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April 26, 2010

VIA HAND DELIVERY

Honorable Ronald M. George, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Kevin Murray v. Alaska Airlines, Inc.*, Case No. S162570—
Supplemental Letter Brief

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Alaska Airlines, Inc. respectfully submits this supplemental brief in response to the Court's letter of April 14, 2010, directing the parties to address the following question:

> What is the relevance, if any, of the decision filed in *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal. 4th 88, to the question posed by the Ninth Circuit in this case?

The question posed by the Ninth Circuit in this case is as follows:

> Should issue-preclusive effect be given to a federal agency's investigative findings, *when the subsequent administrative process provides the complainant the option of a formal adjudicatory hearing to determine the contested issues de novo, as well as subsequent judicial review of that determination*, but the complainant elects not to invoke his right to that additional process? (Ninth Circuit Order Requesting That the Supreme Court of California Decide a Question of California Law, *Murray v. Alaska Airlines, Inc.*, 522 F.3d 920, 920 (9th Cir. 2008) (emphasis added))

The decision in *McDonald* has only limited relevance to this question for three independently adequate reasons.

First, *McDonald* is an equitable tolling case, not a collateral estoppel or judicial exhaustion case, and as the *McDonald* Court expressly recognized, "issues of judicial (or administrative) exhaustion and equitable tolling are distinct." *McDonald*, 45 Cal. 4th at 114. *See* Part I, *infra*.

Second, and perhaps most critically, the administrative process at issue in *McDonald*—unlike the administrative process at issue in this case—did *not* "provide[] the complainant the option of a formal adjudicatory hearing to determine the contested issues *de novo*." *See* 522 F.3d at 920. Accordingly, the *McDonald* decision does not, and indeed cannot, bear on the question certified to this Court. *See* Part II, *infra*.

Third, AIR21—the comprehensive federal scheme to adjudicate whistle-blowing claims that is at issue in this case—includes an express statement that failure to invoke the subsequent administrative process will result in the preliminary order being deemed "a final order that is not subject to judicial review." 49 U.S.C. §42121(b)(2)(A). This provision reflects strong federal interest in finality and efficiency and a legislative judgment that those interests are implicated if a complainant invokes but fails to complete the available administrative procedure. No such provision exists in the administrative scheme at issue in *McDonald*. This critical distinction renders *McDonald* of limited relevance to the instant case. *See* Part III, *infra*.

To the extent that *McDonald* is relevant at all to the question posed by the Ninth Circuit, it is relevant only insofar as it supports Alaska Airline's position that courts examining the applicability of judicially-created doctrines like equitable tolling and collateral estoppel in the context of administrative schemes should give weight to the legislature's intent. *See* Part IV, *infra*.

I.

McDONALD—AN EQUITABLE TOLLING CASE—HAS MINIMAL RELEVANCE BECAUSE ISSUES OF JUDICIAL EXHAUSTION AND EQUITABLE TOLLING ARE DISTINCT.

The question presented in *McDonald* was whether the statute of limitations on a California Fair Employment and Housing Act claim is equitably tolled while an employee voluntarily pursues an internal administrative remedy. This Court held that it is. *McDonald* 45 Cal. 4th at 96. In the course of its analysis, the Court discussed the defendant's argument that tolling should be "categorically unavailable" because the plaintiff "voluntarily abandoned" her pursuit of her internal grievance. *Id.* at 111. The Court rejected this argument, concluding that "principles of judicial exhaustion give us no occasion to reconsider our rule that at least with respect to a defense of *untimeliness*, incomplete alternate proceedings may suffice to support equitable tolling and avoid a

time bar." *Id.* at 114. In this context, the Court briefly addressed the doctrine of judicial exhaustion, but expressly stated that "issues of judicial (or administrative) exhaustion and equitable tolling are distinct" and that "[o]ne inquiry has little bearing on the other." *Id.* Accordingly, by its own terms the *McDonald* equitable tolling case has minimal relevance to the collateral estoppel question presented in this case.

II.

McDONALD DOES NOT BEAR ON THE QUESTION PRESENTED BECAUSE THE ADMINISTRATIVE PROCESS AT ISSUE IN *McDONALD* DID NOT PROVIDE THE COMPLAINANT THE OPTION OF A FORMAL ADJUDICATORY HEARING TO DETERMINE THE CONTESTED ISSUES *DE NOVO* OR SUBSEQUENT JUDICIAL REVIEW OF THAT DETERMINATION.

The AIR21 statute contains the Whistleblower Protection Program ("WPP"), the comprehensive federal administrative program for adjudicating whistle-blowing claims of airline employees who raise air carrier safety concerns.

Under the WPP, an employee who believes that he was retaliated against for providing air carrier safety information to his employer and/or the federal government may—but is not required to—file a complaint with the Secretary of Labor. 49 U.S.C. §42121(b)(1). The Secretary must give the defendant named in the complaint the opportunity to submit a written response to the complaint and witness statements. *Id.* §42121(b)(2)(A). The Secretary then conducts an investigation and issues a written preliminary order of her findings, either that the complaint is without merit or that there is "reasonable cause" to believe that a violation has occurred. *Id.* If the Secretary determines that the complaint has merit, the Secretary *must* order the employer to (1) take affirmative action to abate the violation, (2) reinstate the employee to his former position and award compensation, including back pay, and (3) provide compensatory damages. *Id.* §42121(b)(3)(B).

No later than thirty days after the issuance of the Secretary's preliminary order, either side may file objections to the findings and/or preliminary order, and request a hearing before an Administrative Law Judge ("ALJ") on the record. *Id.* §42121(b)(2)(A). Failure to timely request a hearing before an ALJ results in a final order that is not subject to judicial review. *Id.*; *see also* 29 C.F.R. §1979.106(b)(2) (2009).

If a hearing is requested, the ALJ must, *inter alia*, take documentary and witness evidence, maintain a record of the proceedings and issue a final order based on the evidence presented. *See* 29 C.F.R. §1979.107(a) (2009). Either party seeking to appeal

the ALJ's decision must file a petition for review with the Administrative Review Board, and a party aggrieved by the Board's decision may appeal to the local United States Court of Appeals no later than sixty days after the Board's decision is issued. 29 C.F.R. §1979.110(a) (2009); *id.* §1979.112(a) (2009); 49 U.S.C. §42121(b)(4)(A). Failure to timely file a petition of review before the appropriate circuit court results in a final order that "is not subject to judicial review in any criminal or other civil proceeding." 29 C.F.R. §1979.112(a) (2009); 49 U.S.C. §42121(b)(4)(B).

In other words, a complainant who is not satisfied with the conclusion of the Secretary has the right to obtain a "formal adjudicatory hearing to determine the contested issues *de novo*, as well as subsequent judicial review of that determination." The question posed by the Ninth Circuit is whether issue-preclusive effect should be given to a federal agency's investigative findings in these circumstances. But these are *not* the circumstances presented in *McDonald*.

Under the regulations at issue in *McDonald*, which were enacted to ensure compliance with state and federal prohibitions against unlawful discrimination, the complainant had *no* right to request or obtain a formal hearing as part of the administrative proceeding. The controlling regulations provide that the *community college chancellor* may choose to initiate a hearing pursuant to the California Administrative Procedures Act, but only if s/he finds that a district has violated the provisions of the nondiscrimination subchapter. Cal. Code Regs. tit. 5, §§59356, 59358, *cited in McDonald*, 45 Cal. 4th at 104. In other words, the *complainant* in *McDonald*—unlike Kevin Murray, the complainant here—had no right to obtain a formal adjudicatory hearing.

Accordingly, since the administrative proceeding at issue in *McDonald* does not involve a subsequent administrative process that provides the complainant the option of a formal adjudicatory hearing to determine the contested issues *de novo*, the opinion in *McDonald* has no bearing on the question posed by the Ninth Circuit in this case.

III.

McDONALD HAS MINIMAL RELEVANCE BECAUSE THE ADMINISTRATIVE SCHEME AT ISSUE IN *McDONALD* DID NOT PROVIDE THAT FAILURE TO INVOKE THE SUBSEQUENT ADMINISTRATIVE PROCESS WOULD RESULT IN A FINAL, NON-REVIEWABLE ORDER.

The administrative process at issue in *McDonald* is also distinguishable from the process at issue in this case for another critical reason. AIR21 explicitly states that once the Secretary issues a decision, either side may file objections to the findings and/or

preliminary order and request a hearing before an Administrative Law Judge, but that failure to timely request a hearing before an ALJ results in a final order that is not subject to judicial review. 49 U.S.C. §42121(b)(2)(A); *see also* 29 C.F.R. §1979.106(b)(2) (2009). Murray was specifically told of this consequence. Indeed, as noted by the Ninth Circuit:

> The Secretary's letter closed by notifying Murray that he had "important rights of objection which must be exercised in a timely fashion." "AIR21 permits an aggrieved party, **WITHIN 30 DAYS** . . . to file objections with the Department of Labor and to request a hearing on the record before an Administrative Law Judge." (Emphasis in original.) The letter also warned that if "no objections are filed **WITHIN 30 DAYS**, this decision shall become final and not subject to judicial review." (Emphasis in original.) (522 F.3d at 922)

No such finality provision is included in the nondiscrimination regulations at issue in *McDonald*. To the contrary, the opinion in *McDonald* specifically notes that the complainant in that case was told by the Chancellor's Office that "she could file a FEHA complaint with the Department of Fair Employment and Housing [which is the prerequisite to filing a lawsuit in the superior court] *at any time*." *McDonald*, 45 Cal. 4th at 97 (emphasis added). Moreover, she was specifically informed by the District that:

> [T]he Chancellor's Office does not have primary jurisdiction over employment related cases and in order to obtain a final determination, you must file your complaint with the Department of Fair Employment and Housing. . . . You may file a complaint with DFEH at any[ ]time before or after the [D]istrict issues its report and you may do so whether or not you also submit objections to the Chancellor's Office. (*Id.* at 98)

Given this dramatic difference between the administrative procedures, and the fact that Murray was explicitly warned of the consequences of failing to object to the Secretary's decision (consequences that were not implicated in *McDonald*), it would be inappropriate to apply the dicta in *McDonald* concerning the preclusive effect of the Chancellor's decision to the Secretary's final and non-reviewable order in this case.

IV.

MCDONALD SUPPORTS ALASKA AIRLINE'S POSITION THAT COURTS SHOULD GIVE WEIGHT TO THE LEGISLATIVE INTENT OF THE LEGISLATIVE BODY THAT ENACTED THE ADMINISTRATIVE SCHEME.

To the extent the opinion in *McDonald* is relevant at all, it supports the argument, made by Alaska Airlines in this case, that courts asked to review whistle-blower claims should respect the principles of finality and efficiency that underlie 49 U.S.C. §42121(b). *See* Alaska Airlines' Opening Brief on the Merits ("AAOB") at 18-20; Alaska Airlines' Reply Brief on the Merits ("AARB") at 7-9.

In *McDonald*, this Court devoted substantial time and effort to discerning the legislative policies underlying the statutes at issue. *McDonald*, 45 Cal. 4th at 105-10. It did so in order to avoid applying the judicially created doctrine of equitable tolling in a manner that contravened the legislature's intent. *Id.* at 105. *McDonald* thus teaches that discerning and effectuating relevant legislative policies is a critical step in assessing the applicability of judicially-created doctrines like equitable tolling and collateral estoppel in the context administrative procedures.[1] Following that teaching here leads inexorably to the conclusion that collateral estoppel effect should be given to the decision of the Secretary of Labor in this case.

There can no dispute that a strong federal interest in finality and efficiency underlie §42121(b)'s mandate that failure to timely request a hearing before an ALJ results in a final order that is not subject to judicial review. Refusing to give collateral estoppel effect to the Secretary's final order would not only fail to effectuate—but would in fact *directly contravene*—these legislative principles. Under *McDonald*, this is neither proper or permissible.

Moreover, the opinion in *McDonald* also supports Alaska Air's argument that the application of collateral estoppel here will promote important policies embodied in California collateral estoppel law, such as promoting judicial economy. *See* AAOB at 21-22; AARB at 8. The *McDonald* Court noted that refusing to allow equitable tolling while a complainant exhausts a voluntary administrative remedy would "encourage duplicative filings, with attendant burdens on plaintiffs, defendants, and the court system." *McDonald*, 45 Cal. 4th at 102. Similarly, refusing to give preclusive effect to

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[1]Like equitable tolling, collateral estoppel is a judicially created, non-statutory doctrine. *see Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480 (1982).

the Secretary's decision in this case would result in the same unwanted and inefficient result.

Accordingly, even if the Court does not believe that collateral estoppel effect should be given to *all* administrative decisions where the subsequent administrative process provides the complainant the option of a formal adjudicatory hearing, respect for the federal policies of finality and efficiency embodied in AIR21's determination that failure to invoke the subsequent process results in a final non-reviewable order mandate that preclusive effect be given to the Secretary's final and non-reviewable order in this case.

Sincerely,

David J. Reis
Attorney for Alaska Airlines, Inc.

cc: James P. Stoneman II (Proof of Service attached)

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PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024.

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U.S. Court of Appeals
Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on April 26, 2010.

Gigi T. Ferrer

GIGI FRANCISCO-FERRER