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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TWENTY FIVE

COUPLED PRODUCTS, LLC,	)	
	)	
and	)	Case No. 25-CA-062263
	)	25-CA-031883
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE,	)	
AEROSPACE AND AGRICULTURAL IMPLEMENT	)	
WORKERS OF AMERICA, UAW,	)	
	)	
	)	
	)	

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**RESPONDENT’S ANSWERING BRIEF TO COUNSEL  
FOR THE GENERAL COUNSEL’S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Coupled Products, LLC files this Answering Brief in response to Acting General Counsel’s Exceptions to the Decision of the Administrative Law Judge issued in this matter on June 20, 2012.<sup>1</sup>

**I. INTRODUCTION**

This case deals with the Union’s unreasonable demands to audit the Company’s books during contract negotiations that occurred in May and June 2011, despite repeated Company representations that it was not claiming to be unable to continue paying the wages and benefits demanded by the Union. The Company informed the Union that it sought to achieve labor cost savings at the Columbia City facility, stating that it was not competitive, that the Columbia City

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<sup>1</sup> In this brief the Administrative Law Judge will be referred to as “the ALJ;” the International Union, United Automobile Aerospace and Agricultural Workers of America, UAW, will be referred to as “Union;” and counsel for the Acting General Counsel will be referred to as “CGC.” With respect to record developed in this case, citations to pages in the transcript will be designated as “Trans.” followed by the page number. The General Counsel’s exhibits will be designated as “GCX” followed by the exhibit number. Respondent’s (Coupled Products, LLC) exhibits will be designated as “R” followed by the exhibit number. References to the ALJ’s decision will be designated “ALJD” followed by the page.

facility was losing money, and that it was not willing to continue operate the Columbia City facility with its current labor cost structure. At no time, however, did the Company state that it was losing money as a company, that it was contemplating bankruptcy, or was unable to continue paying the wages and benefits demanded by the Union. The Company actually indicated its willingness to continue to operate the Columbia City facility if it could operate at break-even level or even at a slight loss, in order to maintain a manufacturing presence in the United States. Ignoring the Company's repeated assurances that it was not claiming to be unable to pay, the Union continued to demand to audit the Company's books. Because the Company had never claimed to be unable to pay the wages and benefits demanded by the Union, it refused to submit to the Union's requests to audit its books.

The Union filed unfair labor charges alleging that the Company had refused to provide it with the financial information that it had requested. Counsel for the Acting General Counsel "CGC" filed a Consolidated Complaint, which alleged that the Company refused to furnish the Union with its financial records. (Compl. at ¶ 5(d), ¶ 5(f)). Consequently, the Complaint alleged that the parties had not reached a valid impasse, that the Company had unilaterally altered the terms and conditions of employment, and that the Company's purported unfair labor practice charge caused or prolonged the Union's strike. (*Id.* at ¶ 6-7).

On June 20, 2012, ALJ Mark Carissimi held that the Company did not violate Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to permit the union to audit its financial records and dismissed that allegation in the Complaint. (ALJD at 19). After the ALJ found that the Company did not violate the Act by refusing to allow the union to review and audit its financial records, he also (1) found that the parties were at a valid impasse when the Company implemented its final offer, and dismissed the complaint allegation that the Company

violated Section 8(a)(5) of the National Labor Relations Act when it implemented its final offer; and (2) found that the Union's strike is an economic strike, rather than an unfair labor practice strike.

CGC filed 20 exceptions to the ALJ's decision which disagree with the ALJ accepting the uncontested evidence submitted by Respondent with the balance of exceptions dealing with the Board's disagreement with the ALJ's credibility determinations.<sup>2</sup> CGC also contests the ALJ's accurate assessment of the documentary evidence which plainly showed that the CGC had failed in its burden of demonstrating that Respondent had inappropriately denied the Union's request for a full Union audit of the Respondent's financial records.<sup>3</sup> Specifically, CGC failed in presenting any evidence or law to support its position that the Union was entitled to an audit of Respondent's books; or that the parties had not reached impasse at the time impasse was declared by Respondent. CGC continues to cling to her failed arguments that Respondent indicated an inability to pay, which assertion was shown to lack merit by the Union's own notes, the Board's witnesses, as well as Respondent's evidence. CGC continues to cling to its misplaced assertion that the parties were not at valid impasse, attempting to bootstrap the Company's refusal to give a financial audit of its entire company books, and ignoring the uncontested evidence at the hearing that the parties had reached a point at which neither side was moving and neither side willing to accept the other side's position. Finally, CGC continues to cling to its belief that the strike engaged in since June of 2011 by the Union is an unfair labor practice strike as opposed to an economic strike. CGC continues to maintain this position despite the stipulation between **all** of the striking members of the Union and the Company that

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<sup>2</sup> CGC labels its exceptions both alphabetically and numerically. For ease of reference within this brief, Respondent will refer to them numerically.

<sup>3</sup> The undisputed evidence is that the employer engaged in research and preparation for the negotiations while the Union actually conducted no independent research and merely plucked its negotiating position from air. If either party were deemed to have negotiated in bad faith, the evidence would suggest it was the Union.

the employees had been permanently replaced, a position that is inconsistent with their position that they are engaged in an unfair labor practice strike.

As will be more fully detailed below, each of CGC's exceptions are without merit. The ALJ's Findings of Fact, credibility resolutions, and conclusions of Law are supported by the evidence contained in the records, as well as supported by legal precedent. As such, the ALJ's decision should be adopted by the Board.

## **II. STATEMENT OF FACTS**

### **A. BARGAINING HISTORY**

The International United, Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 2049 ("the Union") is the certified representative of all production and hourly employees employed by the Company at its Columbia City, Indiana facility ("the Columbia City facility").<sup>4</sup> In 2009, the Union and the Company negotiated a Collective Bargaining Agreement, which was effective from June 17, 2009 through June 17, 2011. As of October, 2010, the Company had two production facilities: one facility in San Luis Potosi, Mexico, and the other in Columbia City, Indiana.<sup>5</sup> (Trans. at 29, 488-89).

In a letter dated October 20, 2010, the Company notified the Union that, due to labor costs and other factors, it would be moving the work performed at the Columbia City facility to Mexico, thus closing the Columbia City facility. (GCX 3). The Company requested that the Union contact its counsel to discuss effects bargaining pursuant to the National Labor Relations Act. (*Id.*). In a subsequent letter dated October 28, 2010, the Company indicated that it would

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<sup>4</sup> The Columbia City facility was formerly a Dana Corporation facility. The Company purchased the Columbia City facility in 2007. (Trans. at 27).

<sup>5</sup> Throughout 2009 and 2010, the Company consolidated several non-union United States production facilities into its Columbia City facility. (Trans. at 487-88).

move the business to Mexico to realize labor cost savings, and that it would honor the current CBA unless or until it was altered by a subsequent agreement. (GCX 4).

The Company, the Union international representatives, and the Union bargaining committee (“the committee”) engaged in effects bargaining throughout late 2010 and early 2011. In November, 2010, one of the Company’s owners, Brad Ginsberg, and its Director of U.S. Operations, Tina Johnson, met with Union international representatives Jeff Shrock and Ginny McMillin for effects bargaining over the proposed closure of the Columbia City facility and transfer of the Columbia City facility’s work to Mexico. At these meetings, McMillin and Shrock convinced the Company to entertain proposals by which the Company would keep work at the Columbia City facility. The Company indicated to McMillin and Shrock that it wanted to maintain a United States production presence as both a matter of principle and a marketing tool. (GCX Exh. 5; Trans. at 475-76). The Company agreed to entertain Union proposals for cost savings at the Columbia City facility that would persuade it to continue operating the Columbia City facility. (*Id.*).

In November, 2010, at the Union’s request, the Company provided the Union with the Columbia City facility’s general financial information by way of its Profit and Loss Statement, which detailed its cost of sales and its earnings before interest and taxes from January-October, 2010. (GCX Exh. 5; Trans. at 298; 301-02). This financial statement was the same financial statement that Johnson used to manage the Columbia City facility. (Trans. at 471-72). The Union did not request any additional financial information throughout the course of the bargaining that occurred from November, 2010 through February 2011. (Trans. at 302).

On many occasions between late 2010 and early May 2011, the Company informed the committee and the Columbia City employees that although *Company* (Coupled Products, LLC)

was profitable, the Columbia City facility was losing money. (Trans. at 474-475, 489-90). The Company explained that it was effectively subsidizing the Columbia City facility with profits from its Mexico facility. (*Id.*). The Company explained to the committee and the Columbia City employees that in order to maintain a manufacturing presence in the United States, it was willing to continue funding the Columbia City facility if it operated at a breakeven or a slight of a loss. (*Id.* at 475-76). However, the Company stated that it was unwilling to continue subsidizing the Columbia City facility at the same level it was currently subsidizing the facility. (*Id.* at 475-76).

In January, 2011, the Union membership voted in favor of the committee negotiating with the Company to arrive at a solution where the Company would be willing to continue operating the Columbia City facility. (GCX 6). On January 11, 2011, the Union proposed giving up giving up a ten minute paid lunch, and work from 6:30 A.M. until 2:50 p.m., which it believed would save approximately \$36,000 annually. (GCX 32).

On January 18, 2011, the Company proposed the following items to maintain a presence in Columbia City: (1) contribution from the Union to offset efficiency losses and out-of-pocket expenses related to the Post and Mail matter and related litigation; (2) changing fringe benefits to be consistent with other non-bargaining unit United States employees, including insurance benefits, holiday schedules, eliminating sickness and accident pay, bereavement to be taken as vacation or personal time, eliminating perfect attendance time, eliminating the 10-minute paid lunch; and requiring vacation pay to be paid as taken, with no cash in lieu of unused vacation; (3) a \$0.75 per hour pay reduction, which was to increase by six cents per hour for every week thereafter until agreement was reached; (4) changing classifications so that temporary transfers were paid for the actual hours worked in the classification, employees would be allowed to bump only into a previously held classification; SSR and platers would become asterisk positions; and

seniority would be held for one year; and (5) reducing the amount of notice required for layoffs from 3-5 days to 1-2 days. (GCX 7).

In a letter dated January 24, 2011, the committee indicated that the membership had rejected the proposal. (GCX 8). The committee forwarded the following counterproposal: (1) employees would pay 35% of current premiums, with other benefits remaining the same as of that date; (2) employees would be allowed to take Good Friday off with no pay, Christmas Eve Day and New Years Day off with four hours' pay, and all holidays in the current CBA remaining the same; (3) maximum amount of sickness and accident benefits would be reduced from twenty-six weeks to thirteen weeks; (4) allowing up to six paid days of bereavement time; (5) current CBA terms would be maintained with regards to perfect attendance time, but two hours would be paid and two hours unpaid; (6) vacation time would be paid when taken, with unused vacation days paid at the end of the vacation year; (7) giving up the 10-minute paid lunch and 10-minute paid break; (8) payment for temporary transfer for the actual hours worked in one-hour increments; (9) provision of one to two days' notice for layoffs; and (10) paying overtime at the rate of pay for the classification in which the employee was working. (*Id.*). The Union also offered to help the Company locate other insurance carriers to reduce the cost of medical insurance. (*Id.*). The Union refused the Company's request for contribution for losses associated with the Post & Mail matter. (*Id.*).

On January 25, 2011, the Company made an additional counterproposal. (GCX 9). This counterproposal requested a smaller portion of losses from the Post & Mail matter, dropped the requirement that seniority within a classification be held for one year, dropped the requirement that temporary transfers would be paid only for the actual hours worked in the classification, and dropped the proposed changes to layoff notification. (GCX 9). The counterproposal also

proposed an hourly wage reduction of \$0.87, which would increase by \$0.06 per hour every week until an agreement was reached. (*Id.*). On January 27, 2011, the Company provided the Union with its best and final offer. (GCX 10). In this offer, Johnson stated, “Columbia City from a financial aspect cannot come close to our Mexico labor alternative.” (*Id.*). This best and final offer contained the same terms as the January 25, 2011 offer. (*Id.*). The membership did not accept the Company’s best and final offer.

At a plant-wide meeting in January, 2011, Ginsberg indicated to Columbia City employees that, to maintain a United States presence, the Company was willing to continue operating the Columbia City facility if it could operate at a break-even level, or at a slight loss. (Trans. at 475-76; 489-90). However, Ginsberg indicated that the Company was unwilling to continue subsidizing the Columbia City facility to the same extent that it had been. (*Id.*).

On February 15, 2011, the committee proposed dates to continue bargaining over the closure of the Columbia City facility. (GCX Exh. 11). In a letter dated February 17, 2011, the Company stated that it preferred to wait until closer to the end of the Collective Bargaining Agreement to negotiate, given the significant time that had elapsed since the Company and the Union had first met to discuss the transfer of work. (GCX Ex. 12). At least one committee member understood that the Company had switched gears from wanting to close the facility to looking at ways to continue operating the Columbia City facility. (Trans. at 188).

## **B. MAY AND JUNE, 2011 CONTRACT NEGOTIATIONS**

### **1. INITIAL PROPOSALS**

In early May, 2011, prior to the first bargaining meeting, the Union and the Company exchanged contract proposals. Although the Company had expressed throughout effects bargaining that it sought labor cost savings to continue operating the Columbia City facility, the

Union's proposal included a wage *increase* of \$0.90 per hour during the first year of the contract, and \$0.75 per hour during the second and third years of the contract, a \$500.00 signing bonus, and an increase in the Company's contribution to health insurance premiums.<sup>6</sup> (GCX Ex. 14). The committee testified that the amounts of the hourly wage increases were selected randomly, without research or analysis of the wages paid to manufacturing employees in the community. (Transcript at 134, 148, 158, 311). The committee presented no information to the Company regarding alternative health insurance carriers. (Trans. at 134-35, 354).<sup>7</sup>

The Company did not change its position that labor costs savings were necessary to warrant the continued operation of the Columbia City facility. Before preparing the Company's proposal, Johnson tasked Human Resources Director RoseAnn Rubrake with researching the wages paid by local manufacturing industry employers. (Trans. at 514). Rubrake contacted several local manufacturing facilities, including Dexter Axle, 80/20, Reelcraft, and People Link,<sup>8</sup> and inquired of their wage scale. (Trans. at 319-322, 455-458). Rubrake also visited the website for the Bureau of Labor Statistics and completed internet searches to determine competitive wages. (Trans. at p. 402-403, 410, R13). Rubrake learned that local manufacturing industry employers were not offering benefits, and that these employers were paying their skilled workers *more* than the Company was paying its skilled workers, but considerably *less* than the Company was paying its unskilled workers. (R10; R11). Thus, if the Company reduced skilled employee wages, its wages would not be competitive with those paid by local employers, making it

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<sup>6</sup> Under the 2009-2011 CBA, bargaining unit employees contributed between twenty-one and thirty-five percent of the health insurance premiums. (GCX 2 at p. 64; GCX Exh. 35). Under the Union's proposal, employees would contribute only twenty percent of their health insurance premiums. (GCX at Ex. 14).

<sup>7</sup> While Kathy Smith contends that she was "pretty sure" that committee members were "making calls" to alternative insurance carriers during negotiations for a new contract, the committee members testified that they "called around" and wrote down information for themselves, but did not present any information to the Company. (Trans. at 134-35; 251).

<sup>8</sup> PeopleLink is a temporary services staffing facility. Several manufacturing companies indicated to Rubrake that they used temporary staffing companies for their unskilled labor needs.

difficult for the Company to hire and retain these employees. However, it could substantially reduce the wages paid to unskilled employees and still pay a competitive wage. Using this information, the Company altered its proposal requiring a wage cut from all employees, and instead required a wage cut from the unskilled employees, who were overpaid relative to the local market. (R11).

The Company's proposal included: a \$4.50 per hour wage reduction for unskilled employees;<sup>9</sup> elimination of sickness and accident pay; reduction in paid vacation; and elimination of paid perfect attendance time. (GCX 13). The Company's proposal also included the elimination of its contribution towards group health insurance premiums, which was consistent with an agreement reached with the Union in 2009 that specified that the union membership would have the same health insurance structure as non-bargaining unit employees from time to time.<sup>10</sup> (*Id.*; Trans. at 477). Additionally, the Company's proposal included mandated use of paid vacation time during July and December plant shutdowns; changes to call-in pay; the elimination of triple time for holidays; changes to classifications; elimination of layoff notice and recall; changes to overtime pay and required overtime; and various miscellaneous items. (GCX 13).

## **2. MAY-JUNE 2011 NEGOTIATIONS**

At bargaining sessions, the Company was represented by Rose Rubrake, Stephanie Johnson, and David Jagger, with Johnson serving as its main spokesperson. The Union was

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<sup>9</sup> The Union takes issue with the fact that the Company's proposed wage cut during the January 2011 bargaining started with \$.75 per hour, with increasing cuts in each following week. However, after the Company researched wages in the area, it concluded that (1) it could not compete for skilled employees if it cut their wages; but (2) its unskilled workers were paid more than other unskilled workers in the community. Thus, the wage cuts in the May, 2011 bargaining proposal sought roughly the same amount of wage reductions, but from one subset of employees, instead of all employees. Moreover, the Union's own proposals at negotiations in May and June, 2011 were less favorable to the Company than the negotiations than the proposals made during the January bargaining.

<sup>10</sup> At the time of negotiations, the salaried employees paid the full cost of their health insurance premiums. (Trans. at 477-78).

represented by its bargaining committee members, Kathy Johnson, Beverly Kohne, Barb West, and Joyce Lane, with international representative McMillin serving as its main spokesperson. All of the committee members held unskilled positions; no employees in skilled positions were on the committee. (Trans. at 159; 222). Bargaining occurred on May 17, May 18, May 20, May 24, May 26, May 27, June 6, and June 15, 2011.

**a. MAY 17-19, 2011.**

At negotiations on May 18, 2011, the Union requested a financial report from the Company. (GCX 31 at 9). Johnson stated that she had previously provided the Union with such a report and that nothing had changed, but that she would discuss it with Ginsberg. (*Id.*). While discussing committee pay, McMillin commented that Ginsberg, “must have a lot of money to go to arbitration.” (*Id.* at 11).

In a letter dated May 19, 2011, the committee requested from the Company “proof of the companies [sic] finances in all aspects. . . we would also like to remind you that on January 13, 2011, Brad Ginsberg . . . made a statement in front of the entire Bargaining Unit members [sic] during a plant meeting that he had nothing to hide and was willing to open his books to anyone who wanted to see them. Therefore we are requesting to review Coupled Products LLC Financial Books [sic].” (GCX Ex. 19).

**b. MAY 20, 2011**

On May 20, 2011, the Company provided the Union with a profit and loss statement detailing the net income and losses from the Columbia City facility’s operations from January through April 2011. (GCX Ex. 16). This profit and loss statement was the same document that the Company provided to Johnson, and the same statement Johnson used to manage the Columbia City facility. (Trans. at 471-72). Around this time, the Company also provided the

Union with payroll records detailing the wages paid to bargaining unit employees. (R15).

Throughout late May, 2011, the Company provided the Union with information regarding its health, life, and dental insurance premiums. (R16-20). The Company also provided the Union with information detailing another health insurance carrier's refusal to insure the Columbia City employees. (R19).

As discussed in more detail below, the Union also submitted a strike authorization request to the International Union on May 20, 2011. (GCX 41).

**c. May 24, 2011**

At negotiations on May 24, 2011, the Company discussed its research on wages paid by local manufacturing industry employers. (GCX 31 at 17; GCX 17; R10-13; Trans. at 148-49). Rubrake discussed wages paid by local employers such as Dexter Axle, 80/20, and ReelCraft. (Trans. at 319-22; 455-58, 514). She also explained that some of these employers had told her that they used temporary service agencies to fill unskilled labor positions, and explained her research on the wages paid to temporary employees. (Trans. at 149). The Company attempted to provide the Union with documentation of its research on compensation paid by local manufacturing facilities, but McMillin and the committee declined to take or look at such information. (Trans. at 150-151; 444). Neither the committee nor McMillin presented any information to refute the Company's position.<sup>11</sup>

During negotiations on May 24, 2011, the bargaining notes reflect that both the Union and the Company professed that they would not compromise on the monetary issues (meaning the wage and benefit proposals). After Johnson indicated that the monetary proposals had to stand, McMillin asked Johnson if the Company was stating an inability to pay, thus "giving [the

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<sup>11</sup> The committee did no research on what companies in the Columbia City area were paying to skilled or unskilled workers. (Trans. at 222).

Union] permission to audit [its] books.” (GCX 31 at 23-24; R4 at 28-29; R9 at 487, 491). According to the Union’s “official” notes, Johnson replied, “yes, were [sic] *not willing* to pay.” (GCX 31 at 24). (emphasis added). McMillin’s account of this conversation, contained in a May 26, 2011 memo, states that Johnson replied, “yes, [sic] am to be competitive, we can no longer pay these wages.”<sup>12</sup> (GCX 39 at 2). According to Rubrake’s bargaining notes, Johnson clarified that the Company was not stating that it could not pay, but that it did not want to pay. (R9 at 487). According to the bargaining notes of both the Union and the Company, immediately after McMillin accused Johnson of stating that the Company was unable to pay, Johnson told McMillin “not to put words into [her] mouth.” (GCX 31 at 24; GCX 39 at 2; R9 at 487). It is undisputed that immediately *after* this exchange, McMillin told the committee that the Company did not legally have to allow the Union to audit its books. (GCX 31 at 24; R4 at 28-29; R9 at 487, 491; Trans. at 359).

**d. MAY 25, 2011**

In a May 25, 2011 e-mail, McMillin demanded, “to audit Coupled Products LLC books and all finances. Per NLRB rulings, when a company is demanding wage reductions on poverty or their inability to pay the wages . . . [w]e as a Union have the right to go over all books pertaining to finances and that is what I am requesting to do.” (GCX Ex. 17).

On May 25, 2011, the Union submitted its counterproposals to the Company. (GCX 18). These counterproposals included a wage freeze; twenty weeks of sickness and accident pay at \$205 per week; employee contribution of 25% of health insurance premiums; vacation pay remaining the same as shown in Vacation Exhibit C, and paid when taken without accrual from year to year; bereavement leave for deaths in the immediate family; perfect attendance time to be

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<sup>12</sup> McMillin’s bargaining notes conveniently exclude the remainder of the exchange she later recounted to Mo Davidson.

earned without pay; making the SSR classification an “asterisk” job; and overtime paid only after an employee reached forty hours of actual work in a week, with some exceptions. (*Id.*).

**e. MAY 26, 2011**

In a letter dated May 26, 2011, Johnson told the committee that the Company would not provide an audit because it was privately owned and its books were proprietary. (GCX 19).

On May 26, 2011, McMillin wrote a memo to Mo Davison “requesting assistance from the UAW Research Department with our negotiations for a collective bargaining agreement with Dana Coupled Products. The Company is pleading poverty.” (GCX 39). In this memo, McMillin reported that the Company was requesting a \$4.50 cut in pay (excluding skilled trades) and requiring employees to pay for their entire health insurance premiums, stating, “There is no way these employees can afford this and especially with the pay decrease.” She also stated, “It was just recently that management informed the Committee that they were going to go ahead with negotiations for a new Collective Bargaining Agreement; and that is why the Committee did not have time to request all this information ahead of time.”<sup>13</sup> [ . . . ] I truly believe that this company is very dirty to say the least; and they are playing games.” (*Id.*).

Interestingly, McMillin’s memo reflects her May 24, 2011 exchange with Johnson regarding the Company’s ability to pay the wages and benefits demanded by the Union very differently than her bargaining notes. While her notes suggest that Johnson flatly stated that the Company was unable to pay wages at their current levels (*See* R1 at p. 51), McMillin’s memo reads: “I asked the Plant Manager, Tina Johnson yesterday in our meeting point blank, are you

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<sup>13</sup> McMillin’s contention that the Company had simply “sprung” the fact that the parties would be bargaining for a new collective bargaining agreement onto the Union is simply untrue. Bargaining committee member Bev Kohne testified as to her understanding that the Company had switched gears from wanting to close the facility to looking at what ways to continue operating the Columbia City facility. (Trans. at 188). In April, 2011, the parties began attempting to schedule negotiations. The Union took a strike vote on May 2, 2011. (GCX 33). The Company sent its first proposal to the Company on May 3, 2011. (GCX 13). The actions of both the Union and the Company demonstrate an understanding that they were attempting to negotiate a new contract.

telling me the company is stating at this time their inability to pay the wages as they are today. She said, “Yes, [sic] am to be competitive, we can no longer pay these wages.” (GCX 39 at p.2). McMillin’s memo goes on to describe Johnson’s instruction to McMillin to “not put words in her mouth” regarding inability to pay. (*Id.*)<sup>14</sup>

**f. MAY 27, 2011**

Although the contract did not expire until June 17, 2011, McMillin requested the Company’s best and final offer at negotiations on May 27, 2011. (GCX 31 at 30). After requesting the Company’s best and final offer, McMillin threatened to file “NLRB charges” because the Company would not let the Union perform an audit. (GCX 31 at 30).

McMillin stated that the Union would not support the Company’s offer in any way and indicated that there was nothing left to say. When Johnson indicated that she did not want to walk away, McMillin replied that she did not think that the proposal was a win-win situation for anyone. (*Id.*).

The Company provided its last, best, and final offer to the Union. (GCX 20). This offer proposed a one-year agreement with the following terms: (1) insurance benefits were to be consistent with other non-Union U.S. employees, which required employees to pay their health insurance premiums; (2) reduction in paid vacation time, and a different method of accrual; (3) change in paid holidays; (4) elimination of sickness and accident pay; (5) bereavement days included in paid vacation days; (6) elimination of paid perfect attendance time; (7) elimination of a ten-minute paid lunch, with new plant hours from 6:30 a.m. to 2:50 p.m.; (8) a \$4.25 per hour wage reduction for unskilled labor; and (9) modifying call-in time from four hours to two hours.

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<sup>14</sup> McMillin’s memo corroborates the Company’s position that it did not state an inability to pay, but stated that a wage reduction was necessary to remain and become competitive. It further suggests that the union’s financial request was not made to verify the Company’s bargaining position, but to punish the Company for requesting concessions.

(GCX 20). The Company's best and final offer also contained various other terms pertaining to classifications, layoffs, overtime, and other miscellaneous provisions. (GCX 20).

**g. JUNE 6-10, 2011**

The Union took issue with the fact that the Company's proposal for a concessionary contract was written as a one-year contract instead of a two-year contract and demanded clarifications of the Company's proposal. (Trans. at 230-31). Per the Union's request, on June 8, 2011, the Company re-submitted its last, best, and final offer, written as a two-year agreement and incorporating several clarifications. (GCX 21).<sup>15</sup> The Company's last, best, and final offer included: (1) employees paying 100% of health insurance premiums; (2) reduction of paid vacation time; (3) changes in holiday schedule; (4) elimination of sickness and accident pay; (4) three days of unpaid bereavement leave for family members listed in the current contract; (5) elimination of paid perfect attendance time; (6) \$4.25/hour wage reduction for employees, excluding those within skilled labor classification; (7) modification of call-in pay from four hours to two hours; (8) paying temporary transfer in one-hour increments instead of two hour increments; (9) SSR becoming an asterisk position; (10) requiring employees disqualified from a classification to wait one year to bid again; (11) reduction of notice for layoffs from 3-5 days to 24-hour notice; (12) elimination of 5-day recall rights from layoff to 24 hours after receiving notification; (13) overtime paid after an employee reached forty hours of actual work (excluding vacation, holidays, union business, perfect attendance, jury duty or any other company-driven absence); (14) allowing the company to mandate daily overtime in emergency situations with thirty minute notice; and various miscellaneous provisions. (GCX 21).

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<sup>15</sup> On June 7, 2011, the Company provided the Union with the information regarding the accrual of paid vacation under the Company's best and final offer. (R14).

At negotiations on June 6, 2011, the Union indicated that it would take the Company's best and final offer to the membership, but would not support the ratification of this offer. (Trans. at 331-32).

On June 9, 2011, the Union membership voted against ratifying the Company's last, best, and final offer. (GCX 34). In a letter dated June 10, 2011, the Union notified the Company that the membership had voted against ratifying the Company's last, best, and final offer. (GCX Ex. 36). The Union proposed a list of things that its membership "could live with." (GCX 36).<sup>16</sup>

**h. JUNE 15, 2011**

At negotiations on June 15, 2011, the committee, although it had refused to accept the Company's research regarding the wages paid to unskilled workers at local facilities, expressed disbelief that the Company could hire people to do the same job for a lower wage, and requested that the Company "ask people what they make." (R8 at 456). When negotiations drew to a close on June 15, 2011, the Union informed the Company that it would not accept a \$4.25 pay cut for its unskilled workers or the proposed increased contribution to their health insurance premiums, and that it was going on strike. (GCX 31 at 36-37; Trans. at 170). The Union indicated that it was going on the type of strike "where you hold signs." (GCX 31 at 36-37; Trans. at 170). The Union's "official" bargaining notes suggest that the Union was going on an economic strike, which it categorized as the type of strike where contract ends and the Company will not agree to a new contract. (GCX 31 at 36-37). McMillin indicated that the Company should back up the trucks and move to Mexico. (GCX 31 at 36; Trans. at 169-70; R8 at 25).

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<sup>16</sup> This list included an extension of the current agreement for one year; a wage freeze for the duration of a new agreement; employee contribution of twenty-five percent of health insurance premiums; vacation time "up front" with pay when taken; twenty weeks of sickness and accident pay; and three days of paid bereavement time for immediate family members. (GCX 36).

The Company and the Union were unable to agree on a new Contract. Both the Union and the Company testified that they were too far apart on the economic issues to come to an agreement (Trans. at 169). The Union has not changed its position since the Company provided it with its best and final offer. (*Id.*). The Company has not changed its position, either. (Trans. at 481).

**C. STRIKE VOTE**

On May 2, 2011, prior to the first bargaining session, the Union body voted in favor of a strike. (GCX Ex. 33). On May 20, 2011, after only three days of negotiations, the Union submitted a request for strike authorization to the international union. (GCX Ex. 41). In its strike authorization request, the Union cited the following issues to support its request: wage reduction, vacations, holidays, S & A, bereavement, seniority, and increased insurance premiums. (GCX Ex 41, p. 3).

A second strike vote was not taken. (Trans. at 177). The Union membership voted against ratifying the Company's best and final offer agreement on June 9, 2011. (GCX Ex. 34). At the ratification vote, McMillin told the membership that she thought the Company's offer was bad because the wages were ridiculous, and that she did not recommend accepting it, although the ultimate choice was theirs. (Trans. at 337-339). When addressing the membership, McMillin did not use the term "unfair labor practice strike." (*Id.*). There was no discussion amongst the bargaining committee members as to whether they were going on an economic strike or an unfair labor practice strike. (*Id.* at 246).

On June 15, 2011, the Union's International Executive Board issued a strike authorization approval. (GCX Ex. 42).

**D. UNION STRIKE AND ENSUING ACTIONS**

The Union went on strike on June 17, 2011. In a letter dated June 17, 2011, the first day of the Union's strike, the Union again accused the Company of stating that it could no longer afford or was unable to pay wages at the same rate, stating, "if this is true and you can show us this through your financial books we may be more apt to convince the membership that with these current wages the company would go bankrupt."<sup>17</sup> (GCX Ex. 40). That same day, Johnson corrected the Union, reiterating that she had not stated that the Company could not continue to pay wages, but that the Company *would not pay* wages at the current rates because it needed to be competitive. (R5). Johnson again denied the Union's request for an audit. (*Id.*).

The Company instituted its best and final offer on June 20, 2010. (GCX Ex. 30). On June 20, 2010, the Company notified the Union that it would hire permanent replacement workers. (GCX Ex. 24). As part of an administrative matter before the Indiana Department of Workforce Development that occurred on May 2, 2012, counsel for the striking Union members stipulated that the striking Union members had been permanently replaced in June 2011. (R23)

#### **E. PROCEDURAL HISTORY**

On June 17, 2011, the Union filed unfair labor practice charge, Case 25-CA-031883, alleging that the Company had violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA") by engaging in surface bargaining, denying the union's request for financial information necessary for the union to evaluate the company's assertions regarding its financial health and allow it to develop its own proposals, and taking a position throughout bargaining that was reasonably calculated to prevent the parties from coming to an agreement. (GCX 1(a)). On August 4, 2011, the Union filed a second unfair labor practice charge, Case 25-CA-062263, alleging that the Company had violated Sections 8(a)(1) and (5) of the NLRA by failing to

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<sup>17</sup> Johnson and McMillin both testified that no one from the Company indicated that the Company was contemplating bankruptcy. (Trans. at 332; 471).

provide the Union with adequate financial information to evaluate the Company's claims that concessions were necessary, refusing to extend the terms of the previously negotiated bargaining agreement, and implementing its best and final offer before lawful impasse had been reached in negotiations. (GCX 1(c)).<sup>18</sup>

On December 28, 2011, the Board's Regional Director for Region 25 issued an Order Consolidating Cases, Consolidating Complaint and Notice of Hearing. (GCX 1(e)). This Order consolidated the aforementioned charges, and issued a Complaint thereon. The Complaint alleges that the Company failed to provide the Union with requested financial information that was relevant to its performance of its duties as the exclusive collective-bargaining representative of the Union, specifically:

(d) Since on or about May 24, 2011,<sup>19</sup> May 27, 2011,<sup>20</sup> and June 17, 2011,<sup>21</sup> the Union verbally and by letter, has requested that the Respondent furnish the Union with Respondent's financial records.

(e) The information requested by the Union, as described above in paragraph 5(d) is necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the Unit.

(f) Since about May 24, 2011, Respondent has refused to furnish the Union with information requested by it as described in paragraph 5(d).

(Compl. at ¶ 5.)

Thus, the Complaint alleges that the Company refused to provide the Union with a financial audit, or general access to its financial information. The Complaint also alleges that the Company altered the terms and conditions of employment without first bargaining with the

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<sup>18</sup> All of the allegations made in the second unfair labor practice charge would have been known to the Union on June 17, 2012. It is unclear why the second ULP charge was filed on these issues.

<sup>19</sup> Presumably, General Counsel believes that the Union verbally requested financial information during negotiation on May 24, 2011, although the Union's own bargaining notes reflect that the international representative acknowledged that the Union was not legally entitled to audit the Company's books. (GCX 31 at p. 24). On May 25, 2011, McMillin e-mailed a "request in writing for audit." (GCX at 17).

<sup>20</sup> During negotiations on May 27, 2011, the Union's "official" notes state that McMillin asserted that the Union "could" audit the Company's books and threatened to file "NLRB charges" against the Company for not allowing the Union to audit its books. (GCX 31 at 29-30).

<sup>21</sup> On June 17, 2011, the committee requested that the Company "open [its] books to the International Union UAW Auditing Department for review." (GCX 40).

Union to a good-faith impasse, committed unfair labor practice charges that caused and prolonged the Union's strike; and failed and refused to bargain collectively with the Union.<sup>22</sup> (GCX at 1(e)).

### **III. ANSWERING EXCEPTIONS**

Most of CGC's exceptions to the ALJ's findings boil down to CGC's disagreement with the ALJ's credibility determinations. The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). Here, the preponderance of the relevant evidence demonstrates that the Board's credibility resolutions are, in fact, correct. To the extent that CGC argues that the ALJ erred in his legal conclusions, a close review of Board precedent, as applied to the facts in the instant case, demonstrates that the ALJ's conclusions of law are correct.

#### **A. The ALJ correctly found that the Company did not state an inability to pay.**

##### **Acting General Counsel Excepts to the ALJ's finding:**

- 2. inferring that Respondent only stated that it needed wage and benefit reduction to remain competitive (ALJD p. 14, ll. 6-9).**
- 3. inferring that Respondent's [sic] never claimed an inability to pay the Union's demands. (ALJD p. 14, ll. 24-25).**
- 4. finding that there was no credible evidence that Respondent maintained the position that it was unable to pay existing wages and benefits. (ALJD p. 15, ll. 11-12).**

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<sup>22</sup> At hearing, General Counsel's questioning suggested that the Union was alleging that the Company had engaged in surface bargaining. However, the Complaint states, "By the conduct described above in paragraphs 5(f), 6(a) and 6(c), Respondent has been failing and refusing to bargain collectively with [the Union]." GCX 1(e). Paragraph 5(f) refers to the Company's purported failure to furnish the Union with requested information. (*Id.*). Paragraphs 6(a), and 6(c) refers to the Company's alleged alteration of the terms and conditions of bargaining unit employees without first bargaining to a good-faith impasse with the union. (*Id.*).

Contrary to CGC's exceptions, the record clearly demonstrates that the Company stated that it needed to reduce labor costs and benefits in order to be competitive, and that it was not willing to pay the existing wages at the Columbia City facility. The Company did not express that it was unable to pay the existing wages and benefits.

It is undisputed that, throughout negotiations, the Company repeatedly stated that it sought concessions in order for the Columbia City facility to be competitive. (GCX 31 at 12, 14, 30, 36; R8 at 434, 437, 440, 446, 455-56; R9 at 475, 481, 507-09; Trans. at 107,140, 204). The Company also consistently maintained its belief that wages for its unskilled employees under the current contract were not aligned with the local market wages, and that it could hire and retain unskilled employees with a significantly lower hourly wage. The Company provided the Union with its research on the wages paid to unskilled workers at local manufacturing facilities to support its position. (GCX 31 at 17; Trans. at 153).

Bargaining notes from the May 24 meeting reflect that both the Union and the Company professed that they would not compromise on the wage and benefit proposals. After Johnson indicated that the monetary proposals had to stand, McMillin asked Johnson if the Company was stating an inability to pay, thus "giving [the Union] permission to audit [its] books." (GCX 31 at 23-24; R4 at 28-29; R9 at 487, 491). According to the Union's "official" notes, Johnson replied, "yes, were [sic] *not willing* to pay." (GCX 31 at 24). (emphasis added). McMillin's account of this conversation, contained in a May 26, 2011 memo, states that Johnson replied, "yes, [sic] am to be competitive, we can no longer pay these wages." (GCX 39 at 2). According to Rubrake's bargaining notes, Johnson clarified that the Company was not stating that it could not pay, but that it was unwilling to pay. (R9 at 487). The bargaining notes of both the Union and the Company reflect that, immediately after McMillin accused Johnson of stating that the Company

was unable to pay, Johnson told McMillin “not to put words into [her] mouth.” (GCX 31 at 24; GCX 39 at 2; R9 at 487). It is undisputed that immediately *after* this exchange, McMillin—who the Union concedes understood the relevant legal framework for “determining the contours of the Company’s obligation to divulge information”—told the committee that the Company did not legally have to allow the Union to audit its books. (GCX 31 at 24; R4 at 28-29; R9 at 487, 491; Trans. at 359). McMillin’s concession that the Company was not legally obligated to provide an audit indicates that she did not believe that the Company had stated an inability to pay.

McMillin’s direct testimony at trial did not suggest that the Company was claiming an inability to pay the wages demanded by the union. McMillin stated that she requested to audit the Company’s books because she

“felt like because the company was asking for concessions and that if they would show us their books—if they were saying that they needed to be more competitive, they were losing money, if they would show us our [sic] books [ . . . ] it be more to our advantage trying to explain to our membership for all the concessions they were asking for.” (Trans. at 268).

McMillin stated that she wanted to audit the books so that she could persuade her members to take steep concessions. (Trans. at 317). Nowhere in her direct testimony did McMillin state that the Company had claimed to be unable to pay.

The bargaining committee’s testimony also demonstrates that the Union did not understand that the Company was stating an inability to pay. Recording secretary Bev Kohne testified that the Company stated that it no longer *wanted* to pay a portion of the employee’s health insurance benefits because it needed to be competitive, because insurance rates had gone up, and because it wanted to be profitable. (Trans. at 107-08) (emphasis added). Kohne also testified that Johnson repeatedly stated that the Company needed to be competitive. (*Id.* at 140). Local president Kathy Smith testified that the Union requested an audit because the Company

stated that it was losing money, losing customers, and was not competitive. (*Id.* at 203-04).

Both Kohne and Smith testified that they understood that the Company's position was that the proposed wage reduction would bring the Columbia City employees more in line with the local market. (*Id.* at 153, 228).

Nothing in the record suggests that the Company made any representation that could be reasonably interpreted as stating that it had insufficient assets to pay the wages and benefits demanded by the Union or that it would have insufficient assets to pay during the life of the proposed contract. It is undisputed that the Company never claimed that it was contemplating bankruptcy. (Trans. at 332, 471). When the Union accused the Company of stating that it was unable or could not afford<sup>23</sup> to continue paying the wages and benefits at their current level, Johnson refuted this allegation, maintained the Company's desire to be competitive, and expressed the Company's unwillingness to pay such wages. (Trans. at 156-57, 326-27; GCX 31 at 24; GCX 39 at 2; R2; R5; R9 at 483, 487, 498).

**B. The ALJ correctly found that the Company's refusal to submit to the audit demanded by the Union did not constitute an unfair labor practice.**

**The Acting General Counsel excepts to the [ALJ's]:**

- 5. finding that Respondent's did not violate Section 8(a)(1) and (5) of the Act when it refused to allow the Union to review and audit its financial information. (ALJD p. 15, ll. 13-14).**
- 6. finding that the cases relied upon by the Acting General Counsel in support of the argument that Respondent's refusal to allow the Union to review and audit its financial information violated Section 8(a)(1) and (5) of the Act were distinguishable.**

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<sup>23</sup> The committee's testimony regarding negotiations suggests that *the Union* made statements about the Company's ability to afford to pay wages/benefits. Bargaining committee member Kathy Smith commented that the company could not afford to pay. (Trans. at 152-53, GCX 31 at 23). The Company replied by explaining that it could hire people off of the street to do the job for less. (*Id.*). McMillin also commented that the Company could not pay the wages. (Trans. at 377; R4 at 28).

7. **failure to find that while the survival of the Respondent as a whole was not an issue, Respondent did put the survivability of the Columbia City facility at issue. (ALJD p. 16, ll. 8-9).**
8. **finding that Respondent did not base its proposals on financial hardship or the inability to pay the current wages and benefits.**
9. **statement that the facts in this matter do not establish a nexus between statements made by Respondent during negotiations regarding its desire for concessions at the Columbia City facility and its survivability during the term of the Contract. (ALJD p. 16, ll. 34-36).**
10. **finding that Respondent never made statements linking its economic proposal to its survivability as a company. (ALJD p. 16, ll. 20-22).**
11. **finding that the cases relied upon by the Acting General Counsel to support its position that Respondent was obligated to provide information to the Union to justify its concessionary proposals were distinguishable from the instant case.**
12. **finding that the Union did not make a specific request for information to evaluate the specifics of Respondent's claims.**
13. **finding that the Union failed to specifically tailor its request for information to Respondent's assertions in bargaining.**
14. **finding that the Acting General Counsel failed to cite any case where a union made a request for financial information and the Board ordered the employer to provide more specific information.**
15. **finding that Respondent did not violate Section 8(a)(1) and (5) of the Act when it refused to allow the Union to review and audit its financial information and the dismissal of that allegation in the Complaint.**
1. **To state an inability to claim, an employer must link its economic proposals to the survival of *the Company*, not the continued operation of a particular facility.**

CGC argues that the ALJ erred in distinguishing the instant case from the Board's previous decisions *ConAgra, Inc.*, 321 NLRB 944 (1996), *enf. denied* 117 F.3d 1435 (D.C.

Cir.)<sup>24</sup>, *Stroehmann Bakeries, Inc.*, 318 NLRB 1069, 1079, *enf. denied* 95 F.3d 218 (2<sup>nd</sup> Cir. 1996), *Lakeland Bus Lines*, 355 NLRB 322 (2001) *enf. denied*, 347 F.3d 955 (D.C. Cir. 2003),<sup>25</sup> **all of which federal courts have refused to enforce**, and its decision in *Stella D’Oro Biscuit Co.*, 355 NLRB No. 158 (2010). CGC contends that the ALJ incorrectly distinguished the instant case from these previous decisions because the Company did not link its economic proposals regarding the Columbia City facility to its survival as a whole. (CGC Ex. Br. at 15).

The ALJ’s decision is not based entirely upon the fact that the Company as a whole was not losing money. Instead, the ALJ’s decision is based mostly upon the fact that the Company repeatedly stated that concessions were necessary in order to be competitive—statements that do not obligate an employer to provide a union, upon request, with records regarding its financial condition. (ALJD at 14, ll. 6-9, 27-35). The ALJ also held, “during negotiations, the Respondent did not *even* state that it was losing money as a whole. Rather, at the May 20 meeting, Johnson indicated only that Columbia City was losing money and customers.” (ALJD at 14, ll. 25-27) (emphasis added).

Nevertheless, CGC argues that the ALJ erred in distinguishing the Company’s statement that the Columbia City facility was unprofitable from Board precedent holding that statements that place the continued survival of an employer *as a company* at issue constitute a statement of inability to pay. (CGC Exc. Br at 15). CGC insists that the Company’s stated desire to move the work from the Columbia City facility to its Mexico facility if the Columbia City facility’s performance did not improve placed the “survival of the Columbia City facility at issue,” and

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<sup>24</sup> In *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997), the court denied enforcement because the employer’s representatives repeatedly stated that the company remained profitable, but that it needed concessions to improve its ability to compete. Therefore, the Board could not find, consistently with its decision in *Nielsen*, *supra*, that the employer was claiming it could not afford to pay the union’s demand.

<sup>25</sup> in *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955 (D.C. Cir. 2003), the court relied on evidence that the employer explicitly stated that it was not asserting an inability to pay, but was only asserting the existence of short-term business losses

amounted to a claim of inability to pay under *ConAgra*, *Stella D'Oro*, *Stroehmann*, and *Lakeland Bus Lines*. (*Id.*). CGC misunderstands the principles of corporate formation, and misstates both the Board's factual and legal findings in these decisions.

**a. The ALJ correctly determined that this instant case is distinguishable from the Board's decisions in *Stroehmann*, *Stella D'Oro*, and *ConAgra*.**

CGC contends that the ALJ erred in distinguishing the facts at issue here from *Stroehmann* because (1) the employer in *Stroehmann* “never claimed that it was losing money as a whole, but “claimed that its parent company had deep pockets and that it was the only particular facility losing money,” and (2) the employer in *Stroehmann* never asserted that the survivability of the company as a whole was at issue. It only asserted that the survivability of that facility was at issue.” (GCX Exc. Br. at 14).

The facts of *Stroehmann*, which CGC blatantly misstates, are important. There, the employer, a bakery, (*Stroehmann*) was a subsidiary of Weston Foods. Weston Foods, in turn, was a subsidiary of a Canadian conglomerate, George Weston Limited. *Stroehmann* was comprised of six bakeries and fourteen depots for distribution, including a Syracuse, New York facility. The Syracuse facility's employees were represented by a union. At contract negotiations in 1993, the *Stroehmann* indicated that it had lost \$12 million in the previous year, and was projected to lose \$16 million in 1993, but the actual loss appeared to be closer to \$20 million. *Stroehmann*'s representative also quoted from the conglomerate's annual report, which stated that the conglomerate's bakery operations, *including Stroehmann* reported operating losses for the first time, and described factors such as falling retail bread prices, rising flour prices, and reduced sales of particular products as “a disastrous combination for profitability.” *Stroehmann* also specified that the Syracuse facility lost \$150,000 in 1992 and 1993. *Stroehmann*'s representative indicated that *Stroehmann* could have gone out of business, but that its parent

company, which had deep pockets, wanted to remain in the United States and remain competitive. He also stated that Stroehmann could not go on without a parent company willing to fund its losses. Stroehmann also asserted that it “had to run an efficient operation in order to survive,” and that it *needed* to eliminate the Syracuse facility and relocate the work to a different facility in order to meet the parent company’s requirement that it be competitive. (emphasis added).

The Board upheld the ALJ’s conclusion that Stroehmann claimed financial hardship and inability to pay. *Id.* at 1079. In so holding, the ALJ noted that Stroehmann’s representative stated that *Stroehmann* had suffered huge financial losses in 1992 and projected continuing heavy losses in 1993, and *that he did not limit his representations of loss to losses out of the Syracuse operation*, although he did note that the Syracuse operation itself was operating with substantial financial loss. *Id.* (emphasis added). The ALJ held that, although Stroehmann acknowledged its parent company’s deep pockets, it also asserted that (1) it could not go on without a parent company willing to fund its losses; and (2) it needed to eliminate the Syracuse facility in order to meet *the parent company’s* requirement that Stroehmann be competitive. The ALJ interpreted Stroehmann’s statements as stating that the parent company would not subsidize Stroehmann without concessions, and that the parent company’s refusal to subsidize would render Stroehmann unable to afford to pay the wages demanded by the union. *Id.* at 1079. Therefore, the ALJ held that Stroehmann was basing its contract proposals on asserted financial hardship and inability to pay, and that it was required to provide the Union with the requested financial information. *Id.* at 1079-80. The ALJ’s decision was premised upon (1) Stroehmann’s representation that *Stroehmann* (and not just the Syracuse facility) had experienced heavy losses, (2) Stroehmann’s representations that it could not operate without the parent company’s bail-out,

and (3) Stroehmann's representation that the parent company had expressed an unwillingness to subsidize if it did not take steps—including closing the Syracuse facility—to become competitive, which would leave *Stroehmann* unable to pay. *Id.* at 1079-80 (emphasis added).

CGC blatantly misstates the facts in *Stroehmann*. First, she argues, “the employer in *Stroehmann* never claimed that it was losing money as a whole. Rather, the employer claimed that its parent company had deep pockets and that it was only the particular facility that was losing money.” (GCX Br. at 13). In *Stroehmann*, however, it was the *company* (which was comprised of six bakeries and thirteen depots), and not just one particular facility was suffering heavy losses. The ALJ found that Stroehmann's representative stated that “the Company suffered huge financial losses in 1992 and projected continuing losses in 1993” and “did **not** limit his presentation to the Syracuse operation, although he asserted that the Syracuse operation itself was operating with substantial financial loss.” *Id.* at 1079 (emphasis added).

Stroehmann's company president even issued an open letter to its employees stating that it had sustained major operating losses in 1992 and 1993 and that profitability had not improved, and that “we cannot continue to operate as we have in the past. We simply cannot afford it.” *Id.* at 1073. Stroehmann sought to close the Syracuse facility because of the Company's heavy losses and poor performance, and the specific losses out of that facility.

CGC fails to recognize that Stroehmann did not have “deep pockets.” Its *parent company* did. Stroehmann indicated that it could not continue without its parent company's funding, and that closing the Syracuse facility (amongst other changes) was necessary in order to meet the parent company's requirements that Stroehmann become more competitive. Absent such changes, the parent company was unwilling to continue subsidizing Stroehmann, which would have render Stroehmann unable to afford to continue to pay the wages and benefits demanded by

the union. *Id.* at 1079. While Stroehmann proposed closing the Syracuse facility, the closure was to effectuate the changes demanded by the parent company in order to receive funding from the parent company—funding that it had acknowledged was necessary for it to survive. Thus, in *Stroehmann*, the survival of the entire Company—not just the Syracuse facility, was at issue.

Contrary to CGC’s spurious exceptions, the ALJ correctly distinguished the instant case from the facts at issue before the Board in *Stroehmann*. While the employer in *Stroehmann* cited heavy losses as a company, and not just for the facility at issue, Johnson stated that the Columbia City facility was not profitable, but that the Company as a whole was profitable. (Trans. at 474-75). Additionally, the employer in *Stroehmann* stated that it could not operate without funding from its third-party parent company, and the parent company conditioned continued funding upon increased competitiveness, including the closure/reduction of the Syracuse facility. Here, the Company did not require funding from a third party in order to continue operating the Columbia City facility, and was under no compulsion to close the Columbia City facility in order to continue to receive funding.<sup>26</sup> In fact, the Company actually expressed willingness to continue operating the Columbia City facility if it could be operated at break-even point or at a slight loss, in order to maintain a presence in the United States. (Trans. at 474-75, 489-91).

CGC also asserts that the ALJ erred in distinguishing the instant case from *Stroehmann* on the grounds that the Company did not base its proposals on financial hardship or an inability to pay current wages and benefits. (CGC Exc. Br. at 14). Without citation to the record, CGC insists that the Company “asserted again and again in negotiations that it was suffering severe financial losses at Columbia City. Respondent threatened to move the Columbia City work to

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<sup>26</sup> While CGC apparently faults the ALJ for not finding that Johnson stated that she was fighting to keep their jobs in the United States, (CGC Ex. Br. p. 12, n. 2), it is clear from the context of the negotiations Johnson’s statements pertained to her desire to be able operate the Columbia City facility at a level where the Company would be willing to continue operating it.

Mexico in order to save on labor costs. Respondent's concessionary proposals were clearly based on financial hardship." (*Id.*). CGC appears to believe that a Company's desire to maximize profit by moving operations to a lower-cost facility and unwillingness to continue operating an unprofitable facility without improved performance constitute a statement of financial hardship. They do not. While Johnson did assert that the Columbia City facility was losing money, and was not competitive, she indicated that the Company was willing to continue operating the facility in order to maintain a presence in the United States. (Trans. at 474-75).

CGC's arguments that the instant case is not distinguishable from other existing Board must also fail. *Con Agra* involved two separate corporate entities who were alleged to be joint employers: ConAgra, and the employer, MPR, which was a wholly-owned subsidiary of ConAgra. MPR consisted of three facilities, and was one of sixty *companies*<sup>27</sup> that made up ConAgra's Grain Processing Company. At negotiations, an MPR representative stated that he had seen MPR decline over the last 4 years, "the situation is serious and fragile," "if we are not competitive we cannot survive," and "we must do something to be able to survive." MPR's manager stated that if immediate measures were not taken, it was probable that MPR would not exist in the future. Additionally, MPR stated that things small expenses like supplying soap to employees were "what makes us not be competitive and can make us have to close up shop because we cannot compete." MPR refused the union's request for MPR's audited financial records. The Board upheld the ALJ's decision that, in light of what she characterized as MPR's

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<sup>27</sup>The ALJ in *ConAgra* sometimes referred to the sixty companies comprising ConAgra as sixty plants, and sometimes referenced the union's purported threats to close MPR as threats to "the plant" or "the mill." (*Id.* at 949, 950, 955). However, she contended that the Respondents "impl[ie]d that MPR might be superfluous." (*Id.*). In her findings of fact, she describes MPR as one of many companies comprising the ConAgra Grain Processing Company ("... He explained that MPR was now 1 of 60 companies within the new division, the ConAgra Grain Processing Company. He added that henceforth, MPR's performance would be compared with the other companies in the grain processing division rather than with competitive, unrelated companies on the island. . .)" (*Id.* at 950).

“ominous warnings” about its future, the union was entitled to MPR’s audited financial records.<sup>28</sup> (emphasis added).

Unlike the situation in *ConAgra*, which involved “ominous warnings” about MPR’s future and threats that the parent company could “put MPR out of business,” the only employer at issue here is the Company—Coupled Products, LLC. The Company was admittedly profitable, but indicated an unwillingness to continue operating the Columbia City facility with its then-current labor cost structure because it could realize substantial labor cost savings by moving the work done at the Columbia City facility to its Mexico facility. While MPR delivered “ominous warnings” to the union about its ability to survive, these warnings were dependent upon parent corporation’s decisions regarding MPR’s continued operation. Here, the Company was the sole decision-maker with regards to the continued operation of the Columbia City facility.

The Board’s decision in *Stella D’Oro Biscuit Co.*, 355 NLRB 769 (2010) also demonstrates that to constitute a statement of inability to pay, an employer’s statement must pertain to its continued survival as a Company, and not merely the continued operation of the specific facility in which the employees work. In *Stella*, the employer’s parent company expressed willingness to continue funding the employer in the short-term, although the employer was experiencing losses. The employer’s negotiators stated that it would not be able to survive if the Union did not agree to its proposals, that it was losing money, that it required cost savings or it would not be going forward with the business, and that if it did not make a profit, the parent company would take its “toy” and leave. Importantly, in its decision, the Board specifically

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<sup>28</sup> In a lengthy opinion, the Court of Appeals for the District of Columbia refused to enforce the Board’s decision in *ConAgra*. The Court held that because the employer’s representatives repeatedly stated that the company remained profitable, but that it needed concessions to improve its ability to compete, the Board could not find, consistent with its decision in *Nielsen*, that the employer was claiming that it could not afford to pay the union’s demand. *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1442-43 (D.C. Cir. 1997).

pointed out that the dissent had mistakenly stated that the *employer* was willing to fund losses in the short term, while the record actually reflected that the *parent company* was willing to fund losses in the short term, contingent upon demanded labor-cost reductions. *Id.* at \*2, n. 6 (emphasis added). The Board noted that this difference was material. *Id.* In holding that the employer had stated an inability to pay, regardless of the parent company’s willingness to fund the operation in the short term, the Board noted that the employer’s bargaining representations suggested that it would *become* unable to pay if the parent company “pulled the plug.” *Id.* at \*4 (emphasis added). The Board specifically held that it was the employer’s ability to pay—not the parent company’s ability to pay, that was at issue. *Id.* at \*5.

Here, the Company indicated that it was profitable, and that it was willing to continue funding the Columbia City facility if it could be operated at a break-even level or a slight loss, in order to maintain a presence in the United States. (Trans. at 474-75, 489-91). Unlike the employer in *Stella*, who represented at the bargaining table that it required funding from a third party parent company to continue operating, the Company’s willingness to continue operating the Columbia City facility in order to maintain a United States presence was not contingent upon the receipt of funding from a separate entity.

Citing no Board precedent for the proposition that an employer’s decision to close an unprofitable facility places the survival of the Company in jeopardy, thus entitling the union to audit the Company’s financial records, CGC queries “what difference [it could] possibly make to the Union or the employees in the bargaining unit if Respondent was referring to the Company as a whole or just the Columbia City facility? The employees’ jobs were in Columbia City. If that plant closed, they would be out of work.” (*Id.*). CGC simply misses the point—it should have cared very much that the Company was making money in Mexico. The Company expressed

willingness to continue operating the Columbia City facility if it broke even or achieved a slight loss *because* of the profits it realized from its Mexico facility.

**2. The Company was not obligated to provide the Union with information that it had not requested.**

CGC argues that the ALJ erred distinguishing the instant case from *Caldwell Manufacturing, A-1 Door & Building Solutions*, and *Taylor Hospital* by “claiming that the Union’s requests [ . . . ] were overly broad because they requested general financial information rather than specifically limiting the requests to information about Columbia City.” (GC Exc. Br. at 18). In reality, the ALJ recognized existing Board precedent that distinguishes between the type of information to which the union is entitled, upon request, when the employer claims an inability to pay, and the type of information to which it is entitled when the employer claims that it needs concessions to remain competitive. The ALJ held that the Union:

did not make a specific request for information to evaluate the specifics of the Respondent’s claims that it needed concessions in order to make the Columbia City plant more competitive. Rather, the Union requested an audit of the Respondent’s general financial records and *Caldwell* itself establishes that the Union is not entitled to such information based on the claim that concessions are necessary in order to be competitive. (ALJD p. 18, ll. 1-5).

In *Caldwell*, the union requested cost data for each of the competitor’s plants, competitor data, and data on possible new production, in response to the employer’s claims that concessions were necessary if the plant wished to become a viable option for the location of new product lines and to be competitive in the industry. In *A-1 Door & Building*, the union requested specific information regarding the employer’s job bidding history, in response to the employer’s statement that its wages and benefits were not competitive with its competitors, making it difficult for the employer to get bids. In *Taylor Hospital*, the union sought information regarding a hospital’s budget and copies of census and reimbursement records, in response to the

employer's representations that it was decreasing the number of available beds and laying off nurses because insurance reimbursement rates had dropped, resulting in fewer patients and shorter hospital stays. The specific information requested in *Caldwell, A-1, Taylor Hospital*, and other cases dealing with information requests to verify an employer's specific claims about competitiveness, is not just narrower than a request for "an audit" of the Company's financial records, but often completely *different* from the information that would be learned in an audit.

**3. The Union did not make a limited demand for information, but instead continued to demand an audit.**

CGC excepts to what she believes to be the ALJ's finding the Union had not specifically limited its request to information about the Columbia City facility (CGC Ex. Br. at 18). CGC now appears to argue that the Union actually requested a more limited or specialized set of information to determine whether the Company's claims regarding the Columbia City were true. CGC contends that it is "obvious" that the Union's June 17 letter to the Company was clearly in response to the Respondent's June 8 last and best proposal, and that the Union's June 17 information request was "clearly referring to claims of losses at Columbia City."<sup>29</sup> (*Id.*).

The Union's June 17 letter to the Company, however, cannot be described as requesting information that is specifically limited to determining whether the Company was experiencing losses out of Columbia City. This letter, sent more than one week after the Union received the Company's best and final offer, and after the Union had threatened to file "NLRB charges" because the Company refused to submit to an audit, simply repeated the Union's unreasonable demand for an audit. It states:

We the bargaining Committee of UAW Local 2049, Unit 1 in a last ditch effort to avoid a labor dispute are requesting that the company open their books to the International UAW Auditing Department for review.

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<sup>29</sup> By making this argument, CGC appears to concede that the Union understood that the Company was referring to the profitability of the Columbia City facility, and not the Company as a whole.

You stated that Brad (Coupled Products LLC can no longer afford, and has the inability to pay wages where they are at today.

You tell us the company is continuously losing money, if this is true and you can show us this through your financial books we may be more apt to convince the membership that with these current wages the company would go bankrupt.

(GCX 40). The Union simply did not make a limited request for particular information to establish the Company's claims. Instead, it persisted in its demand for an audit, and for general access to the Company's financial records.

**4. Board precedent does not require the Company to determine which information the Union might necessary to validate its claims.**

CGC contends that the Company had an obligation to inquire of the Union regarding the exact nature of its request for an audit. (CGC Exc. Br. at 18). With this argument, CGC seeks to impose upon an employer the onus of determining what type of information the union believes is necessary to validate its bargaining claims and counsel its members. According to CGC, the Union was entitled to repeatedly demand an audit (to which it was not entitled), and then fault the Company for failing to accurately determine that the Union was not actually requesting an audit, but different information.

CGC cites *Keauhou Beach Hotel Co.*, 298 NLRB 702 (1990) for the proposition that a company who has not stated an inability to pay cannot deny a union's request for an audit, but must guess that the union's demand for an audit is not actually a request for an audit, but a request for different information. In *Keauhou Beach Hotel*, the Union requested information about (1) the name, age, classification, wage rates of each covered employee, (2) the weighted average wage rate, (3) total compensable hours for the past year, (4) total cost, on a compensable hour basis of benefits use, and (5) cost per employee per month of the medical, dental drug,

vision, and/or life insurance and pension/profit sharing plans. The employer refused to provide the requested information because the Union's information request was ambiguous in that it failed to specify whether it sought information regarding all employees or only unit employees. The Board noted that the employer had not attempted to rebut the presumption that the requested information was relevant. *Id.* at 702. However, the Board held that even if the Union's request was ambiguous and/or intended to include information about non-unit employees when made, this would not excuse the Respondent's blanket refusal to comply, and that the employer could not simply refuse to comply with a request, but must clarify and/or comply with the request *to the extent it encompasses necessary and relevant information.*" *Id.* at 703 (emphasis added). Importantly, the information requested in *Keahou* was clearly delineated, and the employer was not required to determine the type of information the Union might deem relevant.

The Board in *Keauhau* did not hold that the Union can demand to audit the Company's books, and then complain (after being on strike for more than a year) that the Company had not responded to the audit request with information about its competitors or some other unspecified information that it did not request. Unlike the union in *Keauhau*, who requested a clearly delineated set of information, but did not specify whether it pertained to bargaining unit members or all employees, the Union here requested to audit the Company's books, but now, more than a year later, appears to argue that the Company should have responded by providing it with different information that it had not requested.

CGC also cites a footnote in the Board's recent decision in *Kennametal, Inc.*, 358 NLRB No. 68, fn. 7 (June 26, 2012) to support her contention that the Company had a duty to provide unspecified information to the Union in response to the Union's repeated demand for an audit. In *Kennametal*, the employer implemented MBS, a company-wide safety initiative in July 2010.

MBS required employees to review safety checklists pertaining to the machinery they would operate, and memorialize their review of the safety information. On July 16, 2010, the union e-mailed the employer:

The USW [the international union] was just informed [. . .] of a new safety procedure that the company has implemented and I am requesting bargaining concerning this procedure and the effects it will have on the bargaining unit employees.

Please send me any and all information that you have pertaining to this by the end of next week.

The employer never responded to the union's request. It argued that it was not required to respond to the request because it sought information about MBS generally (not simply about the checklist requirement) and because MBS as a whole was not a mandatory subject of bargaining. The Board held that because the Union's request was made only two weeks after the safety checklist requirement was implemented and sought information about "a new safety procedure," it was clear that the union was referring to the checklist requirement. *Id.* The Board, citing *Keauhou Beach*, also stated, "in any event, and employer is not free to simply ignore an ambiguous or overbroad information request." *Id.* at fn. 7.

CGC argues that *Kennametal* is "very similar" to the facts at issue here, "where the Union's request made it clear what was being requested." (CGC Ex. Br. at 19). However, even CGC's brief, with the benefit of an entire year of hindsight, does not clarify what the Union contends that it was actually requesting! Assuming that CGC argues that the Union's June 17, 2011 request for the Company to "open [its] books to the International UAW Auditing Department for review" was actually not a request for an audit, but a request for some other unspecified proof that the Columbia facility was losing money, this request is distinguishable from the request in *Kennametal*. Unlike the union in *Kennametal* who clearly requested

information about “a new safety procedure” that the employer had recently implemented, which should have indicated that it was requesting information about the procedure (and not the MBS initiative generally), the Union here simply made another demand to audit the Company’s books. Nothing in the Union’s June 17 letter reasonably suggests that the Union was not actually requesting to audit the Company’s books.

CGC advocates for an extremely broad reading of the holding in *Keauhou Beach* and *Kennametal* that is far-removed from the basic tenor of those decisions. In both *Keauhou Beach* and *Kennametal*, the Board basically imposed a reasonableness standard that prevented the employer from refusing to produce any of the information requested by the Union because of perceived ambiguities in the request that could arguably be interpreted to make it overbroad. Neither the Union, CGC, nor the ALJ appear to be aware of any Board precedent obligating an employer to respond to the union’s overt request for an audit by guessing that the Union was not actually requesting an audit, or by determining what information the Union might believe to be relevant.

Furthermore, the policies advocated by *Keauhou Beach* and *Kennametal* are not furthered by the policy that CGC advocates here. Using CGC’s logic, a union would be well-advised to demand an “audit” or even “every document in your possession” at the beginning of highly-contentious negotiations, thus forcing the employer to attempt to determine what information to actually provide, and providing grounds for an unfair labor practice charge if the employer does not adequately assess the Union’s request. While CGC insists that the Company should have attempted to “clarify” the Union’s demands, this contention is especially unreasonable when considered in light of the fact that the Union *never* wavered from its demands for an audit or access to the Company’s general financial information—information to which it was not entitled.

Despite the Company's repeated denial of the Union's request for an audit, the Union never attempted to limit or amend its request for an audit to include a more limited set of information, or to indicate to the Company that it was requesting anything other than an audit. Certainly, *Keauhou Beach* and *Kennametal* do not stand for the proposition that the employer is required to do all of the legwork in determining the extent of the Union's information requests.

**C. The ALJ Properly held that the Parties Had Reached a Valid Impasse. (GCX Exceptions 16-18).**

CGC contends that the ALJ erred by finding that the Company and the Union were at a valid impasse because, under Board precedent, a finding of a valid impasse is precluded where the employer has failed to request information relevant to the core issue separating the parties. (CGC Exc. Br. at 20). As discussed above, the Company did not express that it was unable to pay the wages and benefits demanded by the Union. The Union was, therefore, not entitled to audit the Company's financial records. The Company's refusal to provide the Union with an audit—to which the Union was not entitled—did not prevent the parties from reaching valid impasse.<sup>30</sup>

While CGC argues that the Union, without the Company's financial information, lacked the ability to determine whether the Company's proposed concessions were reasonable, and that, without this determination, it was "unable to intelligently counsel its members" as to whether or not they should accept the Company's best and final offer, it is undisputed that the Union actually counseled its members to reject the proposal because the wages were "ridiculous." (Trans. at 337). Furthermore, the Company *did* provide (or attempt to provide) the Union with a substantial amount of information to which it was entitled—including its profit and loss statements, local wage research, payroll records detailing the wages paid to bargaining unit

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<sup>30</sup> The Union actually did perform an audit of the Company's books in early 2012. However, the Union has expressed no interest in returning to the bargaining table, even after performing the audit.

employees, information regarding its health, life, and dental insurance premiums, and even information detailing another health insurance carrier's refusal to insure the Columbia City employees. (R15-20). The Union, although it refused to perform any of its own research, continued to demand that an audit was necessary.

A union's unfailing insistence on economic data, when the union has no right to that data, may give rise to an objectively reasonable declaration of impasse. In *Concrete Pipe and Products Corp.*, 305 NLRB 152 (1991), *enf'd sub nom. United Steelworkers of America v. NLRB*, 983 F.2d 240 (D.C. Cir. 1993), the employer sought wage concessions of approximately 33% and reductions in benefits of approximately 50% to maintain its competitiveness, stating, "to be competitive, wage rates and benefits must be lowered." The employer did not claim that it could not afford the current wages or that it was at risk of closing down. The union requested economic information to justify the employer's position on wage cuts and would not agree to any concessions without access to the company's financial records. The Board concluded that an impasse has been reached and that the employer was thereafter entitled to unilaterally implement its final proposals. *Id.* at 153. The Board rejected the claims that the employer negotiated in bad faith and prematurely declared an impasse. *Id.* at 153-54.

Like the employer in *Concrete Pipe*, who asserted that wage and benefit cuts were necessary to remain competitive, the Company requested wage and benefit concessions to increase the Columbia City facility's competitive position and operate the facility at a level that its owners felt was acceptable. Additionally, like the union in *Concrete Pipe*, who refused to move on wage reduction issues without access to the employer's books, the Union insisted that an audit was necessary for it to convince its members to accept concessions. Considering the Union's repeated insistence that an audit was necessary to accept concessions and refusal to

accept any type of wage concession, the Company was entitled to conclude that impasse had been reached.

Regardless of the Union's improper demands for an audit, it is undisputed that the Company and the Union remained far apart on their positions regarding "monetary issues," or the Company's proposed wage and benefit reductions. As early as May 20, 2011, McMillin indicated that the Union would not accept the Company's proposed wage and benefit reductions and requested strike authorization. (Trans. at 316; GCX 41). Kohne testified that the gap between the Union's position and the Company's position with regards to "monetary issues" was too wide to be resolved. (Trans. at 169). Smith testified that negotiations were going nowhere. (Trans. at 230). The Union requested the Company's best and final offer on May 27, 2011, long before the current contract expired. (GCX 31 at 30). On June 9, 2011, after receiving the Company's best and final offer with the requested clarifications, the Union voted against ratifying the Company's offer. (GCX 21). On June 10, 2011, the Union offered limited counter-proposals, which the Company did not accept. (GCX 36). At negotiations on June 15, 2011, the last meeting before the Union went on strike, McMillin told Johnson to "pack up the trucks," and "call Mexico" to tell it that "stuff was on the way," insinuating that the Union preferred closing the Columbia City facility to accepting the Company's best and final offer. (Trans. at 169-70; 374; R8 at 25; GCX 30 at 36). The Union has not changed its position since the Company provided it with its best and final offer. (Trans. at 169). Smith testified that she remains unwilling to return to work under the Company's current terms and conditions of employment. (Trans. at 218). The Company has also not changed its position.

GGC insinuates that the parties were unable to arrive at impasse because the Company did not provide the Union with the requested audit. As discussed above, however, the Union was

not entitled to audit the Company's books. Moreover, even if the Company had allowed the Union to perform the audit, an audit would not have confirmed or denied that the Company was not competitive, or that the wages for unskilled workers were higher than the wages paid to other unskilled workers in local manufacturing companies. Such an audit would have shown, as the Company maintained, that the Company was capable of paying the wages and benefits demanded by the Columbia City employees. Because the Union's testimony insinuates that its members would not accept a concessionary agreement unless the Company was literally unable to pay the wages and benefits, an audit establishing the Company's ability to pay would not have assisted the parties in reaching an agreement. Even if the Company had submitted to the Union's demands and allowed the Union to audit its books, the Union's statements that it preferred the closure of the Columbia City facility to accepting the Company's best and final offer suggests that an audit establishing the Company's ability to pay the demanded wages and benefits would not have motivated the Union to accept the Company's position.

The record shows that the parties had reached a valid impasse. Bargaining committee members testified that the gap between the Union and the Company's position on "monetary issues" was too wide to be resolved, and that negotiations were going nowhere. (Trans. at 169, 230). McMillin told Johnson to "pack up the trucks" and "call Mexico" to tell it that "stuff was on the way," insinuating that the Union preferred closing the Columbia City facility to accepting the Company's best and final offer. (Trans. at 169-70; R8 at 25; GCX 30 at 36). Neither the Union nor the Company appear to have changed their positions.

The NLRA does not require the Company to continue engaging in fruitless discussions with the Union. The Union maintained throughout negotiations that it would never accept the Company's best and final offer, even indicating a preference for closing the Columbia City to

accepting it. The Company maintained that it was unwilling to maintain the status quo with regards to the payment of wages and benefits. Because both parties refused to depart from their positions on wages and benefits, there was no realistic possibility that continued negotiations after June 15, 2012 would have been fruitful. The Company and the Union reached legal impasse, and neither party has indicated a change in position that would break the existing deadlock. The Company was entitled to unilaterally implement the terms of its best and final offer.

**D. The ALJ correctly found that the Union's strike is an economic strike and not an unfair labor practice strike. (GCX Exception 19)**

**1. No Unfair Labor Practice Occurred.**

CGC argues that the ALJ erred by finding that the Union initiated an economic strike, and not an unfair labor practice strike. (CGC Exc. Br. at 22). The record demonstrates, however, that the Company properly refused the Union's demand for an audit. Because the Company did not claim an inability to pay the wages and benefits demanded by the Union, the Union was not entitled to audit the Company's financial information. The Union's persistent demands for an audit also did not obligate the Company to provide the Union with different information that the Union did not request. The Company's refusal to provide the Union with an audit, and failure to determine that the Union's request for an audit was actually a request for competitor information do not constitute an unfair labor practice. Therefore, the Union cannot be engaged in an unfair labor practice strike.

**2. Even if the ALJ improperly found that an unfair labor practice occurred, the record demonstrates that the unfair labor practice had nothing to do with the strike.**

General Counsel contends that the Company's unfair labor practice caused or prolonged the Union's strike. The existence of prior unfair labor practices does not mean that a subsequent

strike is an unfair labor practices strike for purposes of the NLRA. In *Golden Stevedoring Co.*, 355 NLRB 410 (2001), the Board held that “a work stoppage is considered an unfair labor practice strike if it is motivated at least, in part, by the employer’s unfair labor practice. . . It is not sufficient however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events . . . In sum, the unfair labor practices must have contributed to the employees’ decision to strike.” *Id.* at 411; *RGC (USA) Mineral Sands, Inc.*, 324 NLRB 1633, 1634 (1997).

Board precedent requires evidence that the strikers themselves were motivated by the employer’s unfair labor practices. See *Golden Stevedoring Co.* 355 NLRB at 411-12 (finding it “most significant” that General Counsel failed to offer evidence that unfair labor practices were discussed at strike meeting and rejecting employees’ generalized complaints about management “harassment” as proof that unfair labor practices motivated strikers); *C-Line Express*, 292 NLRB 638, 639 (1989) (noting lack of evidence that strikers “were even aware” of alleged refusal to answer information requests or that unlawful statements to some of their co-workers on the picket line prolonged the strike); *F.L. Thorpe & Co. v. NLRB*, 71 F.3d 282, 290-91 (8<sup>th</sup> Cir. 1995) *denying enf.* 315 NLR 147 (1994) (reinstating ALJ’s conclusion that employer’s unfair labor practices did not motivate strike when abundant evidence showed that employees were motivated by economic issues, evidence of dissemination was limited to small number of employees, and picket signs never reference the unfair labor practices).

The state of mind of the strikers must be that their concerted work stoppage and strike was, at least in part motivated by their employer’s unfair labor practices. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006). Put another way, whenever a reasonable inference may be drawn that an employer’s unfair labor practices played a part in the decision of the employees to strike,

said concerted work stoppage is an unfair labor practice strike. *Post Tension of Nevada, Inc.*, 352 NLRB 1153, 1162-63 (2008). The burden is on the employer to establish that the strike would have occurred even if it had not committed unfair labor practices. *Id.*

Nothing in the record supports a reasonable inference that the Company's purported unfair labor practices played a part in the Union members' decision to strike.<sup>31</sup> The bargaining unit voted to support a strike on May 2, 2011, prior to the first bargaining session, and prior to any Union request for an audit of the Company's finances. (GCX Ex. 33). On May 20, 2011, after only three days of negotiations, and before the Company had made any statements that the Union interpreted as pleading inability to pay, the Union submitted a request for strike authorization to the international union. (Trans. at 316; GCX Ex. 41). In its strike authorization request, the Union cited the following issues: wage reduction, vacations, holidays, S & A, bereavement, seniority, and increased insurance premiums. (GCX Ex 41, p. 3).

A second strike vote was not taken. (Trans. at 177). On June 9, 2011, the Union membership met to vote on the ratification of the Company's best and final offer. (GCX 34). At the ratification vote, McMillin spoke told the membership that she thought the Company's offer was bad because the wages were ridiculous, and that she did not recommend that they accept the Company's offer. (Trans. at 337, 339). At this meeting, she did not use the term "unfair labor practice." (*Id.*). Notably, McMillin's testimony does not suggest that she or any other committee member advised the membership that they should vote against ratifying the Company's best and final offer because the Company refused to allow the Union to perform an audit. (*Id.* at 337-339). Smith testified that the committee did not speak to the Union

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<sup>31</sup> Although CGC references, through a misleading citation, testimony from Kathy Smith, that the Company's alleged failure to provide information was a "sticking point" in the negotiations, which was elicited through a leading question on direct examination, such testimony is not properly before the Board. (CGC Exc. Br. at 23). The Company's objection to such evidence was sustained, and the ALJ stated that he would give it no weight. (Trans. at 260).

membership about whether the Union was going on an unfair labor practice strike or an economic strike. (*Id.* at 246). In fact, nothing in the record suggests that the rank and file membership was even aware of the Company's refusal to allow the Union to audit its books.

While some picketing union members were depicted holding "Unfair Labor Practice" signs in a photograph taken in March 2012, McMillin testified that she had gotten some of the signs from the Chrysler plant at Local 685, and could have been sent some of the signs from the International Union, but could not remember when the "unfair labor practice" signs were put into rotation. (Trans. at 336-37). Even Mike Ailes, who served as the assistant director for Region 3 of the International Union in 2011, testified that he was unsure whether the international union had approved an unfair labor practice strike. (Trans. at 288). In any event, in an administrative proceeding before the Indiana Board of Workforce Development, the representative for the striking Union members stipulated that the striking Union members had been permanently replaced in late June, 2011, a position that is consistent with an economic strike. (R23).

Nothing in the record suggests that the Union membership initiated a strike because the Company refused to allow the Union to audit its books.<sup>32</sup> Throughout negotiations, and specifically in the days immediately preceding the strike, the Union repeatedly indicated that it would not accept the proposed wage reductions for its unskilled employees or shoulder their own health insurance premiums. (Trans. at 371; R4 at 38) The Union's bargaining notes reflect that it was going on strike because its members would not accept the \$4.25 pay cut for unskilled workers or the increased health insurance premiums. (GCX 31 at 36-37; Trans. at 374-75). While CGC argues that the Union was unable to persuade its members to ratify the Company's proposal without auditing the Company's financial information to give the membership a "good reason" for ratifying the Company's proposal, (ostensibly to "prove" that the Company was

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unable to pay the wages demanded by the Union), the Company maintained throughout the course of negotiations that it was able to continue paying the wages and benefits demanded, but did not wish to do so. Given the Union's position that the Company's inability to pay was the only "good reason" for accepting concessions, an audit demonstrating the Company's financial ability to pay would not have prevented or shortened the Union's strike.<sup>33</sup>

Even if the Company's refusal to submit to an audit were to constitute an unfair labor practice, nothing in the record suggests that the rank and file Union membership is even aware of the purported unfair labor practices, or that they voted to strike or are currently engaged in a strike because of such purported unfair labor practices.

### **III. CONCLUSION**

The ALJ correctly found that the Company did not state an inability to pay, that the Union was not entitled to audit the Company's books, and that the Company was not obligated to respond to the Union's audit demand by guessing at what types of information that Union might have deemed relevant. Because the ALJ correctly found that no unfair labor practice had occurred, he correctly found that the parties were at valid impasse, that the Company was entitled to unilaterally alter the terms and conditions of employment, and that the Union is currently engaged in an economic strike. Therefore, the Company respectfully requests that the Board AFFIRM the ALJ's findings of fact and conclusions of law.

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<sup>33</sup> Again, the Union performed the audit in early January, 2012. The Union remains on strike, and has not requested to return to the table.

Respectfully Submitted,

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I hereby certify that on the 1st day of August 2012, I e-mailed a true and correct copy of the above and foregoing to:

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