JD(NY)-23-24
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MOUNT SINAI HEALTH SYSTEM, INC.[1]

and **CASE NO. 02-CA-329471**

ALEXANDER SCOTT WELLER, An Individual

Nikhil Shimpi, Esq.
for the General Counsel

Damien DiGiovanni and Brendan Sweeney, Esqs.
for the Respondent

Alexander Weller, MD (Pro Se)
for the Charging Pary

DECISION

Statement of the Case

MICHAEL P. SILVERSTEIN, Administrative Law Judge. In this case, the General Counsel alleges that confidentiality and non-solicitation provisions contained in Mt. Sinai Health System, Inc.'s ("Respondent") standard employment agreements for part-time physicians infringe on employees' Section 7 rights in violation of Section 8(a)(1) of the Act. The record evidence, however, shows that Mount Sinai Health System, Inc. does not employ any statutory employees, and the General Counsel has essentially named the wrong entity as the respondent in its Complaint without a pleading of derivative liability to connect Mount Sinai Health System, Inc. to the proper employing entity. Thus, I recommend dismissal of this complaint.

Alexander Scott Weller ("Charging Party") filed the charge in this case on November 1, 2023. The Complaint issued on June 18, 2024, Respondent filed its Original Answer on July 16, and its Amended Answer on September 20.

[1] The name of the Respondent was amended during the hearing.

The record in this case opened via the Zoom for Government platform on September 24, 2024, and continued in-person in New York, New York on September 27, September 30, and October 1. At trial, all parties were afforded the right to call, examine, and cross-examine witnesses[2], to present any relevant documentary evidence, and to argue their respective legal positions orally. Counsel for the General Counsel, the Charging Party[3], and Respondent filed post-hearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and Respondent, I make the following:

FINDINGS OF FACT

JURISDICTION

At the outset of the hearing, all parties entered into the following stipulation regarding jurisdiction:

- Mount Sinai Health System, Inc., annually, in conducting its business operations, derives gross revenues in excess of $250,000.
- In conducting its business operations, Mount Sinai Health System, Inc. annually purchases and receives at its facilities in the City of New York, goods valued in excess of $5,000 directly from suppliers located outside the State of New York.
- At all material times, Mount Sinai Health System, Inc. has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and for purposes of this case, has been a health care institution within the meaning of Section 2(14) of the Act.
- Mount Sinai Health System, Inc. is an Employer under Section 2(2) of the Act.

[2] The General Counsel called two witnesses – Alexander Weller and James Granata (Respondent's custodian of records) – while the Respondent called one witness – Jodi Cohen-Ansari.

[3] In his post-hearing brief, the Charging Party requests that the Region be ordered to provide the transcripts to the Charging Party at no charge and that I grant the Charging Party leave to file an amended post-hearing brief after he reviews the trial transcripts. I decline both requests. The Charging Party asserts that he did not receive a copy of the transcripts because the court reporting service wished to charge him $1,000 for a copy of the transcripts and the Region would not provide the transcripts to him free of charge. In support of his argument, the Charging Party cites to *M.L.B. v. S.J.,* 519 U.S. 102 (1996), a case challenging the State of Mississippi's requirement that indigent parents appealing a loss of parental rights through the Chancery Courts must pay over $2,000 in court fees to process their appeal. The Supreme Court ruled such a requirement violated the Equal Protection Clause. That case is clearly distinguishable from our case. There is no evidence that the court reporting service charged the Charging Party a higher fee than the other parties to this case and unlike in *M.L.B.,* paying the court reporting fee is not a condition precedent to maintaining this charge or filing an appeal. Additionally, the Charging Party cites no authority for the proposition that the Region must provide him with a copy of the transcripts free of charge and therefore, I decline to order this remedy.

Despite this stipulation, Respondent has repeatedly argued (in its Answer, in its opening statement, and throughout the hearing) that the General Counsel has named the wrong entity as the respondent in this case, that the Icahn School of Medicine at Mount Sinai ("the Icahn School") was Dr. Weller's employer, and that Mount Sinai Health System, Inc. does not employ any physicians and does not employ any statutory employees.

Before and throughout the trial, Counsel for the General Counsel was given numerous opportunities to consider amending its complaint to allege either a different entity as the respondent in this case or allege derivative liability attaching to Mount Sinai Health System, Inc. and the Icahn School. Counsel for the General Counsel, however, declined to amend its pleadings.

During his opening statement, Counsel for the General Counsel confirmed that he was not alleging Mount Sinai Health System, Inc. and the Icahn School are a single employer, even though he asserted that the evidence would show that transactions or dealings between the entities were not at arms-length, they were "fully collaborative and part of a single operation." (Tr. 35).

ALLEGED UNFAIR LABOR PRACTICES

Dr. Alexander Weller worked about four shifts in November 2022 as a hospitalist at Mount Sinai Hospital Queens in New York City. (GC Ex. 5a). Prior to beginning this job, Weller signed an offer letter and an agreement containing standard terms and conditions of part-time physician employment. (GC Ex. 2).

The offer letter reads:

> "We are delighted that you have agreed to accept a part-time position in the Mount Sinai Health System. You will join the faculty of the Icahn School of Medicine at Mount Sinai and the Medical Staff of Mount Sinai Queens."

The offer letter specifically identified Dr. Weller's employer as the Icahn School and stated that he may be reassigned to other sites or locations within the Mount Sinai Health System if required by the changing needs of Mount Sinai. (GC Ex. 2). The offer letter documented Weller's hourly pay rates and stated that the agreement was for one year. The offer letter was signed by Dr. Amrita Gupte (Chief Medical Offer, Vice President, Medical Affairs for Mount Sinai Queens), Dr. Monica Kraft (System Chair, Department of Medicine and Professor of Medicine at the Icahn School), and Dr. Dennis Charney (Dean of the Icahn School and President for Academic Affairs for the Mount Sinai Health System). (GC Ex. 2).

Counsel for the General Counsel complains about two specific provisions contained in the standard employment agreement.[4] Section C2 is titled "Non-Solicitation of Employees" and states:

[4] All physicians employed by the Ichan School plus those physicians working or applying for work at any of the Mount Sinai-affiliated hospitals were required to sign this standardized agreement. (Tr. 351-353).

> "During the Term and for a one-year period following the termination of employment, physicians may not recruit, solicit or induce to terminate their employment or other relationship with Mount Sinai, any employee or independent contractor of the School or the Hospital(s)."

Section C3 is titled "Confidentiality" and contains the following provision:

> "During the Term and after termination of employment without limitation of time, physicians may not provide or disclose to any person any confidential or proprietary information of Mount Sinai, unless required by law, in which case they must notify Mount Sinai prior to such disclosure. Employment agreements are considered confidential information and may not be disclosed to any person other than to the Physician's spouse, accountant, or attorney. Upon termination of employment, physicians must immediately return to Mount Sinai any and all such information and any other property of Mount Sinai in their possession."

Prior to signing the offer letter, Dr. Weller raised concerns with many terms contained in the employment agreement.[5] Gwendolyn Martin[6] informed Dr. Weller via email on October 31, 2022, that the language contained in the employment agreement was standard language used for all per diem physicians employed at all sites of the Health System. (GC Ex. 3(a); Tr. 65). Based on this response, Weller assented to the terms and signed the offer letter and employment agreement on November 2, 2022.

Weller's Employment at Mount Sinai Queens

Starting November 4, 2022, Weller worked four shifts as a hospitalist at Mount Sinai Queens, a 200-bed community hospital in Astoria, Queens.[7] (Tr. 90). Mount Sinai Queens has an emergency department and an in-patient unit that handles patients of mild to moderate complexity. Specialty services available at Mount Sinai Queens include cardiology, nephrology, and gastroenterology. Mount Sinai Queens also houses onsite clinics and offers physical therapy, speech, and occupational therapies, along with social work and pharmacy services. (Tr. 102-103).

A hospitalist is either a family physician or internal medicine-trained physician who takes care of patients exclusively at the hospital. The hospitalist evaluates and admits patients from the emergency department and/or takes care of patients after they are admitted to the hospital. (Tr. 49). The per diem, part-time hospitalists' primary role is to cover shifts that aren't covered by full-time faculty of the Icahn School. (Tr. 280). Thus, Weller covered shifts either in Mount Sinai Queens or at one of the primary care clinics attached to Mount Sinai Queens. (Tr. 51).

[5] Dr. Weller did not complain about either the confidentiality or non-solicitation clauses.
[6] Gwendolyn Martin is the administrative assistant to Dr. Kathy Navid, the director of hospitalist services at Mount Sinai Queens.
[7] Weller estimated that 7-8 other hospitalists worked with him on the day shift and 2-3 other hospitalists worked the overnight shift. (Tr. 188).

Before joining the medical staff of the hospital, Weller submitted his credentialing application to Respondent's centralized credentialing office. This credentialing office verifies applicants' licensing and background and grants privileges to one or more of the hospitals in the Mount Sinai Health System. For purposes of Weller's employment, his credentials were limited to Mount Sinai Queens. (Tr. 53).

Dr. Kathy Navid interviewed Weller for the hospitalist position and served as his supervisor during his limited tenure with the hospital. Navid is directly employed by the Icahn School. (Tr. 285). Navid assigned Weller his scheduled hours and after each shift, Gwendolyn Martin sent Weller a pre-populated timesheet reflecting his work hours and requesting his signature to verify the hours.[8] (Tr. 56-57, 60). Weller's paystubs and W-2 form referenced his employer as "The Mount Sinai Hospital" with an address listed on East 42nd Street in Manhattan. (GC Exs. 4 and 5(b)).

Even though Dr. Weller received a faculty appointment to the Icahn School, he did not give lectures or teach medical students. The clinical instructor title he received was essentially a courtesy appointment. (Tr. 63-64, 87).

Weller resigned from his hospitalist position in about the end of November or beginning of December 2022. (Resp. Ex. 2; Tr. 181, 184).[9]

Testimony and Documentary Evidence Regarding the Relationship Between Mount Sinai Health System, Inc., Its Affiliated Hospitals, the Icahn School, and Mount Sinai Queens

Jodi Cohen-Ansari is the chief strategy officer for Mount Sinai Hospital. (Tr. 270). She offered detailed testimony about the interplay between Mount Sinai Health System, Inc., its affiliated hospitals, and the Icahn School.

Mount Sinai Health System, Inc. is the colloquial name for all the hospitals under the Mount Sinai corporate umbrella plus the Icahn School. Cohen-Ansari testified that the following hospitals are affiliated with the Mount Sinai Health System, Inc: Mount Sinai Hospital, Mount Sinai West and Morningside, Mount Sinai Beth Israel, Mount Sinai Brooklyn, the New York Eye and Ear Infirmary, and Mount Sinai Queens. (Tr. 274, 335). Cohen-Ansari next clarified that Mount Sinai Health System, Inc. does not employ physicians. Instead, the Icahn School hires and employs doctors and the hospitals within the System purchase physician services from the Icahn School. Thus, all clinicians working at Mount Sinai Queens are directly employed by the Icahn School. (Tr. 284-285, 351). Cohen-Ansari testified that this purchase of services agreement was formalized in 2000 and provides a more cost-efficient means to support clinical efforts in these teaching hospitals. (Tr. 272-275). The Icahn School purchases payroll services

[8] The record is unclear as to whether Gwendolyn Martin is directly employed by Mount Sinai Hospital or Mount Sinai Queens. (Tr. 285).

[9] During his short tenure, Dr. Weller raised concerns with Mount Sinai Health System's corporate compliance office about alleged wage theft and other alleged improprieties. (Tr. 97, 182). In 2023, Dr. Weller filed a lawsuit against the Ichan School, Respondent, and individually named physicians in federal district court asserting a panoply of employment-related claims. (GC Ex. 1(h)). Neither the status of the lawsuit nor the allegations contained therein impact the issues I am tasked to decide in this case.

from Mount Sinai Hospital and buys supplies for physician practices that are under the auspices of the Icahn School. (Tr. 358).

The Icahn School and the Mount Sinai Hospital use a common paymaster under Mount Sinai Hospital's tax ID number. Mount Sinai Hospital serves as the paying entity for both organizations, payroll is generated with Mount Sinai Hospital's name on it and the costs are transferred between the entities. Thus, if a physician is employed by the Icahn School, their paycheck (like Dr. Weller's) would say "Mount Sinai Hospital." (Resp. Ex. 3; Tr. 275-276).

Mount Sinai Health System, Inc.

Mount Sinai Health System, Inc. is a 501(c)(3) corporation that was established in 2013. Part of its certificate of incorporation specifies that Mount Sinai Health System, Inc. is not authorized to provide hospital or health related services in the State of New York. (GC Ex. 12). Additionally, Mount Sinai Health System, Inc.'s Tax Return Form 990 for the Year 2022 confirms that although it collected program service revenue in excess of $24,000,000, Mount Sinai Health System, Inc. had zero employees. (GC Ex. 10). There are, however, 13 voting members of the Board of Trustees, including Kenneth Davis (President and CEO) and Margaret Pastuszko (EVP, System CIO). On page 21 of the 2022 tax return, it states the following:

> "Control and management of Mount Sinai Health System, Inc. is vested in the same persons that control and manage its supported organizations by virtue of the overlap of the trustees and officers of Mount Sinai Health System, Inc. and its supported organizations. Although the trustees of Mount Sinai Health System, Inc. do not comprise a majority of each of the Boards of its supported organizations, nonetheless all of the trustees of Mount Sinai Health System, Inc. serve on the Boards of some or all of Mount Sinai Health System's supported organizations. Further, all of the officers of Mount Sinai Health System, Inc. also serve as officers of all of Mount Sinai Health System, Inc.'s supported organizations."[10]

The Icahn School

The Icahn School was founded in 1963 and serves as a teaching and research institution that educates physicians, biomedical students, and medical students for careers in the practice of medicine, the delivery of health care and the pursuit of medical research. (GC Exs. 17 and 18). At the end of 2022, the Icahn School directly employed 17,768 individuals. Kenneth Davis is the CEO of the Icahn School and Margaret Pastuszko is the president and COO. (GC Ex. 16).

According to the Icahn School's Consolidated Financial Statement (as of 12/31/21), the Icahn School is closely affiliated with the Mount Sinai Hospital and its affiliates, although the Icahn School is managed separately and is a separate legal entity. The Consolidated Financial Statement reads as follows:

[10] These supported organizations include the Icahn School, The Mount Sinai Hospital, Beth Israel Medical Center, St. Luke's Roosevelt Hospital Center, The New York Eye and Ear Infirmary, and South Nassau Communities Hospital. (GC Ex. 10).

> "On September 30, 2013, the Icahn School, the Mount Sinai Hospital and the Mount Sinai Medical Center, Inc…consummated a transaction pursuant to which the Mount Sinai Entities and Beth Israel Medical Center, the St. Luke's-Roosevelt Hospital Center, and the New York Eye and Ear Infirmary came together to create the Mount Sinai Health System, an integrated health care system and academic medical center. Pursuant to this transaction, two new not-for-profit entities were formed: Mount Sinai Health System, Inc. and Mount Sinai Hospitals Group, Inc. Mount Sinai Health System, Inc. was formed to be the sole member of Mount Sinai Hospitals Group, Inc., the Icahn School, and Mount Sinai Medical Center, Inc."[11] (GC Ex. 18).

The Mount Sinai Hospital

The Mount Sinai Hospital is a teaching hospital located in upper Manhattan founded in 1852 with a division in Queens, New York. Mount Sinai Hospital provides a full range of ambulatory and inpatient general and specialty services to patients and operates one of the largest graduate medical education programs in the United States. (GC Exs. 13 and 15). According to Mount Sinai Hospital's Consolidated Financial Statement ending in 2022, Mount Sinai Hospital is closely affiliated with the Icahn School and its affiliates. The Icahn School is a separate legal entity and, along with Mount Sinai Hospital, shares a four-block campus on the Upper East Side of Manhattan. (GC Ex. 13). Its 2022 tax return shows that the Mount Sinai Hospital has 20,273 employees. (GC Ex. 14). David Reich is the president of both Mount Sinai Hospital and Mount Sinai Queens. (Tr. 338).

Respondent's Business Justification for the Confidentiality Language Contained in Its Employment Agreement

Cohen-Ansari testified regarding the business need for the confidentiality language contained in the standard employment agreement for all part-time physicians employed by the Icahn School. She explained that the primary purpose for the confidentiality clause is to protect the hospitals' patients. To this end, patients' medical records require strict confidentiality and patient-related care is governed by the Health Insurance Portability and Accountability Act (HIPAA). (Tr. 322-323). Cohen-Ansari also testified that the broad confidentiality language in the standard employment agreement protects research conducted at the hospitals. For example, clinical trials require confidentiality agreements to ensure that specific protocols being tested are not publicized until a new treatment is patented. In this regard, hospitalists care for patients participating in a clinical trial if they are admitted to the hospital. Cohen-Ansari explained that a hospitalist must be advised of the details of the clinical trial to care for the patient properly. But the potential impact of a breach of confidentiality could mean the discontinuation of the clinical trial at the hospital. (Tr. 324-325). Additionally, Cohen-Ansari explained that the confidentiality clause has no expiration date because it impacts patients who might be patients in the hospital system for a long time and whose medical conditions must never be exposed. (Tr. 382).

[11] In 2014, Mount Sinai Hospital obtained approximately 450,000 square feet of space located at 150 East 42nd Street to be used to consolidate corporate services of Mount Sinai Health System, Inc. The space replaced existing leased and owned office space to provide additional capacity for clinical and research activities. (GC Ex. 18).

The standard employment agreement does not define what "confidential" information means, but Cohen-Ansari confirmed that information concerning Weller and other hospitalists' pay and benefits cannot be disclosed under the terms of the standard employment agreement. (Tr. 332-333). This means that Weller is not permitted to talk with other hospitalists about his wages or to inquire with his co-workers about their wage rates. (Tr. 333). When asked why this was the case, Cohen-Ansari explained that there are often different circumstances why a physician might be paid differently than their colleagues, e.g. experience, specialty. (Tr. 333). While this answer explained why physicians might be paid different wage rates, it did not explain why physicians were not permitted to discuss their wage rates with their colleagues.

Respondent's Business Justification for the Non-Solicitation Language Contained in Its Employment Agreement

Cohen-Ansari testified that the purpose of the non-solicitation clause was to protect the hospital system when a physician leaves the organization so that they don't take other Mount Sinai or Icahn School employees with them. (Tr. 354, 378). She explained that physicians are leaders in her organization, and they have a healthy amount of goodwill with the staff such that they can easily take staff with them if they move to a different employer. This domino effect disrupts patient care, negatively impacts hospital revenue, and triggers a costly and time-consuming process to recruit new physicians and staff to replace those leaving the organization.[12] (Tr. 313). Thus, the non-solicitation language is used to protect against the poaching of hospital employees – doctors, nurses, medical assistants, etc.

Analysis

The burden of proof lies with the General Counsel to establish that Mount Sinai Health System, Inc. is an employer within the meaning of Section 2(2) of the Act. *Construction and General Laborers Local 1177 (Qualicare-Walsh, Inc.),* 269 NLRB 746 (1984). An "employer" under Section 2(2) of the Act is one that employs statutory employees. *International Union of Operating Engineers Local 487 Health and Welfare Trust Fund,* 308 NLRB 805 (1992). Mount Sinai Health System Inc.'s tax return confirms that it has no employees and Jodi Cohen-Ansari's detailed, credible testimony establishes that all physicians working at the Mount Sinai-affiliated hospitals are employees of the Icahn School. Counsel for the General Counsel has offered no evidence to the contrary.

The parties' stipulation memorialized in Joint Exhibit 1 provides the factual underpinnings for the commerce information necessary to establish jurisdiction. And the parties specifically stipulated to the legal conclusion that Mount Sinai Health System, Inc. is an employer within the meaning of Section 2(2) of the Act. Under federal law, stipulations and admissions in pleadings are generally binding on parties and the court. *PPX Enterprises, Inc. v. Audiofidelity, Inc.,* 746 F.2d 120, 123 (2nd Cir. 1984). A court, however, "is not bound to accept stipulations regarding questions of law, nor may the parties create a case by stipulating to facts that do not exist." *Sinicropi v. Milone,* 915 F.2d 66, 68 (2nd Cir. 1990). A court may also

[12] Resp. Exhibits 7 and 8 represent business plans mapping out the extensive costs to replace departing employees. Neither of the physicians referenced in the business plans worked at Mount Sinai Queens and neither of the positions remotely resembles Weller's part-time hospitalist position.

disregard a stipulation if the evidence contrary to the stipulation is substantial. *PPX Enterprises, Inc.,* 746 F.2d at 123. Even the Supreme Court has blessed lower courts' refusal to accept what was in effect a stipulation on a question of law. *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.,* 508 U.S. 439, 448 (1993).

In this case, the record evidence is clear that Mount Sinai Health System, Inc. does not employ any statutory employees. To this end, Cohen-Ansari testified credibly that Mount Sinai Health System, Inc. does not employ any physicians and that all part-time hospitalists working at Mount Sinai Queens, and all other affiliated hospitals within the Mount Sinai System, are directly employed by the Icahn School. Additionally, Mount Sinai Health System Inc.'s tax returns indicate that it does not have any employees, and its bylaws confirm that it is not authorized to provide hospital-related services in the State of New York.

Counsel for the General Counsel asserts that Darrick Fuller's email tagline identifying himself as the Vice President of Audit and Compliance Services for the "Mount Sinai Health System" establishes Mount Sinai Health System, Inc. as an employer of statutory employees under Section 2(2) of the Act. I do not agree. The record is bereft of any specific evidence identifying Fuller's actual employer – Fuller did not testify nor did any other witness testify in detail about Fuller's employment. It is the General Counsel's burden to establish that Mount Sinai Health System, Inc. has statutory employees – and this sliver of evidence, without more, fails to satisfy this burden of proof.[13]

In its post-hearing brief, the General Counsel, for the first time in this case, asserts that Mount Sinai Health System, Inc. was a direct participant in the development and use of the employment agreement and is, therefore, liable for any violation of the Act. In support of this theory, the General Counsel cites to *Wyndham International, Inc.,* 330 NLRB 691, 693 (2000) for the proposition that "for a parent to be liable for the unfair labor practices of its subsidiary, there must be a showing of the parent's 'direct participation' in the unlawful conduct."[14] Counsel for the General Counsel further cites to *Bannum of Saginaw, LLC,* for the proposition that "due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated." 372 NLRB No. 97, slip op. at 11 (2023).

Contrary to the General Counsel, I find that the absence of pleadings either naming the Icahn School as a co-respondent or laying out any theory of derivative liability in the body of the complaint fail to satisfy due process requirements. And even if the General Counsel could clear the due process hurdle, I find insufficient evidence to support a finding of liability based on the direct participation theory.

In all the cases cited by the General Counsel, multiple respondents were named in the complaint and at a minimum, the broadest strokes of derivative liability were laid out in the

[13] Given Fuller's title as a "Vice President," it is far more likely that he is a supervisor under Section 2(11) of the Act or a managerial employee.

[14] In *Wyndham,* the General Counsel initially pled the direct employer of the employees as the respondent. At the hearing, the General Counsel added the parent company as a named respondent. Here, the General Counsel has refused to add Dr. Weller's direct employer as a named respondent.

pleadings. For example, the General Counsel relies on *Massey Energy Co.,* 358 NLRB 1643 (2012), for the proposition that although the complaint did not allege a specific theory of derivative liability, it is permissible for the Board to rely on the post-hearing brief asserting single employer status as one basis for specifically finding the two employers constituted a single employer. In *Massey,* the General Counsel named Massey and its subsidiary Mammoth Coal in the underlying complaint as respondents. The Board noted that the complaint alleged a theory of Massey's broad, encompassing liability for Mammoth's conduct, describing the parties as acting as agents of each other regarding all relevant conduct. And due to the broad, but ambiguous nature of the General Counsel's theory of the case, the Board invited the parties to file supplemental briefs regarding the Board's authority to consider whether Massey and Mammoth were a single employer. *Id.* at 1650.

Unlike in *Massey,*[15] the General Counsel here did not plead the Icahn School as a respondent in the underlying complaint and there is no allegation that the Icahn School acted as an agent of Mount Sinai Health System, Inc., or was in any other way connected to the alleged unlawful acts here. The complaint instead alleges that Mount Sinai Health System, Inc. employed part-time physicians and that Mount Sinai Health System, Inc. requires its physician employees to abide by the confidentiality and non-solicitation clauses in the part-time physician employment agreement. In fact, the only reference to the Icahn School in the complaint is a reference to the "School" in the non-solicitation language quoted in the complaint. But nothing in the complaint attaches a name to the "School."

Counsel for the General Counsel next relies on *Costa Mesa Cars, Inc.,* 366 NLRB No. 154 (2018), for the proposition that a respondent is a direct participant based on its superseding role in its subsidiary's alleged distribution and maintenance of arbitration agreements despite not having employees and not qualifying as an employer under the Act. Counsel for the General Counsel's reliance on this case is misplaced. Although the Administrative Law Judge in *Costa Mesa Cars* found that the parent company (AutoNation, Inc.) did not have any statutory employees, she found AutoNation, Inc. liable under the direct participation theory proffered by the General Counsel. But the Board never ruled on the direct participation finding or any other issue related to derivative liability. The Board, instead, dismissed this case based on the then-recent *Epic Systems Corp. v. Lewis,* 584 U.S. 497 (2018) Supreme Court decision concerning the maintenance of arbitration agreements. *Costa Mesa Cars* is distinguishable from our case on many fronts. First, the underlying complaint in *Costa Mesa Cars* named AutoNation, Inc. as a respondent in addition to Costa Mesa Cars and two other related entities. Next, the pleadings in the complaint alleged that both Costa Mesa and AutoNation, Inc. maintained the arbitration agreements in dispute in that case and that both entities required employees to sign the agreement as a condition of employment. In our case, however, the Icahn School was not pled as a respondent in the complaint, the complaint did not allege that the Icahn School had a legal connection to Mount Sinai Health System, Inc., nor did the complaint allege that the Icahn School maintained the confidentiality or non-solicitation provisions at issue in this case.

[15] This case was decided by a panel of Board members whose recess appointments were found to be unconstitutional in *NLRB v. Noel Canning,* 573 NLRB 513 (2014). Thus, this case has no precedential value.

Counsel for the General Counsel also relies on *Esmark, Inc.,* 315 NLRB 763 (1994) to supports its belief that the Icahn School can be found derivatively liable for unfair labor practices based on its direct participation in wrongful conduct even absent a finding of an identity-based theory such as single or joint employer status. The Board in *Esmark* noted that Section 8(a)(3) permits a finding of liability with respect to employers not standing in a direct employment relationship with affected employees. *Id.* at 764. The Board stated that in cases where violations of Section 8(a)(3) are alleged "an employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affect the working conditions of the latter's employees because of the union activities of said employees." *Id.* at 768, quoting *Dews Construction,* 231 NLRB 182, 182, fn. 4 (1977). But the *Esmark* case relied on by the General Counsel began its administrative hearing journey as *Swift Independent Corp.* 289 NLRB 423 (1988), where it was alleged that Swift and Esmark, along with several other entities, were joint and single employers, as well as alter egos. Such a pleading stands in stark contrast to our case, where the General Counsel seeks to attach liability to the Icahn School even though the complaint did not allege the Icahn School to be a bad actor. Furthermore, *Esmark* involved violations of Sections 8(a)(3) and (5) of the Act, neither of which applies to our case, and the Board in *Esmark* explicitly declined to find violations based on the direct participation theory. *Esmark, Inc.,* 315 NLRB at 763, 767.

Additionally, in *Bannum Place of Saginaw, LLC,* 372 NLRB No. 97 (2023), the Board adopted the Administrative Law Judge's finding that the respondents Bannum Place of Saginaw, LLC and Bannum, Inc. were single employers and responsible for backpay awards deriving from an earlier Board decision. In an amended compliance specification that issued more than three months prior to the compliance hearing, the General Counsel alleged for the first time that the two entities were single and/or joint employers. *Id.* at slip op. 2. This amended compliance specification also laid out a direct participation theory of liability. In her decision, the Administrative Law Judge found that the facts supported a finding that Bannum Inc. directly participated in the affairs of Bannum Saginaw, including its labor relations. The Judge noted that Bannum, Inc.'s officers hired and terminated employees, provided benefits as directed by Bannum, Inc's handbook, and directly participated in the decisions to fire the two discriminatees in that case. *Id.* The Administrative Law Judge also found that the two entities were single employers, and it was this specific finding that the Board affirmed in its decision.[16] Like with the above-referenced cases, the facts in *Bannum* are distinguishable from our case. To this end, the General Counsel in *Bannum* specifically pled its derivative liability theories in its amended compliance specification, allaying any due process concerns. In our case, the General Counsel did not plead the Icahn School as a respondent or as a bad actor in any way connected to the allegedly unlawful employment agreement provisions.

As for evidence of direct participation, Counsel for the General Counsel asserts that Mount Sinai Health System, Inc.'s officers and directors signed the employment agreement's offer letter and standard terms, along with officials from Mount Sinai Hospital and Mount Sinai Queens. Counsel for the General Counsel also relies on evidence showing that Mount Sinai Health System, Inc. wholly owns and controls the Icahn School, these entities share legal representation and failed to abide by corporate procedures and formalities in developing the employment agreement. But the record evidence simply does not bear this out. To this end, the

[16] The Board did not address the direct participation theory in its decision.

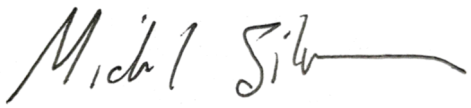
only record evidence adduced regarding the drafting of the employment agreement came from Cohen-Ansari. She testified that she had a hand in drafting the employment agreement along with legal counsel. Cohen-Ansari testified that she is directly employed by Mount Sinai Hospital and there is no record evidence clarifying whether the legal counsel responsible for drafting this agreement worked for Mount Sinai Hospital, the Icahn School, Mount Sinai Health System, Inc., none of the above, or all of the above. Furthermore, Dr. Weller's offer letter and employment agreement were cosigned by higherups from Mount Sinai Queens and the Icahn School. While GC Exhibit 2 also shows that the CEO, COO, and co-chairmen of the Board of Trustees for the "Mount Sinai Health System" approved the terms in the employment agreement, there is no record evidence showing they participated in the drafting of this language or that they were even employees of Mount Sinai Health System, Inc.[17]

Because the General Counsel has failed to establish that Mount Sinai Health System, Inc. employs statutory employees and due process concerns prohibit a finding of derivative liability, or any other legal theory, connecting the Icahn School to Mount Sinai Health System, Inc. without the proper notice and pleadings, the complaint allegations must be dismissed.

ORDER

The complaint in this case is dismissed in its entirety.[18]

Dated, Washington, D.C. December 31, 2024



Michael P. Silverstein
Administrative Law Judge

[17] There is no doubt that there is a lot of overlap in Mount Sinai's governance – a case for single employer status could potentially be made out – but that is not my charge here. Counsel for the General Counsel repeatedly refused my overtures to amend its complaint to specifically name the other entities it believed should be liable for the alleged unlawful conduct here, and to identify the specific nature of the interrelationship between these entities (e.g. single employer or joint employer). Therefore, I am tasked to decide whether Mount Sinai Health System, Inc. is an employer under the Act and whether due process has been given to the Icahn School even though they were not named in the complaint or alleged to have a legal attachment to Mount Sinai Health System, Inc. as it relates to the above-referenced employment agreement. Because I find that the record evidence does not establish that Mount Sinai Health System, Inc. is an employer under the Act and due process has not been afforded to the Icahn School for it to be found liable under a theory of derivative liability, and Counsel for the General Counsel has not carried its burden to show Mount Sinai Health System, Inc. is a direct participant in the unfair labor practices here, I do not reach the issue of the legality of the confidentiality or non-solicitation language contained in the above-referenced employment agreement,

[18] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.