UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

FRED MEYER STORES. INC., and **ALLIED EMPLOYERS, INC.,** and **UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION**	Cases 19-CA-32908 19-CA-33052

RESPONDENTS' POST HEARING BRIEF

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I. INTRODUCTION

The Consolidated Complaint ("Complaint") in this case alleges that Fred Meyer Stores, Inc. ("Fred Meyer") and Allied Employers, Inc. ("Allied Employers") (collectively referred to herein as "Respondents") violated Section 8(a)(5) and (1) of the National Labor Relations Act ("Act") by: 1) "effectively" unilaterally removing the nutrition employees working in Fred Meyer's stores in Lacey and Tumwater, Washington, from the grocery unit covered by the Mason/Thurston grocery agreement between Fred Meyer and United Food and Commercial Workers Union ("UFCW") Local 367, and the playland employees working in Fred Meyer's University Place store in Tacoma, Washington, from the Combined Checkstand ("CCK") unit covered by the Pierce County CCK agreement; 2) failing to apply the "general" terms of the Mason/Thurston grocery agreement to the Lacey/Tumwater nutrition employees and the "general" terms of the Pierce County CCK agreement to the University Place playland employees; 3) failing to bargain with Local 367 regarding "unique" terms and conditions of employment applicable to the Lacey/Tumwater nutrition and University Place playland employees; and, 4) failing to pay the ratification bonus provided for in the 2010 Seattle Settlement to the Lacey/Tumwater nutrition and University Place playland employees. (Tr[1] 29-30, 296-301; Complaint, paras. 7(d)-(e), 9(e), 10, 11, 13.) The Complaint also alleges that Fred Meyer violated Section 8(a)(1) of the Act by "posting a notice to its employees at all of its stores

[1] Citations to the transcript of the hearing in this case are referred to as "(Tr __.)" Citations to exhibits entered jointly by the parties are referred to as "(Jt Ex __.)" Citations to exhibits entered by Counsel for the Acting General Counsel are referred to as "(GC Ex __.)"; citations to those entered by Local 367 are referred to as "(U Ex __.)"; citations to those entered by Respondents are referred to as "(R Ex __.) Joint Exhibit 17 contains exhibits that were entered by the parties in a related arbitration hearing. References to the exhibits contained in Joint Exhibit 17 are referred to as "(Jt Ex 17: Jt-__.)" for joint exhibits; "(Jt Ex 17: U__.)" for Union exhibits; and, "(Jt Ex 17: E-__.)" for exhibits entered by Allied Employers.

represented by the Union, blaming the Union for lack of ratification bonuses and for the delay in reaching a collective bargaining agreement." (Tr. 27-28, Complaint, paras. 8, 12.) Counsel for the Acting General Counsel ("General Counsel") failed to carry her burden to prove any of these charges against Respondents and the Complaint must therefore be dismissed.

II. STATEMENT OF FACTS

A. Fred Meyer's Met, Grocery and CCK Agreements with the Puget Sound Area UFCW Locals. Including Local 367, are Bargained Every Three Years in Seattle, Washington, during Multi-Employer, Multi-Union Negotiations.

Fred Meyer owns and operates 131 retail stores in several states including Washington State. (Tr. 136, 137, 425; Jt Ex. 19.) 123 of these stores are considered to be "one stop" shopping stores selling a full line of merchandise including grocery and general merchandise items, such as apparel, home, photo electronics, and garden goods. (Tr. 137, 425.) They are all over 100,000 square feet in size. *Id*. The remaining eight stores are called "Marketplace" stores. *Id*. They are less than 100,000 square feet in size and sell primarily grocery items and do not sell home and apparel goods. (Tr. 137, 425.)

Fred Meyer's employees in Western Washington State (a.k.a the "Puget Sound" area) are represented by UFCW Locals 367, 21 and 81 (and in some cases by Teamsters Local 38). (Tr. 136-39; Jt Ex. 16, p. 44; Jt. Ex. 19.) The employees in Fred Meyer's one-stop shopping stores who are represented by UFCW Locals 21, 81 and/or 367 are generally divided into four distinct bargaining units covered by the following types of collective-bargaining agreements: grocery, meat/seafood, Combined Checkstand ("CCK") and general merchandise (also referred to as "non-foods").[2] (Tr. 138-40.) Fred Meyer bargains its grocery and meat

[2] In the Marketplace stores, bargaining unit employees who would normally be covered by a CCK or general merchandise agreement are instead covered by the grocery

[Footnote continued on next page]

agreements with UFCW Locals 21, 81 and 367 through multi-employer, multi-union negotiations with the Locals. (Jt Ex 16, p 44.) In those negotiations, Fred Meyer is represented by Allied Employers, which is a multi-employer association of retail grocery employers whose members also include, among others, Safeway, QFC and Albertsons (collectively referred to herein as the "grocery employers"). (Tr. 136, 311-12; Jt. Ex. 16, p. 44.) Fred Meyer's CCK and general merchandise agreements with UFCW Locals 21, 81, and 367 are bargained on Fred Meyer's behalf directly with the individual Locals by Allied Employers because the other retail grocery employers do not have CCK and general merchandise agreements. (Tr. 139, __.)

Local 21[3] represents Fred Meyer employees in the following bargaining units in the following counties in Washington: Snohomish (grocery, CCK, meat), Jefferson and Clallam (meat), Whatcom (grocery, CCK, meat), Skagit Island (grocery, CCK, meat), Kitsap and North Mason (grocery, CCK, meat), and King (grocery, CCK, meat). (Jt Ex. 19.) Local 81 represents employees in bargaining units covered by meat agreements in the following counties: King/Kitsap and Mason/Thurston. Local 367 represents employees in the following bargaining units in the following counties in Washington: Pierce (grocery/CCK, meat); Mason/Thurston (grocery); Thurston (CCK); and, Grays Harbor and Lewis (grocery and meat). (Tr. 136; Jt Ex. 19.)

[Continued from previous page]

agreement because the Marketplace stores do not have CCK and general merchandise units. Fred Meyer acquired the Marketplace stores with the existing grocery agreements in place. (Tr. 139, 435.)

[3] Over the years many UFCW locals merged into Local 21, and Local 21 assumed the collective-bargaining agreements of the merged locals. (Tr. 139; Jt. Ex. 16, p. 45; Jt Ex. 19.) These merged locals include Locals 44, 381, and 1105. *Id.*

The grocery, meat and CCK agreements expire on different dates every three years, with the earliest expiration dates falling on May 1. (Jt Ex. 16, p. 44; Jt Ex. 19.) The practice has been that the multi-employer, multi-union negotiations for successor agreements would begin with the agreements expiring on May 1, and the negotiations would be held by the parties in Seattle, King County, Washington. (Jt Ex 16, pps 44-45; Jt Ex 10.) These negotiations are commonly referred to as the "Seattle Negotiations" and the settlement agreements resulting from those negotiations are commonly referred to, collectively, as the "Seattle Settlement." Typically, the parties bargain to apply the Seattle Settlement to the later expiring agreements, in whole or in part. (Jt. Ex. 16, pps. 44-45, 47; Jt. Ex. 17: E-7 – E-8.)

Randy Zeiler of Allied Employers has been involved with every round of Seattle Negotiations since 1989, and has been the chief spokesperson for the grocery employers since 2001. (Tr 356; Jt Ex. 16, p 44.) Prior to 2007, Local 367 was an active participant in the Seattle Negotiations. (Jt Ex 16, p 45.) In fact, Local 367's then-President Ron Hayes acted as chief spokesperson for the UFCW Locals in the 2001 Seattle Negotiations, which resulted in grocery, meat and CCK agreements effective from 2001 to 2004. (Jt Ex 16, p 45; Jt Ex 17: E-3.) Teresa Iverson also actively participated in the negotiations of these, meat, grocery and CCK agreements on behalf of Local 367. (Jt Ex 16, 45.)

B. After Walking Out Of the 2004 Seattle Negotiations, Local 367 Agrees to Apply to its Agreements All of the Changes Made in the 2004 Seattle Settlement.

Teresa Iverson led Local 367's bargaining team during the 2004 Seattle Negotiations. (Tr 134; Jt Ex 16, p. 45.) Iverson and her bargaining team walked out of those negotiations shortly before they were completed. *Id*. The grocery employers and the remaining UFCW Locals then agreed on a settlement for the grocery, meat and CCK agreements effective

from 2004-2007. (Jt Ex 16, pps 45-46.) Wanting to protect Local 367's members after Local 367 walked out of the negotiations, the UFCW International representative present during the Seattle negotiations told Zeiler that the grocery employers would have to offer *the same settlement* to Local 367 as a condition of settlement with the remaining UFCW Locals. (Jt Ex 16, p 46.)

Zeiler complied by offering *the same settlement* to Local 367 through the federal mediator who had been assigned to the 2004 Seattle Negotiations. (Jt Ex 16, p 46; Jt Ex 17: E-4.) Zeiler essentially took the 2004 Seattle Settlement, changed the names from Local 21 and 81 to Local 367, and provided it to Local 367. (Jt Ex 16, p 47; Jt Ex 17: E-6, 8.) If Local 367 did not accept the same settlement as presented by Zeiler, Local 367 would have had to bargain its grocery, meat and CCK agreements separately with Allied Employers. (*Id*.) Local 367 first rejected but then accepted Zeiler's offer, and once its members ratified the 2004 Seattle Settlement, Local 367 applied the *same settlement* to all of its agreements. (Jt Ex 16, p 46; Jt Ex. 17: E-4 – 6, 8.)

C. Local 267 was not Invited to Participate in the 2007 Seattle Negotiations, so Local 367 President Teresa Iverson Proposes and Executes a "Blank Check" Me-Too Agreement with Allied Employers Agreeing to Apply to its Agreements the Same Settlement Reached During the 2007 Seattle Negotiations.

As the start of the 2007 Seattle Negotiations loomed, Local 367's relationship with the other Puget Sound area UFCW Locals remained fractured, and Local 367 was not invited to participate in the Seattle Negotiations. (Tr 389; Jt Ex 16, p 48.) As a result, Local 367 President Teresa Iverson approached Zeiler in April 2007, proposing that the parties execute an "interim/me-too agreement" because she feared that Local 367 would not be able to achieve by itself successor grocery, meat and CCK agreements that would improve upon any settlement

reached in the upcoming Seattle Negotiations. (Jt Ex 16, p 48; R Ex 1; R Ex 6, pps1-8.) Iverson and Zeiler met on Friday, April 13, 2007, to discuss Iverson's proposed interim/me-too agreement. (R Ex 6, p 2.) During those discussions, Iverson proposed that they enter into a me-too agreement similar to the one Allied Employers had executed with UFCW Local 381 in 1989. (Tr 317-18; Jt Ex 17: E-9, p 7.) Under the me-too agreement Iverson was proposing, Local 367 would agree to apply the terms of the grocery, meat and CCK settlements reached in the 2007 Seattle Negotiations to the grocery, meat and CCK agreements between Local 367 and the grocery employers. (Jt Ex 16, p 48; R Ex 1; R Ex 6, pps1-8.)

Iverson explained to her members why Local 367 needed to execute such a me-too agreement:

> In April, your Executive Board discussed at length what could be the potential outcome of bargaining for the grocery, meat and CCK members in our jurisdiction. ***The major concern was that the employer group would bargain an agreement with Local 21 and 81 in Seattle, and then present a worse proposal to members of Local 367. This is exactly the strategy that was used in our recent dispute with Macy's***.
>
> In past years, Local 367 has bargained for new agreements for grocery, meat and CCK in a union coalition bargaining with a multi-employer group. Recently, however, that process has broken down. To date, Local 367 has not been included in Seattle discussions for new agreements with Local 21, 44 and 81. We do know, however, that those locals have held approximately five bargaining sessions, and each of the locals is participating in a sub-committee to look at the cost of potential plan design changes to the medical and dental plans.
>
> Considering all these factors, I recommended to the Executive Board that we approach Randy Zeiler, President of Allied Employers and lead negotiator, about the possibility of an interim/me-too agreement, which would provide that whatever changes are approved in the Seattle agreements would be incorporated into Local 367's agreements.
>
> * * *
>
> ***I would like to assure we have prepared for bargaining in every conceivable way, but realistically, what comes out of Seattle would be***

> ***very difficult for us to oppose or improve upon in our own separate negotiations, without the benefit of support in the area. Once Seattle settles their contracts, they will not engage in support of this area.***

(R Ex 1 (underlined emphasis in original, italicized, bolded emphasis added).)

Iverson pushed hard for the me-too agreement to be executed quickly, since she feared she would not be able to secure the agreement of her own members. (R Ex 7.) On May 4 she emailed Zeiler informing Zeiler that, in her opinion, Local 367's stewards and "key members" would not be amenable to the me-too agreement she was proposing because they would not want to "[sit] on the sidelines" or "give up their voice in negotiations." (Jt Ex 16, p 48; R Ex 7.) Iverson insisted that Zeiler obtain the grocery employers' agreement to her proposed me-too agreement by May 8 or she would consider the matter closed. (R Ex 7.)

Zeiler discussed Iverson's proposed me-too agreement with the grocery employers, who expressed to Zeiler that they would only enter into the me-too agreement if it contained no restrictions. (Tr 431.) On May 7 Zeiler advised Iverson that he had secured the agreement of employers Safeway, Fred Meyer, QFC and Albertsons "that they would apply the terms of the 'Seattle settlement' to all of their Agreements in [Local 367's] jurisdiction." (R Ex 7.) On May 8 he advised Iverson that he had also secured the agreement of independent employers Haggens, Stormans, and Everybodys. (R Ex 8.) He was still trying to contact employers Fuller and Swansons. *Id*.

On May 9, Iverson faxed the proposed me-too agreement to Zeiler. (Jt Ex 16, p 49; Jt Ex 17: E-9, pps 2-4.) This draft proposal was entitled "interim agreements" and it provided as follows:

> This letter will confirm our understanding that Allied Employers, on behalf of all its employers (list attached, hereinafter referred to as 'Employers'), in Pierce, Thurston, Lewis, Mason, Grays Harbor, and Pacific Counties agrees to the following:

The Employers agree to extend the same recommended settlement as is negotiated in the current (2007) King County UFCW Local 21/81 Grocery, Meat, and CCK negotiations to members of UFCW Local 367 in all Collective Bargaining agreements within the jurisdiction of Local 367 in the counties identified herein. The parties agree that the effective dates of Local 367 agreements will remain the same n those areas that are not identical to King and Pierce Counties (i.e., Mason/Thurston -9/30/07 to 9/29/10, etc.).

The parties agree that changes proposed in the King County Local 21/81 agreements will be the same as those proposed in Local 367's agreements, but that the differences in language will be preserved. For example, if a 50-cent increase in wages should be proposed in King County Local 21/81, then the same 50-cent increase in wages would be applied to Local 367's agreements. In the same sense, if a holiday should be dropped in King County Local 21/81, then the same holiday would be dropped in the proposal applied to Local 367's agreements.

This letter will extend the 2004-2007 agreements until the earlier of July 1, 2007 or the ratification date of the new/successor Local 21/81 agreements, unless this period is extended by mutual agreement. All terms and provisions of the 2004-2007 agreements, including dues check-off, no-strike, no lock-out provisions and Letter or Memoranda of Understanding and Addenda shall remain in effect for the duration of the extension.

The Employers understand that both this agreement and the terms of the recommended settlement from the Local 21/81 negotiations must be ratified by the members of Local 367 in all jurisdictions of Local 367, and that both are contingent on their ratification. Local 367 agrees to recommend the terms of the Local 21/81 recommended settlement in our jurisdiction.

The parties further agree that if there are any disputes that arise under the terms of this Letter of Agreement or the application of the terms of the Local 21/81 settlement to the Local 367 Agreements, either party may request expedited arbitration of the dispute. Both parties agree they will bring this matter before an arbitrator within twenty days of notice of a dispute. The parties agree to select an arbitrator from an FMCS list of arbitrators within seventy-two (72) hours of receipt of the arbitrator list.

(Jt Ex 17: E-9, pps 3-5.)

With regard to the phrase "differences in language," Iverson and Zeiler discussed the fact that some of the language in Local 367's grocery, meat and CCK agreements was different from that in the agreements of Locals 21 (and 44) and 81. (Tr. 314.) In some cases, the differences in language provided Local 367 with richer benefits, but in other cases the differences provided it with lesser benefits. Iverson wanted to ensure that the richer differences remain unchanged by the 2004 Seattle Settlement. (Tr 161, 164.) Zeiler agreed, and wanted to ensure that Iverson understood that by agreeing to the me-too agreement, Local 367 would not get the *same* agreements that Locals 21 (and 44) and 81, have but would instead get only the changes negotiated to that language. (Tr.313-14.) As Zeiler explained: "[I]f there were ***differences in the written language*** in the documents, in Local 367s contracts, that language would not change by virtue of some change to a particular section in the Seattle settlement." (Tr 314.) Iverson and Zeiler discussed some of the particular differences in language between the various agreements, including the differences in the vacation, Sunday premiums, and holidays language. (Tr 161, 164, 314.)

On May 10, Iverson emailed Zeiler saying that she had anticipated a response to her May 9 proposed me-too agreement and that the proposal's provision allowing Local 367's members to vote to ratify both the me-too and any recommended Seattle Settlement should not have been a surprise to Zeiler because they discussed that provision during their meeting on April 13. (Jt 17: E-9, p 6.) Zeiler responded on May 11:

> The "interim agreement" you sent me is nothing like we discussed. This is simply a 2-month extension that gives your members an opportunity to ratify (or not ratify) the Puget Sound settlement. When you initiated this discussion you referred to the 1989 Allied - #381 Agreement. The interim agreement you proposed is nothing like what was agreed to in 1989.
>
> Although your current proposal is unacceptable to the employers we do agree in principal with the concept. Here is what I think would work best

> for all parties: We reach an understanding that the employers will accept a proposal from Local 367 to have the Puget Sound Settlement apply to all your contracts. We could even have a written document prepared outlining our future agreement. You then meet with your membership and advise them that you have a plan to secure them the Puget Sound settlement and would like their approval to propose to the employers. (You can even pass on my comments that I we (*sic*) are already hearing from the employers that certain economic terms of the Puget Sound settlement will probably not be appropriate in some areas that have high unemployment rates and depressed local economies.) Have them then pre-ratify the deal. Once you advise me that the deals have been pre-ratified I would then sign off on our agreement and we are done.
>
> Any agreement we reach will need to have provisions that prevent Local 367 from engaging in economic action…even if there is a dispute in Seattle etc and to essentially remain neutral as the negotiations continue in Seattle.

(Jt Ex 17: E-9, p 7.) Iverson responded as follows:

> As a follow-up to my phone message, it appears this concept is not coming together. In our initial discussion my reference to local 381 was used to explore the possibility of a me-too concept between the parties. In fact, I told you I didn't know the details of the agreement. I am confident though, Randy, that I was very clear in my comments that if we were to proceed with these informal discussion there had to be a clear understanding that the members of Local 367 would have to vote on the me-too and the settlement. It appears that this concept has now gone down an entirely different track. I am sorry we weren't able to put this together. Thank you for your efforts. We should discuss available dates.

Id. Zeiler then responded:

> I agree that we did not discuss specific terms but what you are proposing is not a "me too". You are correct that 381 members did get an opportunity to vote to ratify the ultimate settlement but they did not also hold a second ratification concerning the original agreement. 381 not only agreed to recommend but also agreed that if the agreement was not ratified they would revote until it was ratified. That agreement also contained a strict limitation on 381 engaging in any economic activity. You and I did discuss that aspect of the me too and I thought you said you understood that would have to be part of any me too. Your draft contained no limitations on 367's activities. If you have an interest in some form of a "me too" let me know.

Id. Iverson replied: "I left you a message. We did discuss local 367 limitations on activities and I apologize that is not included in the document. We can try to give this one last shot. Give me a call." (Jt Ex 17: E-9, p 8.)

> On May 14, Iverson again emailed Zeiler, saying:
>
> * * * I have modified the agreement we previously forwarded to you on May 9, 2007 and will fax you a copy shortly. The changes address your concern regarding economic activity and the expiration date of the agreement. Once you sign and return a copy, we will schedule meetings to vote the agreement. I understand your comments regarding 381's vote, but I would find it hard to believe that they included that in a document. * * * As I stated to you on Friday, if this doesn't come together, we are requesting that you sign and return a copy of the extension agreement and I will contact you to select dates.

(R Ex 9.) Iverson then faxed the revised me-too agreement to Zeiler, which provided as follows (Iverson's May 14 modifications to the May 9 me-too proposal are underlined below):

> This letter will confirm our understanding that Allied Employers, on behalf of all its employers (list attached, hereinafter referred to as 'Employers'), in Pierce, Thurston, Lewis, Mason, Grays Harbor, and Pacific Counties agrees to the following:
>
> The Employers agree to extend the same recommended settlement as is negotiated in the current (2007) King County UFCW Local 21/81 Grocery, Meat, and CCK negotiations to members of UFCW Local 367 in all Collective Bargaining agreements within the jurisdiction of Local 367 in the counties identified herein. The parties agree that the effective dates of Local 367 agreements will remain the same in those areas that are not identical to King and Pierce Counties (i.e., Mason/Thurston -9/30/07 to 9/29/10, etc.).
>
> The parties agree that changes proposed in the King County Local 21/81 agreements will be the same as those proposed in Local 367's agreements, but that the differences in language will be preserved. For example, if a 50-cent increase in wages should be proposed in King County Local 21/81, then the same 50-cent increase in wages would be applied to Local 367's agreements. In the same sense, if a holiday should be dropped in King County Local 21/81, then the same holiday would be dropped in the proposal applied to Local 367's agreements.

> This letter will extend the 2004-2007 agreements until the earlier of September 1, 2007 or the ratification date of the new/successor Local 21/81 agreements, unless this period is extended by mutual agreement. All terms and provisions of the 2004-2007 agreements, including dues check-off, no-strike, no lock-out provisions and Letter or Memoranda of Understanding and Addenda shall remain in effect for the duration of the extension.
>
> The Employers understand that both this agreement and the terms of the recommended settlement from the Local 21/81 negotiations must be ratified by the members of Local 367 in all jurisdictions of Local 367, and that both are contingent on their ratification. Local 367 agrees to recommend the terms of the Local 21/81 recommended settlement in our jurisdiction.
>
> If this interim agreement is ratified by Local 367's members, it is understood that Local 367 will not engage in any strike or boycott activities in support of a dispute in Seattle, specifically UFCW Locals 21, 81 and 44.
>
> The parties further agree that if there are any disputes that arise under the terms of this Letter of Agreement or the application of the terms of the Local 21/81 settlement to the Local 367 Agreements, either party may request expedited arbitration of the dispute. Both parties agree they will bring this matter before an arbitrator within twenty days of notice of a dispute. The parties agree to select an arbitrator from an FMCS list of arbitrators within seventy-two (72) hours of receipt of the arbitrator list.

(Jt Ex 17: U-9, pps 9-12.)

Iverson faxed another modified proposal to Zeiler that day. (Jt Ex 17: E-9, pps. 13-16.) Her cover sheet to the fax stated:

> Randy, I understood your telephone message today to say that the Employers objected to the me too document sent to you because it contained the right for Local 367 members to vote twice. From the beginning I was very clear the members would have to ratify the me too and be able to see the proposal to give us a greater likelihood of ratification. The ***blank check*** will be a much harder concept. I am sending revised documents that address your concerns. * * *

(Jt Ex 17: E-9, p 13 (emphasis added).) The attached modified me-too proposal provided as follows (Iverson's May 14 and May 17 modifications to her initial May 9 proposal are underlined below):

> This letter will confirm our understanding that Allied Employers, on behalf of all its employers (list attached, hereinafter referred to as 'Employers'), in Pierce, Thurston, Lewis, Mason, Grays Harbor, and Pacific Counties agrees to the following:
>
> The Employers agree to extend the same recommended settlement as is negotiated in the current (2007) King County UFCW Local 21/81 Grocery, Meat, and CCK negotiations to members of UFCW Local 367 in all Collective Bargaining agreements within the jurisdiction of Local 367 in the counties identified herein. The parties agree that the effective dates of Local 367 agreements will remain the same in those areas that are not identical to King and Pierce Counties (i.e., Mason/Thurston -9/30/07 to 9/29/10, etc.).
>
> The parties agree that changes proposed in the King County Local 21/81 agreements will be the same as those proposed in Local 367's agreements, but that the differences in language will be preserved. For example, if a 50-cent increase in wages should be proposed in King County Local 21/81, then the same 50-cent increase in wages would be applied to Local 367's agreements. In the same sense, if a holiday should be dropped in King County Local 21/81, then the same holiday would be dropped in the proposal applied to Local 367's agreements.
>
> This letter will extend the 2004-2007 agreements until the earlier of <u>September 1</u>, 2007 or the ratification date of the new/successor Local 21/81 agreements, unless this period is extended by mutual agreement. All terms and provisions of the 2004-2007 agreements, including dues check-off, no-strike, no lock-out provisions and Letter or Memoranda of Understanding and Addenda shall remain in effect for the duration of the extension.
>
> <u>The Employers understand that this interim/me-too agreement must be ratified by the members of Local 367in all jurisdictions of Local 367</u>.
>
> If this interim agreement is ratified by Local 367's members, it is understood that Local 367 will not engage in any strike or boycott activities in support of a dispute in Seattle, specifically UFCW Locals 21, 81 and 44.

> The parties further agree that if there are any disputes that arise under the terms of this Letter of Agreement or the application of the terms of the Local 21/81 settlement to the Local 367 Agreements, either party may request expedited arbitration of the dispute. Both parties agree they will bring this matter before an arbitrator within twenty days of notice of a dispute. The parties agree to select an arbitrator from an FMCS list of arbitrators within seventy-two (72) hours of receipt of the arbitrator list.

(Jt Ex 17: E-9, pps 14-15.)

The next day, May 18, Iverson emailed Zeiler saying: "You have the final document that we are willing to present to our members. As my cover letter stated this does eliminate the second vote and as I stated to you before, the ***blank check*** will be tougher to ratify." (Jt Ex 17: E-9, p. 18 (emphasis added).) Zeiler responded: "My problems at this point are: - duration – me toos do not have durations, -the word "recommended" in paragraph 2. It needs to read 'any agreement reached'." *Id*. Iverson replied: "You have the final version we are willing to present to our members. If you want to get this done, sign and return the docs today. No modifications Randy." *Id*. After discussing the me-too proposal with those employers he could reach, Zeiler responded to Iverson as follows:

> I have been able to discuss your proposal with all three chains. They will not sign off unless:
>
> - the agreement is indefinite in duration. In other words, we would agree to extend your current agreement until Local 21 has a ratified deal and we can apply that settlement to your members.
> - the agreement must apply to "any settlement" reached Local 21 etc and cannot be limited to a "recommended" settlement.
>
> At this point I know these 2 items are deal breakers for the employers. They may have additional items after further review but I wanted to get back to you on these items.
>
> If this agreement falls apart and if we are going to then need to discuss meeting dates you will need to let me know the Company you would like to schedule negotiations with first.

(Jt Ex 17: E-9, p 20.) Iverson replied: "* * * I understand. I will consider the me-too discussions closed and I will contact you Monday to schedule dates for bargaining. Thank you for your efforts. I will contact Derrick Anderson discuss (*sic*) dates." *Id.*

On May 22, Zeiler emailed a revised me-too agreement to Iverson. (Jt Ex 17: U 18.) The cover email stated:

> Here is an extension/me-too agreement that is acceptable to the employers. I used your draft as the template for this Agreement and then made the cahnghes (*sic*) required by thye (*sic*) employers.
>
> First, no "me too" would be acceptable to an employer if it allowed the union to terminate the agreement before the underlying negotiations (Local 21 et al) have concluded. The value in a "me too" is really only triggered if we have some sort of dispute in Seattle. The "me too" would prevent Local 367 from getting involved in that dispute and your members would continue to work. Recall that in 1989 there was an on going dispute in Seattle and so the "me too" immediately (*sic*) had that effect. Your proposed extension agreement would allow 367 to terminate the Agreement if there was a dispute in Seattle and allow you to support that dispute. That is not a me too.
>
> I also added language making the agreement null and void if you breach the deal.
>
> I think you should take a hard look at this agreement…it gives both parties the security they need to move forward. For what it is worth, I do not think the employers will enter in to a traditional extension agreement at this point.

(Jt Ex 17: U 18.) The attached me-too proposal provided as follows (Zeiler's additions to Iverson's last me-too proposal are underlined below and deletions are indicated by strike-through):

> This letter will confirm our understanding that Allied Employers, on behalf of all its employers (list attached, hereinafter referred to as 'Employers'), in Pierce, Thurston, Lewis, Mason, Grays Harbor, and Pacific Counties, will agree to the following proposal from UFCW Local 367, if ratified by its members:

The Employers agree to extend the same ~~recommended~~ settlement as is negotiated in the current (2007) King County UFCW Local 21/81 Grocery, Meat, and CCK negotiations to members of UFCW Local 367 in all Collective Bargaining agreements within the jurisdiction of Local 367 in the counties identified herein. The parties agree that the effective dates of Local 367 agreements will remain the same in those areas that are not identical to King and Pierce Counties (i.e., Mason/Thurston -9/30/07 to 9/29/10, etc.).

The parties agree that all changes made ~~proposed~~ in the King County Local 21/81 settlement ~~agreements~~ will be the same as those made ~~proposed~~ in Local 367's agreements, but that the differences in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved. For example, if a 50-cent increase in wages should be agreed to ~~proposed~~ in King County Local 21/81, then the same 50-cent increase would be applied to Local 367's agreements. In the same sense, if a holiday should be dropped in the King County Local 21/81 proposal, then the same holiday would be dropped in the proposal applied to Local 367's agreements.

This letter will extend the 2004-2007 agreements until ~~the earlier of September 1, 2007 or~~ the ratification date of the new/successor Local 21/81 agreements, at which time the Local 21/81 settlements shall be applied ~~unless this period is extended by mutual agreement~~. All terms and provisions of the 2004-2007 agreements, including dues check-off, no-strike, no lock-out provisions and Letter or Memoranda of Understanding and Addenda shall remain in effect for the duration of the extension.

The Employers understand that this interim/me-too agreement must be ratified by the members of Local 367in all jurisdictions of Local 367.

If this interim/me-too agreement is ratified by Local 367 members, it is understood that Local 367 will not engage in any strike or boycott activities in support of a dispute in Seattle, specifically UFCW Locals 21, 81 and 44. Local 367 also agrees to take no action that is intended to criticize, disparage or otherwise disrupt the 2007 Puget Sound Grocery and Meat negotiations or the eventual settlement and agrees that any breach of this provision shall give Allied Employers the right to declare this entire agreement null and void.

The parties further agree that if there are any disputes that arise under the terms of this Letter of Agreement or the application of the terms of the Local 21/81 settlement to the Local 367 Agreements, either party may request expedited arbitration of the dispute. Both parties agree they will bring this matter before an arbitrator within twenty days of notice of a

> dispute. The parties agree to select an arbitrator from an FMCS list of arbitrators within seventy-two (72) hours of receipt of the arbitrator list.

(Jt Ex 17: U 18, p 2.)

Iverson did not object to Zeiler's changes to the sentence: "The parties agree that all changes proposed in the King County Local 21/81 settlements ~~agreements~~ will be the same as those made ~~proposed~~ in Local 367's agreements." (Jt Ex 17: E-9, pps 23-24.) She never said that the me-too agreement applied only to changes in economic terms or mandatory subjects of bargaining. (Tr 320, 346, 357.) Iverson also never said the me-too agreement would not apply to any changes in the scopes of the unit its represents. (Tr 358-59.) Instead, she approved all of Zeiler's changes and signed his revised me-too agreement on May 25, 2011. (Jt Ex 17: E-9, pps 23-24.) Zeiler then affixed his signature on May 28, formalizing the adoption of the "2007 Me-Too Agreement." *Id*.

Iverson very clearly understood that if they ratified the proposed me-too agreement, her members would be issuing a blank check to the grocery employers. The full version of her cover letter enclosing the ratification instructions and ballots left no room for doubt on this point:

> In April, your Executive Board discussed at length what could be the potential outcome of bargaining for the grocery, meat and CCK members in our jurisdiction. The major concern was that the employer group would bargain an agreement with Local 21 and 81 in Seattle, and then present a worse proposal to members of Local 367. This is exactly the strategy that was used in our recent dispute with Macy's.
>
> In past years, Local 367 has bargained for new agreements for grocery, meat and CCK in a union coalition bargaining with a multi-employer group. Recently, however, that process has broken down. To date, Local 367 has not been included in Seattle discussions for new agreements with Local 21, 44 and 81. We do know, however, that those locals have held approximately five bargaining sessions, and each of the locals is participating in a sub-committee to look at the cost of potential plan design changes to the medical and dental plans.

Considering all these factors, I recommended to the Executive Board that we approach Randy Zeiler, President of Allied Employers and lead negotiator, about the possibility of an interim/me-too agreement, which would provide that ***whatever changes are approved in the Seattle agreements would be incorporated into Local 367's agreements***.

As of today's date, because ***the employers were not willing to allow "two bites of the apple,"*** the proposal agreed to by your employer has changed to a one-time vote on whether to enter into an interim/me-too agreement that will ***bind us to the terms of the Seattle agreement, whatever it will be, for better or for worse***. What remains the same, however, is that the employers remain committed to ***extending the same terms and conditions to us as are approved and ratified by the Seattle locals***, while maintaining our own effective dates of contract. In turn, Local 367 would agree not to engage in a strike or work stoppage connected with the Seattle negotiations. ***This agreement is not intended to change or modify the past application or interpretation of our agreements where their language differs from Seattle's***.

If the members do not vote to accept this interim/me-too proposal, Local 367 will continue its preparation for negotiations. Our proposals have been finalized with the Contract Action Team, and we will again request dates to commence bargaining.

Mr. Zeiler, on behalf your employer, has agreed to our proposal for an interim/me-too agreement. Therefore, enclosed with this letter are voting instructions, a ballot, and meeting dates, times, and locations. Please read and follow all directions on how to return your ballot. Failure to do follow the instructions will result in your ballot not being counted.

I would like to assure we have prepared for bargaining in every conceivable way, but realistically, what comes out of Seattle would be very difficult for us to oppose or improve upon in our own separate negotiations, without the benefit of support in the area. Once Seattle settles their contracts, they will not engage in support of this area.

As President of Local 367, along with the Executive Board, I am supporting and encouraging your approval of this proposal. I do not believe, based on the status of bargaining in Seattle and the appointment of a sub-committee at the Trust level in Seattle, that we can exceed the agreement that will be bargained in Seattle. To date, we have had no involvement those negotiations, nor will we. By the same token, I don't believe our participation in a labor dispute in Seattle, if one occurs, will change the outcome of whatever agreement is reached. I am asking each

> of you to appreciate that this proposal covers all counties in our jurisdiction and doesn't allow the employer to divide us.
>
> I believe this agreement, if ratified, will provide all members in all counties with the best possible contract resolution, without a strike. I am recommending you accept this proposal.

(R Ex 1, pps 1-2 (emphasis in original omitted; emphasis added.)) The enclosed "Voting Instructions" also stated: "You are voting on whether you accept the me-too proposal described in this mailing. This means ***all*** changes approved and ratified by the members in Seattle will be the same for Local 367 Grocery, Meat and CCK contracts." (R Ex 1, p 4.) The ballots were counted on June 15, 2007, and Local 367's members "overwhelmingly" voted to ratify the proposed 2007 Me-Too Agreement. (R Ex 1, p 5.) Iverson immediately advised Zeiler of the ratification. (R Ex 10.) In her letter to Local 367's members announcing the ratification of the 2007 Me-Too Agreement, Iverson said: "This means that the members have agreed that ***whatever settlement*** emerges from the Seattle negotiations, if it is accepted and ratified by the members in Seattle, ***will be applied to Local 367's contracts with Allied-represented employers throughout our jurisdiction***." *Id*. (Emphasis added.)

In August 2011, the parties in Seattle reached a settlement (the "2007 Seattle Settlement"), which was ratified by the members of Locals 21 and 81 on August 28. (R Ex 2, p 1.) Allied Employers forwarded the 2007 Seattle Settlement to Local 367 on August 31, and Local 367 distributed the settlement to its members on September 5. (R Ex 2.) All of the changes contained in the 2007 Seattle Settlement were incorporated by Local 367 into its grocery, meat and CCK agreements throughout its jurisdiction. (R Ex 2, p 1.) This included changes in permissive, non-economic terms, including changes to the grievance procedure and to the grocery employers' scheduling practices. (Tr 223, 231, 330-31; R Ex 2, pps 4-5, 6.) Iverson conceded that these changes in permissive, non-economic terms automatically applied to to

Local 367's agreements under the terms of the 2007 Me-Too Agreement. (Tr 223-24.) As part of the 2007 Seattle Settlement, Locals 21 (and 44) and 81 were required to withdraw unfair labor practice charges it had filed against the employers. (Tr 331-32.) Local 367 also withdrew its unfair labor practice charges, which had been pending against the employers, despite the fact that this also was a change in a permissive, non-economic term. *Id.*

D. After Local 367's Agreements were Settled Pursuant to the 2007 Seattle Settlement, it Filed Self-Determination Petitions Seeking to Represent Fred Meyer's Nutrition and Playland Employees.

After the 2007 Seattle Settlement was applied to Local 367's agreements and Local 367's agreements were settled, Local 367 filed a petition with the NLRB on November 27, 2007, seeking a self-determination election in which the employees working in Fred Meyer's stores in Lacey and Tumwater, Washington would vote on whether to join the existing grocery unit covered by the Mason and Thurston Counties grocery agreement between Fred Meyer and Local 367. (Tr 430; Jt Ex 1; R Ex 22, p 4.) The nutrition employees sell specialized organic foods and dietary supplements within Fred Meyer's stores. (Jt Ex 1, p5.) Fred Meyer opposed that petition because its nutrition employees did not share a community of interest with the employees in the existing grocery unit and should instead have been represented as part of the general merchandise unit, in accordance with the parties' bargaining history. (Jt Ex 1; R Ex 22.) Where nutrition employees in Fred Meyer's stores were represented by the UFCW, they were always represented as part of the general merchandise unit. (Tr 426-27; Jt Ex 17: E-2, p 3; R Ex 22, p 5.) In fact, Fred Meyer and Local 367 were already parties to a general merchandise agreement in Pierce County that covered the nutrition employees working in Fred Meyer's Pierce County stores. (Jt Ex 1; Jt Ex 17: E-2, pps 3, 14; R Ex 17, p 24.) During the hearing on Local 367's petition, Carl Wojciechowski, then Group Vice President for Human Resources at

Fred Meyer, testified that if Fred Meyer had bargained changes to the recognition clause in the grocery agreement during the 2007 Seattle Negotiations, Local 367 would have been bound by those changes pursuant to the 2007 Me-Too Agreement. (Tr 429.)

After the hearing, the Regional Director issued a Decision and Direction of Election ("D&DE") ordering the self-determination election in the petitioned-for unit of nutrition employees. *Id*. Fred Meyer filed a Request for Review of the Regional Director's D&DE. (R Ex 22, p 5.) Fred Meyer's Request for Review was denied by the two-member Board on April 21, 2009. *Id*. Local 367 was then certified to represent the Lacey/Tumwater nutrition employees as part of the existing Mason/Thurston grocery unit. *Id*.; (Jt Ex 2.)

This was not the first time Fred Meyer and Local 367 had disagreed over the placement of the nutrition employees. (Jt Ex 17: E-2, p 4.) In a previous Board case, Fred Meyer had been forced to petition the Board asking it to confirm that the Pierce County grocery agreement specifically excluded general merchandise employees (including nutrition employees), and that the general merchandise agreement specifically covered nutrition employees, after Local 367 filed a grievance asserting that the nutrition employees were covered by the general merchandise agreement. (Jt Ex 17: E-2, p 4; E-1.) The Board ordered the Region to hold Fred Meyer's petition in abeyance pending the arbitrator's decision on Local 367's grievance. *Id*. The arbitrator held that the parties' contract and bargaining history established that nutrition employees in Pierce County were covered by the Pierce County general merchandise agreement rather than the grocery agreement, and so Fred Meyer's application of the general merchandise agreement to nutrition employees was correct. *Id*; (Jt Ex 17: E-1.) Fred Meyer withdrew its NLRB petition upon winning the arbitration. (Jt Ex 17: E-2, p 4.)

Local 367 also sought to represent Fred Meyer's playland employees by means of a self-determination petition. On March 23, 2009, Local 367 filed a petition with the Board seeking to represent the playland employees working in Fred Meyer's University Place store in Tacoma, Pierce County, Washington as part of the existing Pierce County CCK unit by means of a self-determination election. (R Ex 23, p 4.) The playland employees babysit customers' children while the customers are shopping in the store. (R Ex 23, p 5.) Fred Meyer opposed the petition because the playland employees did not share a community of interest with the employees in the existing CCK unit sufficient to be included in the CCK unit. (R Ex 23, p 5.) At that time, no playland employees were represented by a union in any of Fred Meyer's stores and currently no playland employees are represented by a union in any of Fred Meyer's stores with the exception of the University Place store at issue in this case. (Tr 437.)

Following a hearing, the Regional Director issued a D&DE directing an election in the petitioned-for Pierce County CCK unit. (R Ex 23, p 5.) Fred Meyer also filed a request for review of this D&DE, which was denied by the two-member Board on June 11, 2009. (R Ex 23, p 5.) Local 367 was then certified to represent the University Place playland employees as part of the Pierce County CCK unit. (R Ex 23, p 6.)

Local 367 subsequently requested to bargain with Fred Meyer regarding the Lacey/Tumwater nutrition employees in June 2009. (GC Ex 16, p 2.) Fred Meyer responded that it had no obligation to bargain regarding the nutrition employees because its request for review of the D&DE had been denied by a two-member Board who did not possess authority to deny the request for review pursuant to the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.2d 469 (D.C. Cir. 2009). (GC Ex 16, p 3; R Ex 22, p 6.) As a result, Fred Meyer believed its Request for Review was still pending before the Board. (Jt Ex

17: U-8, p4, 6.) Local 367 filed an unfair labor practice charge and the General Counsel issued an unfair labor practice complaint alleging that Fred Meyer had refused to bargain in violation of Section 8(a)(5) and (1) of the Act. (R Ex 22, p 6.) In its Answer, Fred Meyer repeated its position that it did not have a duty to bargain regarding the nutrition employees because the two-member Board did not have authority to deny its Request for Review of the D&DE, so its Request for Review was still pending before the Board. *Id*.

Local 367 did not request to bargain regarding the University Place playland employees until October 2009. (R Ex 23, p 6.) In response, Fred Meyer also took the position that it had no duty to bargain regarding the playland employees because the two-member Board did not have authority to deny its Request for Review. *Id*. Local 367 filed an unfair labor practice charge, and the General Counsel issued complaint, alleging Fred Meyer had refused to bargain in violation of Section 8(a)(5) and (1) of the Act. (R Ex 23, p 7.) In its Answer, Fred Meyer repeated its position that it did not have a duty to bargain regarding the nutrition employees because the two-member Board did not have authority to deny its Request for Review of the D&DE, so its Request for Review was still pending before the Board. *Id*.

In the nutrition unfair labor practice case, the two-member Board issued a Decision and Order granting summary judgment against Fred Meyer on January 4, 2010. (R Ex, p 7.) Fred Meyer filed a petition for review of the Board's Order in the D.C. Circuit, and the Board cross-applied for enforcement. *Id*. On February 3, 2010, the Court placed the case in abeyance pending the U.S. Supreme Court's decision in *New Process Steel, L.P. v. NLRB,* 130 S, Ct, 2635 (2010). *Id*.

In the playland unfair labor practice case, the two-member Board issued a Decision and Order granting summary judgment against Fred Meyer on May 7, 2010. (R Ex, p

7.) Fred Meyer filed a petition for review of the Board's Order in the D.C. Circuit, and the Board cross-applied for enforcement. *Id*. The Court also placed this case in abeyance pending the U.S. Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S, Ct, 2635 (2010). *Id*.

The Supreme Court issued its decision in *New Process Steel* on June 17, 2010, holding that under Section 3(b) of the Act, a delegee group of at least three Board members had to be maintained in order to exercise the delegated authority of the Board. (R Ex 23, p 9.) In the meantime, two additional Board members were sworn in. (R Ex 22, p 7.) On August 17, 2010, the Board issued an order setting aside its orders in the nutrition and playland cases and retaining the cases on its docket for further processing. (R Ex 22, p 7; R Ex 23, p 9.) The Board then filed motions with the D.C. Circuit seeking dismissal of the nutrition and playland cases pending before it, which were granted by the D.C. Circuit on August 19 and 20, 2010. *Id*. On August 26, 2010, the three-member Board issued new Decisions and Orders in both cases adopting the decisions previously issued by the two-member Board (the "August 26 Orders"). (R Ex 22, p 8; R Ex 23, p 10.) The Board immediately petitioned for enforcement of its August 26 Orders with the Ninth Circuit Court of Appeals. (R Exs 22, 23.)

E. After its Request to Participate in the 2010 Seattle Negotiations was Denied, Local 367 Proposed and Executed the Same Blank Check Me-Too Agreement with Allied Employers.

Against the back drop of this litigation, the parties were preparing for the 2010 round of Seattle Negotiations. On January 25, 2010, Zeiler contacted Iverson to ask how she would like to process the Local 367 grocery and meat agreements that were expiring in May of that year and informed her that Allied Employers was already scheduling bargaining dates with Locals 21 and 81. (R Ex 11, pps1-2.) When Iverson responded that Local 367 would be sending

out opening notices for those agreements, Zeiler asked if that meant she would not be negotiating alongside Locals 21 and 81 in Seattle and that she would not be proposing a me-too agreement like the one the parties executed in 2007. (R Ex 11, p 3.) Iverson responded they should have further discussion regarding bargaining. *Id*. In the meantime, Local 367 apparently asked Locals 21 and 81 to allow Local 367 to bargain alongside them in the upcoming Seattle negotiations, and that request was denied. (R Ex 3, p 1.) As a result, Iverson met with Zeiler and instead proposed they execute another me-too agreement binding Local 367 to the terms of any 2010 Seattle Settlement, just as the 2007 Me-Too Agreement had bound Local 367 to the terms of the 2007 Seattle Settlement. (R Ex 11, pps 5-6.) Iverson wanted the me-too agreement in 2010 for the very same reasons she had wanted the 2007 Me-Too Agreement: the me-too agreement would guarantee Local 367 received as good a deal as did Locals 21 and 81 in Seattle. (R Ex 3.)

Iverson proposed one change to the language of the me-too agreement in 2010; she added language saying that if an arbitrator had to interpret any part of the me-too agreement, the arbitrator would only consider the bargaining history between Local 367 and the employers. (Jt Ex 16, pps 53-54.) Zeiler rejected that change, pointing out to her that no bargaining occurs between the parties to a me-too agreement, so there would be no bargaining history between Local 367 and the grocery employers for an arbitrator to consider. (Tr 332, 337-38; Jt Ex 16, p 54; R Ex 12.) Iverson dropped her request, and on March 18, 2010, she and Zeiler executed a me-too agreement that was identical to the 2007 Me-Too Agreement (the "2010 Me-Too Agreement"). (R Ex 3, p 1; Jt Ex 10.)

When Iverson presented the 2010 Me-Too Agreement to Local 367's members for ratification, she described it in the same way she had in 2007:

> On March 29, 2010, Allied Employers signed an interim/me-too agreement that will ***bind us to the terms of the Seattle agreement whatever it will be***. This document is identical to the agreement Local 367 members voted to accept in 2007. If accepted by Local 367 members, the interim/me-too agreement will extend ***the same terms and conditions*** to us as are approved and ratified by members of Locals 21 and 81, while maintaining the effective dates for our contracts and any terms that are unique or different in our agreements. *** ***This agreement is not intended to change or modify the past application or interpretation of our agreements where their language is differs from Seattle***.
>
> ***
>
> In summary, you are voting on whether you accept the interim/me-too proposal described in this letter. This means ***all changes*** approved and ratified by the members in Seattle (Locals 21 and 81) will be the same for Local 367, Grocery, Meat and Fred Meyer CCK contracts on their effective dates.

(R Ex 3 (emphasis in original omitted; emphasis added).) Local 367's members ratified the 2010 Me-Too Agreement on April 27, 2010. (R Ex 4.)

F. Pursuant to the Terms of the 2010 Me-Too Agreement, Respondents Offered to Apply the Terms of the 2010 Seattle Settlement to Local 367's Agreements, Including the Unit Exclusions that were bargained with Local 21.

During the 2010 negotiations in Seattle, Fred Meyer and Local 21 agreed to specifically exclude the nutrition and playland employees from coverage under the grocery and CCK agreements, respectively. (GC Ex 7.) They agreed to a "Letter of Understanding #12," which modified the grocery agreement, as it applied to Fred Meyer, by adding the following exclusions to the agreement's recognition clause:

> Excluding employees in all other departments (i.e., Nutrition, Pharmacy, Health and Beauty Aids, Floral Garden Center, Apparel, Shoe, Home Fashion, Photo Electronics, General Merchandise Departments, Playland, Jewelry Department, Time and Attendance, Human Resource Coordinators, Human Resource Coordinators, Human Resource Administrators), and confidential employees and guards as defined in the Act.

(GC Ex 7, p 13.) They also agreed to modify the language in the recognition clause in the CCK agreement with Fred Meyer by adding the following language into the clause itself:

> *** and excluding employees in all other departments (i.e., Nutrition, Pharmacy, Health and Beauty Aids, Floral Garden Center, Apparel, Shoe, Home Fashion, Photo Electronics, General Merchandise Departments, Playland, Jewelry Department, Time and Attendance, Human Resource Coordinators, Human Resource Coordinators, Human Resource Administrators), and confidential employees and guards as defined in the Act.

(GC Ex 7, p 20.) The Fully Recommended Settlements containing the modified "Recognition and Bargaining Unit" clauses were ratified by the members of Locals 21 and 81 on or about December 3, 2010 (the "2010 Seattle Settlement"). (GC Ex 6.) .

Once the 2010 Seattle Settlement was ratified, Allied Employers offered to apply it to Local 367's agreements, pursuant to the terms of the 2010 Me-Too Agreement and the parties' past practice established by the application of the 2004 and 2007 Seattle Settlements to Local 367's agreements. (GC Exs 6-7.) Zeiler emailed the settlement documents to Iverson on Friday, December 3, 2010, and advised her that the grocery employers would begin the process of preparing the lump sum ratification payments provided for in the settlement as soon as Iverson confirmed that Local 367 did not have any issues with the settlement documents. (GC Ex 1, p1.) He further advised her that it would take the employers 30 days to prepare the checks once the process was started. *Id*. Zeiler had not heard from Iverson by Tuesday, December 7, so he emailed her asking if she "had spotted ***any mistakes*** in the [fully recommended settlement] documents" that he had forwarded to her on Friday. (GC Ex 8, p 2 (emphasis added).) Iverson responded that day, saying she had been discussing the settlement documents with UFCW International representative Mike Hatfield, who had been involved in the 2010 Seattle Negotiations, and that she would get back to Zeiler the next day (December 8). *Id*. She also

asked when the lump sum ratification bonus payments would be made. *Id*. Zeiler responded that the employers were making their best efforts to pay the bonuses by December 31, 2010. (GC Ex 8, pps 1-2.) He also told her: "At this point we are on hold until you advise that we have made ***no errors or omissions***." *Id*.

On Wednesday, December 8, Iverson emailed Zeiler to say that Local 367 would have some questions about the settlement documents and that it did not "believe the language regarding Fred Meyer's exemptions in the CCK and Grocery and L of U #12 apply" to Local 367 and that they "should not be part of our documents." (GC Ex 8, p 1.) She said she would get back to Zeiler with a list of questions in the next day or two. *Id*. Zeiler immediately responded that:

> The [Fred Meyer] exemptions in CCK and Grocery and LU #12 are parts of the UFCW 21 King-Snohomish Grocery and CCK settlements. The March 18, 2010, "Me Too" Agreement states that the Employers agree to extend the same settlement to members of Local 367 ***. Therefore, we disagree with your belief that these would somehow not apply to Local 367 members. We need to know your reasoning on this as soon as possible because it is not compatible with the "me too" you signed in March.

(GC Ex 8, p1.) By Sunday December 12, Zeiler still had not heard from Iverson about the status of the 2010 Seattle Settlement documents he had sent to her. (GC Ex 9.) He emailed her that day to inquire about the status of the documents and advised her that the ratification lump sum payments would not be processed or paid until she advised Zeiler that all the terms of the 2010 Seattle Settlement apply to Local 267 "with no exceptions per the 'me too'." *Id*. Iverson responded that Local 367 still did not believe "the Fred Meyer Letter of Understanding applied here," and that Local 367 would continue its review of all the documents, but that Iverson did not agree with Zeiler's "plans to hold up the lump sum." *Id*. Iverson suggested that she and Zeiler look at the arbitration provision in the 2010 Me-Too Agreement if Zeiler disagreed with Local

367's position regarding the Fred Meyer unit exclusions and that it was Local 367's position that Zeiler "should still apply the provisions of the agreement" despite the fact that the parties' did not yet have an agreement. *Id*. On December 13, Blaine Sherfinski, then Secretary/Treasurer for Local 367, emailed Zeiler with a lists of questions Local 367 had regarding the terms of the 2010 Seattle Settlement as it applied to Local 367; Zeiler responded to those questions on December 23. (GC Ex 14, 11.)

On December 15 Iverson sent a letter to Zeiler objecting to five substantive provisions of the 2010 Seattle Settlement. (GC Ex 10.) Her letter stated as follows:

> We are requesting that you implement all terms of the Grocery, Meat, and CCK settlement agreements forwarded to Local 367 on December 3, 2010 except those items listed below:
>
> The March 18, 2010 'Me-Too' agreement does not apply to:
>
> 1. The exclusions from the bargaining unit set forth in the recognition clause of the CCK agreement;
> 2. The exclusions from the bargaining unit set forth Letter of Understanding #12 in the Grocery agreement;
> 3. The provisions in the Grocery, CCK, and Meat documents referring to nullification of arbitrator Axon decisions;
> 4. The no pyramiding language added to Section 2.06 in the Meat agreement;
> 5. Section 10.02 new language on holiday pay in the Meat agreement.
>
> The draft agreement you forwarded us allegedly in compliance with the March 18, 2010, "me-Too" agreement, contains all of the foregoing provisions and does <u>not</u> comply with the "Me-Too" agreement. The first two provisions are directly contrary to NLRB decisions between Local 367 and Fred Meyer. Local 367 did not authorize, through the "Me-Too" agreement, the parties to invalidate arbitral and administrative decisions between Local 367 and our members.

> Your statement in your December 12th email, that you will not implement our agreement until we accept your draft, if itself a violation of the "Me-Too" agreement and is contrary to our practice in the past.
>
> If you still believe the disputed provisions must be included, we are compelled to request expedited arbitration of this dispute under the "Me-Too" agreement. Today, we are requesting a list from the FMCS from which we will select an arbitrator within 72 hours of receipt.
>
> Once we learn that Local 21 and 81 have signed the documents, we are prepared to sign off with the exception of those provisions that will go forward to arbitration. Please call me if you would like to discuss.

(GC Ex 10.) Aside from wages and benefits, the 2010 Seattle Settlement covered only ten changed terms in total; Local 367 was objecting to half of those changed terms. (GC Exs 7, 10.)

The parties agreed to submit their dispute to expedited arbitration pursuant to the terms of the 2010 Me-Too Agreement. (Jt Ex 16, p 4.) The arbitration hearing was not held until March 2, 2011. (Jt Ex 16, p 4.) The arbitrator issued his decision on March 24, 2011, in which he found that Allied Employers had not breached the terms of the 2010 Me-Too Agreement by: (1) insisting that the Local 367 agreements include the provisions nullifying the arbitration decisions related to back-pay between Local 367 and member employers (the Axon decisions); (2) insisting that the Local 367 agreements include the holiday work week language in the meat agreement; and, (3) by refusing to implement the ratification lump sum bonuses for Local 367 members prior to resolution of the dispute before the arbitrator. (Jt Ex 13 "Arbitrator's Award", pps 1-2.) He did find that Allied Employers breached the terms of the 2010 Me-Too Agreement by insisting that the Local 367 agreements include provisions in the Local 367 grocery and CCK agreements excluding workers currently represented by Local 367 (the Lacey/Tumwater nutrition and University Place playland employees). *Id*. As a remedy for this violation, he ordered the parties to retain the status quo with regard to the scope of the bargaining unit. *Id*. He defined that status quo as being the status reflected in the Board's

August 26 Orders, which were still on appeal to the Ninth Circuit. (Jt Ex 13, p 37.) Fred Meyer retained the status quo regarding the Lacey/Tumwater nutrition and University Place playland employees in compliance with the Arbitrator's Order, and complied with his Order to distribute the ratification lump sum bonuses to the remaining members of Local 367. (Jt Ex 13 "Arbitrator's Award", p 2.)

Before and after the arbitration hearing, Local 367 filed with the Board a series of unfair labor practice charges and amended charges, each one making various allegations based on a variety of theories of liability. (GC Exs 1(a) – (g).) The Ninth Circuit issued its Memorandum enforcing the Board's August 26 Orders on January 9, 2012. (Jt Ex 9.) The Board's August 26 Orders ordered Fred Meyer to, "On request, bargain with [Local 367] as the exclusive representative of the employees employed by [Fred Meyer] in the nutrition department of its Lacey and Tumwater, Washington stores as part of the [Mason/Thurston grocery unit]," and to "On request, bargain with [Local 367] as the exclusive representative of the employees employed in the Playland Department of [Fred Meyer's] University Place, Tacoma, Washington store as part of the [Pierce County CCK unit]." (JT Exs 5-8.)

Well after the Ninth Circuit issued its decision enforcing the Board's August 26 Orders, the Board issued the Complaint in this case on February 29, 2012, asserting a theory of liability that was completely independent from all of those asserted by Local 367 in its various charges. (GC Ex 1 (i).) First the first time, it was asserted that the parties had already bargained "general" terms regarding the Lacey/Tumwater nutrition and University Place playland employees and that now the parties are required to bargain regarding only "unique" terms for these employees. *Id*. Despite the Complaint's allegations, however, General Counsel and Local 367 both took the position at hearing that Local 367 did not authorize Local 21 to bargain on its

behalf regarding the Lacey/Tumwater nutrition and University Place playland employees, and it was undisputed at hearing that Local 367 has never requested to bargain with Fred Meyer regarding "unique" terms regarding these groups of employees. (GC Exs 3, 16.).

III. ARGUMENT

A. Fred Meyer and Allied Employers Did Not Violate Section 8(a)(5) and (1) of the Act.

An employer violates Section 8(a)(1) and (5) of the Act by refusing to execute a collective bargaining agreement incorporating the terms agreed on by the parties during negotiations. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).[4] This obligation, however, arises only if the parties had a "meeting of the minds" on all substantive issues and material terms of the agreement. See *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). The General Counsel bears the burden of showing not only that the parties had the requisite "meeting of the minds" on the agreement reached, but also that the document which the Respondents allegedly refused to execute accurately reflected that agreement. See *Crittenton Hospital*, 343 NLRB 718 (2004); *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992); *Kelly's Private Car Service*, 289 NLRB 30, 39 (1988), enfd. sub nom. *NLRB v. W.A.D. Rentals Ltd.*, 919 F.2d 839 (2d Cir. 1990). If there was no agreement or "meeting of the minds," then it is not unlawful for an employer to refuse to execute the written contract because the Board has no authority to order an employer to execute an agreement it has not accepted. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[4] Likewise, Section 8(b)(3) makes it an unfair labor practice for a union to refuse an employer's request to execute a collective bargaining agreement incorporating the terms agreed on by the parties during negotiations. See *Carpenters Local 33 (Curry Woodworking, Inc.)*, 316 NLRB 367, 369 (1995); *Graphic Communications Union District 2 (Riverwood International USA)*, 318 NLRB 983, 990 (1995), and cases cited therein.

In support of the Complaint's Section 8(a)(5) allegations, the General Counsel says that "unit scope and composition are permissive subjects of bargaining" and that "once a specific job has been included in the scope of a bargaining unit, neither party can remove or alter that position without first securing the consent of the other party or the Board." (Tr 28-29.) The General Counsel seems to concede that the parties achieved a meeting of the minds on the material terms of the 2010 Me-Too Agreement, but, despite the clear and unambiguous terms of that agreement, General Counsel argues the 2010 Me-Too Agreement did not bind Local 367 to the unit exclusions contained in the 2010 Seattle Settlement. (Tr 29.) The General Counsel's argument relies solely on what she called "the [A]rbitrator's authoritative interpretation of the [2010] Me-Too Agreement," which "concluded that [the 2010 Me-Too Agreement] did not bind [Local 367] to the new unit exclusion language in the King County agreements." (Tr 29.)

Contrary to the General Counsel's assertion, the Arbitrator's decision is not "authoritative" nor binding on the Administrative Law Judge. The Board has long held "the determination of questions of representation, accretion and appropriate unit do[es] not depend on contract interpretation but involve[s] the application of statutory policy, standards and criteria. These matters are for the decision of the Board rather than an arbitrator." *Marion Power Shovel Co., Inc*., 230 NLRB 576, 577-78 (1977), citing *Combustion Engineering, Inc*., 195 NLRB 909 (1972) and *Hershey Foods Corp*., 208 NLRB 452 (1974). Even the Arbitrator recognized that the issue before him was "one which raises matters of labor law," and limited his decision to concluding not that Allied Employers had violated the Act, but that that Allied Employers did not "properly apply the [Seattle Settlements] to Local 367's contracts when it proposed that Nutrition and Playland employees be excluded from the Grocery bargaining unit." (Jt Ex 13, p

40.) As a remedy, he merely directed "the Parties to retain the status quo with regard to the scope of the bargaining unit."[5] (Jt Ex 13 "Arbitrator's Award", p 1.)

The Arbitrator based his decision on two alternative theories. First, the Arbitrator found that the "proper application" of the 2010 Seattle Settlements "involves the assignment of a principal whereby the result obtained for Local 367 is proportional to the result obtained by" Locals 21 and 81. (Jt Ex 10, p 35.) He concluded that binding Local 367 to the unit exclusions bargained with Locals 21 and 81 would not result in a "proportional" result for Local 367 because employees represented by Local 367 would lose their union representation whereas employees represented by Locals 21 and 81 would not lose their union representation. In the alternative, the Arbitrator found that the 2010 Me-Too Agreement did not apply to permissive subjects of bargaining, such as scope of unit issues because, in his experience me-too agreements only apply to "traditional, mandatory" subjects of bargaining. (Jt Ex 10, p 38.) Both of these theories are contrary to the unambiguous terms of the 2010 Me-Too Agreement, which unequivocally bound Local 367 to make "***all***" the changes contained in the 2010 Seattle Settlement, including the unit exclusions.

[5] The Arbitrator defined the status quo of the bargaining unit as follows: "While the matter is under appeal, the Arbitrator's view is that the NLRB decision reflects the status quo of the bargaining unit. That status quo must be respected by the Employers (*sic*) until and unless they (*sic*) are able to prevail in the appeal." (Jt Ex 10, p 37.) It was undisputed at hearing that Fred Meyer has retained the status quo imposed by the Board's August 26 Orders as enforced by the Ninth Circuit. The Lacey/Tumwater and University Place playland employees continue working under the same terms and conditions of employment they were working under when the elected to join the existing Mason/Thurston grocery and Pierce County CCK units, respectively. (Tr 184-85.)

1. The Parties had a Meeting of the Minds on the Terms of the 2010 Me-Too Agreement, which Bound Local 367 to Accept *All* of the Changes Made in the 2010 Seattle Settlement, Including the Unit Exclusions.

As the Board has explained: "[w]hether the parties have reached a 'meeting of the minds' is determined not by parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *Crittendon Hospital*, 343 NLRB 717, 718 (2004)(citing MK-Ferguson Co., 296 NLRB 776 fn 2. (1988); accord *Winward Teachers Assn*., 346 NLRB 1148, 1150 (2006); *Hempstead Park Nursing Home*, 341 NLRB 321, 323 (2004); *Ebon Services*, 298 NLRB 219, 223 (1990), enfd. mem. 944 F.2d 897 (3d. Cir. 1991). The "subjective understandings or misunderstandings as to the meaning of terms which have been agreed to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard." *Diplomat Envelope Corp*., 263 NLRB 525, 536 (1982), enfd. 760 F.2d 253 (2d Cir. 1985). When the provisions of a document, such as those at issue here, are clear and unambiguous on their face, the Board has rejected parol or extrinsic evidence that would alter or modify their terms. See e.g., *R. J. E. Leasing Corp*., 262 NLRB 373, 379 (1982) (parol or extrinsic evidence of the parties' intent should normally be considered only when the language is ambiguous); *NLRB v. Electric Workers Local 11*, 772 F.2d 571, 575 (9th Cir. 1985)("Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant."); accord *Commonwealth Communications, Inc. v. NLRB*, 312 F.3d 465, 468 (D.C. Cir. 2002) and *In re America Piles, Inc*., 333 NLRB 1118, 1127 (2001).

a. The Clear and Unambiguous Terms of the 2010 Me-Too Agreement Bound Local 367 to Adopt the Unit Exclusions.

Applying the Board's objective standard to the 2010 Me-Too Agreement, one must conclude that Respondents and Local 367 achieved a meeting of the minds on its

substantive issues and material terms. The 2010 Me-Too Agreement clearly and unambiguously bound the Respondents to offer to Local 367 the "***same settlement***" that was negotiated in the 2010 Seattle Negotiations and in turn bound Local 367 to make in its grocery and CCK agreements "***all***" of the changes made in the 2010 Seattle Settlement, including the unit exclusions. (Jt Ex 10 (emphasis added).) These terms are so explicit they simply are not open to interpretation. One cannot fail to under that "same" means "same" and "all" means "all."

The 2010 Me-Too Agreement provided for only one exception to the agreement that the "***same settlement***" would be offered to Local 367 and that Local 367 would then accept "***all***" the changes made in the 2010 Seattle Settlements. That exception provided that the "difference in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved." (Jt Ex 10.) There is no need to look outside the document to determine the meaning of this exception because the parties took the precaution of defining its meaning within the document itself. Thus, parties provided the following explanation:

> For example, if a 50-cent increase in wages should be agreed to in King County Local 21/81, then the same 50-cent increase would be applied to Local 367's agreements. In the same sense, if a holiday should be dropped in the King County Local 21/81 settlement, then the same holiday would be dropped in the settlement applied to Local 367's agreements. (Jt Ex 10.)

With this explanation provided, the phrase "difference in language" is clear and unambiguous. Local 367 would get the same wage increase that was negotiated in the 2010 Seattle Settlement, but the different underlying wage rates in Local 367's agreements would remain the same. It would not get Local 21's underlying wage rates – only the change to that rate. Also, if Local 367's agreements provided for the same holiday as that provided for in the Local 21 and 81 agreements, and one of those holidays

was dropped in the 2010 Seattle Settlement, the same holiday would be dropped from Local 367's agreements.

It is equally clear then that this exception does not apply to the unit exclusions contained in the 2010 Seattle Settlement because there simply is no "difference in language" to be preserved in Local 367's agreements. The language of the "Recognition and Bargaining Unit" clauses in the Mason/Thurston grocery and Pierce County CCK agreements is *identical* to the language in the "Recognition and Bargaining Unit" clauses in the Local 21 grocery and CCK agreements.[6] (Compare Jt Ex 11, p 12 with Jt Ex 14, p1; compare Jt Ex 12, p 1 with Jt Ex 15, p 1.). Any subjective misunderstanding by Local 367 of the "difference in language" exception in the 2010 Me-Too Agreement is rendered irrelevant. See *Diplomat Envelope Corp*., 263 NLRB at 536.

The General Counsel's reliance on the Arbitrator's different interpretation of this language is misplaced, because the Arbitrator misconstrued the otherwise unambiguous provision that the "difference in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved." Citing testimony by Zeiler, the Arbitrator found this language meant that the result achieved from applying the 2010 Seattle Settlement to Local 367's agreements had to be proportional to the result obtained by Locals 21 and 81 in the 2010 Seattle Negotiations.

The Arbitrator obviously misunderstood Zeiler's testimony in this regard. Zeiler testified as follows regarding the parties' applying practice in the settlements reached in the Seattle Negotiations to the agreements of the outlying Locals:

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[6] Local 81 only represents employees covered by meat agreements.

Q [by Counsel for Allied Employers] And I'm asking since 1992 Forward.

A [by Zeiler] Right. 1992 forward, every negotiation since then, we have -- we, the employers and unions involved, have negotiated the agreements that expire in May on a multi-employer, multi-union basis.

Q And are the contracts that expire after May in every way identical to the contracts that expire in May?

A No. They're similar in most respects but there are some differences and provisions in those contracts.

Q Do you have separate negotiations for those later-expiring contracts or how do those contracts get settled?

A We have not since 1992. We have -- as part of the negotiations in Seattle involving these May expirations, we have agreed at some point in those negotiations near the end to apply the settlement that was reached in these May expiration dates and apply it to these later-expiring contracts.

Q How do you go about the process of applying the settlement to the later-expiring contracts?

A Well, in most instances, it's very easy. You're just applying identical terms to the contract and making sure that the sections are the same, but in areas where there are differences in the underlying language, it can get a little tricky, but we try to figure out a way to apply it proportionally, I guess, for lack of a better term.

Q Can you think of maybe any real life example maybe to use an example of how that has been done in the past?

A Yes. one example would be, in the 2004 negotiations here in the Seattle area, we reached an agreement with the unions that the Sunday premiums would be reduced from time and a half to time and a third, and there were some contracts in the later-expiring areas – the ones that come to mind to me are the Grays Harbor grocery and meat agreements, the Grays Harbor agreements with Local 367, and I think what were then the UFCW 44 agreements up in Whatcom and Skagit counties. They had a Sunday premium that was less than time and a half going into those negotiations. In fact, I think it might have even been less than time and a third. So we had to go through some mathematics to figure out how to proportionally apply the same reduction to those contracts.

So, for example -- I don't have the numbers here in front of me but I think the -- in Grays Harbor, for example, we went from like 1.35 down to 1.15 and it was just a direct mathematical calculation of what's an identical reduction.

Q And in that example you used, that was one example that involved Local 367?

A Correct.

(Jt Ex 16, p 45.)

This testimony, viewed correctly, only serves to emphasize that the terms of the 2010 Me-Too Agreement are unambiguous. Zeiler's example of the calculations used in applying the changes in the Sunday premiums to the agreements of the outlying Locals, including Local 367, comports perfectly with the examples provided in the 2010 Me-Too Agreement as to how "the differences in language" in Local 367's agreements are to be preserved when the Seattle settlements are applied to its agreements. As Zeiler explained, in 2004 the Sunday premium was changed from time and a half to time and a third. Local 44's agreements in Whatcom and Skagit Counties, however, already provided for a Sunday premium that was less than time and a half. Local 44 was not allowed to reject the change in the Sunday premium because its Sunday premium language was different and the change would have a negative impact on its members. Instead, Local 44 preserved the difference in its language by retaining its underlying premium and reducing it by the time and a third bargained by the parties in Seattle. In other words – they got the change, not the underlying term to which the change applied.

Contrary to the Arbitrator's finding, application of the unit exclusions here would not have a disproportionate result on Local 367. Local 21 gave up significant rights when it agreed to the unit exclusions and waived its right to represent nutrition and playland employees

as part of the grocery and CCK units, respectively. The fact that Local 21 does not currently represent nutrition and playland employees in these units is immaterial – it has given up the right to do so in the future, thus giving up the right to apply the richer benefits of Local 21's grocery agreement to any nutrition employees and of Local 21's CCK agreements to any playland employees. (Tr 460, 461-62.)Once the 2010 Seattle Settlement is applied, then, the result for Locals 367, 21 and 81 is the same: they all end up without the right to represent the nutrition employees in a grocery unit and the playland employees in a CCK unit.

It is worth noting that several of the independent employers who were bound by the 2010 Me-Too Agreement were unhappy with the 2010 Seattle Settlement because they believed it had a disproportionate result on them. The 2010 Seattle Settlement's provision that the ratification bonuses should be paid as a lump sum payment was going to be an economic hardship for these employers, who do not have the same financial resources available to the larger grocery employers, such as Fred Meyer. (Tr 351-52.) Yet these employers had to implement this term of the 2010 Seattle Settlement because, like Local 367, they were bound to "the same settlement" and "all" the changes agreed to in the 2010 Seattle Settlement. (Tr 352-53.) Like Local 367, they had agreed to take the "good with the bad" and could not reject changes that might have a "disproportionate" impact on them. (Tr 362.)

The General Counsel seems to be relying primarily on the Arbitrator's alternate theory that me-too agreements do not apply to permissive subjects of bargaining. This theory must also be rejected because it also is contrary to the unambiguous terms of the 2010 Me-Too Agreement, and to well-settled principles of federal Labor Law. The Arbitrator stated that "in [his] experience":

> [A] straight-forward 'Me-Too' Agreement … is intended as a means of addressing the topics of wages, hours and working conditions. These are

> mandatory subjects of bargaining and the expectation going into a 'Me-Too Agreement' is that some changes will result on these issues as a consequence of the Agreement. Thus, it seems reasonable and logical that each (*sic*) of the 'Me-Too' encompasses all changes to these traditional, mandatory subjects.

(Jt Ex 13, p 38.) The Arbitrator conceded that that the 2010 Me-Too Agreement was a "blank check" and that in signing it "clearly the Union gave up its voice in negotiations, demonstrating an intention to accept the terms of a settlement as yet unknown." (Jt Ex 13, p 39.) Inexplicably, however, he Arbitrator then reasoned that "[t]his does not necessarily make Local 367 bound by absolutely any agreement between the Employers and the Seattle locals specifically if the agreement involves a permissive subject of bargaining ***." (Jt Ex 13, p 39.) This bizarre "interpretation" is not only contrary to the unambiguous terms of the 2010 Me-Too Agreement itself, it is also contrary to decades of Board law.

On its face, the 2010 Me-Too Agreement applies to ***all*** subjects of bargaining. There is no exception made for permissive subjects of bargaining. It does not say that the employers agree to "extend the ***same settlement*** on mandatory subjects of bargaining" to Local 367 and that "the parties agree that ***all*** changes made in mandatory subjects in King County Local 21 and 81 settlements that are approved and ratified by the members of Local 21 and 81 will be the same as those made in the mandatory subjects of bargaining in all of Local 367's agreements." No, by its terms the 2010 Me-Too Agreement unequivocally applied to changes in ***all*** subjects of bargaining, and thus bound Local 367 to apply the unit exclusions to all of its agreements.

The notion that me-too agreements cannot, by their very nature, apply to permissive subjects of bargaining is contrary to well-established Board law. The Board regularly binds employers and unions who execute me-too agreements to all of the terms of the collective-

bargaining agreements they have agreed to adopt by virtue of signing the me-too agreement, including all the terms of any successor agreements. See e.g., *Carpenters Local 33 (Curry Woodworking, Inc.)*, 316 NLRB 367, 369 (1995) (holding that union violated Section 8(b)(3) of the Act by failing to execute collective-bargaining agreement with employer after parties reached meeting of the minds on agreement to adopt area-wide master agreement); *Graphic Communications Union District 2 (Riverwood International USA)*, 318 NLRB 983, 990 (1995)(adopting ALJ's finding that union violated Section 8(b)(3) of the Act by failing to execute collective bargaining agreement with employer 0after parties had meeting of the minds on the terms of such agreement); *Chinatown Carting Corp*., JD(NY)-51-03, JD slip op. at 10 (Sept. 25, 2003) (*citing Miron & Sons Laundry*, 338 NLRB 5, 8-9 (2002)) (holding that "where an employer executes a 'me too' agreement, the failure to execute the ***full*** collective bargaining agreement once the exemplar employer has reached full agreement with the union, constitutes a violation of Section 8(a)(5) of the Act" (emphasis added)); *Construction Labor Unlimited*, 312 NLRB 364, 367 (1993), *enfd*. 41 F.3d 1501 (2d Cir. 1994) (an acceptance agreement bound an employer to the current master agreement and "any successor agreement(s)"); *Neosho Construction Co*., 305 NLRB 100 (1991) (a stipulation bound an employer to "all future master agreements"); *Z-Bro, Inc*., 300 NLRB 87, 89 (1990), *enfd*. 950 F.2d 726 (8th Cir. 1991) (agreement bound an employer to the current master agreement and to "any renewals, additions, modifications, extensions and subsequent [master] agreements.") If the Board were to suddenly reverse course now and hold that me-too agreements -- by their very nature -- do not apply to permissive subjects of bargaining, it would upset the principle of stability in industrial relations to which the Board is dedicated and which lies at the very heart of the National Labor Relations Act.

b. Extrinsic Evidence Also Establishes that the 2010 Me-Too Agreement Bound Local 367 to Adopt *All* of the Changes Negotiated in the 2010 Seattle Settlement, Including the Unit Exclusions.

If the Administrative Law Judge finds that there is ambiguity in the terms of the 2010 Me-Too Agreement, he still must conclude that the unit exclusions contained in the 2010 Seattle Settlement apply to Local 367's agreements pursuant to the terms of the 2010 Me-Too Agreement as the parties understood those terms. As indicated above, when contract language is ambiguous, it is appropriate to look at extrinsic evidence of the parties' intent. See, e.g., *R. J. E. Leasing Corp*., 262 NLRB at 379; *Spectrum Health-Kent Community Campus v. NLRB*, 647 F.3d at 347. Such evidence may include "bargaining history, the parties' interpretation of the contract, the conduct of the parties, and the legal context in which the contract was negotiated." *Des Moines Register and Tribune Co*. 339 NLRB 1035, 1037 (2003), rev. denied 381 F.3d 767 (8th Cir. 2004) (citing *Electrical Workers Local 1977 (A.O. Smith Corp.)*, 307 NLRB 138, 139 (1992)); see also *Evans Sheet Metal*, 337 NLRB 1200 (2002), enfd. 92 Fed. Appx. 844 (3rd Cir. 2003) (unpub). Here, there is substantial extrinsic evidence to support the Respondents' position that Local 367 was bound to make all of the changes made in the 2010 Seattle Settlement, including the changes in the scopes of the units covered by Local 367's grocery and CCK agreements.

General Counsel is claiming that the 2010 Me-Too Agreement did not apply to permissive subjects of bargaining, but her main witness at hearing, Teresa Iverson, did not testify to that effect. Instead, Iverson claimed the 2010 Me-Too Agreement applied only to economic terms, testifying:

> The purpose of [the 2010 Me-Too Agreement] is that the same settlement that is negotiated in 2010 with Local 21 and 81 … if approved and ratified by their members, would be extended to Local 367's agreements, that is

> the same economics they got 50 cents, we got 50 cents. But there is also important language in there that maintains that if there are any differences in our language, that we maintain those direct differences between King County and Pierce County …."

(Tr 156.) Iverson was grasping at straws, attempting to work her way out of the deal she bargained by grafting new meaning onto the clause "the difference in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved." Her new interpretation of the 2010 Me-Too Agreement is, however, contradicted not only by the explicit terms of the agreement itself, but also by the parties' well documented understanding of this language at the time they executed the 2010 Me-Too Agreement.

The 2010 Me-Too Agreement was identical to the 2007 Me-Too Agreement, so the parties' negotiations regarding the 2007 Me-Too Agreement must be examined to determine the meaning of the 2010 Me-Too Agreement. It was Iverson who approached Zeiler in 2007 with the idea of executing a me-too agreement, and she drafted the initial version of the proposed me-too agreement. As a result, any ambiguities in the 2010 Me-Too Agreement must be construed against Local 367. *Inta-Roto, Inc*., 252 NLRB 764, 770 (1980) (citing *Taft Broadcasting Co*., *WDAF AM-FM-TV v. NLRB*, 441 F.2d 1382, 1384 (8th Cir. 1971).

At the very start of her discussions with Zeiler, Iverson characterized her proposed me-too agreement as one that would require her membership to "sit on the sidelines" and "give up their voice" in the 2007 Seattle Negotiations. (Jt Ex 16, p 48; E Ex 7.) Zeiler confirmed that any me-too agreement would require Local 367's members to give up their voice in negotiations by telling Iverson that the employers would only agree to a me-too agreement that contained no restrictions. (Tr 431.) They eventually agreed on a document containing terms that were consistent with these initial understandings:

- The employers agreed to extend "the ***same settlement***" to Local 367:

Iverson's first draft of the proposed me-too agreement provided that the employers would agree to extend to Local 367 "the same recommended settlement" that resulted from the 2007 Seattle Negotiations. (Jt Ex 17: E-9, p 3.) Zeiler rejected the term "recommended," insisting that the me-too agreement could not be conditioned on a recommended settlement because he did not know if the 2007 Seattle Negotiations would result in a settlement that Locals 21 and 81 would "recommend" to its members for ratification, or if they would instead result in a settlement that Locals 21 and 81 would simply present to its members for ratification without a recommendation. Iverson eventually agreed and the 2007 Me-Too Agreement provided that exactly "the ***same settlement***" reached in the 2007 Seattle Negotiations would be offered to Local 367's members, regardless of whether it was a recommended settlement.

- Local 367 agreed to make "***all changes***" made in the 2007 Seattle Settlement.

Iverson's proposed drafts of the me-too agreement provided that the changes "proposed" in the Seattle negotiations would be the same as those "proposed" in Local 367's agreements. She did not object when Zeiler deleted references to "proposed" changes and modified the sentence to provide that: "The parties agree that ***all changes made*** in the King County Local 21/81 settlements ***will be the same as those made*** in Local 367's agreements." She therefore explicitly agreed that ***all*** changes ***made*** in the 2007 Seattle Settlement would also be ***made*** in Local 367's agreements. She never told Zeiler that the 2007 Me-Too Agreement would only apply to changes made in economic terms, or that it would not apply to changes made in permissive subjects of bargaining, or that it would not apply to changes made in the scope of the units covered by Local 367's agreements. No, she specifically and unconditionally agreed that Local 367 would make ***all*** of the changes made in the 2007 Seattle Settlement

- The Me-Too Agreement was a "blank check" that would not allow Local 367 "two bites at the apple": Iverson had attempted to give her members the opportunity to reject any parts of the Seattle Settlement that they did not want to adopt. Her initial drafts of the proposed me-too agreement provided that Local 367's members would have to ratify both the proposed me-too agreement *and* the proposed 2007 Seattle Settlement. Zeiler rejected this notion outright, correctly pointing out to Iverson that the proposed me-too agreement is not truly a –me-too agreement if Local 367 can reject the terms of the 2007 Seattle Settlement. Iverson did not want to remove the second ratification vote from the me-too agreement because she said that without it the "blank check" concept would be a harder concept to sell to her membership. She understood quite well that if the me-too agreement did not give Local 367's members the right to ratify the 2007 Seattle Settlement before applying its changes to their agreements, the me-too agreement was a ***blank check*** being issued to the employers by Local 367, and Local 367 would have to automatically adopt ***all*** of the changes of the 2007 Seattle Settlement. Of course, this did not stop Local 367 from attempting to still get its two bites of the apple by rejecting the terms of the 2010 Seattle Settlement that they simply do not like. (Tr 219.)

- "But that the ***differences in language*** … will be preserved.": This was the only restriction on the 2007 Me-Too Agreement and the parties' well-documented discussions establish that Iverson's current interpretation of this clause is contrary to the understanding the parties had of the clause when they executed the 2007 Me-Too Agreement. At the time Zeiler and Iverson were negotiating the terms of the 2007 Me-Too Agreement, they both knew there were differences in the language between Local 367's agreements and the agreements of Locals 21 and 81. They also were both aware that when changes agreed upon in previous Seattle Negotiations were applied to and made in the agreements of the outlying Locals, they were made

in such a way to ensure the underlying differences in the language of the outlying Locals' agreements were preserved. As Iverson herself explained it to her members: "This agreement is not intended to change or modify ***the past application or interpretation*** of our agreements where their language differs from Seattle's."

As discussed above, when the Sunday premium was reduced from time and a half to time and a third in the 2004 Seattle Negotiations, the same reduction was applied to the Sunday premiums in the agreements of the outlying Locals. Some of those Locals already had Sunday premiums that were lower than time and a half and that were lower than time and a third, but they did not get the underlying, higher Sunday premiums provided for in the agreements of Locals 21 and 81. They had to reduce their already lower premiums by an additional time and a third. In other words, they did not get the time and a third premium itself – they got the change in the premium. This change applied to Local 367 the same as it did to the outlying Locals, so Iverson was well aware of how this change was implemented in Local 367's agreements.

This method of applying the Seattle Settlements permitted the employers to ensure that the outlying Locals did not automatically get the richer underlying benefits provided for in the agreements of the Locals who were bargaining in Seattle, and it permitted the Locals to ensure that where their agreements had richer benefits, those richer benefits would be preserved even if changes to them were negotiated in Seattle. Another example is provided in the body of the 2007 Me-Too Agreement itself: if a 50 cent wage increase is negotiated, Local 367 gets the 50 cent increase, but it does not get the underlying wage rate to which the 50 cent increase is being applied. This was what Zeiler meant when he said that the me-too agreement was not going to make Local 367's agreement "look like" Local 21's agreement. (Tr 391.) Local 367

would not get the same agreement that Local 21 had (including any of its richer benefits); Local 367 simply would get the changes made to that agreement. *Id*.

Likewise, Local 367 wanted to ensure that it retained its underlying richer benefits, so Iverson and Zeiler specifically discussed the types of differences in language that would be preserved when the 2007 Seattle Settlement was applied. They discussed the Sunday premiums, wage increases, and Local 367's differing holidays schedule and its richer vacation benefit. Iverson was concerned mainly with preserving Local 367's richer vacation benefit. (Tr 164.) They agreed that these types of differences would be preserved and cited some of these examples in the body of the me-too agreement to avoid confusion.

This clause did not allow Local 367 to reject any changes made in the 2007 Seattle Settlement simply because they were changes made to language that was different in Local 367's agreements. As with the example of the Sunday premium, the Locals who already had lower Sunday premiums still had to reduce those premiums by time and a third. Put another way, if Local 21's grocery agreement provided that clerks earn $4.00 an hour, but Local 367's grocery agreement provided that clerks earn $3.00 an hour, and the 2007 Seattle Settlement provided that grocery clerks' wages would be reduced by 50 cents, Local 367's grocery clerks would not get the $3.50 an hour that Local 21's grocery clerks would earn after the reduction. Instead, Local 367 would have to apply the 50-cent reduction and reduce its grocery clerks' wages to $2.50 an hour. Take the reverse of that scenario: if Local 21's grocery clerks earned $3.00 an hour and Local 367's grocery clerks earned $4.00 an hour, then Local 367 would not have to reduce its grocery clerks' wages to $2.50 to match Local 21's grocery clerks wages. Instead, the underlying difference in the language of Local 367's wage rates would be preserved and its grocery clerks would earn $3.50 an hour after the change.

Although the examples of language differences discussed by Iverson and Zeiler were differences in economic terms, neither of them ever said that the me-too agreement would apply only to changes in economic terms, or that it would apply only to changes in mandatory subjects of bargaining, or that it would not apply to changes in the scopes of the units represented by Local 367. Zeiler never would have agreed to any me-too agreement that was restricted in this way. Instead, he and Iverson entered into a me-too agreement that applied to ***all changes made*** in the Seattle Settlement, including changes in both mandatory and permissive subjects of bargaining.

Iverson's own *written* statements in 2007 confirm she understood and agreed the 2007 Me-Too Agreement was a blank check that obligated Local 367 to automatically apply all of the changes made in the 2007 Seattle Settlement to its agreements. In her letters to her members, Iverson made the following statements regarding the 2007 Me-Too Agreement:

- "I recommended to the Executive Board that we approach Randy Zeiler, President of Allied Employers and lead negotiator, about the possibility of an interim/me-too agreement, which would provide that ***whatever changes are approved in the Seattle agreements would be incorporated into Local 367's agreements***";

- "[B]ecause ***the employers were not willing to allow 'two bites of the apple***,' the proposal agreed to by your employers has changed to a one-time vote on whether to enter into ***an interim/me-too agreement that will bind us to the terms of the Seattle agreement, whatever it will be, for better or for worse***";

- "What remains the same, however, is that the employers remain committed to ***extending the same terms and conditions*** to us as are approved and ratified by the Seattle locals";

- "This agreement is not intended to change or modify ***the past application or interpretation of our agreements where their language differs*** from Seattle's";

- "You are voting on whether to accept the me-too proposal described in this mailing. This means ***all changes*** approved and ratified by the

> members in Seattle ***will be the same for Local 367*** Grocery, Meat and CCK contracts."

Iverson did not tell her members that they were voting on a me-too proposal that only applied to changes in economic terms or to changes in mandatory subjects of bargaining. If Iverson believed that the proposed me-too agreement upon which her members were voting applied only to changes made in economic terms, then it appears she grossly misled her membership and they voted to ratify a me-too agreement the terms of which they did not fully understand. Surely that is not what occurred then, and what is occurring now is that Iverson is merely trying change the terms of a bargain she struck in order to avoid its unwanted consequences.

Iverson's claim that the 2007 Me-Too Agreement only applied to changes in economic terms was contrary not only to her own description of the agreement, but to the parties' conduct pursuant to its terms. Pursuant to the terms of the 2007 Me-Too Agreement, the employers offered to Local 367 the ***same settlement*** that was agreed upon in the 2007 Seattle Negotiations, and Local 367 incorporated into its agreements ***all*** of the changes contained in the settlement, including its changes to non-economic terms as follows: work performed on Christmas day would be performed on a voluntary basis; the names of three arbitrators on the panel listed in the grievance and arbitration article were changed and the article was also changed to mandate that the panel of arbitrator must have their primary residence in the Pacific Northwest; and a new letter of understanding was adopted changing the employers' scheduling practices. (Tr 330-31; R Ex 2, pps 3, 5.)

Iverson tried to claim at hearing that Local 367 made these changes to the non-economic terms of Local 367's agreements because there were no differences in the language of Local 367's agreements that would prohibit the changes. (Tr 224, 231) She was contradicting herself. If the me-too agreement applied only to changes in economic terms, as Iverson testified,

then why did Local 367 make any of these non-economic changes at all? Why not object to the changes on the grounds that Local 367 did not have to incorporate the changes in its agreements because the 2007 me-too agreement applied only to economic terms? Local 367 made no such objection in 2007 because Iverson knew very well that the 2007 Me-Too Agreement Local 367 to make ***all*** the changes contained in the 2007 Seattle Settlement.

The parties made the same deal when they executed the 2010 Me-Too Agreement. Again, Local 367 chose to enter into a me-too agreement with Allied Employers instead of bargaining separately with the employers. Iverson proposed only one change to the terms of the 2010 Me-Too Agreement: she wanted to include a provision requiring an arbitrator interpreting the terms of the 2010 Me-Too Agreement to consider only the bargaining history between Local 367 and the employers. Zeiler rejected this change for the obvious reason that there would be no bargaining history between Local 367 and the employers because Local 367 would not be bargaining. Instead, Local 367 was choosing simply to adopt the 2010 Seattle Settlement without bargaining. Iverson dropped this proposed change, and the terms of the executed 2010 Seattle Settlement were *identical* to those of the previous 2007 Me-Too Agreement.

As with the 2007 Me-Too Agreement, Iverson never said that the 2010 Me-Too Agreement would apply only to changes in economic terms, or only to changes in mandatory subjects of bargaining, or that it would not apply to changes made in the scopes of the units covered by Local 367's agreements. Iverson claimed at hearing this was because she had no reason to believe Fred Meyer would negotiate changes to the scopes of the units during the 2010 Seattle Negotiations. (Tr 236.) That testimony was not true because several things occurred between the time the 2007 and 2010 Me-Too Agreements were signed. First, Local 367 filed its self-determination petitions seeking to represent the Lacey/Tumwater nutrition employees as part

of the existing Mason/Thurston grocery unit and the University Place playland employees as part of the Pierce County CCK unit. Fred Meyer vigorously contested those petitions on the grounds that these employees did not belong in these units. So Local 367 was well aware that Fred Meyer did not believe the nutrition employees belonged in the grocery unit or that the playland employees belonged in the CCK unit. Second, Carl Wojciechowski testified during the representation hearing held to determine the appropriateness of Local 367's petition to represent the Lacey/Tumwater nutrition employees, that if the 2007 Seattle Settlement had included changes to the scope of the grocery unit, Local 367 would have been bound to make the same changes in its grocery agreements pursuant to the terms of the 2007 Me-Too Agreement.[7] Daniel Comeau, attorney for Local 367, was present during Wojciechowski's testimony (as was the attorney who represented Local 367 at the hearing and who received a copy of the transcript of the hearing and then submitted a post-hearing brief to the Regional Director on behalf of Local 367). (Jt Ex 1, fn. 1.) Finally, Local 367 knew that Fred Meyer had bargained with Local 367's Spokane-area sister local, Local 1439, to exclude the nutrition employees from the grocery unit represented by Local 1439. (Tr 236, 403, 432-33.) Like Local 367, Local 1439 had filed a self-determination petition seeking to represent the nutrition employees in an existing grocery unit already represented by Local 1439. *Id.* The nutrition employees had voted to be included in

[7] General Counsel tried to argue at hearing that this testimony is irrelevant in this case because the Regional Director decided that the 2007 Me-Too Agreement did not waive Local 367's right to represent the nutrition employees as part of the Mason/Thurston grocery unit. (Jt Ex 1, pps 9-10.) General Counsel misses the point here. The question in this case is whether Local 367 had any reason to believe that Fred Meyer might try to bargain changes to the scope of Local 367's units during the 2010 Seattle Negotiations. Since Wojciechowski testified that he believed the 2007 Me-Too Agreement would bind Local 367 to any changes made in the scope of the units, as bargained in the Seattle Negotiations, this put Local 367 on notice that the Fred Meyer may indeed attempt to bargain changes to the scope of the units during the 2010 Seattle Negotiations.

that unit, but during the round of negotiations for the successor grocery agreement applicable to that unit, Fred Meyer proposed that the nutrition employees should be excluded from the grocery unit and Local 1439 agreed. *Id.* All three of these events provided Local 367 with ample notice that Fred Meyer would seek to bargain unit exclusions for the nutrition and playland employees, and ample reason to limit the applicability of 2010 Me-Too Agreement. Instead, it again signed a blank check me-too agreement, binding itself to make in its agreements all the changes made in the 2010 Seattle Settlement, including the unit exclusions bargained by Fred Meyer.

No one forced Local 367 to execute the 2007 Me-Too Agreement or the 2010 me-Too Agreement. To the contrary, Local 367 suggested the idea of the me-too agreements because it wanted the benefit of adopting the same deal reached by Locals 21 and 81, fearing that it would not be able to achieve a better deal, or even an equivalent deal, by bargaining separately with the employers. Iverson and Zeiler were both experienced negotiators, extremely familiar with the workings of the Seattle Negotiations and with the way in which the Seattle Settlements were applied to the agreements of the various Locals. As Iverson told Local 367's members, the 2010 Me-Too Agreement, like the 2007 Me-Too Agreement before it, bound Local 367 to the terms of the 2010 Seattle Settlement, "whatever it will be, for better or for worse."

c. Respondents did not Violate Section 8(a)(5) and (1) of the Act when they did Nothing More than Bargain in Good Faith with Local 21 to Reach a Settlement and then Offered to Apply that Settlement to Local 367 in Compliance with the Clear and Unambiguous Terms of the 2010 Me-Too Agreement.

The Respondents bargained the unit exclusions with Local 21 in good faith, believing that by signing the 2010 Me-Too Agreement, Local 367 had assigned to Local 21 its authority to bargain regarding all subjects of bargaining, including the scope of the units represented by Local 367. The Board's test for determining apparent authority was recently set

forth in *300 Exhibit Services & Events, Inc*., 356 NLRB No. 66, J.D. slip op at 6 (Dec. 30, 2010) (quoting *SSC Corp*., 317 NLRB 542, 546 (1995)):

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co*., 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. Restatement 2d, Agency Section 27 (1958), Comment. Thus, "two conditions must be present satisfied in order to establish apparent authority, a manifestation by the principal to a third party and a reasonable basis for the third party to believe that the authority granted to the agent encompasses the contemplated activity." *Id*. (citing *Cora Realty Co*., LLC, 340 NLRB 366 (2003)).

Here, the 2010 Me-Too Agreement is a clear, written manifestation by Local 367 to the Respondents, and it provides a reasonable basis for them to believe that Local 21 had been granted the authority to bargain regarding the Lacey/Tumwater nutrition and University Place playland employees. As discussed above, Local 367 did not place any conditions or restrictions on Local 21's authority in the 2010 Me-Too Agreement. To the contrary, Local 367 agreed that "***all*** changes" agreed to by the Respondents and Local 21 would apply to Local 367's agreements. The Respondents relied upon Local 367's manifestation and bargained in good faith with Local 21 regarding the unit exclusions.

General Counsel and Local 367 seem to be arguing at hearing that Local 367 could not assign its right to bargain regarding the scope of the units represented by Local 367 because that right simply cannot be assigned to another Local. General Counsel and Local 367 cannot point to any Board law that establishes such a principle. There is no question that Fred Meyer could have bargained directly with Local 367 to exclude the Lacey/Tumwater nutrition employees from coverage under the Mason/Thurston grocery agreement and the University Place

playland employees from coverage under the Pierce County CCK agreement because Local 367 can bargain away its representation rights. It only makes sense that if that right belongs to Local 367, it could assign that right to Local 21. And that is what it did by signing the 2010 Me-Too Agreement.

General Counsel argues that Respondents should have known Local 367 was not intending to assign its right to bargain regarding the Lacey/Tumwater nutrition and University Place playland employees because Local 367 continued to request to bargain with Fred Meyer regarding these employees after the 2010 Me-Too Agreement was signed. This argument is without merit. Local 367 did not request to bargain regarding the Lacey/Tumwater nutrition employees after it signed the 2010 Me-Too Agreement, so it obviously agreed with Respondents Local 367 had assigned its rights to bargain regarding these employees to Local 21 under the terms of 2010 Me-Too Agreement.

Local 21's unlimited authority to bargain regarding any subject was confirmed during negotiations for the 2007 and 2010 me-too agreements, Iverson never told Zeiler he did not have authority to bargain regarding anything other than what was provided for in the me-too agreements (TR 358.) during the concurrent negotiations for a successor Pierce County general merchandise agent to include the Pierce County nutrition employees in the Pierce County grocery unit. (Tr 268.) Zeiler rejected that proposal, and Local 367 had proposed to informed Local 367's representative at the table, Blaine Sherfinski, that the nutrition employees in Local 367's jurisdiction were being bargained over in the 2010 Seattle Negotiations. *Id.* Sherfinski did not object and tell Zeiler that he and/or Local 21 could not bargain regarding the nutrition employees represented by Local 367. That must be due to the fact that Sherfinski, and Local 367, understood that the 2010 me-too agreement authorized Zeiler and Local 21 to bargain

regarding any subject and that Local 367 would be bound by whatever changes they bargained, for better or for worse.

Local 367 did request to bargain regarding the University Place playland employees after signing the 2010 Me-Too Agreement. In that request, Sherfinski noted that the parties had signed the 2010 Me-Too agreement, which would apply to the Pierce County CCK agreement. He further said: "This means the terms and conditions of our CCK agreement will have the Seattle Local 21 2010 settlement applied, just like three years ago. Therefore since we do not believe the Seattle negotiations will address our playland bargaining unit, we are again requesting dates to convene negotiations for this unit." Sherfinski's letter did not explain why Local 367 believed the 2010 Seattle Negotiations would not address the University Place playland employees, and his stated belief was contrary to the explicit terms of the 2010 Me-Too Agreement and the parties' understanding of the terms of that agreement. It was not the Respondents' responsibility to divine what was in Local 367's mind when Local 367 had already manifested a clear intent to assign its bargaining authority to Local 21. If both parties agreed that any changes bargained in the 2010 Seattle Negotiations regarding the Lacey/Tumwater nutrition employees would apply to Local 367 by virtue of the 2010 Me-Too Agreement, the same must have been true of the University Place playland employees. Respondent's lived up to their end of the bargain they made with Local 367 by signing the 2010 Me-Too Agreement.

They offered to apply the ***same settlement*** to Local 367 that was reached with Locals 21 & 81. Their offer included the new unit exclusion language that had been bargained with Local 21because they understood that the 2010 Me-Too's exception for "differences in language" did not apply to that new unit exclusion language. In turn, Local 367 was bound to accept the Respondents' offer and apply the new unit exclusion language to all of its agreements

because it had clearly and unambiguously agreed to make ***all*** the changes made in the 2010 Seattle Settlement.

Contrary to the General Counsel's assertion, Respondents did not "effectively unilaterally" remove the Lacey/Tumwater and University Place playland employees from their respective units by offering to apply the 2010 Seattle Settlement to Local 367. They simply complied with the clear and unambiguous terms of their bargain with Local 367. Since the new unit exclusions contained in the 2010 Seattle Settlement operated to exclude the Lacey/Tumwater nutrition and University Place playland employees from coverage under the Mason/Thurston grocery and Pierce County CCK agreements, respectively, Respondents were not obligated to apply any of the terms of these agreements to these employees, or any of the other terms of the 2010 Seattle Settlement such as the $.25 wage increase and the ratification bonus. The General Counsel did not provide any evidence at hearing to show that the Lacey/Tumwater nutrition and University Place playland employees have been removed from their units. To the contrary, the status quo regarding these employees has been maintained since they elected to be included in the Mason/Thurston grocery and Pierce County CCK units. (Tr 184-85.) The Complaint's Section 8(a)(5) allegations must therefore be dismissed.

2. If the Unit Exclusions do not Apply to Local 367's Agreements, the General Counsel Failed to Prove that the Parties had a Meeting of the Minds on an Agreement to Apply Any "General" Contract Terms to the Lacey/Tumwater Nutrition and University Place Playland Employees.

If the Administrative Law Judge somehow concludes that Respondents did not successfully negotiate to exclude the Lacey/Tumwater nutrition employees from the Mason/Thurston grocery unit and the University Place playland employees from the Pierce County CCK unit, either because the unit exclusions contained in the 2010 Settle Settlement did

not apply to Local 367's agreements under the terms of the 2010 Me-Too Agreement,[8] or because the parties did not achieve a meeting of the minds on the terms of the 2010 Me-Too Agreement, the Board cannot force the parties to apply the "general" terms of the Mason/Thurston grocery and Pierce County CCK agreements to these employees and/or to bargain regarding "unique" terms for these employees. The Board cannot force any substantive terms on the parties in the absence of a "consciously made" bargain between them regarding these nutrition and playland employees, *Federal-Mogul Corp*., 209 NLRB 343, 343-44 (1974), and the General Counsel failed to meet her burden to establish that Respondents and Local 367 consciously bargained an agreement to apply any so-called "general" terms of the Mason/Thurston grocery and Pierce County CCK agreements to the Lacey/Tumwater nutrition and University place employees, respectively. Furthermore, the General Counsel cannot define for the parties what are "general" and "unique" terms regarding the Lacey/Tumwater nutrition and University Place playland employees. Such terms must be defined by the parties themselves during bargaining regarding these employees. In the absence of a binding 2010 Me-Too Agreement, the Administrative Law Judge must order the parties to bargain initial terms for the Lacey/Tumwater nutrition and University Place playland employees, in compliance with the Board's August 26 Orders, as enforced by the Ninth Circuit.

[8] If the Administrative Law Judge concludes that the parties did not reach a meeting of the minds on the terms of the 2010 Me-Too Agreement, then the 2010 Me-Too Agreement must be rescinded at least as it would be applied to the Lacey/Tumwater nutrition and University Place playland employees. Even in the absence of a binding Me-Too Agreement, however, the parties still have binding agreements regarding the remaining employees in the mason/Thurston grocery and Pierce County CCK units, since they have already implemented the terms of the 2010 Seattle Settlement with regard to these employees. See *DST Insulation, Inc*., 351 NLRB 19 (2007) (in which the Board held that a binding agreement may be formed even when the parties have not reduced to writing their intent to be bound if the party at issue has engaged in a course of conduct that reflects its intent to follow the terms of the agreement)

In support of her argument that the "general" terms of the Mason/Thurston grocery and Pierce County CCK agreements apply to the Lacey/Tumwater nutrition and University Place playland employees, respectively, the General Counsel is no doubt relying on Board law applicable to bargaining regarding employees who have been added to existing bargaining units by means of a self-determination election. In a recent Memorandum, the Board's General Counsel summarized the law applicable to an employer's obligation to bargain in the wake of a self-determination election:

> In *Federal-Mogul Corp.*, the Board set forth a framework for bargaining for the terms and conditions of employment to be applied to a group of employees added (or "Globed") to the unit through a *Globe-Armour* self-determination election. The Board held that the parties must bargain for the initial contractual terms and conditions to be applied to the Globed employees and that the employer had violated Section 8(a)(1) and (5) by unilaterally applying the existing collective-bargaining agreement to the setup employees who had been added to the preexisting production and maintenance unit. At the same time, the Board was not "suggest[ing]" that "either party may adamantly insist to impasse upon a totally separate agreement so designed as to effectively destroy the basic oneness of the unit which we have found appropriate." And when the preexisting contract expires, "the Union and the Employer must bargain for a single contract to cover the entire unit[.]"
>
> Thus, in Federal-Mogul, the Board established two separate phases of bargaining after a Globe-Armour election. During the first phase, when a collective-bargaining agreement is still in effect for the preexisting unit, the employer must bargain over the initial terms and conditions for the Globed employees rather than unilaterally apply the existing contractual terms. During the second phase, after the contract has expired, the employer is obligated to bargain over terms and conditions for the overall unit. At no time may the Employer insist to impasse on "a totally separate agreement so designed as to effectively destroy the basic oneness of the unit" that the Board has found appropriate.

CBS Broadcasting KYW-TV, 4-CA-37264 (NLRB GC, May 26, 2010), 2010 WL 2546943 (NLRBGC). The General Counsel noted, however, that "[s]ubsequent Board cases have applied *Federal-Mogul* only in the context of phase one negotiations. The relevant Advice memos also,

for the most part, have dealt with the parties' obligations during the first phase, while the preexisting contract remains in effect." *Id*. As a result, it is unclear exactly what happens in the second phase of bargaining after the collective-bargaining agreements applicable to the pre-existing units have expired.

In this case, the General Counsel appears to be taking the position that once the pre-existing Mason/Thurston grocery and Pierce County CCK agreements expired, the second phase of bargaining was triggered, and the parties to the 2010 Seattle Negotiations were bargaining for successor agreements that would apply to the overall Mason/Thurston grocery and Pierce County CCK units, which included the Lacey/Tumwater nutrition and University Place playland employees. As a result, the 2010-2013 successor agreements apply to these nutrition and playland employees. General Counsel recognizes, however, that the Board cannot force the parties to agree to terms they have not consciously bargained between, which is why General Counsel is taking the somewhat strange position that only the "general" terms of these successor agreements apply to the Lacey/Tumwater nutrition and University Place playland employees. The General Counsel defines the "general" terms of these agreements as being all of the terms in the agreements appearing before Appendix A, and the wage increases and ratification bonuses provided for in the 2010 Seattle Settlement. In the General Counsel's erroneous view, these "general" terms apply to all of the employees in the units covered by these agreements. General Counsel is not so clear, however, when it comes to defining "unique" terms. "Unique" terms she says, include wages and any other terms that are unique to these employees.

Contrary to the General Counsel's argument, however, Respondents have no duty to apply any of the terms – general or otherwise – of the 2010-2013 Mason/Thurston grocery and Pierce County CCK agreements, or of the 2010 Seattle Settlement, to the Lacey/Tumwater

nutrition and University Place playland employees, because the Respondents and Local 367 never manifested any intent to apply the terms of these agreements to these nutrition and playland employees. In addition, the General Counsel's definition of "general" and "unique" terms is just plain wrong, since the terms of the Mason/Thurston grocery and Pierce County CCK agreements appearing before Appendix A in each agreement do not apply equally to all of the employees in the units covered by those agreements.

Respondents certainly never manifested any intent to apply the "general" terms of the 2010 Seattle Settlement and successor Mason/Thurston grocery and Pierce County CCK agreements to the Lacey/Tumwater nutrition and University Place playland employees. To the contrary, Respondents believed that *none* of the terms of these agreements would apply to these employees because they had successfully bargained to exclude the Lacey/Tumwater nutrition and University Place playland employees from coverage under these agreements.

If Respondents had believed they were bargaining substantive terms applicable to these employees, they would have bargained quite differently and never would have agreed to apply to these employees the "general" terms of the Mason/Thurston grocery and Pierce County CCK agreements, as those terms have been defined by the General Counsel. Respondents would have bargained terms for the Lacey/Tumwater employees that were consistent with the terms applied to nutrition employees in other units. Fred Meyer and Local 367 were already parties to a general merchandise agreement in Pierce County, which covered the nutrition employees in that unit. That agreement provides that the employees subject to that agreement, including the nutrition employees, are covered by Kroger's health insurance plan instead of UFCW's trust plan. Respondents would have bargained for similar terms for the Lacey/Tumwater nutrition employees. There is no precedent for terms applicable to the playland employees, since none of

the playland employees in Fred Meyer's stores are represented by a union, with the exception of those at the University Place store. Respondents therefore would have been bargaining from scratch regarding these employees.

In all likelihood, Respondents would have bargained a separate addendum to the Mason/Thurston grocery agreement setting forth terms applicable to the Lacey/Tumwater nutrition employees and a separate addendum to the Pierce County CCK agreement setting forth terms applicable to the University Place playland employees. The evidence established that the parties have a long history of bargaining such separate addendums when new classifications are added to an existing unit. Those addendums provide for many terms that vary from those appearing before Appendix A to the main agreements, such as: separate recognition clauses, different hours of work, separate seniority lists, different sick leave provisions, additional provisions hours of work and overtime, and different pension contribution rates that vary according to classification. (Tr 323-38; Jt Ex 14, pps 35-36, 39-41.) The parties also regularly bargain terms that exempt certain employees from the units covered by particular agreement, even though the employees in those classifications are included in the unit. (Tr 328-29; Jt Ex 14, p 52.) It is simply unreasonable to believe that Respondents would have abandoned this bargaining history with regard to the Lacey/Tumwater nutrition and University Place playland employees and instead have agreed to simply apply to these employees all of the terms appearing before Appendix A in the Mason/Thurston grocery and Pierce County CCK agreements.

Likewise, Local 367 never manifested any intent to apply the "general" terms of the 2010 Seattle Settlement and successor Mason/Thurston grocery and Pierce County CCK agreements to the Lacey/Tumwater nutrition and University Place playland employees, respectively. As discussed above, General Counsel contended at hearing that Local 367 never

authorized Local 21 to bargain with Respondents regarding the Lacey/Tumwater nutrition and University Place playland employees, as evidenced by Local 367's continued requests to bargain separately with Fred Meyer regarding these employees. General Counsel cannot have it both ways. If Local 367 never intended for Local 21 and Respondents to bargain regarding terms applicable to the Lacey/Tumwater nutrition and University Place playland employees, it cannot now claim that the successor agreements bargained by Respondents with Local 21 apply to these employees.

Since neither party believed the substantive terms of the 2010 Seattle Settlement and the successor Mason/Thurston grocery and Pierce County CCK agreements would apply to the Lacey/Tumwater nutrition and University Place playland employees, there was no "meeting of the minds" between them as to any terms applicable to these groups of employees and Respondents did not violate the Act by failing to apply the "general" terms of these agreements to the Lacey/Tumwater nutrition and University Place playland employees. Nor did they violate the Act by failing to bargain "unique" terms regarding these employees. Particularly when Local 367 never requested to bargain "unique" terms regarding these employees. This is further evidence that Local 367 never intended for the "general" terms of the successor Mason/Thurston grocery and University Place playland employees to apply to the Lacey/Tumwater nutrition and University Place playland employees. Respondents have no duty to bargain "unique" terms regarding these employees unless and until Local 367 requests to bargain such terms.

It is Respondents' position that the phase one bargaining regarding the Lacey/Tumwater nutrition and University Place playland employees was suspended pending the Ninth Circuit's resolution of the Board's petition for enforcement of its August 26 Orders. Once the Ninth Circuit enforced the Board's Orders, phase one negotiations regarding these employees

resumed and the parties are now obligated to bargain initial (i.e., all) terms regarding these employees. The General Counsel's complaint in this case created a conflict in the Employer's duty to bargain regarding the Lacey/Tumwater nutrition and University Place playland employees, which was not resolved by the General Counsel at hearing. The Board's August 26 orders, as enforced by the Ninth Circuit, were issued before the pre-existing Mason/Thurston grocery and Pierce County CCK agreements expired. So then when the Board ordered Fred Meyer to bargain regarding these employees, it was ordering Fred Meyer to bargain initial terms of employment for those employees the General Counsel alleges, however, that the parties have already bargained "general" terms regarding these employees and that Respondents must now bargain "unique" terms. This position simply is not consistent with the Board's August 26 Orders. Fred Meyer has no duty to bargain with Local 367 regarding any other terms for these employees and the Complaint's Section 8(a)(5) allegations to the contrary must be dismissed.

If the Administrative Law Judge somehow finds that the parties did bargain "general" terms applicable to these nutrition and playland employees and orders Respondents to now bargain "unique" terms regarding these groups of employees, such "unique" terms must be defined by the parties and cannot be defined by the Board. The Board has made it very clear that it will "leave to bargaining the applicability of existing contractual provisions to [Globed employees]." *Federal-Mogul*, 209 NLRB *supra* at n. 6. Respondents are of the firm opinion that all of the terms and conditions regarding these nutrition and playland employees are "unique" because no Fred Meyer grocery agreement, including those with Local 367, contains terms applicable to nutrition employees and no Fred Meyer CCK agreement, including those with Local 367, contains terms applicable to playland employees. Thus, these contracts are "silent as to all matters affecting" the Lacey/ Tumwater nutrition and University Place playland

employees. *Federal-Mogul*, 209 NLRB at 345. As established above, the parties have a long history of bargaining addendums containing separate terms for classifications of employees who are added to existing units. They must bargain regarding the Lacey/Tumwater nutrition and University Place playland employees in the same manner, and decide for themselves what terms will be applied to these employees.

3. The Complaint's Requested Remedies for the Alleged Section 8(a)(5) Violations Must be Denied.

Certain portions of the General Counsel's requested remedies must be denied outright. Firstly, no remedy whatsoever can be had against Allied Employers because it cannot provide the requested remedies. Allied Employers cannot apply the "general" terms of the Mason/Thurston grocery and Pierce County CCK agreements to the Lacey/Tumwater nutrition and University Place playland employees. Nor can it pay these employees a wage increase or a ratification bonus. Second, the General Counsel's request for an Order ordering Fred Meyer to pay these employees the $.25 wage increase and ratification bonuses provided for in the 2010 Seattle Settlement is moot, as Fred Meyer established at hearing that these employees have already received the requested $.25 wage increase and the lump sum ratification bonus under the terms of the Tacoma general merchandise agreement. (Tr 445; R Ex 21.) Finally, the General Counsel presented no evidence to establish that these employees are entitled to receive the ratification bonus provided for in the 2010 Seattle Settlement, since she presented no evidence that Local 367 considered these employees to be part of the Mason/Thurston grocery and Pierce County CCK units and treated them as such. In this regard, there was no evidence that these employees were provided with the opportunity to vote on whether to ratify the 2010 Me-Too Agreement. If Local 367 did not believe these employees were eligible to vote on the 2010 Me-Too Agreement or to receive the ratification bonuses, Fred Meyer should not be required

B. Fred Meyer did not Violate Section 8(a)(1) of the Act.

The Complaint alleges that on January 5, 2001, Fred Meyer violated Section 8(a)(1) of the Act by posting a letter "blaming the Union for lack of ratification bonuses and for the delay in reaching a collective-bargaining agreement." (Complaint, para 8.) This allegation is without merit and must be dismissed because the letter was privileged under Section 8(c) of the Act. In 2006, the Board provided a thorough explanation of the protections granted to employers by Section 8(c) of the Act:

> Section 8(c) of the Act "implements the First Amendment" such that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969)). It gives employers the right to express their opinions about union matters, provided such expressions do not contain any "threat of reprisal or force or promise of benefit." Section 8(c); *Progressive Electric*, 344 NLRB 426, 427 (2005); see also *United Technologies Corp*., 247 NLRB 1069, 1074 (1985), enfd. sub nom *NLRB v. Pratt & Whitney*, 789 F.2d 129 (2d Cir. 1986)(finding employer's communications "criticizing the Union's demands and tactics" was protected by 8(c) because "employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issues") Thus, an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees. See *Poly-America, Inc*., 328 NLRB 667, 669 (1999), affd. In part and revd. in part 260 F.3d 465 (5th Cir. 2001)(relying on proposition that "[i]t is well settled that Section 8(c) … gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits [,]" the Board finds that employer did not violate Section 8(a)(1) through its agent's statements to employees that the Union was no good, that it had threatened to burn the plant, and that it would charge up to $300 in weekly or monthly fees); see also *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) (finding that "flip and intemperate" remarks intended to make fun of some union representatives did not violate the Act). …"Argumentation of this type is left routinely to the good sense of employees." *Optica Lee Borinquen, Inc*., 307 NLRB 705, 708-709 (1992), enfd. mem. 991 F.2d 786 (1st Cir. 1993). Although the Board has found that extreme denigration may rise to the level of interference with Section 7 rights, such cases are clearly distinguishable. See, e.g., *Sheraton Hotel Waterbury*, 312

> NLRB 304 fn. 3 (1993), enfd. in relevant part 31 F.3d 79 (2d Cir. 1994) (employer violated Section 8(a)(1) by accusing the union of abusing employees at home, and in response hiring police to patrol its parking lot, thus implying to employees that their safety in the workplace was at issue, while at the same time comparing the union to a totalitarian regime that uses abuse and intimidation to quell dissent).

Children's Center for Behavioral Development, 347 NLRB 35, 35-36 (2006).

Here, as in *Children's Center for Behavioral Development*, Fred Meyer's letter to the employees conveyed nothing more than Fred Meyer's "negative opinion" of Local 367's actions. *Id*. at 36. As noted above, denigration of the Union is insufficient to support a finding that an employer has violated the Act unless it is such as to "threaten reprisals or promise benefits." *Id*. (Quoting *Poly-America, Inc*., 328 NLRB at 669). Fred Meyer's letter did not contain any such threats or promises. "All the General Counsel has proven here is that [Fred Meyer] expressed an unfavorable opinion about [Local 367], its positions, and its actions." *Id*.

It is not clear why the Union objected to Fred Meyer's letter, since the Union itself had already sent its members a letter informing them that the grocery employers, including Fred Meyer, may delay paying the ratification bonuses as a result of the impending arbitration, and that if they did so, the issue of the payment of the ratification bonuses would also be resolved in the arbitration. (R Ex 5.) So when Local 367's members received Fred Meyer's letter, they were already anticipating that Fred Meyer might delay the payment of their ratification bonuses and that the issue would ultimately be resolved in the upcoming arbitration. This allegation in the Complaint must be dismissed.

C. The Union Should be Sanctioned for its Failure to Comply with the ALJ's Order to Produce its Constitution, By-Laws and Position Statements in Response to Respondents' Subpoena.

Since Local 367's Request for Permission to File a Special Appeal of the Administrative Law Judge's Ruling on its Petition to Revoke Respondents' Subpoena is still

pending before the Board at the time of the filing of this brief, Respondents are addressing herein the sanctions that should be ordered against Local 367 for its failure to comply with the Administrative Law Judge's ruling that it should produce its Constitution, By-laws and position statements to Respondents in response to their subpoena. If the Board enforces the Administrative law Judge's ruling, in whole or in part, Respondents believe it is appropriate to apply the following sanctions to Local 367: (1) all testimony elicited by counsel for Local 367 at hearing should be stricken from the record; (2) any exhibits entered by Local 367 should be stricken from the record; (3) any post-hearing brief submitted to the Administrative Law Judge by Local 367 should be stricken from the record by the Administrative Law Judge, and (4), Respondents should be permitted to file a supplemental post-hearing brief if the Board enforces the Administrative Law Judge's ruling, in whole or in part, and after it has had an opportunity to review the additional documents produced by Local 367.

IV. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety.

DATED: September 7, 2012.

BULLARD SMITH JERNSTEDT WILSON

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2012, I served true and correct copies of the foregoing **RESPONDENT'S POST HEARING** BRIEF on the following persons via the methods indicated:

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