UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO

McDONALD'S USA, LLC, A JOINT EMPLOYER, et al.

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FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.

Cases 02-CA-093893, et al. 04-CA-125567, et al. 13-CA-106490, et al. 20-CA-132103, et al. 25-CA-114819, et al. 31-CA-127447, et al.

MCDONALD'S USA, LLC'S MOTION TO PRECLUDE ANY FUTURE CONTINUANCES

In light of the General Counsel's two-plus year investigation into unfair labor practice allegations against McDonald's USA, LLC ("McDonald's USA") and its franchisees, the additional year Your Honor has granted the General Counsel to prepare his case after issuing his complaints in this action, and the severe prejudice McDonald's USA will suffer from a further continuance of the January 11, 2016 trial date, McDonald's USA respectfully requests that Your Honor issue an Order precluding any future continuances in this matter barring truly extraordinary events.

The first unfair labor charge involved in this matter, 02-CA-093893, was filed on November 28, 2012. The General Counsel then investigated the matter for over two years. During this investigation, McDonald's USA provided seven positions statements and produced approximately 1,200 pages of documents. Starting 25 months later, on December 19, 2014, the General Counsel of the National Labor Relations Board (the "Board" or "NLRB") began issuing complaints against McDonald's USA and its franchisees.

The hearing in this matter opened on March 30, 2015. However, apart from tending to

some preliminary and logistical matters on that day, the hearing was adjourned until May 26, 2015. On May 8, 2015, the General Counsel requested and was granted an adjournment of the hearing, which McDonald's USA and the franchisees opposed, from May 26, 2015 until October 5, 2015. On August 24, 2015, the General Counsel yet again requested and received an adjournment of the hearing, which the New York Franchisees opposed, until January 11, 2016.

Notwithstanding Your Honor's observation on June 24, 2015 that the General Counsel was planning on filing subpoena enforcement actions, the General Counsel delayed until September 30, 2015 to file a proposed Order to Show Cause related to enforcing the subpoena issued to McDonald's USA. See Transcript of June 24 teleconference at pg. 417:9-15 ("General Counsel will be going [to] Federal Court to file an application to enforce subpoenas . . . "). The court signed this proposed Order to Show Cause on October 2, 2015, and it was served on McDonald's USA on October 5, 2015. See Exhibit A (Signed Order to Show Cause in Case No. 15-mc-322 (S.D.N.Y.)). To date, McDonald's USA has already produced well over 100,000 pages, which provide the General Counsel with mountains of documents from which to question witnesses. McDonald's USA has done so in spite of the fact that the Board does not allow for pre-trial discovery. See NATIONAL LABOR RELATIONS BOARD, Casehandling Manual at § 10292.4 ("The Federal Rules of Civil Procedure providing for compulsory pretrial discovery have been held not applicable to Board proceedings . . . Any attempt to use such discovery should be resisted."); Offshore Mariners United, 338 N.L.R.B. No. 88 (N.L.R.B. Nov. 22, 2002) ("Pretrial discovery in Board proceedings is neither constitutionally nor statutorily required"), quoting Washington Heights, 897 F.2d 1238, 1245 (2d Cir. 1990). Moreover, the relief sought by the General Counsel in his subpoena enforcement action against McDonald's USA is related to specific franchisees, so the outcome of the action should not impact the General Counsel's ability to begin presenting "nationwide joint employer evidence" on January 11, 2016. In light of the foregoing and given the General Counsel's delay in seeking subpoena enforcement proceedings, it seems that the filing of the subpoena enforcement action is just a tactic to set up yet another continuance.

On October 8, 2015, the undersigned asked the General Counsel to join in this Motion to Confirm the January 11th trial date. *See* Exhibit B. On October 9, 2015, the General Counsel responded that he "would agree not to seek a further adjournment" if McDonald's USA consents to all of the relief requested by the General Counsel in the pending subpoena enforcement action filed against it by November 30, 2015. *See* Exhibit C. Implicit, arguably explicit, in the General Counsel's stunning response is that McDonald's USA is somehow to blame for the delay. This contention ignores that it was the General Counsel who:

- investigated the charges for over two years before issuing complaints;
- requested and received (over McDonald's USA and the franchisees' opposition)
 two continuances already;
- delayed months before filing its subpoena enforcement actions; and
- refused (and continues to refuse) to proceed to the hearing in this case notwithstanding that McDonald's USA has produced well over 100,000 pages of documents to date in response to his extremely overbroad 118 paragraph trial subpoena.

Given the potential for appeals, it is not unreasonable to assume that this matter will be concluded well over ten years after the first unfair labor practice charge was filed. The National Labor Relations Act (the "Act") does not permit such delay, as the General Counsel cannot demonstrate any compelling reason to adjourn this hearing for a third time and such delay will

prejudice McDonald's USA. For all of these reasons and those discussed below, McDonald's USA respectfully requests that Your Honor issue an Order precluding any future continuances in this matter barring truly extraordinary events.

ARGUMENT

Both federal courts and the Board itself have emphasized that administrative delay should be avoided unless there are extraordinary circumstances. See, e.g., N.L.R.B. v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 265-66 (1969) (noting that administrative delay is "deplorable" especially if it results in "the company [being] hampered in the presentation of its defenses"); N.L.R.B. v. American Potash & Chemical Corp., 98 F.2d 488, 492 (9th Cir. 1938) ("The [National Labor Relations] Act makes it clear that [Board] proceedings must proceed with utmost dispatch."); NATIONAL LABOR RELATIONS BOARD, Casehandling Manual at § 10406 ("Counsel for the General Counsel is expected to be ready to proceed with the case at the scheduled time and, absent compelling circumstances, should not request a postponement.") (emphasis added). Courts and the Board have also held that administrative delay should not be tolerated when it results in prejudice or unfairness to a party. E.E.O.C. v. Liberty Loan Corporation, 584 F.2d 853, 858 (8th Cir. 1978) (upholding the dismissal of an administrative complaint based on administrative delay in part because of the prejudice that delay caused the employer); Hijos de Ricardo Vela, Inc., 194 NLRB 377, 377 n.1 (1971), enfd. 475 F.2d 58 (1st Cir. 1973) (upholding denial of a continuance request based in part on the unfairness it would have on other parties and their witnesses). Further, the Board has refused to grant requests for continuances after such requests have been granted in the past. See Glacier Packing Co., 204 NLRB 597, 597, 600 (1973), enfd. 507 F.2d 415 (9th Cir. 1974) (refusing to grant request for continuance since the requesting party had already been granted continuances in the case).

The hearing in this case must resume on January 11, 2016 because the General Counsel cannot demonstrate that there are any compelling circumstances that warrant further delay, any additional delay will prejudice McDonald's USA, and the General Counsel has already received two continuances.

<u>First</u>, the General Counsel cannot articulate any cognizable, compelling reason to further delay this matter. His stated reasons throughout this proceeding – delay in receiving subpoenaed documents and a need to file the pending enforcement actions – do not withstand scrutiny. To date, post-issuance of the Complaint and notwithstanding the fact that there is no pre-trial discovery in Board proceedings, McDonald's USA has produced well over 100,000 pages of documents at a cost of over \$1 million dollars, exclusive of legal fees. It strains credulity to believe, in spite of this enormous production, that the General Counsel cannot even begin examining witnesses. The General Counsel's stubborn refusal to proceed to trial until more documents are produced is wholly insufficient to warrant further delay.

Moreover, although the General Counsel had threatened to file subpoena enforcement actions since at least June 24, 2015, he delayed another three months before doing so. *See*Transcript of June 24 teleconference at pg. 417:9-15 ("General Counsel will be going [to]

Federal Court to file an application to enforce subpoenas . . ."). The General Counsel's dilatory tactics clearly do not constitute a "compelling circumstance" that justifies additional delay of this hearing. NATIONAL LABOR RELATIONS BOARD, *Casehandling Manual* at § 10406. It is unfair and unreasonable for the General Counsel to seek to control the trial schedule through his own inaction and failure to pursue available remedies.

Further, the relief the General Counsel seeks in his subpoena enforcement action against McDonald's USA is related to specific franchisees, so there is no need to delay the General

Counsel's presentation of "nationwide joint employer evidence" on January 11th pending the outcome of the enforcement actions. Indeed, the General Counsel seeks from the federal district court an order that would require McDonald's USA to (a) add as ESI custodians 23 operations consultants assigned to particular franchisees, 24 individuals who oversee those operations consultants, 6 human resources personnel, and 6 other employees; (2) remove redactions on produced documents concerning franchisee financial information and non-responsive information; (3) create new reports related to specific franchisees; and (4) produce documents allegedly in the possession of non-parties (Aon and Franke) that relate to specific franchisees. Thus, no relief available in the subpoena enforcement proceedings should impact the General Counsel's ability to begin his presentation of "nationwide joint employer evidence."

Second, McDonald's USA will be prejudiced by further delay. Some of the underlying unfair labor practices involved in this consolidated case allegedly occurred three years ago (e.g., 02-CA-093893 was filed on November 28, 2012). With every passing month, individuals who may have knowledge of these allegations change positions within McDonald's USA or leave the company. Naturally, their memory fades and they inevitably begin to forget certain details related to the events in controversy or their relationships, if any, with the franchisees at issue in the complaint. Lastly, McDonald's USA should not be forced to engage in expensive and time consuming final trial preparation (e.g., witness preparation, finalization of trial strategy, preparation of exhibits, and resolution of witness scheduling) with the looming possibility that the trial will be postponed for a third time. Without question, a third postponement will severely prejudice McDonald's USA.

<u>Third</u>, the General Counsel is not entitled to another postponement since it has already received two continuances in this matter, which have provided him with more than enough time to prepare for a trial. *See Glacier Packing Co.*, 204 NLRB 597, *enfd.* 507 F.2d 415.

CONCLUSION

For the foregoing reasons, McDonald's USA respectfully requests that Your Honor issue an Order precluding any future continuances in this matter barring truly extraordinary events.

Respectfully submitted,

s/ Willis Goldsmith

Dated: October 9, 2015

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CERTIFICATE OF SERVICE

The undersigned, an attorney, affirms under penalty of perjury that on October 9, 2015, he/she caused a true and correct copy of McDonald's USA, LLC's Motion to Prohibit Any Further Requests For Continuance of the January 11, 2016 Trial Date to be electronically filed using the National Labor Relations Board's website, and thereafter to be served upon counsel for the parties by e-mail (where indicated) and/or otherwise by first-class mail in a postage-prepaid, properly addressed envelope at the following addresses designated for this purpose:

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s/Joshua M. Grossman
An Attorney for McDonald's USA, LLC

EXHIBIT A

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,

Applicant

vs.

MCDONALD'S USA, LLC

Respondent

15MISC 322

ORDER TO SHOW CAUSE

This matter having come before this Court upon an Application of the Applicant, National Labor Relations Board (the Board), for an Order Requiring Obedience to Administrative Subpoena Duces Tecum B-1-L39K3Z issued to Respondent McDonald's USA, LLC, in connection with an unfair labor practice complaint and hearing pending before Board Administrative Law Judge Lauren Esposito;

Said Application being supported by Applicant's Memorandum of Law and supporting documents; and

Case 1:15-mc-00322-P1 Document 1 Filed 10/02/15 Page 2 of 2

It appearing that good cause has been shown that proceedings should commence against 1 2 Respondent for enforcement of Subpoena Duces Tecum B-1-L39K3Z, IT IS HEREBY ORDERED that: 3 1. Respondent appear before this Court on October 19, 2015, at 2:30 pm 4 (p.m. /)a.m.), in Courtroom 17C, at the United States District Court, Southern District of 5 New York, 500 Pearl Street, New York, New York 10007, and then and there show cause, if any 6 there be, why an Order should not be issued requiring Respondent to comply with Subpoena 7 Duces Tecum B-1-L39K3Z; and 8 9 2. Respondent file its Answer to Applicant's Application within 20 days of service of 10 this Order to Show Cause; and 3. A copy of this Order, together with a copy of the Application and all supporting 11 documents, be served upon Respondent forthwith, with service to be made in any manner 12 13 provided in the Federal Rules of Civil Procedure, and with proof of service to be filed with this Court. 14 IT IS SO ORDERED, dated at New York, New York, this 2 day of October, 2015. 15

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United States District Court Judge

EXHIBIT B

McDonald's USA, LLC - 2-CA-093893 et. al.

Willis Goldsmith to: Jamie.Rucker, Alejandro Ortiz, nicholas.rowe@nlrb.gov, julie.ulmet@nlrb.gov, zachary.herlands@nlrb.gov

10/08/2015 05:26 PM

Co: "Doreen Davis", "Jonathan Linas", "Lorena Whittington"

McDonald's USA, LLC ("McDonald's") intends to move the Administrative Law Judge in the above-referenced matters to enter an order confirming that the trial in the case will resume as scheduled on January 11, 2016 and that no further adjournments will be granted. Please advise me at your earliest convenience, but no later than 5 pm Eastern time tomorrow, whether Counsel for the General Counsel will join, oppose or take no position with respect to McDonald's motion. Thank you.

EXHIBIT C



UNITED STATES GOVERNMENT NATIONAL LABOR RELATIONS BOARD

REGION 2 26 Federal Plaza, Suite 3614 New York, NY 10278-3699 Agency Website: www.nlrb.gov

Telephone: (212) 264-0300

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October 9, 2015

Via Electronic Mail [wgoldsmith@jonesday.com]

Willis J. Goldsmith, Esq. Jones Day 222 E. 41st St. New York, NY 10017-6739

Re: McDonald's USA, LLC, a Joint Employer,

et al.

Case Nos. 02-CA-093893, et al.

Dear Mr. Goldsmith:

I have received your e-mail message of yesterday, in which you state that you intend to seek an "order confirming that the trial in the case will resume as scheduled on January 11, 2016 and that no further adjournments will be granted." You then ask whether I will join that motion.

If McDonald's USA, LLC ("McDonald's") is indeed interested in expeditious resumption of the hearing in this matter, it should consent to the relief requested by the General Counsel in the subpoena enforcement action currently pending against McDonald's in the Southern District of New York, 15-MC-00322 (LS). As you know, that action itself was necessitated by McDonald's' refusals to conduct reasonable searches for ESI and other documents and to obey the orders of the Administrative Law Judge in this matter. In return for (1) such consent and (2) completion on or before November 30, 2015 by McDonald's of its production of unprivileged documents (in conformity with the terms of the consent order thereby issued) in response to the subpoena issued to it eight months ago, General Counsel would agree to not seek a further adjournment based on McDonald's' failure to provide unprivileged documents in response to the subpoena in a timely manner.

Similarly, if McDonald's were able to effect fulfillment of any other Respondent franchisee's obligations to produce documents in response to the joint employer-related subpoena served upon that franchisee, and effect completion of that production by November 30, 2015, Counsel for the General Counsel would similarly refrain from seeking any adjournment based on that Respondent's failure to produce unprivileged documents in response to the relevant subpoena in a timely manner.

Yours truly,

/s/ Jamie Rucker

Jamie Rucker, Counsel for the General Counsel