UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ALDEN LEEDS, INC., **Respondent Employer,** **and** **UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1245,** **Charging Party.**	**Case: 22-CA-29188**

RESPONDENT ALDEN LEED'S OPPOSITION TO THE CHARGING PARTY'S MOTION TO STRIKE RESPONDENT'S EXCEPTIONS #11, 12 AND 13 AND PORTIONS OF RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS

The Charging Party, United Food and Commercial Workers Union Local 1245 (hereafter "Charging Party" or "Union"), has filed a motion to strike Respondent's exceptions #11, 12 and 13 and portions of Respondent's brief in support of its exceptions. For the reasons set forth below, the Charging Party's motion should be denied.

Respondent's Exceptions # 11, 12 and 13 are as follows:

> 11. Exception is taken to the ALJ's finding that the Union negotiated in good faith throughout the weeks leading up to the lockout. This exception is taken in light of the undisputed evidence in the record that: (1) Respondent agreed to a 30-day extension of the Agreement and repeatedly indicated its willingness to engage in negotiations for a new agreement in the weeks leading up to the lockout but the Union failed and refused to negotiate with Respondent during this entire period, except for two brief sessions in 30 days; (2) Respondent sent numerous communications to the Union during this critical period to which the Union did not even bother to respond.

12. Exception is taken to ALJ's crediting of the hearing testimony of Union President Vincent DeVito with respect to the circumstances and events leading to the November 3, 2009 lockout. This exception is taken in light of numerous demonstrable inconsistencies and falsehoods contained in DeVito's hearing testimony, including DeVito's sworn testimony that: (1) he needed to confer with counsel just prior to the lockout but was unable to reach counsel, a statement refuted by the sworn testimony at the hearing by DeVito's direct subordinate, John Tricoli, the Union's Secretary-Treasurer; and (2) he was never previously involved in an employer lockout, notwithstanding that, in fact, DiVito was personally involved in a prior lockout with the very same employer.

13. Exception is taken to ALJ's crediting of the hearing testimony of Union Officers John Tricoli and Tom Cunningham with respect to the circumstances and events leading to the November 3, 2009 lockout. This exception is taken in light of the of the critical sworn statements of Tricoli and Cunningham in support of the Charging Parties' remaining claims against Respondent, *all of which were rejected by the ALJ in their entirety.*

Respondent's brief point headings in support of Exceptions 11, 12 and 13 are as follows:

III. ALTHOUGH NOT NECESSARY TO THE REVERSAL OF THE ALJ'S RECOMMENDATION (AS TO THE PRE-LOCKOUT NOTICE ISSUE) THAT IS MANDATED BY THE ARGUMENTS SET FORTH IN POINTS I AND II, SUPRA, IT IS NEVERTHELESS RELEVANT TO THE BOARD'S CONSIDERATION OF THIS ISSUE THAT THE ALJ'S RECOMMENDATION IS PREMISED IN PART ON THE ALJ'S FINDING THAT THE UNION NEGOTIATED IN GOOD FAITH THROUGHOUT THE WEEKS LEADING UP TO THE LOCKOUT. HOWEVER, A REVIEW OF THE RECORD INSTEAD DISCLOSES ABUNDANT EVIDENCE OF THE UNION'S BAD-FAITH CONDUCT, INCLUDING: (1) THE FACT THAT RESPONDENT AGREED TO A 30-DAY EXTENSION OF THE AGREEMENT AND REPEATEDLY INDICATED ITS WILLINGNESS TO ENGAGE IN FACE-TO-FACE NEGOTIATIONS FOR A NEW AGREEMENT BUT THE UNION FAILED AND REFUSED TO ENGAGE IN FACE-TO-FACE NEGOTIATIONS AT ANY TIME DURING THE PERIOD FROM OCTOBER 8 WHEN THE EXTENSION AGREEMENT WAS EXECUTED TO NOVEMBER 3 WHEN IT EXPIRED; AND (2) RESPONDENT SENT NUMEROUS COMMUNICATIONS TO THE UNION DURING THIS CRITICAL PERIOD TO WHICH THE UNION DID NOT EVEN BOTHER TO RESPOND. (EXCEPTION 11)

IV. ALTHOUGH NOT NECESSARY TO THE REVERSAL OF THE ALJ'S RECOMMENDATION (AS TO THE PRE-LOCKOUT NOTICE ISSUE) THAT IS MANDATED BY THE ARGUMENTS SET FORTH IN POINTS I AND II, SUPRA, IT IS NEVERTHELESS RELEVANT TO THE BOARD'S CONSIDERATION OF THIS ISSUE THAT THE CREDIBILITY OF UNION REPRESENTATIVES TROCCOLI CUNNINGHAM AND DEVITO ARE SEVERELY UNDERCUT ON THIS RECORD (EXCEPTIONS 12 AND 13).

A. The ALJ's recommendation of dismissal of the Union's "inability to pay" claim based on the ALJ's rejection of the credibility of the testimony of Troccoli and Cunningham

B. The ALJ's recommendation of dismissal of the Union's "relocation threat" claim based on the ALJ's rejection of the credibility of the testimony of Union Shop Steward Simon Hemby, as well as the testimony of Troccoli and Cunningham

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LEGAL ARGUMENT

The Union's motion to strike the Respondent's Exceptions #11, 12 and 13 is without basis in fact or law. Respondent's Exceptions #11, 12 and 13, in substance, challenge the ALJ's credibility determinations with respect to testimony of the Union's witnesses concerning the key issues in this case. Those credibility determinations are properly before the Board.

The NLRB is free to accept or reject an Administrative Law Judge's recommendations, and it may add to the accepted recommendations any other orders it deems warranted by the evidence and the Board's own findings. NLRB v. Oregon Worsted Co., 94 F2d 671, 672 (9th Cir. 1938). Furthermore, the Board is free to draw different inferences from the facts and may reach different legal conclusions. Pirelli Cable Corp. v. NLRB, 141 F3d 503, 514 (4th Cir. 1998). Finally, although the NLRB ordinarily should give weight to the factual findings and credibility assessments of an Administrative Law Judge who had an opportunity to observe the witnesses, the NLRB's power to reverse a judge's findings of facts is not limited to findings that are "clearly erroneous." Universal Camera Corp. v. NLRB, 340 U.S. 474, 492 (1951).

Thus, the NLRB need not defer to the ALJ's recommendations (including the ALJ's credibility assessments), and is fully empowered to review the entire record, and draw different inferences from the facts and may different legal conclusions than those reached by the ALJ. See id. Therefore, questions of the Union witnesses' credibility -- and of the Union's good faith in the collective bargaining process -- are properly before the Board.

As set forth in our Initial Brief in support of Exceptions, we stress that the Exceptions #11, 12 and 13 -- although **not necessary** to the reversal of the ALJ's recommendation (as to the pre-lockout

notice issue) that is mandated by the arguments set forth in Points I and II of our Initial Brief -- are nevertheless **relevant** to the Board's consideration of the overall issues that underlie this case. As previously noted, those overall issues include: (1) the Union witnesses's credibility; and (2) the Union's good faith in the collective bargaining process. There can be no question that the Board has jurisdiction and authority to consider and determine these issues, and, hence, Exceptions # 11, 12 and 13 are properly before the Board. See Universal Camera Corp. v. NLRB, supra, 340 U.S. at 492 (holding that, although the NLRB ordinarily should give weight to the factual findings and credibility assessments of an Administrative Law Judge who had an opportunity to observe the witnesses, the NLRB's power to reverse a judge's findings of facts is not limited to findings that are "clearly erroneous").

CONCLUSION

For the above reasons, the Union's motion to strike Exceptions # 11, 12 and 13 is properly denied.

Respectfully Submitted,

Sokol Behot and Fiorenzo
Attorneys for Respondent Alden Leeds, Inc.

By: *____/s/ Joseph B. Fiorenzo__*
Joseph B. Fiorenzo

Dated: November 18, 2010