require McDonald's to mail a Special Notice to the de-

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

---

[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

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.

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

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 d caosn-

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

---

[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[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 nterest 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 f

[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

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

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 ot Au« tcIdeord t t lvi judgeent

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-

MCDONALD'S USA, LLC

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

approval of settlement); *Ports America*

Settlement Fund as well

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.

elucidate my evaluation of certain procedural mechanisms contained in the Settlement Agreements now at issue.

During 2012, 2013, and 2014, the Charging Parties in the above matter

before me in New York. Tr. 10-11. General Counsel also 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 appearance [illegible]

Respondent in any other case. On October 12, 2016, I issued an 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.

Date pending proceedings to enforce its Subpoenas Duces 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

process obviated the need for structuring the case presentations 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*

addressed in a Supplemental Order Regarding Production of 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 be or t he ¡

$171,636.00.

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 O e y r em u the oe he (i the all ad

McDonald's and the Franchisee Respondents,

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.

---

[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). Md s ussa litigation t hat “itK, mli365 a aoce

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

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 evidenSe 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. a n

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 ato: franchise mwner1 mw

stage of the litigation, in the specific context of the case at issue.

when General Counsel issued t