UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE UNIVERSITY OF CHICAGO

and **Case No. 13-RC-198325**

GRADUATE STUDENTS UNITED, AFFILIATED WITH THE ILLINOIS FEDERATION OF TEACDHERS, THE AMERICAN FEDERATINO OF TEACHERS AND THE AMERICAN ASSOCIATION OF UNIVERISTY PROFESSORS, AFL-CIO

OCTOBER 12, 2017

MOTION TO INTERVENE AND FOR RECUSAL

Graduate Workers of Columbia-GWC, UAW, ("GWC"), hereby respectfully moves to intervene in this matter for the limited purpose of filing a Motion for Recusal by Board Member Kaplan. The Moving Party is the petitioner in *The Trustees of Columbia University in the City of New York*, Case No. 02-RC-143012 ("the *Columbia* case"), which is pending before the Board. GWC has an interest in this matter because a decision here may have an impact on the disposition of the *Columbia* case. Member Kaplan has recused himself from participation in any cases involving the Trustees of Columbia University, including Case No. 02-RC-143012, because that entity employs his wife. For the same reasons that Member Kaplan has recused himself from participating in the *Columbia* case, he should also recuse himself from cases in which a party is asking the Board to overrule a prior Board holding in the very case that Member Kaplan has recused himself from and in any case in which a decision could dictate the result in Case No. 02-RC-143012. This is such a case for both of those reasons.

I. THE MOVING PARTY'S INTEREST IN THIS MATTER

The petition in Case No. 02-RC-143012 was filed on December 17, 2014, seeking a unit of student employees of Columbia University. The employer in that case is The Trustees of Columbia University in the City of New York. On August 23, 2016, the Board held that the student employees are "employees" within the meaning of section 2(3) of the Act, entitled to the protections of the Act, and ordered an election in the petitioned-for unit. *The Trustees of Columbia University in the City of New York*, 364 NLRB No. 90. The election resulted in a vote of 1602 to 623 in favor of representation by GWC, a margin of more than 2½ to 1. Columbia filed objections, and on March 6, 2017, the Hearing Officer issued her report recommending that those objections be overruled. On March 17, Columbia filed exceptions to the Hearing Officer's report. Those exceptions remain pending before the Board.

In the meantime, elections have been directed by regional directors in units of student employees in *Boston College,* Case No. 01-RC-194148 and *University of Chicago,* Case No. 13-RC- 198325. The respective university in each of those cases has filed a request for review, arguing, *inter alia*, that the *Columbia* decision that student employees are protected by the Act should be overruled. A decision in either of these cases overruling *Columbia* could have an impact on the pending *Columbia* case. As Member Kaplan has a conflict of interest that prevents him from deciding any cases involving the Trustees of Columbia University, it would similarly be improper for him to decide a case that could determine the result of the *Columbia* case. GWC has an

interest in protecting the integrity of the decision-making process in the *Columbia* case. Therefore, GWC should be permitted to intervene in this matter.[1]

II. MEMBER KAPLAN SHOULD RECUSE HIMSELF FROM THIS CASE

Section 2635.502 of the regulations governing federal Government Ethics provides:

> (a) Consideration of appearances by employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, ... and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization ....

5 C.F.R. sec. 2635.502(a). The preceding section of the regulations notes that this prohibition is intended to apply when a government employee knows that a matter "is likely to affect the financial interests of a member of his household...." 5 C.F.R. sec. 2635.501(a). The authorization process refers to 18 U.S.C. sec. 208, which provides that "whoever, being an officer or employee ... of any independent agency of the United States ... participates personally and substantially as a Government officer or employee, through decision ... in a judicial or other proceeding, application, request for a ruling or other determination, contract, claims controversy, charge, accusation, arrest or other particular matter in which, to his knowledge, ... his spouse ... has a financial interest..." without permission of the appointing authority, is guilty of a crime.

Member Kaplan has already determined that these restrictions apply to his participation in any matters involving his wife's employer, the Trustees of Columbia

[1] GWC is filing a similar motion in Case No. 01-RC-194148.

University. Thus, he has committed not to participate in any cases involving the Trustees of Columbia absent authorization (Att. A, B).[2] This commitment would seem to be mandated by both the statute and the regulations, as his wife is dependent upon Columbia for her income. The same reasoning requires Member Kaplan to also recuse himself from this case, as his wife's employer has a substantial interest in the outcome of this case where a party is asking the Board to overrule a prior holding in the very case from which Member Kaplan is recused and in which such a decision would control the outcome in the *Columbia* case.

If review is granted in either the University of Chicago or Boston College with respect to the question of whether student employees are protected by the act, the *Columbia* case may be affected. While the pending exceptions filed by Columbia do not presently raise the issue of the employee status of the unit employees, since the Board's earlier decision on the issue is the law of the case, a decision in either of these other cases would still control the outcome of the *Columbia* case. If the Board were to overrule the *Columbia* decision before any decision regarding the exceptions by Columbia University in the *Columbia* case, Columbia can be expected to ask the Board to find that it lacks jurisdiction to proceed with the *Columbia* case and to dismiss the petition. If the Board finds merit to the objections filed in the *Columbia* case, the employee status of unit employees would be relevant to whether a new election should be ordered.[3]

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[2] As Member Kaplan is a presidential appointee, 18 U.S.C. sec. 208(b)(1) requires that authorization from the president.

[3] The Moving Party believes that this is extremely unlikely, as the objections do not raise any serious questions about the validity of its overwhelming electoral victory.

For both of these reasons, the parties to the *Columbia* case, including the Trustees of Columbia University which employs Member Kaplan's wife, have an interest in the outcome of this case. The close relationship between the pending requests for review and the *Columbia* case is further revealed by the positions taken by the parties. Boston College and the University of Chicago proffer the same arguments presented by Member Kaplan's wife's employer in the *Columbia* case. Indeed, the University of Chicago is represented by the same counsel as Columbia.

In arguing that the election at Chicago should be stayed, counsel have stated that they believe that the new board members have prejudged the issue of employee status and have decided to overrule the *Columbia* decision. Under the current rules, a stay of an election is to be ordered only in "extraordinary" circumstances. As grounds for a stay, the University of Chicago states, "the current Board has a different majority than when *Columbia* was decided, and Chicago submits that it is probable that the newly constituted Board will reverse *Columbia*...." This is the sole basis upon which the University of Chicago seeks this "extraordinary relief." This argument presupposes that the new Board members have prejudged the question of whether to overrule *Columbia*. The University of Chicago's counsel apparently believes that, without considering the careful legal reasoning of the *Columbia* decision, the terms and conditions of employment of student employees, the scholarly research on the impact of collective bargaining on academic relationships, or any of the other factors relied upon by the Board in *Columbia*, that the two newly appointed Board members are ready to overrule that decision. Participation by Member Kaplan in either of these cases would reinforce the perception that the outcome of this litigation is preordained and that the petitioning

unions will not receive a fair, neutral and unbiased decision. It follows that Member Kaplan should not participate in any case in which a party is asking the Board to overrule the *Columbia* decision.

While the statutory provisions regarding recusal by judges are different from the restrictions governing employees of administrative agencies, the purpose of the rules is the same. Both are intended to guard against partiality or the appearance of partiality on the part of a decision-maker. "A fair trial in a fair tribunal is a basic requirement of due process.... To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. *American Cyanamid v. FTC*, 363 F.2d 757, 763 (6th Cir. 1966), quoting *In re Murchison*, 349 U.S. 133, 136 (1955). Thus, Board Members often look to decisions arising under the judicial recusal statute, 29 U.S.C. sec. 455, for guidance. See *Detroit Newspapers*, 326 NLRB 700, 710-13 (1988) (Chairman Gould); *Pomona Valley Hospital Medical Center*, 355 NLRB 234, 239 (Member Becker). There can be no doubt that a federal judge would be obligated to recuse himself in this situation.

Indeed, a very similar issue was presented in *Shell Oil Co. v. United States*, 6782 F.3d 1283 (Fed. Cir. 2012). That case involved a dispute between four oil companies and the federal government. During the litigation, the judge learned that his wife had inherited 97.59 shares in the corporate parent of two of those oil companies. He then recused himself from litigation involving those two companies, but he continued to hear the other two matters, ultimately rendering a decision in favor of the oil companies. The court of appeals found that it was an abuse of discretion for the judge to continue to

hear those two cases because the decision on those two cases was likely to be controlling with respect to the two companies in which his wife owned stock. Member Kaplan's wife has a much greater financial interest in ongoing employment than the judge's wife's interest in a small number of shares in a giant oil conglomerate. As in *Shell*, Member Kaplan's participation in this case could ultimately have a controlling impact on further proceedings in the *Columbia* case. Moreover, here, unlike in Shell, parties in the non-Columbia cases are actually asking the Board to overrule a decision in the still-pending Columbia case itself. Therefore, in order to avoid a conflict of interest or the appearance of bias, Member Kaplan should recuse himself in this matter.

Member Kaplan has himself recognized that ethical considerations would require that he not participate directly in the *Columbia* case because his wife is employed by the University. A reasonable person with knowledge of the facts would conclude that Member Kaplan's impartiality would be compromised if he were to participate in a separate matter where a party is explicitly arguing that the Board reverse a decision in the *Columbia* case itself and thereby render a decision that would control the outcome in the *Columbia* case.

III. CONCLUSION

The Moving Party has an interest in this proceeding, as the participation of Member Kaplan in this matter may prejudice its rights in the pending *Columbia* case in which it is the petitioner. Therefore, this motion to intervene should be granted.

For the reasons stated above, Member Kaplan should recuse himself from this matter.

Respectfully submitted,

Graduate Workers of Columbia-GWC, UAW

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ATTACHMENT A

June 22, 2017

Lori W. Ketcham
Associate General Counsel, Ethics
Designated Agency Ethics Official
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570

Dear Ms. Ketcham:

The purpose of this letter is to describe the steps I will take to avoid any actual or apparent conflict of interest if I am confirmed as a Board Member of the National Labor Relations Board.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

My spouse is employed by Columbia University Hospital. I will not participate personally and substantially in any particular matter involving specific parties in which I know Columbia University Hospital is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I understand that as an appointee I am required to sign the Ethics Pledge (Executive Order No. 13770) and that I will be bound by the requirements and restrictions therein, in addition to the commitments I have made in this and any other ethics agreement.

I will meet in person with you during the first week of my service in the position of a Board Member of the National Labor Relations Board in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I

will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

Finally, I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

Marvin Kaplan

ATTACHMENT B

Kaplan, Marvin E. EA Amendment

July 17, 2017

Lori Ketcham
Designated Agency Ethics Official
National Labor Relations Board
1015 Half Street NE, Washington, DC 20570

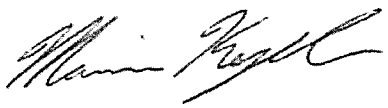
Dear Ms. Ketcham:

The purpose of this letter is to supplement my ethics agreement signed on June 22, 2017. In a separate document, I also am supplementing my financial disclosure report by amending an existing line item of my spouse's employment that I inadvertently misreported.

I originally reported my spouse's employer as Columbia University Hospital. However, my spouse's employer is the Trustees of Columbia University. Accordingly, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Trustees of Columbia University is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I have been advised that this supplement to my ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,



Marvin E. Kaplan