UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

MERCK & COMPANY, Respondent, and UNITED STEEL WORKERS OF AMERICA LOCAL 4-575, AFL-CIO Charging Party.	Cases 22-CA-090990

RESPONDENT MERCK & CO., INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Respondent Merck & Co., Inc. ("Company") submits this reply brief in further support of its motion for summary judgment pursuant to Section 1.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB")[1] seeking dismissal of the Complaint issued by Region 22.

This motion is ripe for summary judgment and nothing in the opposition to the Company's motion changes that fact. Indeed, in its opposition to the instant motion, the General Counsel concedes in the second sentence of her brief that "[t]here are no material facts in dispute." That critical admission coupled with the governing legal principles set forth in the Company's moving brief and below, requires dismissal of the Complaint with prejudice.

With respect to the United Steelworkers of America, Local 4-575, AFL-CIO's ("Union") failure to timely file its Charge, the General Counsel and the Union in their respective briefs present two different sets of facts to avoid the preclusive effect of § 10(b) of the National Labor Relations Act ("Act"), 29 U.S.C. § 151, et seq. The Union alleges that the unfair labor practice purportedly was committed on April 19, 2012, when the Union for the first time allegedly demanded to bargain over the Company's decision to take the unilateral action announced two months prior. On the other hand, the General Counsel alleges that the unfair labor practice did not occur until October 2012, when the Union first was informed of the actual dollar amount each future retiree would receive as a subsidy in 2013, and it purportedly realized that certain employees would be adversely affected. They are both mistaken. The critical date for Section 10(b) purposes is the Company's clear and unequivocal announcement of its decision to take

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[1] The Company expressly reserves the right to raise at any later proceeding the Board's authority to act in this matter given the D.C. Circuit Court of Appeals decision in Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

unilateral action in February 2012. Since that date occurred more than six months prior to the Union's Charge, the Charge is untimely and the Complaint must be dismissed.

In addition, as shown in the Company's moving brief, at all times at issue in the Complaint the parties had in place a clear and unmistakable waiver that permitted the Company to make the unilateral changes being challenged. While the Union in its brief denies that the language upon which the Company relies constitutes a waiver as to any issues relating to retiree health benefits, the General Counsel concedes that the language is a waiver of all but one narrow aspect of retiree health benefits – how retiree health benefits are calculated. As shown below, the General Counsel and the Union's attempts to circumvent the clear and unequivocal language of the Contract are unavailing.

Finally, neither the Union nor the General Counsel sets forth any credible opposition to the preclusive effect of the language in the April 2012 Memorandum of Agreement ("2012 MOA"). As shown below, the Union and the General Counsel's opposition establishes unequivocally that the Union knew of the Company's decision to take unilateral action as of February 2012, knew that the Company believed it had the right to take the unilateral action based on the waiver contained in the 2012 MOA, and with that knowledge, agreed that the Company had "bargained in good faith" and "fulfilled all collective bargaining obligations." That agreement must be enforced, and the Union barred from pursuing the instant unfair labor practice.

For the foregoing reasons and the reasons set forth in the Company's moving brief, no genuine issue of material facts exists and the Complaint must be dismissed as a matter of law.

STATEMENT OF FACTS[2]

All material facts necessary for the resolution of this motion are set forth in the Statement of Facts in the Company's moving submission. Critically, while the Union and the General Counsel set forth new "facts" in their opposition in a desperate attempt salvage their claims, they do not (and cannot) dispute the material facts presented by the Company. Accordingly, there is no material factual dispute warranting a hearing.

ARGUMENT

POINT I

THE OPPOSITION BRIEFS CONFIRM THE UNION HAD NOTICE OF THE ALLEGED UNFAIR LABOR PRACTICE OUTSIDE THE 10(b) PERIOD REQUIRING DISMISSAL OF THE UNION'S CHARGE

The Union and the General Counsel's attempts to circumvent the preclusive effect of § 10(b) of the Act reveal divergent factual allegations. When read together (where possible), the facts as alleged by the General Counsel and the Union establish that the Union's Charge is untimely.

The Company refers to and incorporates by reference the authority set forth in its moving brief that establishes that the § 10(b) period commences when the charging party receives clear and unequivocal notice of the alleged unfair labor practice (Company's Brief, Point II). As confirmed in the briefs of the Union and the General Counsel, the Union had clear and unequivocal notice of the changes they are challenging as of February 2012 (Brief of Counsel for the General Counsel ("GCB"), 7; Union's Brief ("Ub"), 1). Accordingly, the Union's Charge is untimely and the Complaint must be dismissed.

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[2] For purposes of this motion only, the Company accepts as true the allegations set forth in the Complaint, and the opposition submissions of the General Counsel and the Union.

As recognized by the General Counsel and Union President James Conway, the parties' contract contains a clear and unequivocal waiver of the Union's right to negotiate with respect to unilateral changes to retiree health benefits (GCB, 4, Affidavit of James Conway ("Conway Aff."), ¶ 6). According to the General Counsel, the only dispute is whether that broad waiver includes changes to the "calculation" of retiree health benefits (GCB, 10).[3] The General Counsel's sole basis for disputing that the Charge is untimely is that the February 2012 notice announcing the change purportedly was not a "clearly communicated change in terms and conditions of employment" (GCB, 8). That conclusion is based on the fact that the Company's notice regarding its decision did not provide the specific monetary value of the subsidy to be paid to each future retiree (GCB, 7).

Given the General Counsel's acknowledgement in her opposition brief that the Company does not need to negotiate over the amount of the subsidy, the information regarding the amount of the subsidy provided to the Union in October 2012 is irrelevant. The February 2012 notice attached as Exhibit H to the Conway Affidavit, establishes that the Union had clear and unequivocal notice that the Company had changed the method of calculating the subsidy for 2013 – the only subject relating to retiree health benefits over which the General Counsel alleges the Company must bargain – from age plus years of service, to simply age.[4] No additional information was needed for the Union to know that the method of calculation had been changed and, thus, the February 2012 notice marked the beginning of the § 10(b) period.

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[3] Although not entirely clear from the General Counsel's brief, it appears that what is meant by "calculation of retiree health benefits" is the method by which the Company determines the amount of the subsidy to be paid toward the cost of retiree health benefits. (see GCB, 4).

[4] Since the Union was on notice that years of service would no longer be considered when determining the amount of the subsidy, they also knew that any future retirees who would have benefited under the prior calculation based on years of service, would be adversely affected by no longer considering that factor. No dollar amount is necessary to reach that conclusion.

The General Counsel's argument is also based on a faulty legal premise. The General Counsel alleges that "it was only in October 2012 that the Union learned that future retirees were affected by the change and that the change was a detriment to them" (GCB, 8; see also FN 7 "To require the Union to file an unfair practice charge in February 2012, when it could not determine the impact of the announced change, would encourage unnecessary resort to the Board's processes. If, when sufficient information was provided, the change turned out to be a benefit to the employees, the Union would need no relief."). Essentially, the General Counsel argues the Union only became aware of an unfair labor practice when it learned the change would not be a benefit, but rather a detriment. The General Counsel's position flies in the face of decades of legal precedent which precludes any unilateral change (unless after an impasse or pursuant to a valid waiver) regardless of whether the change is a benefit or detriment to the employees. See e.g., NLRB v. Katz, 369 U.S. 736, 745 (1962) (recognizing that a unilateral merit increase is a violation of § 8(a)(5)). Accordingly, whether the unilateral change would constitute a benefit or detriment has no bearing on whether the Union had notice of the alleged unfair labor practice.

The Union's attempt to avoid the preclusive effect of § 10(b) of the Act takes a different approach which, ironically, is contradicted by the General Counsel's position. First, the Union argues that the February 2012 notice was merely a statement of the Company's intention to implement changes to retiree health benefits (Ub, 4 "All that Merck did prior to this date was given [sic] the Union notice that it intended to make certain changes to retiree health benefits at the beginning of the following year"). The Union's position is factually contradicted by the notice attached to the Affidavit of its own President (Conway Aff., Exh. H). The notice is titled "Introducing Merck's New Retirement Benefits Program" and, thus, certainly cannot be

characterized as merely a statement of intent (Id.). The language in the body of the notice provides in pertinent part:

- "Merck's new Retirement Benefits Program begins Jan. 1, 2013 and will provide a single program to all U.S.-based eligible employees – legacy Merck, legacy Schering-Plough, legacy Oganon BioSciences and all new hires" (pg. 1);

- "Although the new plan takes effect on Jan. 1, 2013, we are introducing it now to allow ample time for you to learn about the new plans and for our benefits partners and service providers to prepare for implementation" (pg. 5);

- "If you do not meet the requirements described above, starting Jan. 1, 2013, you will be eligible for Merck's contribution subsidy if you retire at age 55 or older with at least 10 years of service earned after age 40. However, for pre-Medicare coverage, Merck's subsidy will vary based on your age at retirement, instead of using the current "Retiree Points" (ago plus service) contribution schedule. For post-Medicare coverage, Merck's subsidy will be fixed for the year, regardless of your age" (pg. 6).

(Id. (emphasis added)). Accordingly, the notice was not a "statement of intent" as the Union argues (see Ub, 4). It was a notice that a decision had been made with a firm date set for implementation. Once the Union received that clear and unequivocal notice, the § 10(b) period commenced.

The Union further argues that the alleged unfair labor practice did not occur until the Union demanded to bargain in April 2012 and, that, prior to that date, the Union had "no knowledge" that the Company would refuse to bargain over the changes (Ub, 5). In light of the notice the Union received that the Company would implement the announced changes (without any offer to bargain), the Union's position lacks merit. Its position also is contradicted by the General Counsel who does not allege in its opposition that any express demand to bargain was made in April 2012. Indeed, the General Counsel contends that it would have been a "hollow exercise" to bargain over the calculation until October 2012 because it was not until then that the Union purportedly first became aware that "future retirees were affected by the change and that the change was a detriment to them." (GCB, 7-8) Moreover, the Union's own President admits

that the Company informed the Union prior to April 19, 2012, that it had no obligation to bargain over the changes (Conway Aff., ¶10). Thus, the Union's attempt to manufacture a date within the 10(b) period when the unfair labor practice purportedly occurred cannot salvage its untimely Charge.

Regardless of which set of "facts" the General Counsel and the Union ultimately present at a hearing, the undisputed material fact is that the Union received clear and unequivocal notice that the Company changed the method of calculating the subsidy for retiree health benefits in February 2012. The date the Union first became aware of that decision marked the beginning of the § 10(b) period and, thus, the Union's Charge filed in October 2012 is untimely.

POINT II

THE GENERAL COUNSEL AND UNION'S CONFLICTING POSITIONS ON THE EFFECT OF THE WAIVER FAIL TO ESTABLISH ANY GENUINE ISSUE OF MATERIAL FACT WARRANTING A TRIAL.

As shown in the Company's moving brief and as conceded by the General Counsel, at the time the alleged changes were announced, and at the time the changes were implemented, the parties had in place the following language which constitutes a waiver of the Union's right to negotiate changes to retiree health benefits:

> Medical Benefits for Retirees. Active employees who retire with 10 or more years of credited service under the Pension Plan at or over age 55, and their eligible dependents, will immediately be eligible to be covered by Retiree Choice or its successor program(s) applicable to salaried retirees, ***as the terms and conditions of such medical and dental benefits programs may be modified by the Company from time to time at its sole discretion.***

(Certification of Lorin Bradley ("Bradley Cert."), Exh. A, submitted with the Company's moving brief (emphasis added)). The Union and the General Counsel take conflicting positions to

circumvent this clear and unmistakable language. Neither is sufficient to salvage the legally unsustainable position taken in the Complaint.

A. The General Counsel's Position Is Contrary to the Contract Language and the Past Practice Upon Which it Relies.

The General Counsel concedes (as it must) that the governing contract language contains a clear and unmistakable waiver of the Union's right to bargain regarding retiree health benefits. Indeed, the General Counsel relies on an Affidavit signed by the Union President to establish the following:

1) The employer has in the past "changed the amounts of its contributions for retiree health benefits";

2) The employer has in the past changed "insurance carriers and has modified the medical or dental benefits it provides";

3) The employer "has the right to make changes in...the amount of the Employer's subsidy for retiree health benefits";

4) The Employer "has the right to make changes in...the benefits provided, e.g., what medical or dental procedures or modifications are covered."

(Conway Aff., ¶ 6). While the General Counsel concedes that the operative language constitutes a clear and unmistakable waiver, it argues that the waiver does not apply to one narrow aspect of retiree health benefits – the method of calculating the subsidy (GCB, 4).

The General Counsel's position is untenable for several reasons. First, the express language of the waiver undermines its position. The waiver provides that it applies to the "terms and conditions of such medical and dental programs," which terms and conditions the General Counsel concedes include the amount of the subsidy (GCB, 4). Nothing in the waiver or the contract suggests any intention by the parties to treat the calculation of the subsidy paid for retiree health benefits any different than the other terms and conditions of the programs.

Second, an exception to the waiver would serve no practical purpose. Since the General Counsel acknowledges the Company has the right to unilaterally set the amount of the subsidy, how the subsidy is calculated is irrelevant. If the Company can determine the amount of the subsidy in its sole discretion, the method it uses (if any) in determining that amount is immaterial.

The General Counsel advances several arguments to support its position that the plain language of the contract and common sense should not control. First, the General Counsel erroneously argues that the "so-called waiver language is sandwiched between negotiated language in which the parties address how retiree health benefits are computed, notwithstanding the supposed waiver" (GCB, 10). Based on that misreading of the contract, the General Counsel then concludes that if the waiver encompassed a unilateral right to change the method by which retiree health benefits are computed, it would nullify the contractual language before and after the waiver (Id.). The language immediately preceding the waiver that the General Counsel argues would be "nullified" states in pertinent part: "[a]ctive employees who retire with 10 of more years of credited service under the Pension Plan at or over age 55, and their eligible dependents, will immediately be eligible to be covered by Retiree Choice or its successor program(s) (Bradley Cert., Exh. A (emphasis added); GCB, 10). The sentence immediately after the waiver states in pertinent part: "[f]or purposes of the preceding sentence only, 'credited service' for any employee under the age of 50 on January 1, 2003 or who is hired on or after January 1, 2003 will not include any service earned before the employee attains age 40" (Id.). The foregoing language relied upon by the General Counsel deals solely with eligibility to participate in the retiree health benefits programs offered by the Company. The Complaint does

not allege any unilateral change in the eligibility criteria.[5] The fact that the Company unilaterally changed the calculation of the subsidy paid for retiree health benefits under the waiver, has absolutely no bearing on the eligibility criteria set forth in the contract. Thus, there is no conflict between the contract language regarding eligibility and the Company's right to change the method of computing the Company subsidy for retiree health benefits under the waiver.

Second, the General Counsel argues that past practice purportedly establishes that the parties have negotiated the calculation of the subsidy (GCB, 11). As an initial matter, since the waiver is clear and unequivocal, any reliance on bargaining history to alter the plain meaning of that language must be rejected under the parol evidence rule. Fr. Winkler KG v. Stoller, 839 F.2d 1002 (3d Cir. 1988) (recognizing that the parol evidence rule that any previous oral representations or agreements, offered to "vary, modify, or supersede the written contract, [are] inadmissible in evidence.") Moreover, the bargaining history relied upon by the General Counsel concerns negotiations that led to the inclusion of language regarding the eligibility criteria referenced above. Again, the language regarding eligibility and the negotiations that led to its inclusion in the contract, have absolutely nothing to do with the subsidy the Company would provide for retiree health benefits.

Moreover, even if the parties had negotiated the calculation of the subsidy during negotiations for a successor contract at some point in the past, such negotiations lend no support for the General Counsel's allegation here for the simple reason that a waiver of a bargaining right does not survive the expiration of the contract. Beverly Health and Rehabilitation Servs., 355 NLRB 635, 636 (2001), enf'd. 317 F.3d 316 (D.C. Cir. 2003). If that subject was raised during

[5] Indeed, under the General Counsel's theory, the unilateral changes presumably would have violated the contract. No such allegation ever has been raised by the Union.

bargaining for successor contracts as the General Counsel alleges, the Company only was complying with its statutory duties. Once the Union agreed to continue the waiver of its right to bargain regarding all terms and conditions of the benefits (including the amount and calculation of the subsidy), the fact that the Company was willing to bargain over the subject during the prior negotiations that led to the waiver, does not render the waiver any less enforceable and certainly does not justify carving out an exception that simply does not exist.

Finally, the General Counsel argues that the cases upon which the Company relies "are distinguishable" (GCB, 11). In support of that conclusion, the General Counsel, without citation or reference to any specific case, states that "[i]n those cases, unlike here, the reservation of rights specifically covered the unilateral change at issue and the contract was otherwise silent on the term and condition of employment unilaterally changed" (Id.). The General Counsel provides no explanation of how the waiver language in any of the cases cited by the Company is any less specific than the waiver at issue here. Indeed, that position is contrary to the General Counsel's admission that the waiver applies to numerous terms and conditions of the programs, none of which are specifically referenced anywhere in the parties' contract. Regarding the General Counsel's other attempt to create a distinction where none exists, contrary to the General Counsel's assertion, the contract here contains no reference to the calculation of retiree health benefits. Thus, any attempt to distinguish those cases on the incorrect notion that the eligibility language relates to the calculation of the benefit is completely misplaced. For these reasons, the General Counsel's attempt to distinguish the cases upon which the Company relies is unavailing.

In sum, the General Counsel does not challenge that the language upon which the Company relies constitutes a clear and unmistakable waiver of the Union's right to bargain regarding "terms and conditions" of the retiree health benefits programs. Instead, the General

Counsel argues that an exception should be carved out of the waiver. As shown above, each of the General Counsel's arguments purportedly in support of creating such an exception lacks merit. Accordingly, the waiver applies to all terms and conditions of the retiree health benefits programs, including the calculation of the retiree health benefit subsidy, and, thus, the Complaint must be dismissed.

B. The Union's Positions Are Contradicted by the General Counsel and Unsustainable As a Matter of Law.

The Union asserts several different positions regarding the waiver, all of which fail. First, the Union argues that no waiver exists (Ub, 7 "there was and is no explicitly waive [sic] bargaining over this issue."). That position is unsustainable in light of the very plain language at issue and the position of the General Counsel and Union President that the language is a waiver, and the Company has exercised its rights pursuant to that waiver on numerous occasions over the past twenty plus years (GCB, 4; Conway Aff., ¶ 6).

The Union next appears to argue that although the Company "may have a valid defense to a contractual grievance" and may have been given certain "contractual rights," it still had a duty to bargain before exercising them (Id.). It appears, essentially, that the Union contends that a waiver of the right to bargain over a particular subject merely precludes a union from raising a contractual grievance, but does not constitute a waiver of a statutory duty to bargain. There is absolutely no support for such position and would render all waivers entirely meaningless. Indeed, the Union has cited to no case that even suggests that the Board draws a distinction between statutory and contractual rights when determining whether a waiver entitled a party to act unilaterally under § 8(a)(5). In fact, the Board makes no such distinction, and routinely dismisses § 8(a)(5) allegations pursuant to waivers contained in the parties' collective bargaining agreements. See e.g., Mary Thompson Hosp., 296 NLRB 1245 (1989) (dismissing allegations

that the Company refused to bargain in good faith in violation of §§ 8(a)(1) and (5) of the Act based on a waiver incorporated in the parties' collective bargaining agreement).

Next the Union argues that regardless of the Company's duty to bargain mid-contract regarding the changes (for which there is no duty in light of the waiver), that the parties had a duty to bargain here because they were in negotiations for a successor agreement. The Company does not deny that a duty to bargain exists during successor negotiations even as to those subjects that were waived in the predecessor contract. The Union conveniently ignores, however, that the parties entered into negotiations for a successor agreement, which negotiations resulted in the parties agreeing to continue the very waiver upon which the Company relies. Indeed, as made clear by the General Counsel, at the time the parties executed the 2012 MOA, the Company already had explained that they believed the language gave them the right to unilaterally make the changes at issue (Conway Aff., ¶ 10). Armed with that knowledge, the fact that the Union agreed to continue the waiver in the successor contract simply confirms that the Union knowingly waived its right to bargain over the subject.

Finally, the Union argues that the Board should look to bargaining history to determine whether a waiver occurred here. As noted above, in light of the clear and unmistakable waiver, any such parol evidence must not be considered to alter the plain meaning of the language. See, Fr. Winkler KG, supra. Nonetheless, in arguing that the Board should consider past practice, the Union fails to identify any alleged past practice it contends is relevant. Critically, the only bargaining history in the motion record was submitted by the General Counsel through the Affidavit of the Union President, which bargaining history confirms that the Company has made numerous unilateral changes to retiree health benefits pursuant to the waiver without objection

from the Union (Conway Aff., ¶ 6).[6] In sum, the Union has provided no basis upon which bargaining history should be considered here and fails to identify any bargaining history it contends is relevant. Indeed, the only bargaining history presented by any party on this motion record confirms that the Company has the right to make unilateral changes to retiree health benefits.

Accordingly, no fact issue regarding the waiver exists for which a trial would be necessary.

POINT III

TO IGNORE THE UNION'S EXPRESS AGREEMENT THAT THE COMPANY FULFILLED ALL BARGAINING OBLIGATIONS WOULD REWARD CONDUCT THAT UNDERMINES THE BARGAING PROCESS.

The General Counsel and the Union do not dispute that in connection with the execution of the 2012 MOA, the Union expressly agreed that the Company had "bargained in good faith and have met all collective bargaining obligations..." (GCB, 12; Ub, 10). It is clear based on the submission from the Union President that at the time the Union signed this agreement, the Union alleges it had demanded to bargain regarding the changes to retiree health benefits and the Company purportedly refused in violation of the Act (Conway Aff., ¶ 10). Neither the General Counsel nor the Union even attempt to explain why the Union signed an agreement

[6] The Union attempts to distinguish two of the cases cited by the Company in support of the Company's position that the language in the contract constitutes a clear and unmistakable waiver. Ironically, while the Union correctly notes that the Board may look to bargaining history if there is ambiguity in the meaning of the language purporting to be a waiver (Ub, 8-9), in the two cases the Union attempts to distinguish, the Board did not rely on any bargaining history in determining that the language at issue therein constituted a waiver. Provena Hospitals d/b/a Provena St. Joseph Medical Ctr., 350 NLRB 808 (2007) ("...the contract itself plainly speaks to the right of the Respondent to act."); Mary Thompson Hosp., 296 NLRB at 1249 ("This language ...is a clear and unambiguous waiver of [the union's] right to be consulted or to object, during the contract term ...The language in question left nothing to be done through negotiations...).

acknowledging the Company's good faith and fulfillment of its bargaining obligations if, at the same time, they believed the Company had committed an unlawful act.

Both the General Counsel and the Union argue that the Union should not be held to this agreement because it does not specifically reference the unfair labor practice raised here. The Union attempts to distinguish Septix Waste, Inc., 346 NLRB 494 (2006), a case upon which the Company relied in its opening brief, on the grounds that in that case there was an initial unfair labor practice being settled, and here, there is no reference to any specific unfair labor practice in the parties' agreement (Ub, 10). That is a distinction without a difference. The significance of Septix is that, where the parties settle "any and all" claims that they knew or should have known at the time they executed a settlement agreement, that agreement applies to any unrelated unfair labor practices that accrued prior to the date of the settlement. Here, even accepting the Union President's sworn statement that the Union knew prior to signing the 2012 MOA that it had demanded to bargain and the Company refused (Conway Aff., ¶ 10) – the allegation in the Union's Charge – here, as in Septix, the Union should be barred from pursing any unfair labor practices stemming from conduct that preceded the agreement. Just because the agreement occurred in the context of a contract settlement rather than a settlement of an unrelated unfair labor practice, renders it no less enforceable. To the contrary, the fact that the contract settlement is directly related to the unfair labor practice provides a more compelling argument than in Septix that the Union should be held to its agreement.

The Union also argues that the agreement should not be enforced because it purportedly does not satisfy the factors set forth in Independent Stave Company, Inc. That case recognizes that "[t]he Board has long had a policy of encouraging peaceful, nonlitigious resolution of disputes" and that the Board has a "commitment to private negotiated settlement agreements and

[a] policy of 'encouraging parties to resolve disputes without resort to Board processes.'" 287 NLRB 740 (1987). The Board in Independent Stave set forth four factors to be considered when determining whether to honor a private, non-Board settlement. It does not, as the Union suggests, define what is and what is not a settlement agreement.

Indeed, in identifying the four factors, the Board in Independent Stave recognized that the inquiry is designed to determine "whether the purposes and policies underlying the Act would be effectuated by [the Board's] approving the agreement." Id. Here, to permit the Union to sign an agreement acknowledging that the Company "met all bargaining obligations" and had "bargained in good faith" while at the same time believing that the Company had committed an unfair labor practice, is directly at odds with the purposes of the Act. Indeed, it would encourage parties to reach an agreement during negotiations, and then file unfair labor practices over those subjects on which they had to compromise, in an effort to gain through the Board's procedures that which it could not obtain at the bargaining table.[7] It also would generate distrust between the parties if one could not rely on an unambiguous agreement and acknowledgment regarding the other's conduct. In sum, the Union's acknowledgement, in writing, that the Company "has met all bargaining obligations" and "bargained in good faith" constitutes a settlement of any and all unfair labor practices that may have arisen in connection with the negotiations. The purposes and policies underlying the Act require that this agreement be enforced.

The General Counsel argues that the Union's agreement that the Company fulfilled its bargaining obligations purportedly should not be enforced because a "general zipper clause does

[7] In that regard, the Union makes no reference to those benefits the Union received or those proposals the Company agreed to withdraw during the negotiations in exchange for the Union's agreement to continue the waiver into the next contract. To allow the Union to retain those benefits while simultaneously requiring the Company to return to the bargaining table, would be unfair and detrimental to the purposes of the Act.

not mean that a union has clearly and unmistakably relinquished its right to bargain over all mandatory subjects of bargaining" (GCB, 12). The case upon with the General Counsel relies for this proposition is entirely inapposite. In that case, Angelus Block Co., 250 NLRB 868, 877 (1980), the employer relied on a general "zipper clause" to justify unilateral action taken after the "zipper clause" was executed, regarding a subject not specifically referenced in the collective bargaining agreement. Id. Here, the Company is not relying on the language in the 2012 MOA to permit unilateral action it took on some date after the 2012 MOA was executed regarding a subject that never was discussed at negotiations; rather, here, the Company is relying on the Union's express agreement that the Company complied with all bargaining obligations during negotiations to preclude the Union from thereafter taking the exact opposite position – i.e., that the Company failed to fulfill its bargaining obligations during negotiations. Thus, the General Counsel's attempt to circumvent the preclusive effect of this agreement based on an inapplicable principle must be rejected.

The General Counsel also argues that "at the time the parties zipped up their agreement, the Union made clear that the subject of retiree health benefits was unresolved and the Employer acknowledged the disagreement of the parties as to whether the Employer had an obligation to bargain over changes in how retiree health benefits were computed." (GCB, 12). Even if made, that statement is entirely contrary to the written document signed by the Union and, again, cannot be considered under the parol evidence rule. Fr. Winkler KG v. Stoller, 839 F.2d 1002 (3d Cir. 1988) (recognizing that the parol evidence rule that any previous oral representations or agreements, offered to "vary, modify, or supersede the written contract, [are] inadmissible in evidence."). Accordingly, any such alleged statements by the Company must not be considered on this motion record to contradict the written agreement reached between the parties.

For these reasons and the reasons set forth in the Company's moving brief, no basis exists to approve of the Union's conduct by allowing it to pursue the instant unfair labor practice and, thus, the Complaint must be dismissed as a matter of law.

CONCLUSION

For each of the foregoing reasons and the reasons set forth in the Company's moving brief, the Company's motion for summary judgment must be granted and the Complaint be dismissed with prejudice.

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