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May 3, 2010

SUPREME COURT
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Frederick K. Ohlrich Clerk
Deputy

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 Reply Brief

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

By Order dated April 14, 2010, this Court asked both parties to provide supplemental briefs addressing "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." In the parties' opening briefs, which were submitted on April 26, 2010, both parties agreed that the *McDonald* opinion has little relevance to the question presented. *See* Murray's Supplemental Brief, Dated April 26, 2010 ("MSB") at 1 ("In our view, the decision in *McDonald* has little bearing on the answer to the question"); Alaska Airline's Supplemental Letter Brief, Dated April 26, 2010 ("AASB") at 1-4 (explaining why "the decision in *McDonald* has only limited relevance to this question").

Moreover, both parties agreed that the *McDonald* Court's discussion of judicial estoppel was dicta—not a precedential holding of the Court. *See* MSB at 2 (discussing "this Court's analysis of the doctrine of judicial estoppel in *McDonald* (which we do not understand to constitute a holding of the case)"); AASB at 5 (explaining why "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").

In fact, the only thing the parties *disagree* on is the import of this judicial estoppel dicta. Murray contends that this dicta provides "relevant guidance" to the question presented in this case because the administrative proceeding at issue in *McDonald* was

similar to the proceeding at issue here. MSB at 2. Not so. As explained in our April 26 brief:

- Under the terms of AIR21, Murray had the right to request and obtain a formal adjudicative hearing before an Administrative Law Judge to determine the contested issue *de novo*. The complainant in *McDonald* did not. Under the administrative scheme at issue in *McDonald*, the chancellor—not the complainant—could initiate a formal hearing pursuant to the Administrative Procedures Act. Cal. Code Regs. tit. 5, §§59356, 59358, *see also* AASB at 3-4.

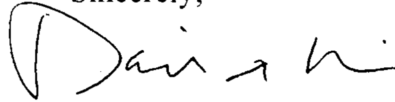
- Pursuant to §42121(b)(2)(A), Murray's failure to object to the Secretary's decision and request an adjudicative hearing automatically resulted in a final order that is not subject to judicial review. The complainant in *McDonald* was not subject to any similar rule. To the contrary, as the complainant in *McDonald* was expressly informed, she was free to "file a complaint with [the Department of Fair Employment and Housing] at any[ ]time before or after the [D]istrict issues its report," and was permitted to "do so whether or not [she] also submit[ted] objections to the Chancellor's Office." *McDonald*, 45 Cal. 4th at 98; *see also* AASB at 4-5.

These are meaningful and important distinctions. Given that the question posed by the Ninth Circuit is whether "issue-preclusive effect [should] 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*," the fact that the complainant in *McDonald* did *not* have the option to request such a hearing renders *McDonald* effectively irrelevant. AASB at 3-4. And given the *McDonald* Court's emphasis on the importance of effectuating legislative intent, the strong federal interest in finality and efficiency reflected in §42121(b) distinguishes this case from *McDonald* and counsels in favor of giving preclusive effect to the Secretary's final and non-reviewable decision in this case. AASB at 4-7.

In sum, where—as here—the complainant had the option to initiate a formal adjudicatory hearing and there is language in the administrative scheme that evidences a

strong legislative interest in finality and efficiency, this Court should give preclusive effect to the investigative decision.

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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On May 3, 2010, I served the following document(s) described as **SUPPLEMENTAL LETTER REPLY BRIEF** on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, 7th Floor, San Francisco, California, to be served by mail addressed as follows:

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Clerk of the Court
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 May 3, 2010.

GIGI FRANCISCO-FERRER