be recused from this case.

McDonald's also argues that Member Emanuel's covered relationship with Littler Mendelson under the Trump Ethics Pledge has expired. Opp. at 6, 9. As previously explained, however, Charging Parties filed their motion for recusal on August 14, 2018, when Member

Emanuel had not yet completed even the first year of his term. That date, accordingly, is the latest arguably appropriate date for analyzing recusal. *See* Motion at 10-11. Indeed, this is apparently the approach the Board has used when making recusal decisions. *See* ES Memo 18-2 at 2 (stating that "[a]s new cases come in to the Board for assignment" the Executive Secretary reviews the relevant "recusal lists" to identify recusals). McDonald's position would establish a perverse incentive structure by which Board members could wait out their two-year prohibition and hold recusal decisions on newly filed (and already pending) cases until the period expires.

Moreover, McDonald's argument ignores that Member Emanuel is not only subject to the two year exclusion from cases involving former Littler Mendelson clients, but is also subject to Board members' other ethical obligations—including, specifically, the duty to avoid the appearance of conflicting loyalties. A reasonable person with knowledge of the circumstances triggering recusal in this case would conclude that Member Emanuel must remain recused from cases involving McDonald's. *See* Motion at 7-11.

McDonald's mistakenly suggests that Charging Parties' Motion for Reconsideration must be addressed to Member Emanuel, rather than the Board, because each individual Board member is responsible for his or her own recusal decision. Opp. at 7-8. That argument is beside the point for purposes of the present proceeding because (1) the pending Motion seeks reconsideration of the Board's December 12, 2019 Decision and Order in its entirety, not just the individual rulings on recusal of Member Emanuel and Chairman Ring; and (2) in any event there is no mechanism for the Charging Parties to submit even a more limited-scope motion for reconsideration other than to the entire Board. Furthermore, McDonald's is wrong in asserting that the Board as a body plays no role in Board Members' decisions on recusal. As discussed above, where a party

appears on a Member's recusal list, Board practice is to honor that list and not even assign the case to the Member in the first instance. ES Memo 18-2 at 2.

Finally, McDonald's does not effectively counter Charging Parties' request for an interim stay pending consideration and ruling on the pending Motion. As demonstrated above, the Charging Parties are indeed likely to succeed in their motion to reopen the record because the Supplemental Recusal List is a document that must be accounted for by the Board. And addressing that consequential document entails, at a minimum, reconsideration of the Board's December 12, 2019 Decision and Member Emanuel's participation therein. In the interim, the Board can and should stay any further steps predicated on fatally flawed Board rulings. Anything else would be wasteful and inefficient, and would fail to afford appropriate relief to the Charging Parties and affected employees whose interests McDonald's professes to champion.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Charging Parties' Motion, the Board should grant the Charging Parties' Motion and the relief requested therein.

January 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathy L. Krieger, affirm under penalty of perjury that on January 29, 2020 I caused a true and correct copy of the foregoing document 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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