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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.

December 12, 2019

ORDER REMANDING

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On July 17, 2018, Administrative Law Judge Lauren Esposito issued an order denying the General Counsel's and McDonald's USA, LLC's (McDonald's) motions to approve settlement agreements in the above captioned cases. The General Counsel and McDonald's each filed a request for special permission to appeal and an appeal of the judge's order, the Franchisees filed briefs in support of the appeals,[1] the Charging Parties filed a brief in opposition, and the General Counsel and McDonald's each filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, we have decided to grant the requests for permission to file a special appeal, grant the appeals, vacate the judge's order, and remand with instructions to approve the settlement agreements. For the reasons set forth below, we find, contrary to the judge, that the standard set forth in *Independent Stave Co.*, 287 NLRB 740 (1987), warrants approval of the settlement agreements.[2]

I. FACTS

The relevant factual background is set forth in full in the judge's order and briefly summarized here. On December 19, 2014, the Regional Directors for Regions 2, 4, 13, 20, 25, and 31 issued six separate complaints against McDonald's, McDonald's Restaurants of Illinois, Inc., and

[1] Franchisee Jo-Dan MadAlisse LTD, LLC filed a brief in support of McDonald's appeal. Franchisees RMC Enterprises LLC; RMC Loop Enterprises; Lofton & Lofton Management V, Inc.; Wright Management, Inc.; Nornat, Inc.; and Faith Corporation of Indianapolis filed a single brief in support of McDonald's appeal. Franchisees Karavites Restaurant 26, Inc.; Karavites Restaurant 11102, LLC; Karavites Restaurant 5895, Inc.; Karavites Restaurant 6676, Inc.; V. Oviedo, Inc.; Taylor & Malone Management, SevenMcD, Inc.; Topaz Management, Inc.; Mashayo, Inc.; and K. Mark Enterprises, LLC filed a single brief in support of McDonald's appeal. Franchisees AJD, Inc.; Lewis Foods of 42nd Street, LLC; 18884 Food Corporation; 14 East 47th Street, LLC; John C Food Corp.; 1531 Fulton St., LLC; McConner Street Holding LLC's store located at 2142 Third Avenue; McConner Street Holding LLC's store located at 2049 Broadway; Mic-Eastchester, LLC's store located at 341 Fifth Avenue; and Bruce C. Limited Partnership's store located at 4259 Broadway filed a single brief in support of McDonald's appeal. Franchisees MaZT, Inc.; Sanders-Clark & Co., Inc.; D. Bailey Management Co.; and 2Mangas, Inc. filed a single brief in support of McDonald's and the General Counsel's appeals.

The HR Policy Association and the Restaurant Law Center each filed a motion to file an amicus brief and a proposed brief. We grant the motions and accept the briefs for filing.

[2] The Charging Parties filed a motion to recuse Chairman Ring and Member Emanuel. McDonald's filed an opposition, and the Charging Parties filed a response. The Coalition for a Democratic Workplace; American Hotel & Lodging Association; Associated Builders and Contractors; Chamber of Commerce of the United States of America; HR Policy Association; Independent Electrical Contractors, Inc.; International Foodservice Distributors Association; International Franchise Association; the National Association of Manufacturers; National Association of Wholesaler-Distributors; National Federation of Independent Business; National Retail Federation; Restaurant Law Center; Retail Industry Leaders Association and the Society for Human Resource Management filed a joint amicus letter supporting McDonald's. Professor Richard W. Painter filed a letter brief supporting the Charging Parties, McDonald's filed an opposition to Painter's letter, and Painter filed a response. The Charging Parties then filed a motion to strike McDonald's response for containing personal attacks on Painter, and McDonald's filed a response. We deny the motion to strike, as the matter complained of does not affect our ultimate decision. *T.E. Elevator Corp.,* 291 NLRB 1184, 1184 fn. 4 (1988).

The motion to recuse Chairman Ring is moot. Chairman Ring took no part in the consideration of this case.

Member Emanuel has considered the motion and has determined, in consultation with the Board's Designated Agency Ethics Official, not to recuse himself. The motion, which is based on Member Emanuel's former affiliation with the law firms of Littler Mendelson and Jones Day, seeks recusal under Executive Order 13770 (the "Trump Ethics Pledge") and the Standards of Ethical Conduct for Executive Branch employees codified at 5 C.F.R. 2635.502. Recusal is not necessary here under either standard.

Under par. 6 of the Trump Ethics Pledge, Member Emanuel may not participate for the first 2 years of his term in cases in which his former firm, Littler Mendelson, represents a party, or in which one of his former clients is or represents a party. No party to this case is a former client of Member Emanuel. The Charging Parties assert that Littler Mendelson provided legal advice to the Respondents in connection with the "Fight for $15" campaign before the unfair labor practice proceeding was initiated. In the circumstances here, however, that does not make Littler Mendelson the representative of a party to this case for the purpose of par. 6 of the Pledge because Littler Mendelson has not represented the Respondents during any phase of the administrative unfair labor practice proceeding, including before the Region, the administrative law judge, or on the various motions filed to date with the Board. With respect to Jones Day, which is counsel of record for Respondent McDonald's USA, Member Emanuel's employment ended in 2004 and is therefore outside the scope of paragraph 6 of the Pledge. See Executive Order 13770 at Sec. 1 ¶6 & Sec. 2(j).

Nor is recusal necessary under the Standards of Ethical Conduct. No person with whom Member Emanuel has a covered relationship within the meaning of 5 CFR § 2635.502 is or represents a party to this case. Member Emanuel no longer has a covered relationship with Jones Day or Littler Mendelson, and in any event Littler Mendelson does not represent a party to this case. Finally, Member Emanuel does not believe that his former affiliation with either law firm would, under the factual, legal, and temporal circumstances here, "cause a reasonable person with knowledge of the relevant facts to question his impartiality." 5 C.F.R. § 2635.502(a)(1).

various franchisees located in New York, New York;[3] Philadelphia, Pennsylvania;[4] Chicago, Illinois;[5] Indianapolis, Indiana;[6] Sacramento, California;[7] and Los Angeles, California.[8] The complaints allege that, in response to Fight for $15 activity, a nationwide organizing campaign by fast food workers for higher wages, McDonald's Restaurants of Illinois and 29 Franchisees violated Section 8(a)(1) of the Act by threatening employees, promising benefits to them, interrogating them, and surveilling their protected activity.[9] The complaints additionally allege that McDonald's Restaurants of Illinois and 9 Franchisees violated Section 8(a)(3) and (1) of the Act by unlawfully discharging 3 employees and suspending, reducing work hours of, or sending home early 17 others, all in retaliation for their union and other protected concerted activity. Although the complaints do not allege that McDonald's independently violated the Act, they allege that McDonald's "possessed and/or exercised" sufficient control over the labor relations policies of the Franchisees that it is a joint employer with the Franchisees and, as such, can be held jointly and severally liable for unfair labor practices committed by the Franchisees.

The cases were consolidated for a hearing in Region 2. The hearing opened on March 30, 2015, before Judge Esposito and then proceeded for the next several years, focused primarily on McDonald's alleged status as a joint employer and punctuated with multiple special appeals to the Board and frequent procedural disputes. To expedite the litigation, on October 12, 2016, the judge severed the Region 13, 20, 25, and 31 cases and placed them in abeyance, pending a decision from the Board in the Region 2 and 4 cases.[10] The judge also ruled that, at the conclusion of the Region 2 and 4 cases, the parties in the severed cases would have an opportunity to submit deferred objections to evidence introduced in the Region 2 and 4 cases, and the entire record in those cases would be admitted into evidence in the severed cases.

On January 19, 2018, the judge granted the General Counsel's motion to stay the hearing for 60 days to discuss "a global settlement of all pending NLRB charges" and to evaluate the impact of the Board's decisions in *Hy-Brand Industrial Contractors, Ltd.*,[11] and *The Boeing Co.*[12] The judge questioned the timing of the requested stay because the parties were within days of closing the record in the Region 2 and 4 cases. Specifically, McDonald's had only two more witnesses to present, including an expert witness in support of its defense that the Charging Parties were engaged in an attack on the McDonald's brand. She nevertheless found the stay warranted, given the prospect of a universal settlement.

When the hearing resumed on March 19, 2018, the General Counsel and McDonald's presented a series of informal settlement agreements resolving all of the cases. Each of the 30 proposed settlement agreements addresses the allegations against a single Franchisee and is executed by that Franchisee, McDonald's, and the General Counsel. The settlement agreements provide 100 percent of backpay for allegations requiring a monetary remedy; front or premium pay to the three alleged discriminatees who were discharged, each of whom has waived reinstatement; restoration of hours and other working conditions; rescission of alleged unlawful rules; expungement of discipline and discharges; and notice posting at the Franchisees' restaurants and mailing of the notice to former employees.

Although the settlement agreements do not impose joint and several liability on McDonald's as a joint employer, they do impose certain obligations on McDonald's to support the remedies to which the Franchisees agreed. Specifically, upon notice from the Regional Director of an uncured breach by a Franchisee, the settlement agreements require McDonald's to mail a Special Notice to the

[3] The New York franchisees include AJD, Inc.; Lewis Foods of 42nd Street, LLC, 18884 Food Corp.; 14 East 47th Street, LLC; John C Food Corp.; 840 Atlantic Avenue, LLC; 1531 Fulton Street, LLC; McConner Street Holding, LLC; MIC-Eastchester, LLC; and Bruce C. Limited Partnership.

[4] Jo-Dan Madalisse, Ltd., LLC (Jo-Dan) is the sole Philadelphia franchisee involved in this proceeding.

[5] The Chicago franchisees include Karavites Restaurants 11102, LLC; Karavites Restaurants 26, Inc.; RMC Loop Enterprises, LLC; Wright Management, Inc.; V. Oviedo, Inc.; McDonald's Restaurants of Illinois, Inc.; Lofton & Lofton Management V, Inc.; K. Mark Enterprises, LLC; Nornat, Inc.; Karavites Restaurants 5895, Inc.; Taylor & Malone Management; RMC Enterprises, LLC; Karavites Restaurant 6676, LLC; and Topaz Management, Inc. McDonald's Restaurants of Illinois is wholly owned and operated by McDonald's.

[6] Faith Corp. of Indianapolis is the sole Indianapolis Franchisee involved in this proceeding.

[7] MaZT, Inc. is the sole Sacramento franchisee involved in this proceeding.

[8] The Los Angeles Franchisees include D. Bailey Management Company; 2Mangas, Inc.; and Sanders-Clark & Co., Inc.

For ease of reference, we use the term "Franchisee(s)" to refer to all of the Respondent restaurants, unless the context warrants differentiating between the Franchisees and McDonald's Restaurants of Illinois.

[9] The complaints allege a total of 181 violations of the Act.

[10] In her October 12, 2016 Order Severing Cases and Approving Stipulation, the judge opined that "hearing all of the consolidated cases together is impossible," and that, with the cases consolidated, the record would not close "for years," and a decision with respect to joint-employer status would not be made "until well into the next decade."

[11] 365 NLRB No. 156 (2017) (overruling *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*Browning-Ferris*), enfd. in part and remanded, 911 F.3d 1195 (D.C. Cir. 2018)), vacated 366 NLRB No. 26 (2018).

[12] 365 NLRB No. 154 (2017) (overruling "reasonably construed" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

defaulting Franchisee's current employees. The Special Notice states that, by the conduct described in the Special Notice, the defaulting Franchisee has violated the Act and is not in compliance with a settlement agreement. The Special Notice additionally states that McDonald's "disavows" the conduct "[s]olely in its role as a party to the [s]ettlement [a]greement," and that its issuance of the Special Notice does not constitute an admission of joint-employer status.

The 10 Franchisees alleged in the consolidated complaints to have committed violations resulting in backpay liability must also contribute to a Settlement Fund totaling $250,000 to benefit potential discriminatees entitled to a monetary remedy as a result of a breach of a settlement agreement. McDonald's is required to collect the funds from the Franchisees and deposit them with the Board. Disbursement is triggered once McDonald's is required to issue a Special Notice because a Franchisee, within 9 months of approval of its settlement agreement, has breached it by committing a violation, e.g., a discharge, a reduction in hours, or a suspension, identical to the violation alleged against that Franchisee in the consolidated complaints.

An alleged discriminatee entitled to a disbursement from the Settlement Fund because of a qualifying discharge or reduction in hours may choose to waive reinstatement or restoration of hours in exchange for 500 hours or 200 hours of premium pay, respectively. If the alleged discriminatee waives reinstatement or restoration of hours, the relevant charges will be dismissed. If the alleged discriminatee chooses not to waive reinstatement or restoration of hours, the General Counsel may issue a complaint and pursue default proceedings against the Franchisee—but not McDonald's—for breaching the settlement agreement. Similarly, an alleged discriminatee entitled to a disbursement due to a qualifying suspension will receive backpay "in lieu of any other remedies," and the relevant charges will be dismissed.

The settlement agreements further provide that in the event of noncompliance by a Franchisee, or a Franchisee and McDonald's, within 9 months of their approval, the Regional Director may reissue the relevant complaint allegations and file a motion for default judgment against either the Franchisee (in the event of a default by the Franchisee alone) or against both the Franchisee and McDonald's (in the event of a default by both). The only issue that may be raised in the default proceedings is whether there was a default on the terms of the settlement agreement.

The General Counsel and McDonald's each filed a motion requesting that the judge approve the settlement agreements and dismiss the consolidated complaints. The Charging Parties opposed approval.

II. JUDGE'S ORDER AND POSITIONS OF THE PARTIES

On July 17, 2018, following the exchange of briefs and an oral argument, the judge issued an Order Denying Motions to Approve Settlement Agreements. Evaluating the four factors set forth in *Independent Stave*, the judge found that they did not overall favor approval of the settlement agreements. Specifically, she concluded that factor one (the parties' mixed support for the settlement agreements) was inconclusive and that factors three (the lack of fraud, coercion, or duress) and four (no history of recidivism) favored adopting them.

Nonetheless, the judge found that factor two (the reasonableness of the settlement agreements in light of the nature of the violations alleged, the risks of litigation, and the stage of litigation) strongly militates against approval. The judge concluded that McDonald's obligations under the settlement agreements "do not in any way approximate the remedial effect" of a joint-employer finding, which the General Counsel had sought to obtain throughout the litigation. The judge additionally found the settlement agreements deficient because they are informal and require a complicated default process to enforce; they require withdrawal of the consolidated complaints before compliance has been effectuated; they do not require the Franchisees to post the notice electronically; they do not include successors and assigns language; and, in the judge's view, they are not likely to definitively resolve these cases.

In their briefs in support of their special appeals, the General Counsel and McDonald's argue that the Board should approve the settlement agreements because they provide an immediate remedy for every substantive violation alleged in the consolidated complaints, while avoiding the cost and uncertainty of litigation. Moreover, they contend that, in finding that the settlement agreements are unreasonable because they do not approximate the remedial effect of a finding of joint-employer status, the judge applied the "full remedy" standard that the Board rejected in *UPMC*, 365 NLRB No. 153, slip op. at 4 (2017) (calling full-remedy "an ill-advised standard less likely to effectuate the purposes and policies of the Act than the Board's longstanding approach embodied in *Independent Stave*"). The General Counsel and McDonald's also assert that the form and provisions of the settlement agreements comport with Board policy governing informal settlements.

The Franchisees agree with and adopt McDonald's arguments. They emphasize that they are small businesses with limited resources that have become unjustifiably embroiled in costly and time-consuming litigation over matters that have nothing to do with the mostly minor unfair labor practice charges against them, but instead relate to

the previous General Counsel's desire to establish McDonald's as a joint employer. The Franchisees in the severed cases further contend that rejecting the settlement agreements would place a uniquely heavy burden on them because the unfair labor practice allegations in their cases will not be heard until after the Board issues a decision in the Region 2 and 4 cases, which may take years. They assert that, in the meantime, as memories fade and witnesses become unavailable, neither they nor the alleged discriminatees will have access to a fair hearing given the passage of time.

In their opposition brief, the Charging Parties contend that the judge carefully analyzed the facts and applicable law and correctly determined that the settlement agreements do not warrant approval under the factors set forth in *Independent Stave*. The Charging Parties also argue that the settlement agreements fail, as an initial threshold matter, because there was no "meeting of the minds" regarding McDonald's obligations under the settlement agreements.[13]

III. ANALYSIS AND CONCLUSIONS

The Board's longstanding policy is to "encourag[e] the peaceful, nonlitigious resolution of disputes." E.g., *UPMC*, 365 NLRB No. 153, slip op. at 3 (quoting *Independent Stave*, 287 NLRB at 741). As we reiterated in *UPMC*, in determining whether to approve a settlement agreement, we

> will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Id., slip op. at 4 (quoting *Independent Stave,* 287 NLRB at 743). As we have long observed—and as the judge acknowledged in her decision —"in determining whether to approve settlement agreements, 'the discretion of the Board is recognized as broad.'" Id., slip op. at 3 (quoting *Farmers Co-operative Gin Assn.*, 168 NLRB 367, 367 (1967)).

Applying that broad discretion to our review of the judge's decision, we believe that the settlement agreements are reasonable under *Independent Stave* and warrant approval. Contrary to the judge, we find that the settlement agreements effectuate the Act because they remedy every violation alleged in the consolidated complaints. Moreover, we conclude that further litigation would impose a substantial burden on the parties, without a significant probability of prevailing on the complaint's joint-employer allegation.[14] Accordingly, we grant the requests for special permission to appeal, grant the appeals, vacate the judge's order, and remand the case to the judge with instructions to approve the settlement agreements.[15]

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[13] The Restaurant Law Center and HR Policy Association's amicus briefs support McDonald's and the General Counsel's arguments. The Restaurant Law Center additionally contends that the Board should defer to the General Counsel's prosecutorial authority under Sec. 3(d) of the Act in evaluating his decision to reprioritize the goals of this litigation.

[14] We emphasize that granting this special appeal on an interlocutory basis, rather than considering the judge's order on exceptions at the conclusion of litigation, will save the parties from expending the very resources on litigation that the settlement agreements are intended to conserve.

[15] Contrary to our dissenting colleague, approval of an informal settlement agreement is always within the discretion of the Board. *Independent Stave*, 287 NLRB at 741 ("[U]pon a motion of one or both of the parties to defer to a settlement agreement in lieu of further proceedings upon a complaint, the Board, after considering any objection raised by the General Counsel, will determine *in its own discretion*, 'whether under the circumstances of the case, it will effectuate the purposes and policies of the Act to give effect to any waiver or settlement of charges of unfair labor practices.'") (emphasis added); see also *Flint Iceland Arenas*, 325 NLRB 318, 319 (1998) (full-Board decision granting special appeal to review judge's approval of a settlement agreement and revoking approval of the agreement because it failed to satisfy the *Independent Stave* factors); *International Shipping Agency Inc*., 24–CA–091723, 2015 WL 1802717 (Apr. 20, 2015). Here, although the judge gave "meaningful consideration" to the immediate relief for the affected employees provided for in the settlement agreements, the judge nonetheless rejected them, in large part because they failed to resolve the joint-employer issue litigated in this case. Specifically, the judge noted that the General Counsel's stated purpose in initiating this case was to obtain a finding of joint-employer liability that would update the Board's joint-employer case law and "'clarify the relationship between franchisor and franchisee' in the context of Board law regarding joint employer status." However, the judge issued her order on July 17, 2018—2 months before the Board issued its Notice of Proposed Rulemaking regarding The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681, on September 14, 2018. This rulemaking proposes to change future Board law regarding joint-employer status, regardless of how this case would have ultimately concluded in the absence of settlement. For that reason, where a part of the judge's rationale in rejecting the settlement agreements is no longer applicable because of a proposed rulemaking, we find it only appropriate for us to exercise our own discretion in deciding whether to approve the settlement agreements, notwithstanding the traditional discretion afforded to a judge to rule on informal settlement agreements reached during a hearing. Moreover, the potential adverse impact on all parties of delay and expense from further litigation in a unique case such as this, which already ranks among the lengthiest and most complex proceedings in Board history—for the judge to update and clarify the case law on a matter that is now the subject of a proposed rulemaking—further demonstrates why it is appropriate for the Board to rule on the propriety of the settlement agreements now rather than in a subsequent review on exceptions to the judge's eventual decision.

A. Independent Stave Factors One, Three, and Four are Inconclusive or Favor Approval.

Here, the judge correctly found that the first factor (the position of the parties) is inconclusive, in view of the General Counsel's and the Respondents' support for the settlement agreements[16] and the Charging Parties' strong opposition. That said, albeit not determinative, we observe that the General Counsel's support for the settlement agreements is an important consideration, especially when he yields on prosecuting an aspect of the complaint to vindicate other public rights.[17] Next, the judge correctly found that the third factor (fraud, coercion, or duress by any of the parties) and fourth factor (history of recidivism by the Respondents) weigh in favor of approval of the settlement agreements. There is no evidence that fraud, coercion, or duress were involved in the negotiation of the settlement agreements or that the Respondents have a proclivity to violate the Act.

B. The Settlements Are Reasonable Under Independent Stave Factor Two.

The second *Independent Stave* factor requires us to examine whether the settlement agreements are reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation. The judge found that this second factor "strongly militates" against approval of the settlement agreements. We disagree.

1. Nature of the violations alleged.

As noted above, the consolidated complaints allege that the Franchisees committed a variety of unfair labor practices under Section 8(a)(1) and (3) of the Act, including three discharges, suspensions, reductions of hours, surveillance, threats, promises of benefits, and interrogation, among others. In evaluating the second factor of the *Independent Stave* test, the most important consideration is that the settlement agreements would provide an immediate remedy for all 181 violations alleged in the consolidated complaints. Thus, under the settlement agreements, the Franchisees would remedy the harm to the victims of the alleged 8(a)(3) violations by paying them full backpay and expunging all references to the alleged violations from their records. The Franchisees have also agreed to pay premium pay to the three discriminatees whom they allegedly unlawfully discharged, in return for those discriminatees' waiver of reinstatement.[18] The settlement agreements would further require the Franchisees to take additional action to remedy the alleged Section 8(a)(1) violations: restore employment conditions; rescind the alleged unlawful rules; and post notices for 60 days and mail them to former employees. These provisions would remedy all of the conduct alleged as unlawful under Section 8(a)(1) and (3), inform current and former employees about their Section 7 rights, and provide assurances that the Franchisees will not interfere with those rights in the future.

The settlement agreements also impose certain obligations on McDonald's in place of the remedial guarantee of joint and several liability as a joint employer. Upon notice from the Regional Director of a Franchisee's uncured breach, McDonald's would be required to mail a Special Notice to the affected employees (with the full notice attached if it had not been previously distributed by the Franchisee, as the General Counsel and McDonald's have since clarified) advising them that, by the conduct described, the Franchisee has violated the Act and is not in compliance with a settlement agreement. McDonald's issuance of the Special Notice would also trigger disbursement from the Settlement Fund if a Franchisee commits the same type of discrimination alleged against it in the consolidated complaints and causes an employee to suffer a monetary loss. Thus, while not identical to the joint and several liability that would have been ordered if McDonald's were found to be a joint employer, the settlement agreements place responsibility on McDonald's to secure both the notice and monetary remedies for the 181 alleged violations.[19]

[16] We disagree with the judge that there was no meeting of the minds between the General Counsel and Respondent on the settlements' operation and therefore do not find that such a disparity militates against approval.

[17] Our dissenting colleague's contention that the General Counsel's position should be of less importance than the Charging Parties', essentially because the General Counsel approves of the agreement, is unsupportable, and simply reflects her policy position on the joint-employer standard rather than the legal standard for analyzing the agreements.

[18] The General Counsel stipulated in his original motion to the judge to approve the settlement agreements that the parties have already satisfied most of their obligations under the agreements, including the surrender of all backpay funds to the Regions, which have been placed in escrow pending Board approval of the settlement agreements. Thus, our dissenting colleague's concern about enforceability of the agreed-upon remedies is misplaced. Further, her conjecture about what could happen in the hypothetical scenario that a closed or sold Franchisee commits an identical 8(a)(3) violation within 9 months is an inadequate basis for rejecting the agreements, because the Franchisees have not been shown to be recidivist offenders predisposed to commit violations of the Act.

[19] Contrary to the judge's finding, McDonald's Special Notice does not contain a nonadmissions clause in the traditional sense. See *Pottsville Bleaching Co.,* 301 NLRB 1095, 1095 fn. 7 (1991) (defining a "nonadmissions clause" as "any language which suggests that the respondent's conduct may have been lawful"). The Special Notice only includes a clause in which McDonald's disclaims being a joint employer or agent of its Franchisees. Although it effectively asserts that McDonald's did not violate the Act, unlike a nonadmissions clause it does not suggest that the Franchisee's conduct as alleged in the complaint was lawful.

Even though the settlement agreements remedy every alleged violation, the judge found them unreasonable, primarily because they "do not in any way approximate the remedial effect of a finding of joint employer status." We understand the judge's and our colleague's concerns about the settlement agreements' failure, if McDonald's were a joint employer, to hold McDonald's jointly and severally liable for the remedial provisions of the settlement agreements, especially after the extensive litigation on the joint-employer issue. However, we do not believe that precludes approval. From the employees' point of view, the remedy they will receive under the settlement agreements is essentially identical to that which they would have received if the General Counsel's joint-employer theory had prevailed, except for a broader notice-posting requirement. This is especially true given that the complaint does not allege that McDonald's independently committed any unfair labor practice itself. Despite the significant agency time and resources expended in making a joint-employer showing, the General Counsel reasonably adjusted litigation priorities and sought to settle the complaint in return for a remedy for all of the alleged violations by the purported wrongdoers.[20]

Indeed, as we just reiterated in *UPMC*, it is well established that approval of settlement agreements under *Independent Stave* does not require that the remedies provided by the settlement be coextensive with the remedies that the Board would order if the General Counsel were to prevail on all complaint allegations. *UPMC,* 365 NLRB No. 153, slip op. at 4; *Independent Stave*, 287 NLRB at 743. If we were to reject the informal settlements solely because McDonald's refused to guarantee compliance with the remedial provisions as a joint employer, we would essentially be reinstating the "full remedy" rule we abandoned in *UPMC*.[21] That, we decline to do, especially here where the General Counsel favors the settlement agreements. Thus, the judge's extensive discussion of the benefits of joint-employer liability and her criticism of McDonald's unwillingness to agree to joint-employer liability are not determinative.

All settlements entail compromise, and the parties made concessions to arrive at a remedy for all affected employees. To preclude the resolution of Board litigation, on reasonable terms, simply because a proposed settlement does not mirror the remedy that could be achieved through successful litigation would undermine the Board's interest in "encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." *UPMC*, 365 NLRB No. 153, slip op. at 4 (quoting *Independent Stave*, 287 NLRB at 743). We therefore conclude that the judge erred in finding that the nature of the allegations militates against approval.

2. Risks inherent in litigation and the stage of litigation.

Approval is also favored because there is a substantial risk that the litigation will not clarify joint-employer law as the General Counsel originally intended and the litigation is still far from final resolution. The judge incorrectly found otherwise.

First, it is beyond dispute that these cases present novel and complex issues with unusual litigation risk. As the judge explained, the General Counsel's "stated purpose" in issuing a complaint alleging McDonald's joint-employer status was "to clarify the relationship between franchisor and franchisee" under Board joint-employer law. But we are unaware of any prior decisions finding McDonald's to be a joint employer under any standard.[22] Similarly, the Board has generally not held franchisors to be joint employers with their franchisees.[23] Even under

We also do not agree with the Charging Parties that the settlement agreements incentivize the Franchisees to skip posting the full Notice, thereby requiring McDonald's to distribute the Special Notice. Failing to post the full Notice would subject the Franchisees to default proceedings and a Board order, which would itself require the Franchisees to post the full Notice. Thus, affected employees would receive two Notices: the Special Notice from McDonald's (which contains a copy of the full Notice) and, upon completion of default proceedings against the Franchisee, the full Notice, which the Franchisee would be required to post at the relevant restaurant(s) and mail to former employees.

[20] Although the Board retains sole discretion to accept a settlement after a hearing opens, we note that the General Counsel's role requires him to exercise his prosecutorial judgment, even after the hearing commences, "to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it," *Local 282 Teamsters v. NLRB,* 339 F.2d 795, 799 (2d Cir.1964), subject to the Board's ultimate approval, of course. Compare *NLRB v. UFCW Local 23*, 484 U.S. 112, 126 (1987) (recognizing the General Counsel's authority, prior to hearing, to dismiss a complaint in favor of an informal settlement).

[21] The judge's extensive reliance on *UPMC* is misplaced. While *UPMC* does present some surface similarities, it was by no means as complex as the current litigation, which involves 181 unfair labor practice allegations, six consolidated complaints, almost three dozen respondents, a joint-employer allegation involving all of them, and a nationwide litigation effort. It is true that the Board found *UPMC*'s consent settlement of a single-employer allegation by a remedial guarantee a reasonable settlement. That, however, does not require the Board to find the different settlements here *unreasonable*, given the different commitment of agency resources, different procedural posture, different risk of litigation, and other distinguishing factors that we address herein.

[22] See, e.g., *Evans v. McDonald's Corp*., 936 F.2d 1087, 1089-1090 (10th Cir. 1991); *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1241 (N.D. Cal. 2015); *Alberter v. McDonald's Corp*., 70 F. Supp. 2d 1138, 1145 (D. Nev. 1999); *Kennedy v. McDonald's Corp.*, 610 F. Supp. 203, 205 (S.D.W.Va. 1985).

[23] See, e.g., *S. G. Tilden, Inc.,* 172 NLRB 752, 753 (1968) (finding that franchisor was not a joint employer, even though the franchise agreement dictated "many elements of the business relationship," because the franchisor did not "exercise direct control over the labor relations of [the

the joint-employer standard articulated in *Browning-Ferris*, there is no guarantee that McDonald's would be found to be a joint employer with its Franchisees, and the Board in that case explicitly disclaimed an intent to address the joint-employer standard in the context of the relationship between a franchisor and a franchisee. *Browning-Ferris*, 362 NLRB 1599, 1618 fn. 120.[24] It is therefore far from certain that this litigation would achieve the General Counsel's original goals regarding McDonald's alleged joint-employer status.

Moreover, the Board's recent notice of proposed rulemaking regarding the standard for determining joint-employer status,[25] which issued after the judge's order, may render moot the utility of using this case as a vehicle to develop joint-employer law. The proposed rule specifically addresses elements of the franchisor/franchisee relationship.[26] As the General Counsel points out, if the Board implements a new joint-employer standard through rulemaking, it will likely supplant any standard arising from the litigation of these cases. As a result, a decision regarding joint-employer status may have limited precedential value.[27] Because of the foregoing, we balance the benefits of settlement against the value of continued litigation differently from the judge.[28]

The judge also erred in finding that the stage of the litigation disfavored approval. We acknowledge that this case involved Herculean efforts to structure the litigation, a myriad of procedural rulings, a highly contentious motions practice before the judge and the Board, and over 150 hearing days over almost three years. The judge was also correct that the parties' cases-in-chief were on the verge of closing. But after the record closed, the judge would need to issue a recommended decision and order. Even if the judge found the alleged violations, there would likely be a lengthy appellate process to the Board and the court of appeals, with the result uncertain. At best, even if the General Counsel were to prevail in all aspects of the litigation before the Board and the court of appeals, years might elapse before notices were posted and the employees obtained backpay and reinstatement. And this does not take into consideration the severed cases from Chicago, Indianapolis, Sacramento, and Los Angeles that are currently being held in abeyance.

In these circumstances, it does not appear that any overriding public interest would be served by forcing the General Counsel and the Respondents to continue litigating these cases. The settlement agreements provide a full remedy to the affected employees, eliminate the risk of losing, and save the parties from expending additional resources on the remainder of the hearing and the appellate process. The immediate remedy provided by the settlement agreements better protects employees' Section 7 rights and ameliorates any lingering coercive effects of the alleged unfair labor practices than would the same remedy, coupled with joint and several liability, after the Board and appellate process is exhausted. As the Supreme Court has observed, "[i]n labor disputes, as in other kinds of litigation, even a bad settlement may be more advantageous in the long run than a good lawsuit." *Air Line Pilots Assn., Int'l v. O'Neill*, 499 U.S. 65, 81 (1991).

3. The judge's concerns over the form of the settlements are unfounded.

As discussed above, the judge objected to several aspects of the settlement agreements that, in her opinion, further justified finding the settlement agreements deficient. Specifically, she criticized the settlements because: (a)

franchisee]" and "the requirement that the franchisees observe . . .standards set by [the franchisor] was merely to keep the quality and goodwill of the [franchisor's] name from being eroded").

[24] In fact, the United States Court of Appeals for the D.C. Circuit only affirmed the facial validity of that standard in part. *Browning Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018). The court approved "the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment." Id. at 1200. It expressly did not pass on whether either of those factors could be dispositive and it also found, that in applying the indirect-control factor, the Board failed to confine its analysis to indirect control over the essential terms and conditions of employment. Id. The court accordingly remanded that aspect of the decision to the Board for it to explain and apply its test consistent with common-law limitations. Id.

Browning-Ferris thus left open the question of whether the Board should continue to exempt franchisors from joint-employer status to the extent their control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. See, e.g., *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 120 (1978) (no joint-employer finding where franchisees were required to prepare and cook food a certain way because, inter alia, the franchisor established the requirements to "keep the quality and good will of [its] name from being eroded") (quoting *S.G. Tilden*, above), enfd. in rel. part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

[25] 83 Fed. Reg. 46,681.

[26] 83 Fed. Reg. 46,697 (examples 5 & 6).

[27] Compare *Pueblo Sheet Metal Workers, Inc*., 292 NLRB 855, 855 fn. 3 (1989) (finding that the judge properly withdrew a complaint due to changes in intervening law).

[28] We find that our colleague's contention that the General Counsel is principally driven by a desire to "avoid" any finding on the joint-employer issue must be measured against her own insistence on obtaining a ruling on the matter. However, in neither instance would an eventual finding by the judge, based on the facts of this particular case, impact the Board's determination in notice-and-comment rulemaking as to the appropriate test of joint-employer status that would prospectively apply. Our colleague also improperly diminishes the possibility that, irrespective of the joint-employer issue, the General Counsel may have reasonably decided that settlements in a case involving complex and novel issues, where violation findings are in no way assured, would be the best use of agency resources, especially where the negotiated settlement agreements provide a remedy for every alleged violation.

they are informal, not formal; (b) they require withdrawal of the consolidated complaints before compliance has been effectuated; (c) they do not require the Franchisees to post the notice electronically or include successors and assigns language; and (d) they are not likely to definitively resolve these cases. We find these concerns insufficient to warrant denying approval to the settlements.

a. The judge found a formal, rather than an informal, settlement necessary because the hearing had already opened.[29] As the General Counsel correctly points out, however, the Board's Rules and Regulations contemplate the possibility of approving informal settlement agreements even after a hearing has begun.[30]

Informal settlement agreements are ubiquitous in Board practice because they are effective. If a respondent breaches an informal settlement agreement containing a default judgment provision, it is subject to immediate default proceedings and has waived the right to challenge the underlying complaint allegations on the merits. Importantly, informal settlement agreements have a strong track record of conclusively resolving unfair labor practice disputes. In Fiscal Years 2017 and 2018, parties entered into 1472 and 1401 informal settlements, respectively.[31] In those same fiscal years, according to records maintained by the Office of the Executive Secretary, the Board considered motions seeking default judgment for breach of an informal settlement agreement in only 6 and 12 cases, respectively. These settlements stick; respondents know that failing to comply with informal settlements is at their own peril.

The judge also concluded that a formal settlement is warranted because the Respondents are "repeat offenders" under General Counsel Memorandum 18-03, *Report on the Midwinter Meeting of the ABA Practice and Procedure Under the National Labor Relations Act Committee of the Labor and Employment Section*. But General Counsel Memorandum 18-03 is not an official statement of agency policy. Rather, it is simply a memorandum transmitting to the Regions a letter from the General Counsel to the American Bar Association explaining his approach to case handling matters. Moreover, by its own terms, General Counsel Memorandum 18-03 states that progressive formality in settlement is typical "[i]n situations where a charged party has been found by the Region to have violated the Act in the past."[32] The judge found many of the Franchisees to be "repeat offenders" solely because a single entity owned several franchises alleged to have committed unfair labor practices *in this case.* The judge, however, did not cite any *prior* informal settlement agreements "in the past" involving the Franchisees that warranted the use of a formal settlement *now.* General Counsel Memorandum 18-03 is therefore inapposite.

b. The judge was also troubled that the settlements required the General Counsel to move for withdrawal of the consolidated complaints within 10 days after their approval. The judge stated that "given the unprecedented and enormous resources expended in connection with this case[,] . . . an informal settlement which provides for the anomalous withdrawal of the Consolidated Complaint in 10 days without full compliance is manifestly unreasonable."[33] However, because of the unusual complexity of the consolidated complaints in this case, we believe that withdrawal of the complaints before compliance has been effectuated is appropriate.

Failure to withdraw the consolidated complaints would tether the Franchisees together throughout compliance, and, as the General Counsel explains, a breach of one settlement agreement would therefore be a default on all of the allegations in the complaints with which it was consolidated, thereby implicating other Franchisees and McDonald's. By withdrawing the consolidated complaints, each Region can police each settlement

[29] A formal settlement provides for entry of a Board order, typically subject to uncontested summary enforcement in the court of appeals, directing the respondent to comply with the settlement's terms. See Board's Rules and Regulations Sec. 101.9(b). Once judicially enforced, a party breaches the settlement at risk of contempt of court. By contrast, in an informal settlement, the parties typically agree to enforce the terms of their agreement through default judgment proceedings. If respondent breaches the settlement, the Regional Director may reissue the withdrawn complaint, and respondent has waived its right to contest the merits of the settlement unfair labor practice allegations, providing for an expedited Board order running against it. Id., at Sec. 101.9(d).

[30] See Sec. 101.9(d)(1) of the Board's Rules and Regulations ("If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for approval."). See also NLRB Division of Judge's Bench Book Sec. 9–410 ("Either type of settlement may be utilized at any time after a charge has been filed, although normally informal settlement agreements are not accepted after the case has been heard and the Board has issued a cease-and-desist and affirmative order based on the record.").

[31] Letter from the NLRB to the ABA Practice and Procedure Under the National Labor Relations Act Committee of the Labor and Employment Section at 2 (Feb. 25, 2019), *available at* www.americanbar.org/content/dam/aba/events/labor_law/2019/MWM/pp-papers/nlrb-response-to-committee-letter.pdf.

[32] See General Counsel Memorandum 18-03 ("In situations where a charged party has been found by the Region to have violated the Act in the past, Regions typically will progressively increase the formality of agreements and may decline to agree to inclusion of a nonadmissions clause, or decline to agree to an informal settlement, instead insisting on a formal stipulation. Whether to agree to any given settlement or not is left to the discretion of the Regional Director.").

[33] See also NLRB Casehandling Manual (Part One), Unfair Labor Practice Proceedings, Sec. 10154.4 (directing that, when a settlement is reached after a hearing opens, the General Counsel should move for an indefinite adjournment and only seek withdrawal "[a]fter compliance has been effected").

individually. Further, even after withdrawal of the consolidated complaints, the settlements' default judgment provisions will ensure that the Respondents refrain from engaging in unlawful activity and from evading their affirmative obligations under the settlements. As previously noted, each settlement provides that, in the event of a breach within 9 months after approval, the Regional Director may reinstate the relevant complaint allegations and move for default judgment and a court order against the Franchisee or, if applicable, the Franchisee and McDonald's. Even after the default provision expires, the Board remains capable of effectuating a remedy if a Franchisee fails to honor the terms of the settlement agreement.[34]

c. We additionally find that the lack of electronic posting and the omission of the traditional language binding "officers, agents, successors, and assigns" do not warrant rejection of the settlement agreements. Electronic posting is frequently absent from even formal settlement agreements, and the Board has approved settlement agreements that lack notice posting entirely.[35] Moreover, at this point in the proceedings, there is no evidence that the Respondents *regularly* communicate with employees electronically. The settlement agreements ensure that a paper copy of the notice, in which the Franchisee promises to refrain from unlawful activity and explains the actions taken to remedy its alleged bad acts, will be posted at each of the Franchisee restaurants where unfair labor practices were allegedly committed. In addition, former employees of the Franchisee at those restaurants will receive a paper copy of the notice in the mail.

Similarly, successors and assigns language is typically absent from informal settlement agreements. We share the concerns of the judge and the Charging Parties regarding the reported changes in ownership at several Franchisee restaurants. However, these concerns are ameliorated by the General Counsel's assurances that the Franchisees have already complied with most of their obligations under the settlement agreements, including their monetary obligations.

d. Next, we find that the judge erred by rejecting the settlement agreements because they are not likely to conclusively resolve these cases. In so finding, the judge relied on what she perceived as "the parties' propensity for additional litigation"; the "complicated default process" in the settlements under which the Respondents would be permitted to contest an allegation that a settlement agreements was breached; and the "substantial and troubling level of confusion" regarding McDonald's obligations under the settlement agreements, which the judge found "raise[s] significant doubt as to whether there was a genuine meeting of the minds."

We believe these settlement agreements are likely to conclusively end this litigation. As explained above, informal settlements are a time-tested and effective tool in settling cases, with an extremely low default rate. Although we understand why the judge would be skeptical after the difficult and contentious litigation below, there is no indication that any of the parties have acted in bad faith or that they have entered into the settlement agreements without a good-faith intent to comply with their terms.

As for the judge's concern that the default provision would permit the Respondents to contest an allegation that a settlement agreement was breached, we note that the Board has held that it would be a denial of due process to issue a default judgment for noncompliance with a settlement agreement without giving the charged party notice and an opportunity to be heard regarding the alleged noncompliance.[36] On a practical note, we believe that the default provisions actually *conserve* resources because the *only* issue that the Respondents are permitted to contest under the default provisions is whether the settlement agreement was in fact breached.

Finally, the record does not support the judge's determination that there was no meeting of the minds. It is true that certain statements made at the hearing by the General Counsel and McDonald's regarding McDonald's obligations under the Special Notice and Settlement Fund provisions appear to conflict. Considered as a whole, however, their subsequent statements and briefs to the judge—as well as their clarification in pleadings to

[34] That is, if a Franchisee engages in post-settlement conduct that is alleged either to violate the Act or the terms of a settlement agreement, the Board may not only consider the new allegations, but may also reinstate the relevant charges and complaint allegations that were withdrawn pursuant to the settlement agreements. See *Wallace Corp. v. NLRB*, 323 U.S. 248, 254–255 (1944) (approving the Board's policy of setting aside settlement agreements "where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice"); *Nations Rent, Inc.,* 339 NLRB 830, 831 (2003) (reaffirming Board's longstanding position that a settlement agreement may be set aside and unfair labor practices found based on pre-settlement conduct if there has been a failure to comply with the provisions of the settlement agreement).

[35] See, e.g., *McKenzie-Willamette Medical Center*, 361 NLRB 54, 56 (2014) (approving settlement agreement that lacks notice posting); *Longshoremen ILA Local 1814 (Amstar Sugar)*, 301 NLRB 764, 765 (1991) (approving settlement agreement that lacks notice posting because the purposes of the Act are best served by settlement "even at the cost of public vindication of the unfair labor practice"); *Independent Stave*, 287 NLRB at 743 (same).

[36] *ConAgra Foods, Inc.,* 365 NLRB No. 102, slip op. at 3 (2017). In fact, the standard default language set forth in the Board's Casehandling Manual expressly provides that the charged party shall be permitted to contest an allegation of noncompliance. See NLRB Casehandling Manual (Part One), Unfair Labor Practice Proceedings, Sec. 10146.7(b).

the Board[37]—demonstrate a coherent and consistent understanding of their obligations under the settlement agreements.

IV. CONCLUSION

In summary, we find that, in denying approval of the settlement agreements, the judge misapplied the standard set forth in *Independent Stave*. Applying that standard, we find that the first factor is inconclusive and factors two, three, and four favor approval. Thus, we conclude that the settlement agreements serve the policies underlying the Act as well as the Board's longstanding policy encouraging the amicable resolution of disputes. Accordingly,

IT IS ORDERED that the appeals are granted, the administrative law judge's order is vacated, and the judge is directed to approve the settlement agreements.

IT IS FURTHER ORDERED that the proceeding is remanded to the judge for further appropriate action consistent with this Order.

Dated, Washington, D.C. December 12, 2019

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.[1]

The National Labor Relations Board is "not required to . . . give effect to all settlements reached by the parties to a dispute," because the Board's "'function is to be performed in the public interest and not in vindication of private rights.'"[2] At the urging of the current General Counsel, the majority today disposes of a mammoth and important joint-employer case under the National Labor Relations Act—before it requires the Board to apply a precedent that both the majority and the current General Counsel have tried unsuccessfully to repudiate. Reversing the administrative law judge, the majority approves a series of informal settlement agreements (omitting a Board order) that do not impose joint and several liability on McDonald's as a joint employer and that prevent a complete evidentiary record from being developed here. The majority's decision is based on application of the wrong standard of review, and it reaches a result that plainly does not "effectuate the purposes and policies" of the National Labor Relations Act.[3]

This case is best understood in the context of the Board's recent efforts to address joint-employer doctrine. In the 2015 *Browning-Ferris* decision, the Board rejected an improperly narrow joint-employer standard and adopted a new approach, consistent with common-law principles and better suited to achieve the goals of labor law in the current economy.[4] That decision has been largely upheld by the District of Columbia Circuit.[5] A new Board majority, however, first overruled *Browning-Ferris* in the ultimately vacated *Hy-Brand* decision[6] and then issued a notice of proposed rulemaking intended to supplant the new joint-employer standard.[7] The current

[37] We are not persuaded by the Charging Parties' argument in their opposition brief that there was no "meeting of the minds" because the General Counsel opined in his brief that in the event a Franchisee fails to post the full Notice, McDonald's is required to enclose the full Notice along with the Special Notice it mails to the Franchisee's employees. The General Counsel acknowledged in his reply brief that the settlement agreements do not expressly require McDonald's to "enclose" the full Notice, but he contends that is "the most reasonable interpretation of what would be required" if a Franchisee failed to post the full Notice. Moreover, McDonald's has stated that it agrees with the General Counsel's interpretation. See *Jam Productions, Ltd.*, 367 NLRB No. 30, slip op. at 2—3 fn. 7 (2018) (rejecting the judge's conclusion that the parties' settlement agreement was ambiguous and that there was no "meeting of the minds" because the settlement was silent on its face regarding seniority rights and the General Counsel had opined after the settlement was signed that seniority rights were implicitly reserved in the settlement).

[1] The Charging Parties have filed a motion seeking the recusal of Member Emanuel. He has chosen to participate in the Board's decision, for reasons he has explained there, following consultation with the Board's Designated Agency Ethics Official (DAEO). I interpret the Charging Parties' motion as directed to Member Emanuel individually, not to the Board itself. For that reason, and because I dissent from the Board's decision in any case, I do not address the motion. As I have previously noted, the Board's rules—in contrast to those of certain other administrative agencies—do not address the question of disqualification of a Board member by the Board as a body, and the Board's practice in that regard has varied over the years. *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 93, slip op. at 5 fn. 4 (2018) (concurring opinion) (collecting cases). I believe that the Board should adopt such a rule. See National Labor Relations Board, *Ethics Recusal Report* (Nov. 19, 2019) (Statement of Member McFerran), available at www.nlrb.gov/reports/other-agency-reports/ethics-recusal-report.

[2] *Independent Stave Co.*, 287 NLRB 740, 741 (1987), quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957).

[3] *Independent* Stave, supra, 287 NLRB at 741.

[4] *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015).

[5] *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

[6] *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), vacated 366 NLRB No. 26 (2018). With Member Pearce, I dissented from the original decision. 365 NLRB No. 156, slip op. at 35 (dissenting opinion).

[7] National Labor Relations Board, *The Standard for Determining Joint-Employer Status*, Notice of Proposed Rulemaking, 83 Fed. Reg. 46681 (Sept. 14, 2018). I dissented. Id. at 46687 (dissenting view). I pointed out, among other things, that it was ill-advised for the Board to proceed with rulemaking until it had the benefit of the District of Columbia Circuit's decision in *Browning-Ferris*, supra, which issued only after

General Counsel, meanwhile, has been unrelenting (if so far unsuccessful) in his own attacks on *Browning-Ferris*. He has defended the vacated *Hy-Brand* decision,[8] has submitted a comment in the current rulemaking insisting that the majority's proposed joint-employer standard is itself too broad,[9] and has argued on remand the District of Columbia Circuit's *Browning-Ferris* decision was wrong.[10] The General Counsel's effort to settle this case over the objection of the Charging Parties is part of the same course of conduct, as is the majority's approval of the settlements.

Administrative Law Judge Esposito, who has handled this epic proceeding with extraordinary skill and determination, rejected the settlements. She persuasively explained why in a detailed decision. Consistent with precedent, the Board is required to review the judge's decision for abuse of discretion,[11] but the majority does not apply the proper standard of review. If it did, the outcome here would be different. Plainly, the judge did *not* abuse her discretion in rejecting the proposed settlements, based on her application of the established *Independent Stave* criteria.[12] Her decision was not merely proper, it was correct. The proposed settlements are unreasonable. As the judge observed, the settlements' "unusual and complicated form and enforcement mechanisms, coupled with the parties' evident confusion and history of antagonism, virtually guarantee that the settlements will not definitively end the case," and on their own terms, the settlements are flawed. The heart of this proceeding is the allegation that McDonald's is a joint employer with certain franchisees. A finding of joint-employer status, of course, would have important collateral consequences for McDonald's, in both unfair labor practice proceedings involving its franchisees and in possible representation cases, if workers employed at McDonald's franchisees sought to organize. The prospect of such consequences makes this a case with very high stakes.

The General Counsel, however, has folded, despite the fact that (in the judge's words) he "adduced a significant quantum of evidence . . . that McDonald's and the Franchisee Respondents engaged in a coordinated effort to effectuate a 'mutual interest in warding off union representation' of employees" at the franchisees' locations, yet the "circumscribed involvement of McDonald's in the . . . [proposed] remedies does not begin to approximate the remedial effect of a finding of joint employer status." The judge described the decision of General Counsel Robb to pursue settlement just before the hearing record closed as "simply baffling," noting that the case is indisputably governed by the *Browning-Ferris* standard, which is even more favorable to the General Counsel than the joint-employer standard in place when the case began. Put simply, it appears clear that the General Counsel is settling the case after years of effort on the eve of its culmination, despite a strong record, because he is desperate to ensure he does *not* prevail.

Now the majority arbitrarily puts the Board's stamp of approval on the General Counsel's actions. Today's decision, unfortunately, continues a pattern in which the Board permits employers to avoid determinations of their status under the Act by purported settlement (including misnamed "consent settlement agreements" actually opposed by both the General Counsel and the charging party),[13] while illustrating a double standard for resolving cases without reaching the merits.[14] Because I cannot condone this course of action, I dissent.

I.

A brief review of the history of this proceeding—which the administrative law judge has described as the "largest case ever adjudicated" by the Board—is in order.

the notice of proposed rulemaking. The proposal cannot be reconciled with the court's decision largely upholding the Board's *Browning-Ferris* decision.

[8] See *Hy-Brand*, supra, 366 NLRB No. 93, slip op. at 1 (noting General Counsel's position); id., slip op. at 3–4 (concurring opinion) (addressing General Counsel's arguments); General Counsel's Response to Motion for Reconsideration of the Board's Order Vacating Decision and Order (April 5, 2018).

[9] General Counsel's Comment (Dec. 10, 2018), RIN 3142-AA13.

[10] Counsel for the General Counsel's Statement of Position in Response to the Remand of the D.C. Circuit, *BFI Newby Island Recyclery*, Case No. 32–CA–-160759 (2019).

[11] See, e.g., *Pueblo Sheet Metal Workers, Inc.*, 292 NLRB 855, 855 fn. 3 (1989) (denying special appeal to review administrative law judge's decision to permit General Counsel to withdraw complaint, because judge "did not act arbitrarily or capriciously or otherwise abuse his discretion").

[12] *Independent Stave*, supra. *Independent Stave* was decided by the Board on summary judgment. 287 NLRB. at 740. It did not involve Board review of an administrative law judge's decision.

[13] See *UPMC*, 365 NLRB No. 153 (2017) (approving "consent settlement agreement" opposed by both General Counsel and charging party, in lieu of deciding single-employer status). I dissented there, as did Member Pearce. See id., slip op. at 11, 16 (dissenting opinions).

[14] Compare this decision with a recent decision in which the majority refused to permit a union to withdraw its unfair labor practice charge in part, in order to allow the General Counsel (who had switched positions) to pursue the reversal of Board precedent (with the support of the respondent employer). *800 River Road Operating Co., LLC*, 368 NLRB No. 60 (2019). There, said the majority, the case "presented the Board with an opportunity to address significant issues of law under the National Labor Relations Act." Id., slip op. at 1. This case certainly raises such issues, and—in contrast to *800 River Road*—it presents a live controversy, assuming the case were prosecuted in good faith by the General Counsel. The difference, of course, is that while in *River Road*, the majority requires a vehicle to reverse precedent, here it wishes to avoid having to apply precedent with which it disagrees. (I dissented in *800 River Road* because the issue was moot.)

The respondent employers are McDonald's, a McDonald's subsidiary, and several McDonald's franchisees. The complaints in these consolidated cases—which involve nationwide allegations of unfair labor practices in response to a fast-food workers' organizing campaign, "Fight for $15"—were issued in December 2014 by then-General Counsel Richard Griffin. These are serious allegations. They involve a calculated, coordinated response to employees' protected activity. The complaints allege that ten franchisees violated Section 8(a)(3) and (1) by discharging three discriminatees, suspending 17 others, reducing employees' work hours, or sending employees home early. Other franchisees allegedly violated Section 8(a)(1) by threatening employees, promising them benefits, and interrogating and surveilling them. McDonald's is alleged to have possessed or exercised sufficient control over these franchisees to be a joint employer with them.[15]

The hearing opened in March 2015 before Judge Esposito and, as the majority observes, "proceeded for the next several years, focused primarily on McDonald's status as a joint employer." This was, the judge observed, the "longest hearing the agency has ever conducted." During the course of the hearing, the Board decided *Browning-Ferris* in August 2015, broadening the joint-employer standard; General Counsel Griffin's term ended in October 2017; Griffin was succeeded by General Counsel Peter Robb in November 2017; a new Board majority reversed *Browning-Ferris* in December 2017 in the original *Hy-Brand* decision;[16] and *Hy-Brand* was vacated—and the *Browning-Ferris* joint-employer standard reinstated—in February 2018.[17]

The settlement agreements at issue now were presented to the administrative law judge on March 19, 2018, just days before the years-long hearing was set to close—and soon after it became clear that *Browning-Ferris* remained controlling law. By that point, as Judge Esposito has pointed out, the General Counsel had "adduced a veritable deluge of evidence regarding McDonald's response to the Fight for $15 campaign, some of which implicates the Franchise Respondents' conduct." The judge's decision details that evidence, including among other things: (1) evidence that "McDonald's response to the Fight for $15 campaign was formulated and implemented from its corporate headquarters, with notifications of upcoming campaign activities, summaries of events, and suggested policies developed and distributed by" a high-level official; (2) evidence that McDonald's specifically created corporate positions "to focus on responding to the Fight for $15 campaign; (3) evidence of "communication with McDonald's franchisees regarding impending, ongoing, and completed campaign activities;" (4) evidence "regarding legal training, organized by McDonald's, provided by attorneys to franchise owners and managers at franchise owner-operator organizations, which specifically addressed labor relations issues;" (5) evidence regarding "McDonald's involvement in the retention of labor consultants by Franchisee Respondents; and (6) evidence regarding "McDonald's involvement in No Solicitation and No Loitering policies for use by its franchisees."

The settlement agreements here are "informal" in Board parlance: they do not include the issuance of a judicially-enforceable Board remedial order against the Respondents. The settlements impose no liability of any kind on McDonald's, nor can they be used as evidence of joint-employer status. McDonald's has made no financial contribution to the settlements, it appears. Among the key elements of the settlements is a requirement that Franchisee Respondents pay backpay to employees who were discharged or had their hours reduced unlawfully. The Franchisees must also restore working conditions, rescind unlawful rules, post notices, and mail notices to former employees.

If a Franchisee defaults within nine months of approval of the settlement, the Regional Director may issue a so-called 'Merits Complaint' against that individual franchisee. Should the breach remain uncured after 14 days, the Regional Director will provide McDonald's with special notices for McDonald's to mail to the breaching Franchisee's employees. However, these notices state that McDonald's only disavows the conduct as a party to the settlement and that the notice does not constitute admission of joint employer status.

Some of the settlements also create a Settlement Fund comprising money that McDonald's collects from the Franchisees (with no contributions from McDonald's) and deposits with the Board. McDonald's has no financial role in compensating discriminatees. This money will be used to pay an eligible employee entitled to a remedy as a result of a Franchisee's uncured breach of a settlement within nine months of the settlements' approval. Liability for Settlement Fund payments, however, is very narrowly defined. To be liable, a Franchisee must commit a violation that is identical to that alleged in the consolidated complaint; liability is not triggered if, for example, a Franchisee was alleged to have reduced an employee's hours in retaliation for protected activity, but subsequently

[15] As the administrative law judge noted, since the beginning of the case, the General Counsel has "contended that McDonald's coordinated and directed the activities of its franchisees' response to the Fight for $15 campaign, which included the violations of the Act alleged here."

[16] 365 NLRB No. 156.

[17] 366 NLRB No. 26.

discharges that employee (or another employee) instead. Similarly, if the consolidated complaint alleged a Franchisee violated the Act, but that violation was not one resulting in backpay liability, the Franchisee will not be liable under the Settlement Fund.[18]

Contrary to standard Board practice, the settlements require the General Counsel to withdraw the consolidated complaint within 10 days after approval of the settlements. Thus, if there is a subsequent failure to abide by the agreements, the usual practice of seeking default judgment on the existing and long-litigated complaint would not be available. Rather, in the event of default by a Franchisee or McDonald's within nine months after approval of the agreements, the Regional Director would notify McDonald's and the Franchisee of the breach and give the Franchisee 14 days to cure. If it does not do so, the Regional Director would have to bring a new "Merits Complaint" against that Franchisee alone. There would be no joint-employer allegations pertaining to McDonald's. The General Counsel would then file a motion for default judgment against the Franchisee on the allegations of the new Merits Complaint.

II.

Judge Esposito rejected the settlements, applying the standard set out in *Independent Stave*, and expressing a variety of concerns (detailed below) about the form of the settlement, its enforceability, the level of resources already expended in the case, and the likelihood of future litigation, among other issues. The majority now concludes that the judge "misapplied the standard set forth in *Independent Stave*," vacates the judge's order, and directs the judge to approve the settlement agreements. The majority's conclusion is based on what is effectively de novo review of the judge's decision. The majority asserts that the Board has broad discretion to determine whether to approve settlement agreements and then states that it "appl[ies] that broad discretion to [its] review of the judge's decision." In fact, however, our precedent makes clear that the Board reviews an administrative law judge's decision to approve or reject a settlement for *abuse of discretion*. Whatever discretion the Board may have in this area, it is not free to ignore its own precedent.[19] As I will explain, Judge Esposito most certainly did not abuse her discretion here.

Abuse of discretion is the proper standard of review, as the Board's 1989 decision in *Pueblo Sheet Metal Workers,* supra, illustrates.[20] Indeed, just a few months ago, my colleagues in the majority applied that standard to endorse a judge's approval of a consent order over the objection of the General Counsel.[21] There is no shortage of similar cases applying the abuse of discretion standard with respect to a judge's decision as to a settlement.[22]

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[18] If the subsequent uncured breach *does* qualify for the Settlement Fund, an employee may choose backpay from the Fund and reinstatement or, in the alternative, waive reinstatement and receive backpay plus an extra payment from the Fund (equal to 500 hours of pay in cases of discharge; 200 hours in cases of reduction of hours). This latter waiver would also mean dismissal of the unfair labor practice charges against the Franchisee.

[19] See, e.g., *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137, 1146–1147 (D.C. Cir. 2017). Furthermore, the Board's well-established practice is that a two-member panel majority, such as the one here, will not reverse Board precedent, because it does not comprise a majority of the Board's five statutory members. See *Hacienda Resort Hotel & Casino*, 355 NLRB 742, 743 & fn. 1 (2010) (concurring opinion of Chairman Liebman and Member Pearce) (collecting cases).

[20] 292 NLRB at 855 fn. 3. See generally *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981, 982 (1992) (once evidence is introduced at hearing, dismissal of complaint "takes on the character of an adjudication" and is matter within "discretionary authority" of administrative law judge, not General Counsel).

The majority cites *Independent Stave* for the view that "approval of an informal settlement agreement is always within the discretion of the Board." My colleagues rely on the Board's statement there that "upon a motion of one or both of the parties to defer to a settlement agreement in lieu of further proceedings upon a complaint, the Board, after considering any objection raised by the General Counsel, will determine in its own discretion, 'whether under the circumstances of the case, it will effectuate the purposes and policies of the Act to give effect to any waiver or settlement of charges of unfair labor practices.'" *Independent Stave*, 287 NLRB at 741. But the majority takes this quote out of context. Examined closely, it cannot bear the weight the majority gives it. First, *Independent Stave* involved a motion for summary judgement made to the Board. In that circumstance, the Board exercises its own discretion. Where, in contrast, the Board reviews the decision of an administrative law judge, it is the judge whose discretion is at issue. Second, the majority cites no cases supporting a de novo standard of review for evaluating a judge's ruling on a settlement. For example, in *Flint Iceland Arenas*, 325 NLRB 318 (1998), the Board analyzed the *Independent Stave* factors and revoked the settlement without explaining what standard of review it was applying. The Board's unexplained decision does not sanction the apparently *de novo* standard of review that the majority applies here. The same is true for *International Shipping Agency Inc.*, 24–CA–091723, 2015 WL 1802717. By contrast, the cases I cite below expressly apply an abuse of discretion standard. Finally, even if the majority had identified Board cases applying some other standard of review, that would at most show an inconsistency in the Board's law on this question. In such cases, the Board must choose between the relevant lines of precedent and explain the reasons for its choice. *ABM Onsite Services v. NLRB*, 849 F.3d 1137, 1146 (D.C. Cir. 2017) ("[T]he requirement that an agency provide reasoned explanation for its action demands that it display awareness that it *is* changing position . . . [t]hus, when the Board fails to explain—or even acknowledge—its deviation from established precedent, its decision will be vacated as arbitrary and capricious.") (internal citations omitted); *E.I DuPont De Nemours v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012) ("We will uphold a decision of the Board unless it…departed from its precedent without providing a reasoned justification for doing so."). The majority has not done so.

[21] *Bodega Latina Corp., d/b/a El Super*, 2019 WL 2435789, No. 28—CA—170463 (June 10, 2019).

[22] See, e.g., *Apex Tool Group, LLC*, 2017 WL 2963206, No. 09–CA–176346 (July 7, 2017) (denying General Counsel's appeal of judge's approval of settlement); *Kiss Electric, LLC*, 2017 WL 279421, No. 04–CA–164351 (June 27, 2017) (denying General Counsel's appeal of judge's

The well-established abuse of discretion standard is also a sensible one, considering the respective functions of administrative law judges and the Board. When it comes to deciding whether to approve or reject a settlement, the judge is in a better position than the Board to apply the *Independent Stave* factors: she has presided over the case from the beginning and is intimately familiar with the record evidence and the procedural history—every aspect of the litigation, in other words. Deferential review is thus appropriate. That is obviously true with respect to this uniquely long and complicated proceeding. There should be no question that Judge Esposito knows this case better than we do.

In a case involving a Regional Director's refusal to accept an informal settlement, notwithstanding the Board's policy to encourage settlements, the Board adopted the judge's finding that there was no abuse of discretion, i.e., discretion "exercised to an end or purpose not justified by and clearly against reason and evidence."[23] Here, Judge Esposito had the discretion to approve or reject the settlements, and her decision to reject them was *not* "clearly against reason and evidence." To the contrary, the judge's decision was correct.

III.

There is no dispute that Judge Esposito applied the correct legal standard for determining whether to approve a settlement, the *Independent Stave* test, which "examines all the surrounding circumstances, including but not limited to":

> (1) whether the charging party, the respondent, and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement;
>
> (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation;
>
> (3) whether there has been any fraud, coercion or duress by any other parties in reaching the settlement; and
>
> (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

287 NLRB at 743.[24] The "surrounding circumstances" here, of course, include the importance of the joint-employer issue to the development of the law and to the employers and employees involved here, the massive size of the proceeding, and the current General Counsel's demonstrated hostility toward the governing *Browning-Ferris* standard. These circumstances, of course, weigh strongly against permitting the premature termination of the case just before the hearing was set to close. The judge's focus was on *Independent Stave* Factor 2, the reasonableness of the settlements, and as I will explain, she reasonably (and, indeed, correctly) exercised her discretion to find that the settlements were *not* reasonable and to give that factor decisive weight. But a proper understanding of this case first requires examining the position of the parties and, in particular, the posture of the current General Counsel.

A.

The majority agrees with the judge—if equivocally—that *Independent Stave* Factor 1, the position of the parties, is "inconclusive" here, given the Charging Parties' "strong opposition" to the settlements. It observes, nevertheless, that the "General Counsel's support for the settlement agreements is an important consideration, especially when he yields on prosecuting an aspect of the complaint to vindicate other public rights." If anything, the opposition of the Charging Parties[25] is entitled to greater weight here, given the overwhelming evidence here that the current General Counsel has been and remains opposed to the successful prosecution of this case to establish the joint-employer status of McDonald's under controlling Board law, the *Browning-Ferris* standard.

The complaint in this case—issued by then-General Counsel Griffin—alleges that McDonald's is a joint employer with the franchisees. As explained, General Counsel Robb, who inherited the case, has attacked the *Browning-Ferris* standard at every opportunity: in opposing the Board's decision to vacate *Hy-Brand*, which had improperly overruled *Browning-Ferris*; in submitting a comment to the Board in connection with its rulemaking proposal to

approval of settlement); *Ports America Outer Harbor, LLC*, 2016 WL 6833983, No. 32–CA–110280 (Nov. 18, 2016) (denying charging party's appeal of judge's approval of settlement); *Children's Law Center of Los Angeles*, 2016 WL 6441583, No. 21–CA–165280 (denying charging party's appeal of judge's approval of settlement); *Enclosure Suppliers, LLC*, 2011 WL 2837659, No. 09–CA–46169 (July 14, 2011) (granting Acting General Counsel's appeal of order approving consent order). See also *Henke v. NLRB*, 182 F.3d 917 (6th Cir. 1999) (unpublished) (rejecting argument that administrative law judge abused discretion in approving informal settlement).

[23] *San Francisco Local Joint Executive Board of Culinary Workers*, 196 NLRB 633, 634 (1972).

[24] The *Independent Stave* Board took care to point out that it was not "provid[ing] an exhaustive list of all the factors which may become relevant in individual cases." 287 NLRB at 743.

[25] There are 20 alleged discriminatees affected by these settlement agreements. Of these, only the three who were discharged have expressly agreed to the terms of the settlements by executing a waiver of reinstatement and agreeing to receive front pay in lieu of that reinstatement along with any backpay owed.

repudiate the *Browning-Ferris* standard; and in urging the Board, on remand, to reject the decision of the District of Columbia Circuit largely upholding *Browning-Ferris*. It seems clear, then, that the proposed settlements here reflect less the General Counsel's good-faith efforts to enforce Board law and more the desire to avoid the application and development of existing law in an important case—and so to advance a policy view contrary to Board law.[26]

The majority describes the General Counsel's effort to end this case as "yield[ing] on prosecuting an aspect of the complaint to vindicate other public rights." But it should be clear that the current General Counsel has never been committed to prosecuting the core aspect of the complaint here: the allegation that McDonald's is a joint employer. The settlements with McDonald's, of course, now explicitly align the General Counsel and the company in a common effort to avoid any possibility of a joint-employer finding by the Board. The settlements that the majority approves today achieve that goal: they do not include a joint-employer admission and they omit any remedial consequences for McDonald's that would come with a joint-employer finding. In this context, the opposition of the Charging Parties—whose unfair labor practice charges were a prerequisite for this litigation—is entitled to great weight. They oppose the supposed trade-off made here by the General Counsel. In these circumstances, their opposition to the settlement—and their commitment to pursuing enforcement of current law—suggests a greater commitment to the public interest.

B.

In rejecting the proposed settlements, however, Judge Esposito did not treat them as suspect for the reasons that I have suggested. She carefully determined that the settlements failed to pass muster under *Independent Stave* Factor 2, which asks "whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation."[27] As I will explain, that determination was correct—not an abuse of discretion. Indeed, there is a strong public interest in ensuring that the important issues here are litigated to conclusion, not disposed of as if only private rights were involved.

1.

Given the centrality of McDonald's alleged status as a joint employer to the case, it would be a mistake not to focus on that issue as a crucial aspect of the "nature of the violations alleged." As Judge Esposito observed, the "General Counsel's stated purpose in initiating this case was obtaining 'a finding that McDonald's . . . was jointly and severally liable for all of the alleged unfair labor practices . . . because of its status as a [j]oint [e]mployer of the affected workers,' and 'to clarify the relationship between franchisor and franchisee' in the context of Board law regarding joint employer status." Indeed, the "vast majority of the evidence and the hearing presentation was directed to the joint employer issue." The judge was thus correct in relying on the indisputable fact that the "circumscribed involvement of McDonald's in the informal Settlement Agreements' remedies does not begin to approximate the remedial effect of a finding of joint employer status." She accurately described this aspect of the settlement as "paltry and ineffective given the scope of the allegations, the resources necessary in order to present the case, and the case's ultimate purpose."

Citing Board precedent,[28] Judge Esposito explained that the settlements do not make McDonald's jointly and severally liable and, in fact, lack any guarantee of the Franchisee Respondents' performance:[29]

> Had [the] General Counsel established that McDonald's was a joint employer with the Respondent Franchisees, McDonald's would have been "jointly and severally responsible for remedying" any unfair labor practices the Respondent Franchisees committed.… [The] General Counsel represented … that the objective in initiating this case was establishing McDonald's joint and several

[26] The General Counsel has publicly expressed his desire to severely limit joint-employer status. In his rulemaking comment to the Board, the General Counsel not only agreed with the proposal to overturn *Browning-Ferris*, but also argued that the Board's proposed rule did not go nearly far enough. The General Counsel argued for a Board rule that would require the purported joint employer to "control all listed essential terms and conditions of employment factors," including determination of wages, benefits, hiring/firing, and discipline, supervision, and direction of employees. General Counsel's Comment at 8–9. In the General Counsel's view, a joint employer finding should be "rare." At no point in the Board's history has it followed such a restrictive approach. The General Counsel's policy view is reflected as well in his brief to the Board, following the District of Columbia Circuit's 2018 remand of *Browning-Ferris*. There, he argued that the court had exceeded its authority and that the Board should "reverse the error" it made in *Browning-Ferris* and "make clear that only a joint employer standard based on substantial direct and immediate control is workable." General Counsel's Statement of Position in Response to the Remand at 8.

[27] 287 NLRB at 743.

[28] See, e.g., *Adams & Assos., Inc.*, 363 NLRB No. 193, slip op. at 1, 7 (2016), enfd. 871 F.3d 358 (5th Cir. 2017).

[29] The judge rejected the Respondents' assertion that a guarantee was infeasible or inappropriate. She cited two reasons: (1) the Franchise Agreements provide McDonald's with sufficient authority over the Franchisees' operations to guarantee their performance; and (2) under the terms of the settlements, McDonald's would have the authority to determine "whether and when" money from the Settlement Fund would be provided to employees of the Franchisees in the event of an uncured breach of a settlement, an authority that "contradict[ed] its contention that it lacks the legal or business capacity to guarantee the Franchisee Respondents' performance."

> liability… [The] General Counsel further stated that the Special Notice and Settlement Fund components of the Settlement Agreements were specifically intended in lieu of a finding of joint employer status…. Thus, McDonald's remedial obligations in lieu of joint and several liability are apparently limited to mailing out of a Special Notice if a Franchisee Respondent fails to remedy a violation of a Settlement Agreement within 14 days after notification, and to collecting and providing to Regional Directors monies comprising the Settlement Fund to remedy a limited universe of possible future violations. . . . Here there is no guarantee by McDonald's of the Franchisee Respondent[s'] performance whatsoever. . . .

The Special Notice states that McDonald's disavows the franchisee's conduct "[s]olely in its role as a party to the settlement" without admitting joint-employer status. And while McDonald's is to collect funds from the franchisees for the Settlement Fund, it is not required to contribute to the settlement fund or otherwise ensure compensation for discriminatees. Were the case prosecuted to a joint-employer finding, discriminatees would have a full guarantee that McDonald's would also be held responsible for any failures to comply by the franchisees. For example, the franchisees are required to pay 100 percent of backpay for allegations requiring a monetary remedy as well as premium pay to those discriminatees who were discharged. Franchisees must also restore prior working conditions, rescind unlawful rules, and expunge disciplines and discharges. Under a joint-employer finding, McDonalds itself would also be responsible for ensuring that these remedial measures were completed as required.[30] In sum, McDonald's responsibilities under the settlement agreements are minimal, as compared to the consequences of a joint-employer finding.

The majority understates matters when it acknowledges only that the settlement agreements are "not identical to the joint and several liability that would have been ordered if McDonald's were found to be a joint employer." Even so, the majority states it "understand[s] the judge's concerns about the settlement agreements' failure, if McDonald's were a joint employer, to hold McDonald's jointly and severally liable for the remedial provisions of the settlement agreements, especially after the extensive litigation on the joint employer issue." Still, the majority "does not believe that precludes approval," citing employees' presumed perspective on the settlement and suggesting that the General Counsel "reasonably adjusted litigation priorities." The majority's discussion, however, obscures crucial points.

First, the question presented is not whether the judge was *required* to reject the settlements, but whether she abused her discretion in doing so. Second, focusing on the settlements' benefits to employees ignores both the opposition of the Charging Parties to the settlements and the fact that the Board's "function is to be performed in the public interest and not in vindication of private rights."[31] Third, as discussed, the limited responsibility assumed by McDonald's responsibility undercuts the value of the settlements even as to the identified employees. Contrary to the majority's assertion that the remedy employees would receive under the settlement agreement is "essentially identical to that which they would have received if the General Counsel's joint employer theory had prevailed," there are significant differences given that joint and several liability is not imposed on McDonald's.[32] Finally, the General Counsel's role in the settlements is hardly a mere matter of "adjust[ing] litigation priorities" in a garden-variety case. As explained, it reflects part of a determined attack on existing Board law— by the official with exclusive authority to prosecute unfair labor practice cases under the Act—in support of a policy view that has never before been endorsed by the Board. Accepting the settlements deprives the Board of the opportunity to decide novel and important joint-employer issues, involving employers across the nation, on a full evidentiary record. It leaves the joint-employer status of McDonald's unresolved, despite years of litigation.[33]

2.

The judge also appropriately considered the "risks inherent in litigation" and the "stage of the litigation," as *Independent Stave* contemplates. Here, both considerations implicate very unusual circumstances.

First, it is almost impossible to conclude that the current General Counsel's decision to pursue settlement here reflects his assessment of the risk of losing – as opposed to the risk of *winning*. Given the General Counsel's demonstrated hostility to the *Browning-Ferris* joint-employer standard, rather, it seems clear that his overriding aim is to avoid presenting the Board with an opportunity to apply that decision in an important case.

[30] See, e.g., *SOS Staffing Services*, 331 NLRB 815, 815–816 (2000).

[31] *Independent* Stave, supra, 287 NLRB at 741.

[32] As the judge noted, for example, "[i]f distribution of the Special Notice and disbursement from the Settlement Fund are both solely functions of McDonald's discretion, McDonald's 'support' for the remedies here is utterly illusory."

[33] The majority errs in characterizing the substance of the judge's evaluation of the settlements. While the judge considered the failure to resolve McDonald's joint employer status in her analysis, this was far from her only consideration. As I note below, the settlements fall short under the other *Independent Stave* factors, given problems with their form, their inability to conclusively resolve the dispute between the parties, and consideration of the stage of litigation and the risks involved.

Second, the stage of the litigation at which settlement was reached—just before the hearing record was completed and the case was submitted to the judge—reinforces this conclusion. The judge described the General Counsel's timing as "simply baffling," pointing specifically to the fact that settlement efforts preempted the testimony of McDonald's expert on "brand protection," which assertedly privileged its intervention in the affairs of franchisees. The inescapable inference is that the General Counsel (not just McDonald's) was concerned that this expert testimony would offer little support for *McDonald's* position. Pursuing settlement at this point, the judge observed, was "incomprehensible."[34] The judge was correct, then, when she observed that approval of the settlements, when presented, "would not conserve the significant agency resources expended over the course of three years to create a record on the joint employer issue" and "while there would certainly be exceptions and appeals available in this matter, the work involved would be less onerous and demand fewer resources than the lengthy, arduous trial presentation necessary to create the record thus far."

Given the primary purpose of the litigation—as identified by the General Counsel—the judge reasonably concluded that litigation risk did not justify terminating the case when and how the General Counsel and McDonald's proposed. The majority rejects this conclusion, stating that the case presents "novel and complex issues with unusual litigation risk." Even under the *Browning-Ferris* standard, my colleagues say, "there is no guarantee that McDonald's would be a found to be a joint employer," and it is "far from certain that this litigation would achieve the General Counsel's original goals." The majority also points to the Board's pending joint-employer rulemaking as likely to "supplant any standard arising from the litigation of these cases." Thus, says the majority, it "balance[s] the benefits of settlement against the value of continued litigation differently from the judge." That the majority strikes a different balance here, however, does not demonstrate the judge abused her discretion, the appropriate standard of review.

It is certainly true that this case presents "novel and complex issues." But that is precisely why the case should be litigated to conclusion and then decided by the Board. The Board's pending rulemaking, in turn, is no proper substitute for adjudicating this case – even putting aside the majority's erroneous decision to pursue rulemaking in the first place and to repudiate the *Browning-Ferris* standard largely upheld by the District of Columbia Circuit. The record in the rulemaking may be less developed than the record in this case. And a final rule—assuming it survives judicial review after what surely will be years of litigation—is unlikely to definitively resolve the joint-employer status of any particular statutory employer, including McDonald's.[35]

C.

Finally, in rejecting the settlement agreements, the judge properly pointed to significant shortcomings in their form. Here, she noted that the Board favors a formal settlement after the issuance of a complaint, not the informal settlement offered at the late stage of litigation in this case.[36] She also found that requiring the General Counsel to withdraw the consolidated complaint before compliance could be established was contrary to standard Board practice. The settlement agreements lacked the Board's standard language binding a respondent's successors and assigns (a concern when four of the original ten Franchisee Respondents or Charged Party locations in New York City have changed ownership and one appears to have ceased operations entirely).

The judge found that it did not appear that the settlement would conclusively resolve these cases, particularly given the contentiousness of the parties, the complex provisions of the default and Settlement Fund, and the lack of clarity regarding the impact of notification procedures on the default process. When added to the contradicting representations regarding obligations and processes under the settlement agreements,[37] the judge determined that the

[34] The judge also pointed to the "General Counsel's machinations involving" the Board's *Browning-Ferris* and *Hy-Brand* decisions as "equally perplexing," because they threatened to hinder—rather than help—his prosecution of this case.

[35] The majority's assertion that the pending rulemaking would mean "a decision regarding joint employer status may have limited precedential value" incorrectly implies that any forthcoming rulemaking will moot any joint employer finding in any case. To the contrary, even after a joint-employer rule is issued, that rule will still have to be applied to the facts of a specific case to determine the employer's status, including future cases involving McDonald's. It is not, therefore, a pointless task to look at McDonald's relationships now.

[36] Sec. 101.9(b)(1) of the Board's Rules and Regulations provide that "[a]fter issuance of a complaint, the Agency favors a formal settlement agreement" with a remedial order.

[37] The judge identified several contradictory representations. For example, the General Counsel initially indicated that if a Franchisee failed to cure an alleged breach of the settlement agreement, it falls to McDonald's to remedy or implement the remedy that the Franchisee failed to carry out. However, on a later date the General Counsel indicated that McDonald's would only have to mail out a Special Notice, not carry out the remedy in full. In addition, the General Counsel's characterization in a posthearing brief of McDonald's as having discretionary authority regarding Settlement Fund disbursements contradicted earlier statements from the parties that the disbursements were mandatory in the context of the default process.

These contradictions suggest that the obligations imposed on the Franchisees and McDonald's, as well as the way in which they are to execute those obligations, are less than clear. In such a large case involving a number of Regions, the concern grows. Notwithstanding and

Settlement Fund as well as the fundamental question of whether a respondent had defaulted would likely engender further litigation.

Contrary to the majority, the judge's reliance on these considerations does not justify reversal here, particularly under the abuse of discretion standard.

1.

As explained, an informal settlement does not incorporate a Board order, ultimately enforceable through contempt proceedings in the federal courts of appeals. Here, the judge correctly pointed to the Board's rules, which expressly state that "[a]fter the issuance of a complaint, the Agency *favors a formal settlement*."[38] The Board has acted in accordance with this stated preference, endorsing a judge's decision to reject an informal settlement.[39] The majority does not and cannot deny that the Board favors formal settlements in cases like this one, where a complaint has been issued—much less a case that was nearly litigated to completion before the administrative law judge. Rather, the majority says that the Board's rules "contemplate the possibility of approving informal settlement agreements after a hearing has begun." But the cited rule refers to an "all-party informal settlement," and here, of course, the Charging Parties objected: the informal settlements did not include them.[40] In any case, that the Board might permit informal settlements in these circumstances does not mean that it favors them – in explicit contrast to formal settlements. There is no basis for faulting Judge Esposito in this respect.

2.

Nor was the judge wrong to give weight to the fact that the settlements require the General Counsel to withdraw the consolidated complaints before compliance with the settlements has been effectuated. Specifically, as the judge accurately stated, under the settlements, the "General Counsel must "move for an order approving withdrawal of the Consolidated Complaints 'no later than ten days' after approval."

Under the Board's standard practice, when a settlement is reached after the opening of the hearing, the General Counsel should move for an indefinite adjournment and should withdraw the complaint only "[a]fter compliance has been effected."[41] As the judge noted, the General Counsel offered no explanation here for deviating from standard practice. At this stage, it is impossible to know whether McDonald's or the Franchisees have complied with the terms of the settlements, particularly as the obligations are ongoing after settlement approval. This is especially concerning given that the separate settlement agreements will involve compliance across six Regions and will be enforced "in five different venues throughout the country." In the event of noncompliance, the General Counsel will have to refile a new complaint, starting the litigation anew. This is a waste of Agency resources, particularly given the length of time, the hours of staff work, and the enormous expense of the litigation to date. Especially given the complexity of determining precise compliance under the settlement agreements, the judge did not abuse her discretion to find the withdrawal of the complaint weighed against approval of the settlements.

The majority argues that failure to withdraw the consolidated complaint would "tether the Franchisees together throughout compliance" so that "a breach of one settlement agreement would therefore be a default on all of the allegations in the complaints with which it was consolidated." This is incorrect. If one Franchisee breaches its settlement agreement, the remaining non-breaching Franchisees need not automatically also be found in default. Nor would a breach of one provision amount to a breach on all provisions of each of the consolidated complaints.

The majority further asserts that different Regions can police each settlement individually and that the default judgment provisions will ensure the Respondents do not engage in unlawful activity. However, following well-established Board practice would be a preferable way to help ensure consistent evaluation of the Respondents fulfillment of their obligations across Regions while also providing a constant reminder to the Respondents of those obligations—and of the fact that the Board is ready to take swift action in the event of noncompliance. In endorsing this aspect of the settlement agreements, the majority simply assumes that there will be compliance and cedes

independent of the arguments my colleagues make in rejecting the assertion that there was no meeting of the minds here, the judge's observations highlight at the very least the uncertainty inherent in what the settlement agreements demand from whom, and what constitutes satisfaction of those obligations.

[38] Board's Rules and Regulations, Sec. 109(b)(1) (emphasis added).

[39] See, e.g., *Hunter Outdoor Products*, 176 NLRB 449, 463-464 (1969).

[40] Sec. 109(d)(1) of the Board's Rules and Regulations provides:

> If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

[41] NLRB Casehandling Manual (Part 1), Unfair Labor Practice Proceedings, Sec. 10154.4.

all leverage over the Respondents during the compliance period. The time and expense in restarting litigation in the event of noncompliance may well result in long delays before McDonald's and the violating Franchisee can be called to account, if they are held accountable at all. In light of these legitimate concerns, the judge did not abuse her discretion in finding this aspect of the settlements weighs against approval.[42]

3.

The judge also properly pointed to the fact that the settlements omit the Board's standard remedial language binding a respondent's "officers, agents, successors, and assigns." Although the absence of such language does not preclude finding that a settlement is reasonable, the judge properly noted that it was significant in the context of this case, where four of the ten Franchisee Respondents or Charged Party locations in New York City have changed ownership and one has ceased operations entirely. As she found, these facts mean that the Franchisee Respondents are not the sort of stable entities for whom standard successors-and-assigns language would be unnecessary.

The majority brushes aside this argument with the claim that these concerns are "ameliorated by the General Counsel's assurances that the Franchisees have already complied with most of their obligations under the settlement agreements, including their monetary obligations. This claim minimizes the obligations in the event of a subsequent identical Section 8(a)(3) violation within nine months of the settlement's approval. If a current Franchisee commits such a violation, it would seem to trigger payment from the Settlement Fund (in certain limited cases). But if the Franchisee no longer exists and its successor or assign commits such a violation, it is unclear whether the successor's actions would be a breach and trigger disbursement of funds to the employee if the successor is not expressly bound by the settlement agreement.[43] The judge's conclusion that the absence of successors-and-assigns language weighs against approval was therefore not an abuse of discretion.

4.

The judge also found that the settlement agreements are unlikely to conclusively resolve these cases. In so doing, she appropriately relied on both her close knowledge of the parties and their contentious behavior as observed over nearly three years, as well as the form of the settlement agreement itself. The most basic possibility lies in a contested allegation of breach, which would result in another hearing, exceptions, and appeal. Moreover, the form and terms of the settlement agreements with respect to McDonald's are sufficiently complex that confusion and conflict is likely. The judge properly noted that the relationship between the default and settlement fund provisions and the steps in the Notification of Compliance section is particularly unclear, with the impact of notification on the default process left unarticulated. The judge correctly noted too that the parties made conflicting representations regarding McDonald's obligations and the workings of the Settlement Fund.

The majority asserts that informal settlements have a low default rate generally and there is no indication that any party acted in bad faith. This view glosses over certain critical facts. First, this is not an ordinary informal settlement; rather, it is the abrupt end to years-long contentious litigation on a complex issue. The settlement does not resolve the core allegation of the General Counsel's case as it was originally brought: McDonald's joint-employer status. With that question unanswered, it is likely that similar issues will arise in the future. Second, the majority seems to ignore the fact that the Charging Parties have in large part not agreed to the settlement at all. Third, as the judge noted, the "General Counsel appears to have significantly misunderstood the scope of McDonald's responsibilities under the default provisions." This suggests that there may well be subsequent charges from employees pressing the General Counsel to act if McDonald's falls short of fulfilling those responsibilities, and litigation over whether or not the Respondents here are in fact in default.

. . .

[42] The majority asserts that any concerns over the settlement's remedies are unfounded because the Franchisees are not recidivists predisposed to violate the Act and they have satisfied their obligations by sending backpay to the Regions to be placed in escrow. This ignores at least two problematic aspects of those remedies. First, the amount of time and Agency resources expended in requiring the General Counsel to bring a new merits complaint for a subsequent violation outweighs the majority's assumption that there will be no such violation. Given the breadth of the instant violations in various areas and among multiple Franchisees, this assumption is uncertain at best. Second, because the settlement imposes no financial or other obligations on McDonald's, the remedies effectively allow McDonald's to escape any remedial consequences for the actions at issue in this case.

[43] For this reason, the majority improperly dismisses my concerns about the enforcement of the settlements' remedies. Even assuming, as the majority claims, that the parties have met most of their obligations (such as providing backpay to be held in escrow by the Region) and that Franchisees are not recidivists, the absence of a successors-and-assigns clause seriously endangers the enforcement of the settlements' remedies. If a Franchisee goes out of business (as more than one has done) and a successor violates the settlement terms, there is no guarantee that the settlement would provide relief for a discriminatee, even if the violation is within the nine months covered by the settlement's terms. The recidivism or lack thereof on the part of the Franchisees does not mitigate the remedial problems the settlement poses.

In sum, the majority has failed to demonstrate that Judge Esposito abused her discretion in giving weight to defects in the form of the proposed settlements.

IV.

This case, as the majority properly acknowledges, presents "novel and complex issues" concerning joint-employer status. In the majority's apt words, it has involved the administrative law judge's "Herculean efforts to structure the litigation, a myriad of procedural rulings, a highly contentious motions practice before the judge and the Board, and over 150 hearing days over almost three years." Judge Esposito—who has ably handled the case and who is in a far better position than we are to assess it at this point—reasonably exercised her discretion to reject settlements that fail to resolve the joint-employer status of McDonald's, and instead serve to advance the policy view of the current General Counsel, who has attacked the Board's current joint-employer standard at every opportunity as he litigated this case brought by his predecessor. Now, applying the wrong standard of review, the majority arbitrarily reverses the judge. But today's ruling, prematurely ending the litigation, will almost certainly not be the last word. Because the Board should have deferred to the judge's decision and permitted the case to proceed, I dissent.

Dated, Washington, D.C. December 12, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

ORDER DENYING MOTIONS TO APPROVE SETTLEMENT AGREEEMENTS

I. STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. After over 150 days of hearing, only a few days before the record would have closed, General Counsel and Respondents presented a series of Settlement Agreements purporting to resolve all of the cases in the above matter. These "informal" Settlement Agreements, referred to as such because they do not provide for the issuance of an enforceable Board remedial order, were proffered for my approval over the strenuous objections of Charging Parties.[1]

The Board has a long history of encouraging settlements in order to promote the expeditious resolution of disputes and enhance productive labor relations. *Independent Stave Co.*, 287 NLRB 740, 741 (1987). The Board has periodically "reiterated its commitment to private negotiated settlement agreements" and its policy of encouraging dispute resolution without resort to the hearing process. *Id.* The Supreme Court and United States District Courts have similarly remarked that settlement is in many instances preferable to litigation. See, e.g., *Air Line Pilots Assn. v. O'Neil*, 499 U.S. 65, 81 (1991) ("In labor disputes, as in other kinds of litigation, even a bad settlement may be more advantageous in the long run that a good lawsuit"); *Weiss v. Mercedes-Benz of North America, Inc.*, 899 F.Supp. 1297, 1301 (D.N.J. 1995) ("a bad settlement is almost always better than a good trial"), quoting In re Warner Communications Securities Litigation, 618 F.Supp. 735, 740 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986).

However, certain fundamental elements of any effective settlement are lacking in this case. It is axiomatic that a settlement requires a meeting of the minds, or a genuine agreement between the parties. As discussed in detail below, General Counsel and McDonald's have made so many conflicting statements regarding McDonald's obligations under the proposed settlements that there is significant doubt as to whether they have actually reached agreement. A meaningful settlement also requires finality, or a measure of certainty that the settlement will conclusively end the litigation. Here, the proposed informal settlements' unusual and complicated form and enforcement mechanisms, coupled with the parties' evident confusion and history of antagonism, virtually guarantee that the settlements will not definitively end the case. Board caselaw also requires that a settlement be "reasonable" given the nature of the allegations, the inherent risks of litigation, and the stage of the litigation. Here, the proposed informal settlements are not a reasonable resolution based on the nature and scope of the violations alleged and the settlements' limited remedial impact, despite the risks inherent in further litigation. General Counsel's proferred justifications for the proposed informal settlements' significant shortcomings are inadequate and inconsistent with Board policy and practice. As a result, the Motions to approve the Settlement Agreements in this case are denied.

II. PROCEDURAL HISTORY

This immense case involved a lengthy hearing characterized by ceaseless evidentiary and procedural objections and florid motion practice. Because the legal standard for the approval of settlements in this context requires an evaluation of the risks inherent in litigation and the stage of the litigation involved, I will describe the procedural history of the case in some detail.[2] A thorough depiction of the history of the case will also help to elucidate my evaluation of certain procedural mechanisms

[1] On March 19, 2018, General Counsel and McDonald's stated that they had reached a settlement and provided a series of proposed Settlement Agreements for my approval. The parties made presentations on the record regarding approval of the proposed Settlement Agreements on April 5, 2018, and submitted Post-Hearing Briefs on the issue on April 27, 2018 and Reply Briefs on May 4, 2018.

[2] In addition to the events described herein, Respondents regularly filed motions requesting reconsideration, revision or simply withdrawal of orders I issued in response to the parties' motions or to issues arising in the course of the hearing. Such motions and the ensuing orders have been omitted unless significant.

contained in the Settlement Agreements now at issue.

During 2012, 2013, and 2014, the Charging Parties in the above matter filed charges against McDonald's USA, LLC (McDonald's) and various of its franchisees located in New York, Philadelphia, Chicago, Indianapolis, Sacramento, and Los Angeles, alleging that McDonald's and its franchisees, as joint employers, violated Sections 8(a)(1) and (3) of the Act. On December 19, 2014, Consolidated Complaints and Notices of Hearing issued against McDonald's and franchisees located in New York City,[3] against McDonald's and franchisee Jo-Dan Madalisse, Ltd., LLC (Jo-Dan) located in Philadelphia, Pennsylvania, against McDonald's and franchisees located in Chicago, Illinois,[4] against McDonald's and franchisee MaZT, Inc. located in Sacramento, California, against McDonald's and franchisee Faith Corp. located in Indianapolis, Indiana, and against McDonald's and franchisees located in Los Angeles, California.[5] On January 5, 2015, the General Counsel transferred the Philadelphia, Chicago, Sacramento, Indianapolis, and Los Angeles cases to Region 2, and on January 6, 2015, the Regional Director, Region 2 issued an Order Consolidating Cases, consolidating them with the cases arising in Region 2 for a hearing before an Administrative Law Judge.[6] McDonald's and the Respondent Franchisees filed Answers denying the Consolidated Complaint's material allegations.[7]

The record in this case opened on March 30, 2015. The first year of the proceedings consisted of litigation regarding the production of documents and electronically stored information (ESI), and the hearing facility arrangements, including parties' participation by videoconference and a website established by General Counsel to enable the exchange of exhibits. Opening statements took place on March 10, 2016, and witness testimony began on March 14, 2016.

A. Initial Motions

As discussed above, the separate Consolidated Complaints in this matter issued on December 19, 2014, and those cases were ultimately consolidated for trial before me on January 5, 2015. On December 29, 2014, McDonald's filed a Motion for a Bill of Particulars, which I denied in an Order dated January 22, 2015. McDonald's filed a Request and a Supplemental Request for Special Permission to Appeal my January 22, 2015 Order, which the Board denied. *McDonald's USA, LLC*, 362 NLRB No. 168 (August 14, 2015).

McDonald's initially refused to acquiesce in the Agency's typical practice of conducting conference calls among the parties prior to the opening of the hearing, unless these conference calls were transcribed by a court reporter. On February 9, 2015, I issued an Order denying McDonald's request to have an initial conference call in the case transcribed. In that Order, I explained that the NLRB Rules and Regulations did not provide for the transcription of conference calls, and noted that during conference calls parties "typically discuss issues involving settlement, proposed stipulations, the production of subpoenaed materials, scheduling of the hearing, and possibilities for the presentation of evidence" in a manner which would be inhibited if an official record of the call were made.

B. The Case Management Order, Stipulation Regarding Severance, and the Deferred Objections Process

In late January and early February 2015, McDonald's and all of the Franchisee Respondents filed Motions to Sever the consolidated case, contending that each individual Franchisee Respondent should be the subject of a separate proceeding. Respondents also contended that the presentation of one case involving parties in different areas of the country was practically infeasible. The Motions to Sever were denied in an Order dated February 20, 2015, in that consolidation of the cases did not constitute an arbitrary abuse of discretion by General Counsel. Respondents filed requests for special permission to appeal, which were denied by the Board on their merits. *McDonald's USA, LLC*, 363 NLRB No. 91 (January 8, 2016).

On March 3, 2015, I issued a Case Management Order establishing parameters for the presentation of the parties' cases. Respondents filed requests for special permission to appeal various aspects of the Case Management Order, which were denied by the Board on their merits. *McDonald's USA*, 363 NLRB No. 92 (January 8, 2016) and 364 NLRB No. 14 (May 26, 2016).

As indicated above, the hearing in this matter opened on March 30, 2015, with some parties appearing by videoconference from remote locations. General Counsel, McDonald's, the New York Franchisees, Jo-Dan, and Charging Parties appeared before me in New York. Tr. 10-11. General Counsel also

[3] This Consolidated Complaint issued against the following franchisees: AJD, Inc., Lewis Foods of 42nd Street, LLC, 18884 Food Corp., 14 East 47th Street, LLC, John C Food Corp., 840 Atlantic Avenue, LLC, 1531 Fulton Street, LLC, McConner Street Holding, LLC, MIC-Eastchester, LLC, and Bruce C. Limited Partnership. These franchisees will be collectively referred to as the "New York Franchisees."

[4] This Consolidated Complaint issued against the following franchisees: Karavites Restaurants 11102, LLC, Karavites Restaurants 26, Inc., RMC Loop Enterprises, LLC, Wright Management, Inc., V. Oviedo, Inc., McDonald's Restaurants of Illinois, Inc., Lofton & Lofton Management V, Inc., K. Mark Enterprises, LLC, Nornat, Inc., Karavites Restaurants 5895, Inc., Taylor & Malone Management, RMC Enterprises, LLC, Karavites Restaurant 6676, LLC, and Topaz Management, Inc. These franchisees will be collectively referred to as the "Chicago Franchisees."

[5] This Consolidated Complaint issued against the following franchisees: D. Bailey Management Company, 2Mangas, Inc. and Sanders-Clark & Co., Inc. These franchisees, together with MaZT, Inc., will be collectively referred to as the "California Franchisees." On February 13, 2015, another Consolidated Complaint issued against Sanders-Clark & Co., Inc. which was consolidated with the instant case on March 23, 2015. McDonald's and Sanders-Clark & Co., Inc. objected on the record and filed Oppositions on April 2 and 3, 2015, which were denied by Order dated April 15, 2015.

[6] During the hearing the Consolidated Complaint was amended by General Counsel to alter and withdraw allegations regarding violations, pursuant to a motion that I granted. Tr. 14312-14314. On May 23, 2017, General Counsel made a motion to amend the Consolidated Complaint to include an allegation that Jo-Dan Enterprises and Jo-Dan Madalisse, Ltd., LLC, constituted a single employer. Tr. 17190-17191. This motion was granted on June 15, 2017. Tr. 18375-18378.

[7] During the hearing, Lewis Foods of 42nd Street, LLC, amended its Answer to admit that at all material times, Mark Grey was an assistant manager for Lewis Foods of 42nd Street, LLC, a supervisor and agent pursuant to Sections 2(11) and (13) of the Act, respectively. Tr. 18514-18515.

appeared by video conference from Philadelphia, Chicago, Los Angeles, Sacramento, San Francisco, and Indianapolis as did Charging Parties and the Chicago Franchisees, the California Franchisees, and Faith Corp. Tr. 11-14. The initial 11 days of hearing, which took place over a year from March 30, 2015 through March 8, 2016, consisted of conferences regarding the hearing facilities and ongoing practical modifications made by General Counsel to address Respondents' complaints. During these hearing dates the parties also addressed their Subpoenas *Duces Tecum*, Petitions to Revoke, and production of documents and ESI, which are discussed in further detail below.

Their Motion to Sever the case having been denied, during this same period McDonald's and the Franchisee Respondents attempted to demonstrate that the videoconference system and Sharepoint website established by General Counsel for the dissemination of exhibits was not adequate for the presentation of the case. Respondents' counsel raised repeated complaints during the initial 11 days of hearing regarding the videoconferencing, the Sharepoint website, wifi service in the hearing room, the counsel tables available, and the absence of a lectern. *See* Order Denying Respondents' Motion for Reconsideration of Denial of Motion to Sever (March 3, 2016). Given the repeated motions filed by Respondents regarding these topics,[8] during the hearing on July 14, 2015 I ordered the parties to meet and confer prior to filing any additional motions regarding the hearing facilities and process. Tr. 477. I further asked that the parties cooperate in a good-faith manner to address such practical issues, instead of creating or amplifying problems with the mechanics of the case presentation in order to support claims that the case could not be tried in accordance with fundamental due-process standards.[9] Tr. 472-474.

Another spate of filings occurred in late November and early December 2015, after the parties were unable to resolve their differences regarding these logistical matters amongst themselves. On November 25, 2015, MaZT, Inc. filed a Motion for an Order Addressing the Use and Administration of Sharepoint and Other Aspects of the Hearing Facilities, and a Motion for Modification of the Case Management Order with respect to advance notice of witness appearances and the presentation of evidence. MaZT, Inc.'s motions, which were joined by McDonald's and a number of the Franchisee Respondents, were denied on December 3, 2015. Instead, the parties agreed to conduct a test of the videoconferencing equipment on January 5, 2016, and I adjourned the hearing indefinitely, directing General Counsel to obtain a larger hearing room and address remaining issues with the videoconferencing and wireless internet access. *See* Order Scheduling Resumption of Hearing (January 27, 2016). During a status conference on January 8, 2016, I ordered additional safeguards in connection with the use of the videoconferencing equipment and hearing facilities. A final test of the enhanced videoconferencing and wifi equipment in the new, larger hearing room was conducted on February 10, 2016, with a second scheduled for February 29, 2016. However, on February 25, 2016 McDonald's filed a Motion to Modify the Case Management Order Because of Technological Difficulties, continuing to contend that the videoconferencing, wifi and Sharepoint website were inadequate to enable the full participation of counsel from remote locations. I then issued the Order Denying Respondents' Motion for Reconsideration of Denial of Motion to Sever dated March 3, 2016, referred to above.

Subsequently, the parties reached a Stipulation As to Modification of the Case Management Order, which was approved on March 13, 2016, providing for a process by which parties were entitled to file "deferred objections" in lieu of appearing in person during any particular phase of the hearing in the case. This Stipulation was designed to obviate the necessity of videoconferencing and remote presentation of documentary evidence by permitting parties to forego making appearances during certain portions of the hearing. Instead, parties would be permitted to file objections to testimony and documentary evidence after the hearing date on which the testimony or documentary evidence was presented. During the proceedings on March 8, 2016, General Counsel further agreed that pursuant to this Stipulation, parties could choose to attend the hearing on a particular day solely to observe, without making an appearance on the record and making their objections during the hearing itself, and then file objections on a deferred basis. Tr. 901-902.

On September 1, 2016, McDonald's filed a Motion proposing to establish "guidelines" regarding the length of the case by limiting the number of hours permitted for each party's case presentation. This motion was denied on the record on September 6, 2016.[10] Tr. 7624-7629.

In early October 2016, General Counsel, the Charging Parties, McDonald's, and all Franchisee Respondents entered into a Stipulation Regarding Proceedings in Severed Cases. This Stipulation addressed the manner in which proceedings would continue in the event of an order severing the Region 2 and 4 (New York and Philadelphia) cases from the Region 13, 20, 25, and 31 (Chicago, Sacramento, Indianapolis and Los Angeles) cases. General Counsel would be permitted to call in the Region 2 and 4 cases any witness already subject to a Subpoena *Ad Testificandum*, regardless of the specific allegations their testimony would ultimately address. The entire record developed in the context of the Region 2 and 4 cases could be made part of the record in the Region 13, 20, 25, and 31 cases. Finally, McDonald's would have standing objections on relevance grounds to evidence that it wished to contend was not pertinent to any Franchisee Respondent in any other case. On October 12, 2016, I issued an

[8] Motions were filed regarding the use of the Sharepoint website to exchange documents, the use of videoconferencing, and notice provided regarding topics addressed during the hearing by McDonald's (July 2, 2015), by MaZT, Inc. (July 6, 2015), by the New York Franchisees (July 10, 2015), and by certain of the Chicago Franchisees and Faith Corp. (July 13, 2015).

[9] Specifically, I referred to "a cacophony of complaints about the hearing process here…about opposing counsel," and to "issues that are normally resolved with just a phone call and a conversation that instead end up in motion practice," expressing my "hope that isn't a specific strategic choice on the part of the parties." Tr. 474.

[10] As I stated on the record at the time, I was unwilling to impose a numerical limitation on the hours available to the parties for the presentation of their cases. Tr. 7624. It was apparent that a set numeric limitation would have inevitably become grist for the ever-churning mill of animosity between them, and the trial would simply be prolonged further by conflict over the specific amount of time consumed by the case presentations.

Order Severing Cases and Approving this Stipulation.[11]

Meanwhile, the Stipulation As to Modification of the Case Management Order and the "deferred objections" process proved fertile ground for motion practice and due process contentions. On May 17, 2016, the New York Franchisees filed a motion for an Order Confirming the Use of Standing Objections as Deferred Objections, which was granted in an Order issued on May 23, 2016. Disputes subsequently arose regarding the time for submission of deferred objections, and on January 18, 2017 I issued an Order requiring that deferred objections on behalf of all Franchisee Respondents be submitted simultaneously after the conclusion of the Region 2 and 4 cases. The parties were then unable to agree upon the format for the deferred objections submission, and on July 13, 2017 I issued an Order on Deferred Objections Submissions addressing that issue. On October 2, 2017, the Chicago Franchisees and Faith Corp. filed a Motion for Reconsideration of these Orders, which was denied by Order dated October 3, 2017. The New York and California Franchisees filed a Motion for Reconsideration of the Orders on October 3, 2017, which was denied by Order dated October 17, 2017.

C. Subpoenas and Petitions to Revoke

In mid-February 2015, General Counsel served McDonald's and the Franchisee Respondents with Subpoenas *Duces Tecum* seeking the production of documents and ESI. McDonald's and the Franchisee Respondents filed Petitions to Revoke, which were denied by Orders dated March 19, 2015.[12] Charging Parties also served Subpoenas *Duces Tecum* on McDonald's and the Franchisee Respondents. McDonald's and the Franchisee Respondents filed Petitions to Revoke, which were granted and denied in part by Orders dated March 24, 2015.

As discussed above, the hearing opened on March 30, 2015, and adjourned until May 26, 2015 to allow for the production of documents and ESI. In late April and early May 2015, I conducted several conference calls to discuss the status of the parties' production. On April 27, 2015, I wrote to the parties to schedule a second pre-hearing conference call, and asked that they provide counsel authorized to discuss and possibly reach agreement regarding the production of materials pursuant to Subpoena, particularly ESI. On April 28, 2015, McDonald's filed an "Emergency Expedited Request for Special Permission to Appeal" what it styled as "Permitting Off-the-Record Motion Practice." The Board denied this request for special permission to appeal on its merits. *Lewis Foods of 42nd Street, LLC*, 362 NLRB No. 132 (June 26, 2015); see also Order Denying Request for Reconsideration Regarding Transcription of Conference Call (February 9, 2015).

McDonald's and the Franchisee Respondents served the Charging Parties and Kendall Fells with Subpoenas *Duces Tecum*, and Charging Parties filed Petitions to Revoke, which were granted and denied in part by Order dated April 9, 2015. McDonald's filed a request for special permission to appeal my April 9, 2015 Order, which the Board denied on its merits.[13] *McDonald's USA, LLC*, 363 NLRB No. 144 at p. 1-2, 11-14 (March 17, 2016). McDonald's also served third parties Mintz Group, LLC, LR Hodges & Associates, Ltd., Berlin Rosen, Ltd., New York Communities for Change, Inc. (NYCC), and Hart Research Associates with Subpoenas *Duces Tecum*. These third parties filed Petitions to Revoke, which were granted on April 9, 2015 and April 15, 2015. McDonald's filed a request for special permission to appeal these Orders, which the Board also denied on its merits. *McDonald's USA, LLC*, 363 NLRB No. 144 at p. 1, 14-19.

On April 27, 2015, the parties entered into a Stipulated Protective Order in this matter.[14] However, in the face of ongoing disputes regarding the production of documents and ESI pursuant to the Subpoenas *Duces Tecum*, on May 19, 2015 I issued an Order scheduling a series of conferences in June, July, and August 2015 to address these matters. I further ordered that opening statements and the presentation of evidence would begin on October 5, 2015. At the first of these conferences on June 2, 2015, General Counsel and Charging Parties objected to McDonald's unilateral redaction of documents it had produced pursuant to Subpoena. Tr. 163-168. After the parties submitted their positions with respect to the redactions, I issued an Order on June 15, 2015 requiring that McDonald's produce unredacted copies of all previously produced documents and cease redacting documents for any reasons other than established privileges or settled Board principles.

Overall, the conferences to address the production of documents and ESI during the summer of 2015 were not productive. McDonald's took the position that it did not intend to comply with my June 15, 2015 order requiring that it produce unredacted documents, would not comply with any order I issued regarding the scope of ESI custodians, and would basically produce only the materials that it considered to be appropriate. Tr. 316-317, 346-347. McDonald's and the Franchisee Respondents also repeatedly refused to comply with specific portions of my order denying their Petitions to Revoke, and refused to agree to any definite time for completing their production of documents and ESI. See, e.g., Tr. 301, 375-380, 417-418, 486-487, 494-495, 497-498, 500-501, 506, 508-509, 510-512. Thus, on August 24, 2015, General Counsel filed a Motion to Adjourn the Hearing Date pending proceedings to enforce its Subpoenas Duces

[11] In this Order I retained jurisdiction over the Region 13, 20, 25, and 31 cases, unless another ALJ was subsequently assigned to hear them.

[12] General Counsel and Charging Parties also served Subpoenas *Duces Tecum* on McDonald's Restaurants of Illinois, Inc., which are discussed in further detail at page 26, *infra*. In mid-December 2015, General Counsel served a Subpoena *Duces Tecum* on Aon Consulting, Inc. (Aon). Aon filed a Petition to Revoke the Subpoena, which was denied by Order dated January 4, 2016.

[13] The Charging Parties produced materials responsive to the McDonald's Subpoena *Duces Tecum* as required by my March 24, 2015 Order in May 2015.

[14] On January 8, 2016, General Counsel filed a Motion for an Order compelling McDonald's to comply with the terms of the Stipulated Protective Order, arguing that McDonald's had over-designated documents as Confidential or Highly Confidential pursuant to the Protective Order's terms. I granted General Counsel's motion and admonished McDonald's against further violations of the Stipulated Protective Order's terms in an Order dated February 11, 2016. On February 2, 2016, the New York Franchisees filed a Motion for Modification of the Stipulated Protective Order, which was denied by Order dated February 11, 2016.

Tecum in federal court, and the New York Franchisees filed a Motion to Confirm the Trial Start Date or Adjourn the Trial. By Order dated August 28, 2015, the hearing was adjourned until January 11, 2016.

General Counsel subsequently filed applications for enforcement of its Subpoenas *Duces Tecum* against McDonald's, the New York Franchisees, Jo-Dan, and the Franchisee Respondents in Chicago, Indianapolis, and California. Respondents were ordered to produce the vast majority of the information sought. See *NLRB v. McDonald's USA*, 15 Misc. 322 (CM) (S.D.N.Y.); *NLRB v. AJD, Inc., et al.*, 2015 WL 7018351 (S.D.N.Y. 2015) (granting applications to enforce subpoenas served on the New York Franchisees); *NLRB v. Jo-Dan Madalisse, Ltd, LLC*, 2015 WL 9302922 (E.D. Pa. 2015) (granting application to enforce subpoena served on Jo-Dan); *NLRB v. K Mark Enterprises, LLC, et al.*, 2016 WL 233096 (N.D. Illinois 2016) (granting applications to enforce subpoenas served on Chicago Franchisees); *NLRB v. Nornat, Inc.*, 2016 WL 233098 (N.D. Ill. 2016) (same); *NLRB v. MaZT, Inc.*, 15-MC-00110-WBS-CKD (E.D. Ca.); *NLRB v. Faith Corp. of Indianapolis*, 15-MC-00092 (JMS-MJD) (S.D. Indiana); *NLRB v. Sanders-Clark & Co., Inc.*, 2016 WL 2968014 at *1 (C.D. Ca. 2016) (noting that the court had granted an application to enforce the subpoena served on Respondent Franchisee Sanders-Clark & Co., Inc.) and 16-55692 (9th Circuit); *NLRB v. 2Mangas, Inc.*, 25-MC-249 and 16-CV-02155 (CAS) (C.D. Ca.) and 16-55690 (9th Circuit); *NLRB v. D. Bailey Management Co.*, 15-MC-250, 16-CV-02156 (C.D. Ca.) and 16-55689 (9th Circuit).

Once General Counsel obtained orders enforcing their Subpoenas *Duces Tecum*, Respondents raised a multitude of privilege assertions engendering extensive litigation. In December 2015 and January 2016, General Counsel filed motions for orders finding a waiver of privilege by McDonald's and requiring the immediate production of documents McDonald's had withheld on that basis. These motions were held in abeyance pending the parties' discussions. However, on January 20, 2016, General Counsel filed a motion for an order finding that Franchisee Respondents 2Mangas, Inc., D. Bailey, Inc., and Sanders-Clark & Co. had waived any claim of privilege by failing to submit their privilege log in a timely manner. This motion was granted in an Order dated February 22, 2016.[15] General Counsel also filed motions for orders finding waivers of privilege and requiring production of documents against the New York Franchisees (February 18, 2016), the Chicago Franchisees (March 2, 2016), and MaZT, Inc. (March 25, 2016).

On April 13, 2016, I issued an Order Requesting Appointment of a Special Master to address contested privilege assertions and the adequacy of Respondents' privilege logs. On April 15, 2016, Robert A. Giannasi, Chief Administrative Law Judge, appointed Judge Jeffrey D. Wedekind to act as Special Master in connection with these issues. Judge Wedekind, as Special Master, subsequently issued Orders addressing General Counsel's contentions regarding the adequacy of Respondents' privilege logs and waiver of privilege by the New York Franchisees (June 1, 2016, addressing 467 disputed entries), McDonald's (June 28, 2016,[16] addressing 101 disputed entries, and September 16, 2016, addressing eight disputed entries), Jo-Dan (September 29, 2016, addressing one disputed entry), the Chicago Franchisees (October 26, 2016, addressing 43 disputed entries), Faith Corp. (October 27, 2016, addressing three disputed entries), and MaZT, Inc. (November 1, 2016, addressing two disputed entries).

In mid-August 2017, McDonald's served Charging Parties SEIU, Fast Food Workers Committee (FFWC), and Pennsylvania Workers Organizing Committee (PWOC) with a second round of Subpoenas *Duces Tecum*. McDonald's also served additional Subpoenas *Duces Tecum* on Kendall Fells and NYCC. These Charging Parties and non-parties filed Petitions to Revoke the Subpoenas *Duces Tecum*, which were granted in an Order dated October 2, 2017. On October 9, 2017, McDonald's filed a request for special permission to appeal my October 2, 2017 Order, which the Board denied in its January 16, 2018 Order discussed in further detail below.

D. Presentation of the Case and Related Motions

The parties gave their opening statements on March 10, 2016, and General Counsel began presenting witnesses on March 14, 2016. General Counsel called 52 current and former McDonald's employees to testify regarding various aspects of the relationship between McDonald's and its franchisees, including the Franchisee Respondents, over 78 days, concluding on January 26, 2017. General Counsel then called 34 witnesses in connection with the New York and Philadelphia unfair labor practice allegations, who testified over 24 days, concluding on May 23, 2017.[17] On October 25, 2016, the New York Franchisees had filed a Motion arguing in relevant part that General Counsel should be required to present all witnesses whose testimony pertained to a particular Franchisee Respondent location prior to presenting any witness whose testimony pertained to a different Franchisee Respondent location. General Counsel filed an Opposition, and I denied this Motion on the record on November 10, 2016. The severance of the cases and deferred objections process obviated the need for structuring the case presentations

[15] See *NLRB v. Sanders-Clark & Co., Inc.*, 2016 WL 2968014 at *3-6. After finding that under Ninth Circuit law ALJs were not empowered to rule on waiver of privilege claims, Judge Snyder determined that Sanders-Clark & Co., Inc. had waived assertions of attorney-client privilege. Judge Snyder reached the same conclusion with respect to 2Mangas, Inc. and D. Bailey Management Co. in cases 16-CV-02155 and 16-CV-02156, respectively.

[16] On August 8, 2016, McDonald's filed a Motion seeking a confidentiality order, beyond the parameters of the Stipulated Protective Order approved on April 27, 2015, applicable to some of the documents it was required to produce pursuant to Judge Wedekind's June 28, 2016 Order. I denied McDonald's Motion by Order dated August 24, 2016.

[17] General Counsel called owners and managers of the New York Franchisees pursuant to FRE 611(c) during his direct case. McDonald's initially took the position that these witnesses were adverse, such that McDonald's was permitted to ask such witnesses leading questions, despite the participation of McDonald's attorneys in their preparation to testify. Tr. 13566-13574, 13583-13584. I rejected this contention for the reasons stated in a ruling on the record on February 2, 2017. Tr. 13875-13882. In particular, McDonald's attorneys participated in preparing many of the witnesses presented by the New York Franchisees and Jo-Dan on their direct cases to testify. See, e.g., Tr. 18088-18089, 18212-18213, 18358-18359, 18818-18819, 18919-18920, 19219-19220, 19900-19901, 20153-20154.

in such a manner, and calling whatever witnesses were available to testify regardless of the location which their testimony would address was a more efficient use of the available hearing time. Tr. 10934-10941, 13375-13377.

On January 31, 2017, the parties agreed to the entry of a sequestration order, and I issued a sequestration order pursuant to *Greyhound Lines*, 319 NLRB 554 (1995). Tr. 13629-13632; see also NLRB Judges Bench Book § 1-300. An initial dispute between the parties regarding the number of New York Franchisee representatives entitled to be present during testimony dissipated on the submission of written statements. Tr. 13628-13633, 13674-13676. Subsequently on February 16, 2017 I issued an Order permitting the New York Franchisees to have one non-sequestered representative per Charged Party franchise entity present throughout the hearing.

On May 25, 2017, the New York Franchisees began presenting their direct case. The New York Franchisees presented 35 witnesses over 22 days, concluding on October 26, 2017. Jo-Dan presented one witness, concluding on October 24, 2017.[18]

From the moment the first witness took the stand in this case on March 14, 2016, the evidentiary issues raised by McDonald's and the Franchisee Respondents have simply been extraordinary. Of course, pursuant to Section 10(b) of the Act, agency proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." See also, NLRB Rules and Regulations, § 102.39. Thus, "It is well-established that the Board is not bound to apply strictly the Federal Rules of Evidence." *Times Union, Capital Newspapers*, 356 NLRB 1339, n. 1 (2011); *Conley Trucking*, 349 NLRB 308, 310 (2007), enf'd. 520 F.3d 629 (6th Cir. 2008). For example, ALJs are not precluded from admitting hearsay and according it the weight they believe to be appropriate based upon other record evidence. *Conley Trucking*, 349 NLRB at 310-312, discussing *Alvin J. Bart*, 236 NLRB 242 (1978) (admissibility of witness affidavit); see also *St. George Warehouse*, 353 NLRB 497, 503 (2008), adopted at 355 NLRB 474 (2010), enf'd. 645 F.3d 666 (3d Cir. 2011) (admissibility of hearsay testimony). Unfortunately, as I stated on the record, McDonald's took deliberate strategic positions regarding evidentiary and procedural issues which obstructed the creation of the record and prolonged the hearing. Tr. 8126-8127.

For example, documents offered into evidence by General Counsel were subject to a barrage of evidentiary objections, even though the vast majority of the documents at issue had been produced by the Respondents themselves pursuant to subpoena. McDonald's began by taking the position that it had no custodian of the records for any documents, at any level, in its corporate headquarters, departments, or Regional offices, even with respect to documents as fundamental to its business as executed written agreements with the Franchisee Respondents. See Tr. 1175-1178, 1203-1204, 1497-1500, 1503-1506, 1546-1560, 1681, 1685. McDonald's also refused to identify any "qualified witness" for the admission of such documents pursuant to Federal Rule of Evidence 803(6). Tr. 1548-1550, 1557-1561, 1685, 3180-3181. As a result, McDonald's repeatedly contended that every individual who actually prepared or received a document was required to personally testify that they recalled having prepared or received it for the document's admission into evidence. See, e.g., Tr. 1203, 1481-1482, 1683-1684, 2138-2139, 3706-3707. Eventually, Respondents and General Counsel entered into stipulations agreeing to the authenticity of certain of the documents, some of which also addressed hearsay objections. But Respondents continued to meet attempts to introduce documents they had produced pursuant to subpoena with repeated objections that the particular witness was not an "appropriate" witness to "shepherd" the document into the record. See, e.g., Tr. 1409, 1479, 1683-1684, 2062-2063, 3180-3181, 3706-3707, 5494-5495, 5571, 8340-8354, 12133. No legal authority was ever presented to substantiate this contention.

Similarly, McDonald's and the New York Franchisees refused to stipulate that e-mails they produced pursuant to subpoena, sent to an address admittedly used by a particular witness, were actually received or seen by that individual, and objected to their admission into evidence on this basis. See, e.g., Tr. 15174-15175, 16123-16128, 16137-16140, 16845-16860, et seq. Here McDonald's at least presented a legal argument that certain e-mails contained in a "chain" could not be authenticated because they could have been altered by the ultimate sender or recipient, which I rejected on the record based on countervailing caselaw. Tr. 16845-16850. McDonald's then contended that such documents, while "authentic" lacked a "foundation" for admissibility, reverting to its claim that a witness with "personal knowledge" of every document was required. Tr. 16854-16855. Finally, McDonald's counsel claimed, with no factual elaboration whatsoever, that attorney-client privilege precluded disclosure of *the date* that it discovered a particular document responsive to General Counsel's Subpoena but never previously produced. Tr. 20993, 21000.

McDonald's began presenting its direct case on October 30, 2017, and 15 of its witnesses had testified when the hearing adjourned on December 13, 2017. At that time 12 additional hearing dates had been scheduled beginning on January 22, 2018 and continuing into February. On July 28, 2017, McDonald's had written to General Counsel, stating that it had retained Professor Chekitan Dev as a possible expert witness regarding "branding, brand protection, and McDonald's brand, culture and/or franchising relationship." General Counsel requested production of an expert's report in connection with Professor Dev's testimony. On August 11, 2017, McDonald's filed a Motion for an order stating that its notice of potential expert testimony was sufficient, and on August 12, 2017, General Counsel filed a motion to compel disclosure of or preclude the expert testimony. On September 5, 2017, I issued an Order requiring that McDonald's provide an expert's report in connection with Professor Dev's testimony, in the format prescribed by Federal Rule of Civil Procedure 26(a)(2)(B), thirty days in advance of the anticipated date of Professor Dev's testimony. On September 13, 2017, McDonald's filed a Motion for Reconsideration and/or Clarification of the September 5, 2017 Order raising various issues, which I addressed in a Supplemental Order Regarding Production of

[18] I had suggested to the parties earlier that they agree to some procedure permitting Jo-Dan to forego attending the hearing during the presentation of evidence addressing the unfair labor practice allegations against the New York Franchisees, but the parties did not do so.

Expert's Report issued on October 2, 2017. On October 9, 2017, McDonald's filed a request for special permission to appeal the September 5, 2017 order requiring the production of an expert's report, but not the October 2, 2017 Order resolving the ancillary issues it had raised.

Before adjourning the hearing in December 2017, McDonald's stated that it had two additional witnesses to call – a fact witness and Professor Dev – after which it would close its direct case. Tr. 201011-201013, 201021. Apparently, the only rebuttal General Counsel intended to present was a position statement submitted by counsel for the New York Franchisees during the investigation of the charges. Tr. 21208-21209. The hearing was scheduled to resume on January 22, 2018.

On January 2, 2018, General Counsel filed a Motion seeking an Order precluding McDonald's from presenting expert testimony and admonishing McDonald's. In an Order dated January 12, 2018, I declined to hold the record in the case open for the testimony of Professor Dev in the event that the Board had not ruled on McDonald's October 9, 2017 request for special permission to appeal prior to the resumption of the hearing. While declining to admonish McDonald's, I found that McDonald's had purposefully delayed the presentation of its direct case in order to obtain a "stay" of the hearing pending the Board's ruling on its request for special permission to appeal, or for some other undisclosed purpose. Specifically, I found that McDonald's had deliberately prolonged the presentation of its case by refusing to present more than one witness each day even though on nine days its sole witness testified for two hours or less, and by unilaterally canceling four hearing days which had been scheduled for six months.

On January 16, 2018, the Board issued an unpublished Order ruling that McDonald's was not required to provide an expert's report with respect to Professor Dev's testimony. The next day, General Counsel filed a Motion to Stay the hearing, which was scheduled to resume in less than a week, for 60 days, asserting that McDonald's "initiated discussions regarding a global settlement of all pending NLRB charges" in December 2017. General Counsel further stated that the stay was necessary in order to evaluate the impact of the Board's decision *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (December 14, 2017), which overruled *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015). Charging Parties opposed the Motion. I granted the Motion by Order dated January 19, 2018. The hearing was adjourned until March 19, 2018, with an additional 11 hearing days agreed upon by the parties.

On February 26, 2018, the Board vacated its decision in *Hy-Brand Industrial Contractors, Ltd.*, stating that as a result, "the overruling of the *Browning-Ferris* decision is of no force or effect." 366 NLRB No. 26.

The hearing resumed on March 19, 2018. At that time, General Counsel and McDonald's presented a series of Settlement Agreements executed by McDonald's and the Franchisee Respondents in both the instant case and the severed cases, purportedly resolving all of them.[19] Charging Parties objected. I then adjourned the hearing until April 5, 2018, when the parties were given the opportunity to present evidence and argument regarding whether the Settlement Agreements should be approved pursuant to *Independent Stave Co.*, 287 NLRB 740 (1987). The *Independent Stave* hearing took place on April 5, 2018, and all parties were provided with the opportunity to submit briefs and replies addressing that issue.[20]

III. The Proposed Settlement Agreements

As indicated above, on March 19, 2018, General Counsel and McDonald's presented a series of thirty informal Settlement Agreements for my approval, each Settlement Agreement addressing the allegations against one Franchisee Respondent and executed by that Franchisee Respondent and McDonald's. On April 5, 2018, copies of the Settlement Agreements executed by General Counsel were moved into evidence. McDonald's contends in its Briefs that General Counsel has represented that the proposed Settlement Agreements will serve as a "template" for settlement of other cases involving an allegation that McDonald's constitutes a joint employer with one of its franchisees, which were never consolidated with the cases at issue here. McDonald's Brief in Support of Motion to Approve at p. 6, 7-8; McDonald's Post-Hearing Brief at p. 7, n. 9, 9.

The Settlement Agreements provide for the posting of a Notice in English and any additional language the particular Regional Director determines to be appropriate, at the Franchisee Respondent's location. The Settlement Agreements also provide for the mailing of the Notice to the last known address of former employees employed at any time during the six months following the last date that the Respondent Franchisee allegedly committed the unfair labor practices.[21]

The Settlement Agreements further provide for the payment of backpay in the form of a certified or cashier's check to the 20 alleged discriminatees. Three of these employees were allegedly discharged, and the other 17 were allegedly suspended for one day, assigned reduced work hours, and sent home early at various times in retaliation for their support for and activities on behalf of the Union. The three employees who were allegedly discharged unlawfully – Sean Caldwell, Tracee Nash, and Quanisha Dupree – have waived reinstatement, and will receive front pay.[22] All 20 of the alleged discriminatees receiving backpay will receive interest and an excess tax award as well. The total amount payable for all alleged discriminatee awards is $171,636.00.

[19] It should be noted that McDonald's appeared at the March 19, 2018 hearing without a witness and otherwise unprepared to continue its direct case, declaring "we have settled the case," despite its claim that "we had no idea what was going to happen today," and the fact that the Settlement Agreements had been neither executed by General Counsel nor approved by me. Tr. 21216, 21219, 21236-21237.

[20] Post-Hearing Briefs were filed by General Counsel, Charging Parties, McDonald's, the New York Franchisees, and Jo-Dan. McDonald's, the New York Franchisees, Jo-Dan, and Charging Parties also filed Reply Briefs. The Chicago Franchisees, Faith Corp., and the California Franchisees also filed Motions in support of the Settlement Agreements' approval.

[21] The Settlement Agreement with Mic-Eastchester, LLC provides solely for mailing of the Notice to the last known addresses of employees working at 341 Fifth Avenue, New York, New York during the period March 1, 2013 through June 1, 2013.

[22] Caldwell, Nash and Dupree have executed written waivers to this effect. G.C. Exs. Waiver 1-3.

The Settlement Agreements provide that, subject to stipulated confidentiality designations pursuant to the parties' Protective Order, General Counsel may seek to use evidence obtained during the investigation and hearing for any relevant purpose in the instant case or any other cases. Such evidence may form the basis for findings of fact and/or conclusions of law. The Settlement Agreements provide that neither the Agreements nor any conduct taken in order to effectuate them constitute an admission or will be asserted as evidence of joint employer status between McDonald's and any of its franchisees.

The Settlement Agreements also contain processes for addressing breaches occurring within a period of nine months after the Agreements are approved.[23] First, the Regional Director involved is to notify McDonald's and the relevant Franchisee Respondent of the breach, and the Franchisee Respondent shall have fourteen days to remedy the violation. In the event that the Franchisee Respondent fails to do so, the Regional Director may issue what the Settlement Agreements refer to as a "Merits Complaint" against that Franchisee Respondent only, containing all of the allegations pertinent to the Franchisee Respondent in the instant case except for the allegations that McDonald's is a joint employer with the Franchisee Respondent of the Franchisee Respondent's employees. General Counsel may then file a motion for a default judgment with the Board on the allegations of the Merits Complaint.

The Settlement Agreements further provide that in the event of an instance of non-compliance which is not cured by the Franchisee Respondent within 14 days after notice provided by the Regional Director, the Regional Director will provide Special Notices containing agreed-upon language to McDonald's, which McDonald's will mail to the last known address of the Franchisee Respondent's employees.[24] A representative Special Notice is attached here to as Appendix A.

The Settlement Agreements then provide that if *both* McDonald's and the Franchisee Respondent fail to cure the breach of the Agreements identified by the Regional Director, the Regional Director may amend the Merits Complaint to include McDonald's as a Respondent and include the allegations pertinent to joint employer status. After the Regional Director makes these amendments, resulting in what the Settlement Agreements term the "Default Complaint," General Counsel may file a motion for a default judgment with respect to its allegations. The Settlement Agreements provide that in the event of a motion for a default judgment the pertinent Answers will have been withdrawn and the allegations admitted. However, McDonald's and the Franchisee Respondent involved may still raise before the Board the issue of whether one or both of them have defaulted on the Settlement Agreements' terms. The Board may then find the allegations of the Merits or Default Complaint true and make appropriate findings of fact and conclusions of law. The Settlement Agreements further provide that a United States Court of Appeals Judgment may be entered enforcing any such board order ex parte after service or an attempt at service on McDonald's and/or the Franchisee Respondent at the last addresses they have provided to General Counsel.

Some of the Settlement Agreements also provide for a Settlement Fund of $250,000 contributed by the Franchisee Respondents, to be used "for the benefit of any and all potential discriminatees who may be entitled to a monetary remedy" as a result of a breach. Only Franchisee Respondents alleged in the Consolidated Complaint to have committed violations of Section 8(a)(3) of the Act resulting in backpay liability are subject to the Settlement Fund provisions.[25] Furthermore, a Settlement Fund disbursement is only available if the Franchisee Respondent in question commits a violation identical to the violation(s) of Section 8(a)(3) initially alleged in the Consolidated Complaint. Tr. 21248-21249. Pursuant to the Settlement Agreements, monies from the Settlement Fund may become available in the following circumstances: (i) a Regional Director provides written notice of a breach of a Settlement Agreement consisting of a Franchisee Respondent's relevant violation of Section 8(a)(3) within nine months following approval of the Settlement Agreement; and (ii) the Franchisee Respondent fails or refuses to cure the relevant breach of the Settlement Agreement. If McDonald's notifies the Regional Director that it will issue a Special Notice as described above, the alleged discriminatee in question may choose between two options. The alleged discriminatee may waive reinstatement and receive a payment from the Settlement Fund equal to 500 hours of pay plus backpay running from the date of the violation through the date that the Regional Director provides written notice of the breach. The alleged discriminatee may in the alternative elect to receive a payment from the Settlement Fund equal to the pay they would have earned from the date of the violation through the date of the Regional Director's written notice of the breach.[26] If the alleged discriminatee elects to waive reinstatement, the payment from the Settlement Fund shall be in lieu of any other remedies, the charges will be dismissed, and General Counsel will take no further action. If the alleged discriminatee chooses not to waive reinstatement, General Counsel may issue a complaint based on the violation alleged, but will not pursue default proceedings against McDonald's based on the violations.

After 15 months, if the Regional Director in question determines that there are no pending charges alleging a breach of the pertinent Settlement Agreements, the remainder of the Settlement Fund monies will be returned to McDonald's. If there are pending charges after fifteen months, the balance of the Settlement Fund will be returned after the pending charges are resolved.

Finally, the Settlement Agreements provide that 10 days after approval, General Counsel will move the ALJ for an order approving withdrawal of the Consolidated Complaint against McDonald's and the Franchisee Respondents, as well as the

[23] The Settlement Agreements provide that the Notice's statement "WE WILL NOT do anything to prevent you from exercising the above rights" may not constitute the basis for finding a breach or violation.

[24] The Franchisee Respondents agree to provide the employees' names and last known addresses to McDonald's for this purpose.

[25] For example, Franchisee Respondent Lewis Foods of 42nd Street, LLC is alleged to have assigned more onerous work to an employee in retaliation for her union activities in violation of Sections 8(a)(1) and (3). G.C. Ex. 1(eee), ¶¶10, 13. However, the Settlement Agreement with that entity does not contain Settlement Fund provisions.

[26] Calculations of the amounts payable from the Settlement Fund in both circumstances will be performed by the Regional Director.

withdrawal of any Answers. No further action will be taken by General Counsel on those allegations, contingent on the parties' compliance with the Settlement Agreements. The parties to each Settlement Agreement will notify the Regional Director in writing regarding the steps McDonald's and the Franchisee Respondent have taken to comply within 5 days and again after 60 days from the date that the Settlement Agreements are approved.

IV. THE *INDEPENDENT STAVE* ANALYSIS

For many years, the Board has articulated a policy objective of encouraging the resolution of disputes without litigation in order to promote productive and stable collective bargaining relationships and labor relations. See, e.g., *UPMC*, 365 NLRB No. 153 at p. 3 (2017); *Independent Stave Co.*, 287 NLRB 740, 741 (1987). This policy, however, is not without its limitations, for "the Board's power to prevent unfair labor practices is exclusive, and…its function is to be performed in the public interest and not in vindication of private rights." *Independent Stave Co.*, 287 NLRB at 741, quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957). As a result, "the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned," a discretion "recognized as broad." *Id*; *UPMC*, 365 NLRB No. 153 at p. 3, quoting *Roselle Shoe Corp.*, 135 NLRB 472, 475 (1962), enf'd. 315 F.2d 41 (D.C. Cir. 1963). In exercising this discretionary function, the Board "will refuse to be bound by any settlement that is at odds with the Act" or with its own policies. *Independent Stave Co.*, 287 NLRB at 741; see also *UPMC*, 365 NLRB No. 153 at p. 3, quoting *Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958).

Therefore, in order to determine whether to accept a settlement agreement in lieu of further proceedings after issuance of a complaint, the Board considers whether "under the circumstances of the case," giving effect to "any waiver or settlement of charges" "will effectuate the purposes and policies of the Act." *Independent Stave Co.*, 287 NLRB at 741, quoting *National Biscuit Co.*, 83 NLRB 79, 80 (1949). The analysis developed by the Board encompasses issues such as "the risks involved in protracted litigation…the early restoration of industrial harmony…and the conservation of the Board's resources." *Independent Stave Co.*, 287 NLRB at 741. The Board also evaluates whether the affected employees have agreed to the proposed settlement, and "whether the agreement was entered into voluntarily by the parties, without fraud or coercion." *Id.* As summarized in *Independent Stave*, "in order to assess whether the purposes and policies underlying the Act would be effectuated by" approval of a settlement agreement, the Board evaluates

> all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

287 NLRB at 743.

For the following reasons, I find that the first of the *Independent Stave* factors does not weigh in favor of approval of the proposed settlements, and that the second factor militates significantly against approval. The third and fourth components of the *Independent Stave* analysis favor approval of the settlements. For the reasons discussed herein, I find overall that approval of the proposed Settlement Agreements is not appropriate.

A. The Positions of the Parties

The first element of the *Independent Stave* analysis requires a consideration of whether the parties have agreed to be bound by the proposed settlement, and General Counsel's position. Here, Respondents and General Counsel have signed the informal Settlement Agreements and argue for their approval. However, Charging Parties vehemently oppose approval of the Settlement Agreements.[27] Furthermore, although the three alleged discriminatees who were discharged executed waivers of reinstatement, there is no evidence regarding the positions of the other 17 alleged discriminatees receiving backpay.[28]

I find that pursuant to the Board's decision in *UPMC*, the position of the General Counsel is significant but not conclusive with respect to the first component of the *Independent Stave* analysis. In *UPMC*, the General Counsel and the Charging Party both opposed the settlement of the single employer allegations advanced by Respondents and ultimately accepted by the ALJ. 365 NLRB No. 153 at p. 7, 23. The Board stated there that while General Counsel's opposition to the proposed resolution was "an important consideration" weighing against approval, it was "not determinative under *Independent Stave*."[29] *UPMC*, 365 NLRB No. 153 at p. 7, quoting *McKenzie-Willamette Medical Center*, 361 NLRB 54, 55 (2014); see also *Independent Stave Co.* 287 NLRB at 741 (the Board "is not required…to give effect to all settlements reached by the parties to a dispute with or without

[27] Nothing in the record supports McDonald's assertion that Charging Parties "boycotted" the negotiation of the Settlement Agreements. McDonald's Post-Hearing Brief at 8-9, Reply Brief at 3; see Tr. 21201-21204.

[28] See, e.g., *Alamo Rent-A-Car*, 338 NLRB 275 (2002) (noting that only one of four individual discriminatees approved the proposed settlement); *Flint Iceland Arenas*, 325 NLRB 316, 320 (1998).

[29] General Counsel's argument that an ALJ's prerogative to approve or reject settlements under *Independent Stave* is somehow limited by "prosecutorial discretion" contradicts the Board's position in *UPMC* described above and is rejected. Post-Hearing Brief at p. 4. Furthermore, General Counsel's contention that the Chicago, California, and Indianapolis cases are within his "final authority" to resolve because the hearing with respect to those allegations has not yet begun is meritless. Post-Hearing Brief at 4-6. General Counsel has already presented approximately 15 witnesses pertaining to the Chicago Franchisees, eight witnesses pertaining to the California Franchisees, two witnesses pertaining to Faith Corp., and ten witnesses from various departments within McDonald's USA whose testimony General Counsel will presumably contend is relevant to McDonald's relationship with all of the Franchisee Respondents. As discussed *infra*, this testimony includes material relevant to the unfair labor practice allegations against the Chicago and California Franchisees and Faith Corp., as well as joint employer status. See materials cited at footnotes 45-46, 51-53 in Section IV(B).

the General Counsel's approval").

Respondents elide this issue entirely or refer to other Board decisions regarding the significance of General Counsel's position with respect to a proposed settlement, without directly addressing the Board's discussion of this factor in *UPMC*. See McDonald's Post-Hearing Brief at 15, Jo-Dan Post-Hearing Brief at 9. However, I find *UPMC* persuasive in this respect. *UPMC* is the Board's most recent decision applying the *Independent Stave* analysis. In addition, *UPMC* directly addresses aspects of a settlement intended in lieu of a single employer finding and joint and several liability, as opposed to settlement provisions remedying violations of the statute in and of themselves. Respondents cite no other Board decisions applying the *Independent Stave* analysis to settlement provisions specifically addressing single or joint employer status and/or joint and several liability. As a result, I find that *UPMC*'s analysis of the consideration given to General Counsel's position with respect to the proposed settlement is instructive.

In addition, General Counsel and McDonald's appear to lack a coherent understanding of McDonald's obligations under the proposed informal settlements. As discussed in further detail in Section IV(B), below, both General Counsel and McDonald's have made contradictory representations on the record and in their Briefs regarding the Settlement Agreements' provisions and McDonald's obligations. These conflicting assertions are significant, and specifically involve the portions of the Settlement Agreements – the default provisions contained in the Performance section and the language regarding the establishment and workings of the Settlement Fund – purportedly intended as a remedy in lieu of a finding of joint employer status. Given General Counsel and McDonald's confusion regarding these aspects of the Settlement Agreements, affording substantial weight to their positions regarding approval of the proposed settlement is not appropriate.

For all of the foregoing reasons, I find that the parties' positions with respect to the proposed settlement do not militate in favor of approval of the Settlement Agreements pursuant to *Independent Stave*.

B. Whether the Settlement is Reasonable

The second of the *Independent Stave* factors requires an evaluation of whether the settlement is reasonable in light of the nature of the alleged violations, the inherent risks of litigation, and the stage of the litigation involved. Here, I find that the circumscribed involvement of McDonald's in the informal Settlement Agreements' remedies does not begin to approximate the remedial effect of a finding of joint employer status. Furthermore, given the history of this case and the propensity for additional litigation, the form of the Settlement Agreements is simply inadequate. The complexity of the Settlement Agreements' enforcement provisions and the parties' conflicting interpretations indicate that even if a mutual understanding exists between them the proposed settlements will likely engender further proceedings, as opposed to finally resolving this matter. In addition, while the Consolidated Complaint does not allege that McDonald's committed unfair labor practices, General Counsel has adduced a significant quantum of evidence in support of the theory that McDonald's and the Franchisee Respondents engaged in a coordinated effort to effectuate a "mutual interest in warding off union representation" of employees at the Franchisee Respondent locations. Tr. 972-973 (G.C. Opening Statement), quoting *Capitol EMI Music*, 311 NLRB 997, 999 (1993), enf'd. 23 F.3d 399 (4th Cir. 1994). Finally, given the stage and posture of this particular litigation, the Settlement Agreements are not a reasonable counterpoint to the risks of completing the record and subsequent proceedings.

Given the scenario that the Board evaluated in *UPMC*, its decision is relevant to applying the second of the *Independent Stave* criteria. *UPMC* involved allegations that UPMC, as a single employer with its subsidiary UPMC Presbyterian Shadyside, committed multiple violations of Sections 8(a)(1), (2), (3) and (4) of the Act. 365 NLRB No. 153 at p. 1, 22. General Counsel and the Charging Party union served Subpoenas *Duces Tecum* on UPMC and Presbyterian Shadyside seeking documents relevant to the single employer allegation, and the Respondents' Petitions to Revoke were denied by the ALJ. *UPMC*, 365 NLRB No. 153 at p. 1-2, 23, fn. 2. Respondents refused to comply with the ALJ's order that they produce documents pursuant to the Subpoenas, and General Counsel initiated enforcement proceedings in the United States District Court for the Western District of Pennsylvania. *UPMC*, 365 NLRB No. 153 at p. 2, 23, fn. 2. The District Court granted General Counsel's application for enforcement of the Subpoenas, but stayed its order pending Respondents' appeal to the United States Court of Appeals for the Third Circuit. *Id.*

While the subpoena enforcement proceedings were underway, the parties presented evidence regarding the unfair labor practice allegations in the case over 19 days of trial. *UPMC*, 365 NLRB No. 153 at p. 2, 23. The ALJ then issued an order severing the single employer allegations from the unfair labor practice allegations, so that the still-pending subpoena enforcement proceedings did not delay resolution of the unfair labor practice issues. *Id.* The ALJ later issued a decision finding that Presbyterian Shadyside had violated the Act in various respects. *Id.* The complaint did not allege that UPMC independently committed any unfair labor practices, and "there was no evidence presented at trial" to that effect. *UPMC*, 365 NLRB No. 153 at p. 2, 24. The parties filed exceptions to the ALJ's decision regarding the unfair labor practice allegations with the Board. *UPMC*, 365 NLRB No. 153 at p. 2.

About six months later, UPMC filed a partial motion to dismiss the allegation that it comprised a single employer with Presbyterian Shadyside, proposing that the single employer allegation "be resolved on the basis that Respondent UPMC shall guarantee the performance of Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and appeal process." *UPMC*, 365 NLRB No. 153 at p. 2, 23. UPMC further stated in its briefs in support of the motion that as a result of its "guarantee," "UPMC would be responsible for any remedy along with Presbyterian Shadyside." *Id.* General Counsel and the Charging Party opposed the motion. *Id.* The ALJ granted UPMC's motion, dismissed the single employer allegation, and issued an order providing that "UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order in the original decision in this case," and thereby "must ensure" that Presbyterian Shadyside

"takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if [] Presbyterian Shadyside is unable to do so." *UPMC*, 365 NLRB No. 153 at p. 26. General Counsel and Charging Party filed exceptions to the ALJ's decision.

The Board upheld the ALJ's dismissal of the single employer allegation and adopted his recommended Order as modified in the manner discussed below.[30] *UPMC*, 365 NLRB No. 153 at p. 1, 11. The Board found that the General Counsel and Charging Party's opposition to UPMC's proposed guarantee was not determinative in terms of the first of the *Independent Stave* factors, and that the third and fourth factors militated in favor of approval of the proposed settlement. *UPMC*, 365 NLRB No. 153 at p. 7-8. With respect to the second factor, the Board determined that "UPMC's remedial guarantee is as effective as a finding of single employer status," in that it rendered UPMC "liable for Presbyterian Shadyside's compliance with *any remedy ordered* and to…take *any necessary action* to ensure compliance" for unfair labor practices that Presbyterian Shadyside did not remediate. *UPMC*, 365 NLRB No. 153 at p. 8 (emphasis in original). Thus, the guarantee obviated the risk that UPMC would not eventually be adjudged a single employer with Presbyterian Shadyside, and therefore not responsible for compliance. *UPMC*, 365 NLRB No. 153 at p. 9. The Board also emphasized that Presbyterian Shadyside, and not UPMC, allegedly committed the unlawful conduct at issue, and there was no evidence adduced at the hearing that UPMC had committed violations of its own. *UPMC*, 365 NLRB No. 153 at p. 8-9. The Board further noted that approval of the guarantee would expedite the resolution of the case, given that litigation of the single employer issue was at a halt pending a decision by the Third Circuit regarding the district court's decision in the subpoena enforcement proceeding.[31] *UPMC*, 365 NLRB No. 153 at p. 9. The Board modified the ALJ's order to omit "officers, agents, successors and assigns" language that was not included in UPMC's offer, noting that both UPMC and Presbyterian Shadyside were "stable corporate entities with substantial assets." *UPMC*, 365 NLRB No. 153 at p. 8. The Board therefore dismissed the single employer allegation, but retained UPMC as a party to the case "for the purpose of ensuring enforcement of UPMC's guarantee of the remedies, if any, ultimately ordered against Presbyterian Shadyside." *UPMC*, 365 NLRB No. 153 at p. 11.

1. Remedial Effect

In the specific context of this case, McDonald's obligations pursuant to the Settlement Agreements do not constitute anything approaching as effective a remedy as a finding of joint employer status. Had General Counsel established that McDonald's was a joint employer with the Respondent Franchisees, McDonald's would have been "jointly and severally responsible for remedying" any unfair labor practices the Respondent Franchisees committed.[32] See, e.g., *Adams & Associates, Inc.*, 363 NLRB No. 193 at p. 1, 7 (2016), enf'd. 871 F.3d 358 (5th Cir. 2017); *Turtle Bay Resorts*, 353 NLRB 1242, n. 5 (2009). General Counsel represented at the April 5, 2018 hearing that the objective in initiating this case was establishing McDonald's joint and several liability with the Franchisee Respondents for the unfair labor practices alleged in the Consolidated Complaint. Tr. 21254. General Counsel further stated that the Special Notice and Settlement Fund components of the Settlement Agreements were specifically intended in lieu of a finding of joint employer status. Tr. 21254. Thus, McDonald's remedial obligations in lieu of joint and several liability are apparently limited to mailing out a Special Notice if a Franchisee Respondent fails to remedy a violation of a Settlement Agreement within 14 days after notification, and to collecting and providing to Regional Directors monies comprising the Settlement Fund to remedy a limited universe of possible future violations.[33] Tr. 21246.

McDonald's obligations under the Settlement Agreement are therefore not comparable in any way, shape, or form to joint and several liability, or to the guarantee of performance that the Board found to approximate joint and several liability in *UPMC*.[34] Here there is no guarantee by McDonald's of the Franchisee Respondent's performance whatsoever; McDonald's is not "responsible for any remedy along with" the Respondent Franchisees. *UPMC*, 365 NLRB No. 153 at p. 8. The contentions advanced in support of accepting a settlement without a guarantee on the part of McDonald's are not convincing. General Counsel states that the Settlement Agreements contain no guarantee because McDonald's would not agree to one. G.C. Post-Hearing Brief at 12-14. This may be factually accurate, but it is not a compelling argument for the Settlement Agreements' approval. General Counsel further argues that a guarantee approximating joint and several liability under *UPMC* is inappropriate because McDonald's did not have the authority to effectuate the reinstatement of the three Franchisee Respondent

[30] At the time that the Board issued this decision, the parties' exceptions to the ALJ's decision regarding the unfair labor practice allegations remained pending. *UPMC*, 365 NLRB No. 153 at p. 2.

[31] Once the Third Circuit issued a decision, the parties would present evidence before an agency ALJ regarding the single employer issue, an estimated four to five day process, the ALJ would issue a decision, and the parties could avail themselves of the exceptions and appeals process. *UPMC*, 365 NLRB No. 153 at p. 9.

[32] Of course, a putative joint employer may avoid joint and several liability by establishing that "it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action." *Adams & Associates, Inc.*, 363 NLRB No. 193 at p. 1, n. 7, quoting *Capitol EMI Music*, 311 NLRB at 1000 (emphasis omitted). My discussion of these basic legal precepts here and *infra* does not in any way constitute any finding regarding joint employer status, the unfair labor practice allegations, or any contention any party could raise or establish pursuant to *Capitol EMI Music*.

[33] The parties' confusion over the extent of McDonald's involvement in the remedies is discussed in further detail below.

[34] Respondents argue in their Post-Hearing Briefs that *UPMC* did not "create a template" for a settlement in lieu of a finding of single or joint employer status pursuant to *Independent Stave*. McDonald's Post-Hearing Brief at 2, 23-24. However, as discussed previously, Respondents do not cite any other Board decision directly addressing a settlement in lieu of a finding of single or joint employer status in the context of the *Independent Stave* analysis. Regardless, it should be evident from my overall discussion that an analysis of the *Independent Stave* factors determines whether approval of the Settlement Agreements is appropriate.

employees that were allegedly unlawfully discharged. Id. But such considerations have not precluded the imposition of joint and several liability on joint employers, even in the only case cited by General Counsel for that proposition. See *Skill Staff of Colorado*, 331 NLRB 815, 815-818 (2000) (finding joint employers "jointly liable" in connection with unlawful discharge, while ordering one of the two joint employer entities to reinstate disciminatee). In addition, *Capitol EMI Music*, cited by General Counsel in this context, places the burden on the joint employer to prove that it neither knew nor should have known of the unlawful motivation involved, or that if it knew it "took all measures in its power to resist." 311 NLRB at 1000; see also *Adams & Associates, Inc.*, 363 NLRB No. 193 at p. 1, n. 7. *Capitol EMI Music* thus sets forth an affirmative defense which must be established by record evidence, and not a remedial precept. Furthermore, the Board has construed *Capitol EMI Music* as applicable in cases where "one employer supplies employees to the [other] employer," a scenario that General Counsel contended was irrelevant in his Opening Statement.[35] *Skill Staff of Colorado*, 331 NLRB at 816; see Tr. 971-973.

Respondents' assertions with respect to the infeasibility of a guarantee are also not persuasive. McDonald's and the Franchisee Respondents contend that a guarantee is inappropriate because their franchise relationship is different from the relationship between the parent and subsidiary entities in *UPMC*. However, the specific legal or business relationship between two entities is not relevant in the remedial sense, i.e., it does not legally determine the ability of one to guarantee the performance of another. See Black's Law Dictionary (10th Ed. 2014) (defining a guarantor as "[s]omeone who makes a guaranty or gives security for a debt"). In addition, the Franchise Agreements in evidence would appear to provide McDonald's with sufficient authority over the Franchisee Respondents' operations to guarantee their performance under the Settlement Agreements. For example, the Franchise Agreements specifically state that the Franchisee Respondents "shall comply with the entire McDonald's System," including complying with "all business policies, practices, and procedures imposed by McDonald's." Franchise Agreement ¶¶ 12, 12(a). The Franchise Agreements further state that McDonald's has "the right to inspect" Franchisee Respondent locations "to ensure that Franchisee's operation thereof is in compliance with the standards and policies of the McDonald's System." Franchise Agreement ¶ 12. Pursuant to the Franchise Agreement, the Franchisee Respondents are required to "comply with all federal, state, and local laws, ordinances, and regulations" pertinent to their operations at the location. Franchise Agreement ¶ 12(k). Failure to "maintain and operate" a location "in compliance with the standards prescribed by the McDonald's System" constitutes a "material breach" of the Franchise Agreement, resulting in McDonald's option to terminate the Agreement itself. Franchise Agreement ¶ 18; see also Franchise Agreement ¶ 19 (describing McDonald's prerogatives in the event of a non-material breach of the agreement, including "the right to seek judicial enforcement of its rights and remedies, including…injunctive relief, damages, or specific performance"). Furthermore, the record contains evidence of McDonald's involvement in the posting of materials directed to Franchisee Respondent employees, for example, a "9-in-1" poster informing employees of their rights under federal and state law, and No Solicitation and No Loitering signs. See, e.g., Tr. 1648-1650, 1652, 1654-1655, 2097, 3237-3240, 2128-2130, 3478-3481; G.C. Ex. HR 9, 29, 300, 375, 621; see also materials cited at footnote 54, *infra*, regarding McDonald's involvement in No Solicitation and No Loitering policies in effect at the Franchisee Respondent locations.

When questioned at the hearing, McDonald's counsel did not elucidate any legal basis or record evidence establishing that it was devoid of the requisite authority to guarantee the Franchisee Respondent's performance, asserting only that the Franchisee Respondents were "independent business people," and "it's their responsibility to pay for it, not ours." Tr. 21317-21318. However, despite this contention, the Settlement Agreement provides that "*McDonald's USA, LLC* shall deliver to the National Labor Relations Board ("Board") funds *provided by the Franchisees* in the amount of $250,000.00, which shall be transferred by the Board into a 'Settlement Fund'" (emphasis added). In addition, General Counsel states in his Post-Hearing Brief McDonald's "has the responsibility for deciding whether and when to trigger any disbursement from the fund" to the Franchisee Respondent employee receiving it. Post-Hearing Brief at p. 9, fn. 23. Thus, McDonald's will ostensibly collect contributions from the Franchisee Respondents, transfer them to the Agency for placement in a Settlement Fund, and then determine "whether and when" monies from that Fund will be provided to Franchisee Respondent employees in the event of an uncured breach of the Settlement Agreement during the 15 months of the Fund's existence. Its apparent ability to take these measures contradicts its contention that it lacks the legal or business capacity to guarantee the Franchisee Respondents' performance pursuant to the Settlement Agreements.

The form of the proposed Settlement Agreements further weighs against a finding that the Settlement Agreements constitute a reasonable resolution of this matter. Section 101.9(b)(1) of the Board's Rules and Regulations states that "After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C." and includes "the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order." Indeed, the putative single employer's guarantee in *UPMC* was embodied in the ALJ's order, as affirmed by the Board in its order, which could then be enforced in one of the federal Courts of Appeal. 365 NLRB No. 153 at p. 11, 26. Here, by contrast, the obligations of McDonald's and the Respondent Franchisees are contained in informal Settlement Agreements, which are enforceable only through the complicated default processes they

[35] General Counsel further argued in his Opening Statement that the affirmative defense set forth in *Capitol EMI Music* does not apply to alleged violations of Section 8(a)(1), and was irrelevant because McDonald's and the Franchisee Respondents, the alleged joint employers here, "perceive[d] a mutual interest in warding off union representation from the jointly managed employees." Tr. 972-973, quoting *Capitol EMI Music,* 311 NLRB at 999; also citing *D&F Industries, Inc.*, 339 NLRB 618, n. 2 (2003).

contain, and, according to General Counsel, a separate proceeding before an ALJ to establish that Respondents have somehow breached them. Tr. 21247. An ALJ order in that situation finding a breach of a Settlement Agreement could then be subject to exceptions filed with the Board, and the Board's order subject to a Request for Review before one of the federal Courts of Appeal. The form of the Settlement Agreements here is therefore legally distinct from and substantially less effective than those contained in an ALJ or Board order, and does not obviate further litigation in the manner of the ALJ and Board orders in *UPMC*. 365 NLRB No. 153 at p. 9.

Charging Parties also contend that a formal settlement is necessary because some of the Franchisee Respondents, and McDonald's itself, can be considered "repeat offenders." General Counsel Memorandum GC 18-03 defines "repeat offenders" in this context as "the universe of charged parties who have been found to have violated the Act by a Regional office in the recent past," and states that such circumstances may warrant "insisting on a formal stipulation" as opposed to an informal settlement. It is beyond dispute at this point that some franchise locations technically operated by different entities are ultimately controlled by the same owner-operator organization, which directs and coordinates human resources activities and policies for all of the franchise entities under its control. Among the New York Franchisees, for example, McConner Street Holding, LLC (which operates the facilities at 2142 Third Avenue and 2049 Broadway), Bruce C. Limited Partnership (which operates the facility at 4259 Broadway), and Mic-Eastchester, LLC (which operated the facility at 341 5th Avenue), were all ultimately owned and operated by Bruce Colley during the pertinent period. See Tr. 1190-1191, 1515, 7198; G.C. Ex. F 23-30. Each of these franchisees is alleged in the Consolidated Complaint to have committed multiple unfair labor practices. In addition, separate complaints have been issued against franchisee entities ultimately controlled by owner-operators that also control Franchisee Respondents herein. Thus, General Counsel in his Post-Hearing Brief identifies several additional cases involving separate complaints issued against other franchisee entities owned by Nick Karavites, who owns or partially owns four of the Franchisee Respondents in Chicago (13-CA-159428), Ronnie and Lillian Lofton (13-CA-142517 and 13-CA-177346) who also own a Franchisee Respondent in Chicago, and Donald Bailey (31-CA-189714), who owns a Franchisee Respondent in Los Angeles.

Respondent McDonald's Restaurants of Illinois, Inc. warrants special consideration in this context, due to its status as a wholly-owned subsidiary of McDonald's. In 2015, General Counsel and Charging Parties served Subpoenas *Duces Tecum* on Respondent McDonald's Restaurants of Illinois, Inc.[36] In its Petition to Revoke General Counsel's Subpoena, McDonald's represented that McDonald's Restaurants of Illinois, Inc. was "a wholly-owned subsidiary of McDonald's USA, LLC," such that "There is no involvement of any independent franchisee and no alleged issue of joint employment."[37] See General Counsel's Opposition to McDonald's Petition to Revoke Subpoena *Duces Tecum*, Ex. A, p. 4-5 (March 5, 2015). On March 30, 2015, during oral argument regarding the Petition to Revoke, McDonald's counsel reiterated this position, claiming that, "we have admitted we have total, absolute control over everything" with respect to McDonald's Restaurants of Illinois, Inc. McDonald's counsel further represented, "There's no doubt that the corporation controls all operations at that restaurant, that the restaurant is owned by the company," and "It's what we call a corporate-owned store, owned and operated." Tr. 60-61. I granted McDonald's Petitions to Revoke General Counsel and Charging Parties' Subpoenas *Duces Tecum* on that basis. Tr. 64-66. Now, however, McDonald's claims in its Post-Hearing Brief that McDonald's Restaurants of Illinois, Inc. "is a different entity from McDonald's USA," and that conduct at that location is irrelevant to repeat offender status as a result. McDonald's Post-Hearing Brief at p. 21, n. 15. That specious argument is rejected, and I find that the similarity of the violations alleged at that location to those which allegedly took place at the other Charged Party locations indicates that a formal settlement rather than an informal agreement is appropriate here.

Furthermore, the Settlement Agreements dispense with common practice before the agency by providing that General Counsel will move for an order approving withdrawal of the Consolidated Complaints "no later than ten days" after approval. Typically when a settlement is reached after the hearing opens in a case, General Counsel makes a motion on the record for an indefinite adjournment pending the Charged Party's full compliance with the settlement's terms. See NLRB Case Handling Manual, Part 1, Section 10154.4. General Counsel only moves to withdraw the complaint after compliance is complete. Id. General Counsel provided no explanation for abandoning this common practice in the instant case, particularly where 30 separate Settlement Agreements will require the efforts of six Regions' compliance personnel. Overall, given the unprecedented and enormous resources expended in connection with this case – 155 days of trial over three years involving the testimony of approximately 150 witnesses, incessant motion practice, subpoena enforcement litigation in five different venues throughout the country, and Special Master adjudication of hundreds of privilege claims – an informal settlement which provides for the anomalous withdrawal of the Consolidated Complaint in 10 days without full compliance is manifestly unreasonable.

The Settlement Agreements' omission of the typical language binding a respondent's "officers, agents, successors, and assigns" with respect to the relief in question is also problematic in this case. In *UPMC* the Board determined that excising such language did not preclude a finding that UPMC's guarantee was reasonable pursuant to *Independent Stave*. 365 NLRB No. 153 at p. 8, n. 14. Specifically, the Board found that such language was unnecessary because "the record reveals that both UPMC

[36] General Counsel and Charging Parties argued that a comparison of the implementation of McDonald's policies, tools and programs at a facility it totally controls with their implementation at Franchisee Respondent locations was relevant to a determination of joint employer status. General Counsel's Opposition at p. 2.

[37] The Petition to Revoke was filed by the attorneys representing McDonald's USA, LLC on behalf of both that entity and McDonald's Restaurants of Illinois, Inc.

and Presbyterian Shadyside are stable corporate entities with substantial assets." *Id.* Here, by contrast, the New York Franchisees acknowledge that four of the ten Franchisee Respondents or Charged Party locations in New York City have changed ownership. Post-Hearing Brief at 6-7. In addition, it appears that one of the New York Franchisees has ceased to operate entirely, based on their assertion that the Settlement Agreement requires posting of Notices at "all nine charged New York stores remaining in operation." Post-Hearing Brief at p. 6. Charging Parties also contended at the hearing and in their Post-Hearing Briefs that ownership at three additional Charged Party locations has changed. Tr. 21290-21291; C.P. Post-Hearing Brief at p. 36, n. 70; C.P. Reply Brief at p. 8, n. 8-9. It therefore does not appear that the Franchisee Respondents subject to the Settlement Agreements are "stable" entities such that the typical language "officers, agents, successors, and assigns" in a remedial order is unnecessary.

Furthermore, it does not appear that the proposed settlement will conclusively resolve these cases and preclude additional proceedings given the Settlement Agreements' language and my experience thus far with this case and these parties. In fact, the complicated default process and the possibility of a proceeding to establish a breach of a Settlement Agreement actually increase the likelihood of further litigation. Of course, as General Counsel acknowledged at the hearing, a contested allegation that a Settlement Agreement was breached could result in another hearing before an Administrative Law Judge, with possible Exceptions and appeals. Tr. 21247. In addition, the default and Settlement Fund provisions are complex, with multiple phases and components of relief. Furthermore, the relationship between those aspects of the Settlement Agreement and the steps described in the Notification of Compliance section is unclear. Specifically, the Notification of Compliance section requires all parties to notify the appropriate Regional Director regarding "what steps the Charged Parties have taken to comply with the Agreement…within 5 days, and again after 60 days, from the date of approval of this Agreement." However, the impact of these notifications on the default process is not articulated. In this respect, and in light of the procedural history described above, the parties' propensity for litigation, constant battles over miniscule strategic advantage and inability to resolve issues in a cooperative fashion virtually guarantee that additional proceedings are forthcoming.

Indeed, based on the array of conflicting contentions advanced by General Counsel and McDonald's regarding McDonald's obligations in lieu of a finding of joint employer status, it appears that the parties' understanding of the Settlement Agreements' terms is incomplete or at odds. For example, General Counsel represented on March 19, 2018 that pursuant to the Settlement Agreements' default provisions if a Franchisee Respondent fails to cure an alleged breach of a Settlement Agreement, "It then turns to McDonald's U.S.A. to remedy or implement the remedy that the Franchisee failed to," i.e. McDonald's would be responsible for effecting whatever remedy the Franchisee Respondent had not performed. Tr. 21198-21199. However, on April 5, 2018, General Counsel depicted McDonald's obligations when a Franchisee Respondent fails to cure a breach of the Settlement Agreement as significantly more limited. Specifically, General Counsel described McDonald's failure to remedy a Franchisee Respondent's breach of the Settlement Agreement solely as "failing to mail the Special Notice." Tr. 21246. Thus, if a Franchisee Respondent failed to cure a breach of the Settlement Agreement, McDonald's would only be required to mail out the Special Notice, as opposed to implementing the remedy initially required of the Franchisee Respondent. As a result, because the language of the Settlement Agreement did not change after March 19, 2018, General Counsel appears to have significantly misunderstood the scope of McDonald's responsibilities under the default provisions.

The parties have also made contradictory representations regarding the establishment and workings of the Settlement Fund. The Settlement Agreements state that McDonald's "shall deliver to" the Board "funds provided by the franchisees in the amount of $250,000" to comprise the Settlement Fund, and that any unused balance of the Fund will be returned to McDonald's "for distribution to the appropriate franchisee." McDonald's reiterated as much in its Motion to Approve, submitted on March 19, 2018. Motion to Approve at 9; see also McDonald's Post-Hearing Brief at 11. At the hearing on March 19, 2018, General Counsel described the Settlement Fund as "McDonalds U.S.A.'s set up for helping cure monetary remedies that would be part of a breach." Tr. 21200. However, when questioned by me on April 5, 2018, McDonald's counsel denied that the company was "coordinating logistically…the contributions to and the operations of the settlement fund." Tr. 21318. McDonald's counsel contended that the Respondent Franchisees would make contributions to the Settlement Fund and the Regional Directors would make disbursements from it, claiming, "We don't have anything to do with it." Tr. 21318. General Counsel's Post-Hearing Brief, however, described McDonald's role in the Settlement Fund's operations as even more extensive than his representations on the record. In his Post-Hearing Brief, General Counsel asserted that McDonald's will not only collect and return any unused "contributions" to the Settlement Fund, but that McDonald's itself will determine when a disbursement from the Settlement Fund is warranted:

> The settlement agreements impose the responsibility for the fund on McDonald's. McDonald's was obligated to collect and deliver the $250,000 being placed in the fund *and has the responsibility for deciding whether and when to trigger any disbursement from the fund. See, e.g.,* "Settlement Fund" section in GC Exhibit Settlement 1.

G.C. Post-Hearing Brief at p. 9, n. 23 (emphasis added). These conflicting accounts evince a substantial and troubling level of confusion among the parties regarding McDonald's role in the establishment and operations of the Settlement Fund. They raise significant doubt as to whether there was a genuine meeting of the minds regarding these crucial provisions. See *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 784 (2006) (settlement agreement must be set aside where "the parties' different understandings of the language…warrant the conclusion that there was no meeting of the minds").

General Counsel's description of McDonald's authority with respect to disbursements from the Settlement Fund as essentially discretionary also contradicts the parties' earlier statements

construing disbursements as mandatory in the context of the default process. At the April 5, 2018 hearing, General Counsel described the issuance of a Special Notice and a disbursement from the Settlement Fund as directly engendered by a Franchisee Respondent's uncured breach of the Settlement Agreement. Specifically, General Counsel stated that "If there's an alleged breach and a failure by a Respondent franchisee to cure, then the special notice issues," which "triggers disbursement from the settlement fund."[38] Tr. 21251-21253. McDonald's counsel also represented that issuing the Special Notice "directs the Regional Director" to make a disbursement from the Settlement Funds, and, rather cryptically, "all we do is say, what the facts were." Tr. 21318-21319. Contrary to the parties' assertions at the hearing, however, General Counsel's interpretation of the Settlement Fund provisions in his Post-Hearing Brief appears to allow McDonald's, at its sole discretion, to decide "whether and when to trigger any disbursement from the fund." Furthermore, both General Counsel and McDonald's described Settlement Fund disbursements as triggered by McDonald's distributing the Special Notice.[39] Tr. 21252-21253, 21318-21319. Thus, General Counsel's contention that a disbursement from the Settlement Fund is entirely McDonald's prerogative calls into question the nature of McDonald's obligation to disseminate the Special Notice as well. If distribution of the Special Notice and disbursement from the Settlement Fund are both solely functions of McDonald's discretion, McDonald's "support" for the remedies here is utterly illusory. In any event, given the pervasive uncertainty caused by these discrepancies, and based upon my three years and 155 trial days of experience with these parties, it is simply inconceivable that the default and Settlement Fund provisions, and/or allegations that a Settlement Agreement has been breached, will not engender further litigation.[40]

Issues of McDonald's discretion aside, it does not appear that the Settlement Fund provisions constitute a significant deterrent to future conduct violating the Act or a meaningful remedial measure. Although the Settlement Fund provides for backpay and an additional incentive payment if the discriminatee chooses to waive reinstatement, the Fund is only applicable to Franchisee Respondents alleged in the Consolidated Complaint to have committed violations of Section 8(a)(3) which involve a monetary remedy. Furthermore, Settlement Fund disbursements only become available if the particular Franchisee Respondent commits and fails to cure a violation of precisely the type alleged in the Consolidated Complaint. Tr. 21248-21249; McDonald's Reply Brief at 13. As a result, if for example a Franchisee Respondent which was alleged in the Consolidated Complaint to have unlawfully reduced an employee's hours discharges that same (or another) employee for retaliatory reasons, there is no recourse to the Settlement Fund to remedy the unlawful discharge. Although McDonald's portrays this result as common in the context of Board settlements, that is definitively not the case. Reply Brief at 13. It is well-settled that a settlement agreement may be set aside "if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed." *Twin City Concrete*, 317 NLRB 1313 (1995), quoting *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1988), enf'd. 914 F.2d 1442 (10th Cir. 1990). Post-settlement violations justifying revocation of a settlement agreement need not be identical to the violations addressed in the settlement agreement itself. See, e.g., *Twin City Concrete*, 317 NLRB at 1310, 1315, 1316 (employer's post-settlement assistance to employee filing a decertification petition in violation of Section 8(a)(5) warranted revocation of settlement agreement regarding refusal to bargain); *YMCA of Pikes Peak Region*, 291 NLRB at 1010 (post-settlement discharge of employee violating Sections 8(a)(3) and (4) justified revocation of settlement agreement regarding threats to discharge her violating Section 8(a)(1)); see also *Oster Specialty Products*, 315 NLRB 67, 73-74 (1994) (post-settlement promise of benefit warranted revocation of settlement agreement addressing different violations of Section 8(a)(1)); *Nashville Plastic Products*, 313 NLRB 462, 468 (1993).

In addition, the Special Notice McDonald's must mail to the Franchisee Respondent employees in the event of an uncured violation is insubstantial compared with the Notice typically required pursuant to standard NLRB informal settlement agreements. The Settlement Agreements here apparently provide that the Special Notice will list solely the violations by which the Franchisee Respondent allegedly breached the Settlement Agreement itself, and not all of the violations originally alleged in the Consolidated Complaint. Nor will the Special Notice include the specific remedial assurances contained in a traditional Notice, which are modeled after the violations alleged. The Special Notice contains a general statement of employee rights under the NLRA, and the standard description of the agency and its purposes. Other than that, the Notice states only that the Franchisee Respondent has not complied with the Settlement Agreement, that in such situations the Settlement Agreement requires that McDonald's send out the Special Notice, and that McDonald's disavows the conduct which violated the Settlement

[38] The Settlement Agreements provide that Settlement Fund disbursements "will be triggered when McDonald's USA, LLC notifies the Regional Director that McDonald's USA will issue the approved Special Notice."

[39] The Settlement Agreement links the two as well. The Performance section states that if the Franchisee Respondent fails to cure a breach after 14 days' notice from the Regional Director, the Regional Director "will promptly provide McDonald's USA LLC the approved Special Notices…and then provide 14 days to McDonald's USA LLC to mail the approved Special Notices." The Settlement Fund section states that "Disbursement from the Settlement Fund to the alleged discriminatee(s) will be triggered when McDonald's USA, LLC notifies the Regional Director that McDonald's USA will issue the approved Special Notice."

[40] The fate of the parties' Stipulation regarding the deferred objections process, discussed previously, is portentous here. Even through this Stipulation was entirely a creature of the parties' negotiations, they were unable to agree upon modifications regarding the time and format for filing deferred objections after the cases were severed. After my exhortations that they address these issues amongst themselves were fruitless, I issued orders regarding both issues which were the subject of repeated Motions for Reconsideration by the Franchisee Respondents. See Orders on Deferred Objections dated January 18, 2017 and July 13, 2017; Orders Denying Motions for Reconsideration dated October 3, 2017 and October 17, 2017.

Agreement. Thus, if a Franchisee Respondent breaches a Settlement Agreement by failing to post the required Notice and fails to cure that breach, *no* Notice fully detailing the Franchisee Respondent's alleged violations, and consonant reassurances, will be provided to employees. In addition, the Special Notice contains "non-admissions" language stating that the Special Notice does not constitute an admission that McDonald's is a joint employer with the Franchisee Respondent in question. The Board has held that non-admissions clauses should not be included in a Board Notice to Employees "under any circumstances." *Manchester Plastics*, 320 NLRB 797, n. 1 (1996), quoting *Pottsville Bleaching Co.*, 301 NLRB 1095, 1095-1096 (1991). Thus, General Counsel's argument that the Special Notice will ameliorate the effects of an additional violation breaching the Settlement Agreement which the Franchisee Respondent has failed to cure is not convincing.

The Settlement Agreement's provisions regarding the Franchisee Respondents' dissemination of the Notice are also inadequate in certain respects. There is no requirement for electronic posting of the Notice via email, intranet or internet, as prescribed in *J. Picini Flooring*, 356 NLRB 11 (2010), despite evidence that during 2012 through 2014 employees at Franchisee Respondent locations received training electronically using materials developed and disseminated by McDonald's. See, e.g., Tr. 13451-13453, 13926, 13993-13994, 14860, 14874-14879, 15039-15040, 15053-15054, 15289, 15471, 15475-15477, 15589, 15596-15597, 15908, 15910, 15914-15918, 16074-16077, 17105-17107, 17892-17893, 19862; G.C. Ex. Lewis 50, TR 25 (p. 19). In addition, as Charging Parties note, there is also record evidence that McDonald's distributed labor relations materials, such as legally required notices to employees, to the Franchisee Respondents for posting. See materials cited on p. 24, *supra*, and at fn. 54, *infra*. General Counsel states that electronic posting of the Notice was not required because McDonald's did not communicate with employees by e-mail and employees' use of a McDonald's connection was "intermittent," such that "the best way to inform employees of the notices" was a physical posting alone. Tr. 21243-21244; G.C. Post-Hearing Brief at p. 8, n. 20. However, as discussed above, there is evidence indicating regular use of the McDonald's connection and electronic materials for the training and orientation of employees at the Franchisee Respondent locations. In addition, all of the evidence presented in the instant case applied solely to practices in effect and events which occurred from January 1, 2012 through December 31, 2014. There is no indication here that General Counsel considered any information regarding McDonald's and the Franchisee Respondents' practices regarding electronic communications with employees at franchise locations after that time. By contrast, *J. Picini Flooring* contemplates the gathering of evidence regarding a respondent's customary means for communicating with employees at a time more proximate to the implementation of remedies. 356 NLRB at 13-14; see also *Apex Linen Service*, 366 NLRB No. 12 at p. 2, 13 (2018). Finally, *J. Picini Flooring* does not involve an assessment as to "the best way to inform employees of the notices," as General Counsel contends, but only a consideration of whether the respondent "customarily communicates with its employees or members electronically." 356 NLRB at 13-14.

Finally, based on the above discussion it must be noted that overall the relief contained in the proposed Settlement Agreements is not materially different from offers to settle the case made by the Franchisee Respondents prior to the opening of the hearing. On the first day of the hearing, March 30, 2015, McDonald's stated on the record that some of the Franchisee Respondents had offered to resolve the allegations against them without an admission of joint employer status, and that General Counsel had rejected such proposals. Tr. 112. In their opening statements on March 10, 2016, McDonald's and several of the Franchisee Respondents represented that they had made attempts to settle the cases against them which would have provided full relief with respect to the alleged violations, but General Counsel refused to resolve the cases without an agreement as to joint employer status. Tr. 1012-1013. At the hearing on April 5, 2018, General Counsel, McDonald's, the New York Franchisees, and Jo-Dan all confirmed this sequence of events. Tr. 21254-21256, 21260-21264. As a result, the thirty individual Settlement Agreements – one with each Franchisee Respondent – do not appear to accomplish anything more than what ostensibly could have been achieved prior to the start of the three-year hearing in this matter. They also effectively grant McDonald's and the Franchisee Respondents' Motions to Sever which I denied on February 20, 2015, as affirmed by the Board on January 8, 2016.[41] *McDonald's USA, LLC*, 363 NLRB No. 91. As such, the Settlement Agreements essentially render a significant portion of this three-year, 155-day proceeding a nullity.

For all of the foregoing reasons, I find that the obligations incumbent upon McDonald's pursuant to the Settlement Agreements do not in any way approximate the remedial effect of a finding of joint employer status. In addition, even in the event that a genuine meeting of the minds exists the Settlement Agreements are not likely to definitively resolve the case, and will instead very possibly engender additional litigation. I further find that the questionable remedial impact of the Settlement Agreements overall does not justify accepting the settlement in lieu of further proceedings. All of these factors strongly indicate that the Settlement Agreements do not constitute a reasonable resolution to the instant case.

2. Conduct of McDonald's

As discussed above, the Board in *UPMC* also considered the conduct of putative single employer UPMC in evaluating whether its guarantee constituted a reasonable resolution of the single employer issue. The Board noted that the complaint did not allege that UPMC had committed any unfair labor practices, and the evidence did not establish any violations on the part of UPMC alone. *UPMC*, 365 NLRB No. 153 at p. 8-9. The Board therefore found that it was appropriate to hold Presbyterian Shadyside "primarily and directly liable," with UPMC's guarantee. *Id.*

[41] As discussed above, McDonald's and the Franchisee Respondents argued in those Motions that each Franchisee Respondent location should be the subject of a separate proceeding. My October 12, 2016 Order Severing Cases and Approving the parties' Stipulation severed the cases in a geographical group (New York and Philadelphia), and not by Franchisee Respondent.

While the Consolidated Complaint in the instant case does not allege that McDonald's independently committed any unfair labor practices, McDonald's has not been construed by General Counsel as a bystander liable only as a function of its business arrangements. General Counsel has since the case's inception contended that McDonald's coordinated and directed the activities of its franchisees' response to the Fight for $15 campaign, which included the violations of the Act alleged here. See Tr. 940-942, 973 (G.C. Opening Statement). General Counsel has further argued that McDonald's coordination and direction of the Franchisee Respondents' activities in connection with the Fight for $15 campaign substantiates the allegation that McDonald's constituted a joint employer with the Franchisee Respondents. Id. In fact, General Counsel began the case by contending that the affirmative defense set forth in *Capitol EMI Music*, described above, did not apply here because McDonald's and the Franchisee Respondents "perceive[d] a mutual interest in warding off union representation from the jointly managed employees." Tr. 972-973 (G.C. Opening Statement), quoting *Capitol EMI Music,* 311 NLRB at 999.

Thus, General Counsel has adduced copious evidence pertinent to McDonald's activities in order to provide resources and support for its franchisees throughout the country in response to the Fight for $15 campaign. For example, General Counsel has introduced evidence that McDonald's response to the Fight for $15 campaign was formulated and implemented from its corporate headquarters, with notifications of upcoming campaign activities, summaries of events, and suggested policies developed and distributed by Vice President of U.S. Human Resources Danitra Barnett.[42] General Counsel has further introduced evidence regarding Division-level Human Resources positions specifically created by McDonald's to focus on responding to the Fight for $15 campaign.[43] General Counsel has adduced evidence regarding the creation and operations of Market Activation Teams at a national level and by McDonald's Region, staffed by McDonald's corporate and Regional-level executives, to address the Fight for $15 campaign.[44] General Counsel has introduced substantial evidence pertinent to McDonald's corporate and Regional staff monitoring of Fight for $15 campaign activities,[45] communication with McDonald's franchisees regarding impending, ongoing, and completed campaign activities,[46] dissemination of specific advice to franchisees regarding their interactions with employees and the media,[47] and assignment of McDonald's Regional staff and security to visit specific

[42] See, e.g., Tr. 1575-1576, 1897-1899, 1900-1904, 1908-1909, 1913-1915, 1935-1937, 1939-1940, 1942-1945, 1946-1949, 3554-3556, 3558-3560; G.C. Ex. HR 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 129, 130, 131, 325, 358.

[43] See, e.g., Tr. 1632-1634 (Division Human Resources Director of Employee Relations position created for McDonald's East, West, and Central Divisions); Tr. 4074-4074, 12914, 12920-12925 (testimony of former West Division Labor Relations Director Jeanne Hardemion-Kemp); Tr. 3558-3560, G.C. Ex. HR 358, 500.

[44] See, e.g., Tr. 1835, 1837-1838, 3950-3954, 4129-4131, 12983-12984, G.C. Ex. HR 452 (National Market Activation Team); Tr. 4016-4020, 4054-4055, G.C. Ex. HR 557 (New York); Tr. 3868-3869 (Philadelphia); Tr. 2782-2784, 2897-2898, 2987-2988, 3284-3286, G.C. Ex. HR 601.19, 635.2 (Chicago); Tr. 2193-2194, 2196-2199 (Indianapolis); Tr. 10466, G.C. Ex. HR 845 (Sacramento); Tr. 4123-4124, 12939-12952, 12955-12959, G.C. Ex. HR 904-907, 909 (Los Angeles).

[45] See, e.g., Tr. 4015-4016, 4023-4025, 4087, 6584-6589, 6592-6598, 6620-6622, 6632, 6657-6662, 6702-6712, 6716-6717, 6718-6722, 6723-6726, 6726-6730, 6732-6733, 6744-6745, 6768-6770, 6932-6934, 9694-9698, 9722-9726, 9740-9744, 10020-10024, 10629-10630, 10634-10639, 10644-10648, 11736-11738, 11743-11749, 11755-11756, 11757-11758, 11761, 11765, 11767, 11775-11777, 11781, 11782-11788, 11795-11799, 11803-11806, 11810-11823, 11826-11828, 11835-11846, 11851-11855, 11857-11864, 12220-12222, 12226-12230, 12251-12252, 12258, 12266-12267. G.C. Ex. BC 75, 78, 86, 88, 92, 1232, 1339, 1341, 1342, 1348, 1352, 1353, 1379, 1385 (p. 6-7, 25-27, 28, 31-38, 39-53, 64-67, 68-71, 79, 81-86, 88-96, 98, 99), 1386 (p. 3-7, 15-25, 26, 33-35, 36-45, 46-49), 1817, 2311 (p. 3-8, 25-34, 36), 2312 (p. 44-45 64-76), 1848 (p. 3-7, 10-15, 21, 24, 25, 35-36), HR 140, 151, 156, 187, 192, 706-709, 721, 728-730 743, 749, 752, 758, 760, 762 (New York); Tr. 6763-6766, G.C. Ex. HR 720 (Philadelphia); Tr. 2837-2843, 2932, 2958-2960, 2975-2977, 2979-2983, 10413-10415, 10429-10430, 10436-10437, 10906-10907, 10909-10913, 11656-11661, 11947-11953, 13174, 13178, G.C. Ex. BC 173, 174, 945 (p. 4-5, 7-8, 10-13) 1654, 1669, 1865 (p. 6, 10-12, 13-21, 23-26), 2021, HR 601.3, 601.4, 602.5, 602.11, 602.15, 813, 814-817, 819-821, 823-824, 826-828, 830 (Chicago), McDonald's Ex. 44 (p. 8-19); Tr. 2115-2118, 2126-2131, G.C. Ex. HR 371, 374, 375 (Indianapolis); Tr. 3498-3502, 3528-3530, 3531-3532, 3537-3540, 3541-3547, 3557-3560, 10466, G.C. Ex. HR 302, 310, 315, 316, 318, 319, 319.1, 319.2, 327, 358, 397, 847-849 (Sacramento); Tr. 4081-4084, 4143-4144, 12360-12364, 12933-12938, 12966-12969, 12986-12990, 1332-13329, G.C. Ex. BC 1149, 1948, 1949, HR 529, 530, 547, 899-902, 914, 917, 918, 938 (Los Angeles). This included specifically monitoring activities at the Franchisee Respondent locations. See, e.g., G.C. BC 1352, 1385 (p. 25-27, 28, 39-53), 1386 (p. 7, 15-25, 26, 33-35, 36-45, 46-49), 1817, HR 140, 187, 706, 707, 708, 709, 730 (New York); G.C. Ex. HR 720 (Philadelphia); G.C. Ex. HR 815-817, 820, 821, 823, 824, 826, 827, 828, 830 (Chicago); G.C. HR 848-849 (Sacramento); G.C. Ex. HR 912, 914 (Los Angeles).

[46] See, e.g., Tr. 1890-1896, 1900-1904, 1906-1907, 1913-1915, 1935-1936; G.C. Ex. 82, 83; Tr. 6574-6579, 6599-6606, 6611-6613, 6628-6629, 6630-6631, 6633-6634, 6636, 6641-6642, 6650-6652, 6657-6662, 6665-6666, 6712-6716, 6723-6726, 6791-6794, 11724, 11727, 11736-11738, 11747-11749, G.C. Ex. BC 1232, 1352, HR 174, 184, 185, 190-193, 198, 199, 208, 211, 515. 702, 716, 726, 728, 731, 764 (New York); Tr. 3873-3880, 3904-3908, 3915-3916, G.C. Ex. HR 400, 401, 411, 414, 416, 419, 549 (Philadelphia); Tr. 2842-2843, 2846-2850, 2868-2871, 2875, 2897-2898, 2899-2900, 2909-2912, 2932-2934, 2952-2958, 2983-2985, 3205-3208, 10414-10415, 10432, 10436, G.C. Ex. BC 174, 809, HR 75-76, 79, 80, 522, 524, 601.4, 601.6, 601.12, 601.13, 601.19, 601.20, 602.5, 602.6, 602.10, 614, 644, 650, 813 (Chicago); Tr. 2114-2115, 2126-2131, 2135-2137, 2179-2180, 2192, G.C. HR 78, 374, 375, 378, 382 (Indianapolis); Tr. 3498-3502, 3528-3530, 3538-3540, 3541-3547, 3557-3560, G.C. Ex. HR 302, 310, 316, 318, 319, 319.1, 319.2, 327, 358, (Sacramento); Tr. 4143, 12360-12364, 12933-12938, 12955-12960, 12962, G.C. Ex. BC 1159, HR 527, 529, 530, 546, 899-902, 909, 910, 912 (Los Angeles).

[47] See, e.g., Tr. 4028-4033, 6492-6493, 6577-6579, 6623-6627, 6628-6629, 6633-6634, 6650-6652, 6698-6699, 6723-6726, 6805-6806, 9740-9743, 10618-10619, 11794-11795, 11831-11835, 11852-11853, 11856, 11859-11860, G.C. Ex. BC 92, 1385 (p. 16-24, 65-67, 73-74, 88-92), 1386 (p. 13-14), 1813, HR 172, 190-192, 519, 542, 716, 726, 767, 799 (New York); Tr. 1890-1894, 4057-4060; Tr. 3864-3867, 3882-3883, 3886-3888, 3902-3904, 6777-6779, G.C. Ex. HR 152, 404, 406, 410, 455 (Philadelphia); Tr. 2788-2790, 2795, 2846-2850, 2903-2905, 2952-2958, 2970-2975, 9421, 10407-10414, 10904-10905, 13159-13163, 13174, 11386-11390, G.C. Ex. BC 172, 173, HR 75, 522, 524, 601.6, 602.10, 602.14, 641, 1102, 1106, 1646, (Chicago); Tr. 2088, 2095, 2115-2118,

franchisee locations affected by or anticipating Fight for $15 activities.[48] General Counsel has introduced evidence regarding legal training, organized by McDonald's, provided by attorneys to franchise owners and managers at franchise owner-operator organizations, which specifically addressed labor relations issues.[49] General Counsel has also introduced evidence regarding McDonald's involvement in the retention of labor consultants by Franchisee Respondents.[50] General Counsel has further introduced e-mails and text messages illustrating communications involving McDonald's corporate-level executives, Regional-level staff and Franchisee Respondent personnel regarding Fight for $15 campaign activities.[51] Some of these communications specifically involve alleged discriminatees and activities pertinent to the violations of the Act alleged in the Consolidated Complaint.[52] Others involve the unfair labor practice charges filed in this case.[53] Finally, General Counsel has introduced evidence regarding McDonald's involvement in No Solicitation and No Loitering policies for use by its franchisees, including the Franchisee Respondents.[54]

McDonald's for its part has never denied that it provided assistance to the Franchisee Respondents in connection with the Fight for $15 campaign. See, e.g., Tr. 1008-1011 (McDonald's Opening Statement). Instead, McDonald's has countered that it was compelled to do so in order to fend off an attack on its brand, and that whatever resources it provided were made available to franchisees on a voluntary, as opposed to mandatory, basis. Id.; see also *McDonald's USA, LLC*, 363 NLRB No. 144, p. 1-2, 9-11. McDonald's even retained a potential expert witness to elucidate its "brand attack" theory, and engaged in extensive motion practice regarding the parameters of the expert witness' testimony, as discussed in the procedural history above.

As the foregoing illustrates, while the Consolidated Complaint did not allege unlawful conduct on the part of McDonald's, for three years General Counsel construed McDonald's as formulating a coherent strategy and coordinating the Franchisee Respondents' activities in connection with the Fight for $15 campaign. Furthermore, General Counsel introduced a significant quantum of evidence intended to substantiate that contention, and to establish pursuant to *Capitol EMI Music* that McDonald's and the Franchisee Respondents "perceive[d] a mutual interest in warding off union representation" of employees at the Franchisee Respondent locations. Thus, the instant case is in this respect materially distinguishable from *UPMC*, where the putative single employer was a mere "bystander" to the alleged violations.

3. The Inherent Risks of Litigation and the Stage of the Litigation

The second component of the *Independent Stave* analysis also requires a consideration of the inherent risks of litigation and the

2128-2131, 2135-2138, 2179-2180, 2192, G.C. Ex. HR 366, 371, 375, 378, 379, 382 (Indianapolis); Tr. 3498-3502, 3518, 3521-3526, 3528-3536, 3538-3540, 3541-3545, 3547-3549, G.C. Ex. HR 302, 306-308, 310-314, 316, 318, 397, 320 (Sacramento); Tr. 7094, 12933-12939, 12955-12960, G.C. Ex. HR 527, 531, 899-903, 909, 910, Q 5671., 567.2 (Los Angeles).

[48] See, e.g. Tr. 1622, 1628, 6645-6646, 6657-6662, 6665-6666, 6700-6701, 6722-6723, 6276, 6762-6763, 6766-6767, 9740-9743, 10614-10618, 10620-10621, 101628-101629, 10631-10648, 11017-11018, 11724-11725, 11743-11745, 11749-11750, 11772-11777, 117781, 11782-11787, 11856, 11866-11867, 12199-12200, 12203-12204, 12216, 12223-12225, 12266-12267, G.C. Ex. BC 92, 1339, 1341, 1379, 1381, 1385 (p. 73-74, 104), 1815, 1816, 1819, 1820, 1821, 1848 (p. 16, 19-22, 26-31, 34) 2214, 2311 (p. 21), 2312 (64-76), HR 142, 177, 222, 234, 235, 237, 238, 727, 728, 731 (New York); Tr. 6766-6767, G.C. Ex. HR 239 (Philadelphia); Tr. 2822-2826, 2985, 9910-9913, 10436, 11389-11390, 13159-13163, G.C. Ex. BC 1106, HR 652, 812 (Chicago); Tr. 8648-8650 (Indianapolis); Tr. 12955-12959, G.C. Ex. 909 (Los Angeles).

[49] See, e.g., Tr. 1863, 1866-1868, 6565-6569; G.C. Ex. HR 94, 94.1, 204, 369, 526, 528, 550; Tr. 12677-12678, 15296-15298, 16701-16702, G.C. Ex. HR 800.2 (New York); Tr. 3007-3009, 3018-3020, 3046-3047, 3049-3055, 3064-3068, 3071, 3120-3130, 3138-3139, 3145, 10415-10417, 10437, 12936-12937, G.C. Ex. BC 176, HR 605.1, 605.2, 605.3, 605.4, 605.5, 608.1, 642, 649, 654, 655, 825, (Chicago); Tr. 2104-2017, 2011-2014, 2164-2165, 2285-2288, G.C. Ex. HR 369, 370, 394 (Indianapolis); Tr. 3508, 3514-3515, 3518-3521, 3523-3526, 3536, 3549-4550, 10466, G.C. Ex. HR 303, 304, 304.1-304.4, 305-307, 321, 395, 396, 846 (Sacramento); Tr. 4065, 13001-13002, 13004, 13331-13333, G.C. Ex. BC 1950, HR 526 (Los Angeles). General Counsel also introduced evidence that McDonald's established hotlines for questions from personnel at both franchisees and McDonald's-owned restaurants. Tr. 1880-1882, 1935-1936, 2179-2180, 2913-2915, 6789-6790; G.C. Ex. HR 74, 83, 753, 382.

[50] See, e.g.,Tr. 12517-12518; Tr. 6763-6766, G.C. Ex. HR 720 (New York); Tr. 4105-4108, G.C. Ex. HR 531 (Los Angeles).

[51] See, e.g., Tr. 6502-6504, 11751-11753, 11755-11756, 11782-11785, 11863, 12251-12252, 12258-12261, G.C. Ex. BC 1301, 1341, 1385 (p. 98), 2312 (p. 44-45, 49-50), HR 291, 518 (New York); Tr. 2826-2834, 2842-2843, 2851-2853, 2877-2879, 2905-2908, 2932-2934, 2950-2951, 2975-2977, 10414-10415, 11656-11661, 12203-12204, 12208, 12216, 13178, G.C. Ex. BC 174, 1669, 2214, 2215, HR 601.1, 601.4, 601.8, 601.14, 601.15, 602.6, 602.9, 602.15, 646, McDonald's Ex. 44 (p. 8-11, 17-19) (Chicago); Tr. 13327-13329, 13334-13336, 12360-12364, 12366-12367, 12370, G.C. BC 1159, 1161, 1898 (p. 5-7), 1948, 1949 (Los Angeles). See also materials cited at footnotes 45 to 48, *supra*.

[52] See, e.g., Tr. 1883-1885; G.C. Ex. HR 90 (alleged discriminatee Linda Archer, New York); Tr. 6611-6615, 11849-11851, 11853, G.C. Ex. BC 1385 (p. 59-63), HR 184 (alleged discriminatee Jose Carillo, New York); Tr. 2843-2846, 2900-2903, 7592, 10432, 11946, 11949-11951, 11955, G.C. Ex. BC 825, 1865, p. 12, 14, 16, HR 601.5, 601.21, 808 (alleged discriminatee Tyree Johnson, Chicago); Tr. 11946, 11951-11953, 11955, G.C. Ex. BC 1865 (p. 17, 19-21) (alleged discriminatee Victor Guzman, Chicago); Tr. 12364-12366, 12370-12375, 12378-12379, G.C. Ex. BC 1160, 1162, 1164 (alleged discriminatee Bartolome Perez, Los Angeles); Tr. 12370-12375, 12378-12379, G.C. Ex. BC 1162, 1164 (alleged discriminatees Vincent Delgado, Rudy Interiano, and Eric Ramirez, Los Angeles).

[53] See, e.g., Tr. 6630-6631, G.C. Ex. HR 211 (New York); Tr. 6763-6766, G.C. Ex. HR 720 (Philadelphia); Tr. 10437, G.C. HR 829; 4108-4111, 4115-4119, G.C. Ex. HR 532, 545 (Los Angeles).

[54] See, e.g., Tr. 5656-6569, 6650-6652, 9696-9697. 9740-9743, 10618-10619, 10629, 11738-11742, 11864, G.C. Ex. BC 78, 92, 1240, 1349, 1385 (p. 99), 1813, HR 191, 203, 517 (New York); Tr. 3796-3797, 3889-3891, 3898, G.C. Ex. HR 408, 438 (Philadelphia); Tr. 2909-2912, 3205-3208, 10437, 13174, G.C. Ex. HR 614, 644, 820, 1646, (Chicago); Tr. 7105-7106, 12360-12364, 12934-12938, 13004-13005, G.C. Ex. BC 1159, HR 541, 900-902, 936, Q 571, 571.1 (Los Angeles). In his Opening Statement, General Counsel contended that McDonald's "directs" the Franchisee Respondents to display its "Nine in One" poster, "which itself incorporates McDonald's no solicitation policy in every crew room." Tr. 962.

stage of the litigation, in the specific context of the case at issue. For the following reasons, these factors weigh here against a finding that the proposed Settlement Agreements are reasonable.

In the instant case, the parties' protracted presentations on the joint employer issue are nearly complete, with McDonald's having two additional witnesses to present on its direct case and General Counsel intending to submit documentary evidence as rebuttal.[55] Furthermore, as discussed above, General Counsel presented 52 witnesses primarily addressing the joint employer issue over a ten month period. These witnesses testified for 78 days, and were presented by seven attorneys for General Counsel.[56] McDonald's presented 15 witnesses who testified for 14 days. These case presentations comprise the bulk of the largest case ever adjudicated by this agency, and the longest hearing the agency has ever conducted. Furthermore, the case required federal court litigation in six different venues and substantial work by an appointed Special Master, all of which has been completed. Thus, the current posture of this case is completely different from the stage of the litigation in *UPMC* at the time that the Board approved the proposed resolution of the single employer issue. In *UPMC*, the parties had not yet begun presenting their evidence regarding the parties' single employer status. 365 NLRB No. 153 at p. 2, 23. In addition, the subpoena enforcement issues which remained pending at the Third Circuit in *UPMC* and precipitated the bifurcation of that case have been fully litigated and resolved here, as discussed in the procedural history above. Thus, approval of the Settlement Agreement at this time would not conserve the significant agency resources expended over the course of three years to create a record on the joint employer issue, as was the case in *UPMC*. And while there would certainly be exceptions and appeals available in this matter, the work involved would in my judgment be less onerous and demand fewer resources than the lengthy, arduous trial presentation necessary to create the record thus far.[57]

In addition, General Counsel's decision to pursue a settlement, and accept the Settlement Agreements discussed above, literally days before the close of the monumental record in this case is simply baffling. Specifically, General Counsel's decision to settle the case in the manner discussed above without hearing the testimony of McDonald's expert, Professor Chekitan S. Dev, is incomprehensible. Since the Petitions to Revoke Subpoenas filed in 2015, McDonald's has repeatedly argued that its "brand protection" prerogative precluded consideration of its activities and resources provided to the Franchisee Respondents regarding the Fight for $15 campaign in the context of the joint employer issue. As is apparent from the preceding discussion, General Counsel adduced a veritable deluge of evidence regarding McDonald's response to the Fight for $15 campaign, some of which implicates the Franchisee Respondents' conduct and directly involves the alleged discriminatees in this case. McDonald's fact witnesses on its direct case largely did not testify regarding the issue. The testimony of Professor Dev would therefore have been critical, if only to assess the relative strength of the parties' cases for the purpose of settlement negotiations. Yet General Counsel chose to forego hearing such significant testimony, and instead entered into the Settlement Agreements, which, as discussed previously, provide relief that largely could have been obtained in 2015. Furthermore, when questioned about this aspect of his decision on April 5, 2018, General Counsel provided no meaningful response. He only reiterated that settling the case at this juncture obviated the necessity of further proceedings – a statement that is true of any settlement at any time prior to a final judgment. Tr. 21258.

General Counsel's machinations involving the *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), and *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), decisions are equally perplexing. As discussed in further detail above, the Consolidated Complaints in this matter were issued on December 19, 2014, and were themselves consolidated by order of January 6, 2015. At that time, *Browning-Ferris* had not yet been decided, and the previously existing standard for determining joint employer status applied. Therefore, General Counsel anticipated proving that McDonald's constituted a joint employer with the Franchisee Respondents under the pre-*Browning-Ferris* standard in effect at the time that the case was initiated. The various Petitions to Revoke Subpoenas were also decided in March and April 2015, before *Browning-Ferris* was decided. On August 27, 2015, the Board issued the *Browning-Ferris* decision. Thus, General Counsel was no longer required to prove McDonald's actual exercise, as opposed to possession, of authority over terms and conditions of employment at the Franchisee Respondent locations, and was no longer required to demonstrate McDonald's "direct and immediate control" over the over the work of employees at Franchisee Respondent locations in order to establish joint employer status. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 at p. 1-2. The Board's revision of the legal standard for joint employer status in *Browning-Ferris* may therefore have strengthened General Counsel's case. But because General Counsel issued the Consolidated Complaint prior to *Browning-Ferris*, that decision could not possibly have been a necessary precondition for General Counsel's initiating the instant litigation.

On December 14, 2017, the Board issued its decision in *Hy-Brand Industrial Contractors, Ltd.*, overruling *Browning-Ferris* and returning "to the principles governing joint employer status that existed prior to that decision" – the legal standard applicable

[55] Respondents have made statements on the record to the effect that they have the right to present sur-rebuttal evidence. It is well-settled that proper sur-rebuttal evidence is evidence which explains, counteracts, or disproves the adverse party's evidence, and that cumulative evidence is not admissible. The admissibility of evidence on rebuttal and sur-rebuttal is within the discretion of the Administrative Law Judge. *Garden Ridge Management*, 347 NLRB 131, fn. 4 (2006); *Water's Edge*, 293 NLRB 465, fn. 2 (1989), enf. granted and denied in part on other grounds, 14 F.3d 811 (2nd Cir.1994); see also *Bethlehem Temple Learning Center*, 330 NLRB 1177, fn. 1 (2000). In any event, Respondents have never indicated that they intend to present sur-rebuttal evidence in any form.

[56] Other witnesses called in connection with the unfair labor practice allegations against the New York Franchisees and Jo-Dan also testified regarding issues pertinent to joint employer status.

[57] McDonald's asserts that Post-Hearing Briefs on the merits of the case would not be submitted until after my ruling on the deferred objections. Post-Hearing Brief at 7, 19-20. I have never made any ruling in this case that deferred objections will be submitted and decided prior to the submission of Post-Hearing Briefs on the merits.

when General Counsel issued the Consolidated Complaint herein. 365 NLRB No. 156, at p. 2. General Counsel nevertheless asserted that he was requesting a stay of the hearing on January 17, 2018, five days before it was set to resume, to evaluate the impact of the *Hy-Brand Industrial Contractors, Ltd.* decision, even though that opinion purported to simply return to the joint employer analysis upon which General Counsel had based this case. Then, as discussed above, during the stay the Board vacated its decision in *Hy-Brand Industrial Contractors, Ltd.*, reinstating the *Browning-Ferris* standard which would presumably be more advantageous to General Counsel. 366 NLRB No. 26 (February 26, 2018). However, General Counsel continued to pursue the settlement of this case, and had no adequate explanation when questioned on April 5, 2018 regarding the rationale for this course of action. He simply reiterated that continuing the instant case "would exhaust agency resources," and that "this settlement provides immediate relief for affected workers." Tr. 21256-21257.

This last is a meaningful consideration, for the Settlement Agreements provide for full back pay for the 20 alleged discriminatees, and even front pay for the three employees – Tracee Nash, Sean Caldwell, and Quanisha Dupree – who were allegedly unlawfully discharged. Yet General Counsel's stated purpose in initiating this case was obtaining "a finding that McDonald's USA, LLC was jointly and severally liable for all of the alleged unfair labor practices…because of its status as a Joint Employer of the affected workers," and "to clarify the relationship between franchisor and franchisee" in the context of Board law regarding joint employer status. Tr. 21254. As is evident from the procedural history and the above discussion, the vast majority of the evidence and the hearing presentation was directed to the joint employer issue. In addition, the overwhelming majority of the multitudes of unfair labor practices alleged involved either statements or policies and practices designed to inhibit the exercise of Section 7 rights by employees at the Franchisee Respondent locations, as opposed to actual retaliation against specific individuals precipitating an individual remedy. Thus, while approval of the Settlement Agreements would result in immediate relief for the alleged discriminatees, the remainder of the proposed settlement is paltry and ineffective given the scope of the allegations, the resources necessary in order to present the case, and the case's ultimate purpose. The effect of the uncertainty inherent in future litigation on the relief the alleged discriminatees would obtain through the proposed settlement is therefore not a compelling counterweight.

For all of the foregoing reasons, I find that the stage of this enormous case strongly militates in favor of expending the several days of trial time required to complete the record, and thereafter continuing with the decisional and appeals process, despite the inherent uncertainties of litigation.

C. Fraud, Duress and Coercion, and Any History of Prior Violations

The third component of the *Independent Stave* analysis requires a consideration of whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement. There is no contention or evidence of fraud, coercion, or duress here, and this factor therefore weighs in favor of approval.

The fourth of the *Independent Stave* criteria requires an evaluation of whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. The record does not establish such a history in this case. Although, as discussed above, there were other cases settled by certain owner-operators whose Franchisee Respondents are also Charged Parties here, cases where the Board finds a history of violations in the context of an *Independent Stave* analysis typically involve previous decisions finding violations. See, e.g., *Goya Foods of Florida*, 358 NLRB 345, 347, n. 15 (2012); *Webco Industries*, 334 NLRB 608, 611 (2001), enf'd. 90 Fed.Appx. 276 (10th Cir. 2003). Therefore, the fourth component of the *Independent Stave* analysis weighs in favor of approving the proposed settlement.

D. Conclusion

For all of the foregoing reasons, I find that the first of the *Independent Stave* criteria does not favor approval of the proposed settlements, and that the second factor militates strongly against approval. The third and fourth factors weigh in favor of approval. Given the size and import of this case, the resources expended in the hearing presentations, the terms of the proposed settlement, and the distinct possibility of additional litigation, I find overall that approval of the Settlement Agreements is not warranted pursuant the *Independent Stave* criteria.

Based on the foregoing, it is hereby ordered as follows:

1. General Counsel and McDonald's Motion to Approve Settlement Agreements in the above matter is denied.

2. In the event that no party files a Request for Special Permission to Appeal this Order within 28 days, the parties shall schedule 12 additional days of hearing in October 2018. If additional hearing days are scheduled, General Counsel shall make the necessary arrangements to have the hearing continue at 26 Federal Plaza, Courtroom 238, New York, New York.

Dated, July 17, 2018