

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION SEVEN (*DETROIT*)

In the Matter of:

**ASSOCIATED GENERAL CONTRACTORS  
OF MICHIGAN,**

Case No. 7-RC-64788

and

**ASSOCIATED CONCRETE CONTRACTORS  
OF MICHIGAN,**

Case No. 7-RC-64796

and

**CONSTRUCTION ASSOCIATION OF MICHIGAN,**

Case No. 7-RC-64723

Employers,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND  
CEMENT MASONS' INTERNATIONAL  
ASSOCIATION OF THE UNITED STATES AND  
CANADA, AFL-CIO,**

Petitioner,

**LOCAL 1, INTERNATIONAL UNION OF  
BRICKLAYERS AND ALLIED CRAFTWORKERS,  
AFL-CIO,**

Intervenor.

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**BROADCAST DESIGN & CONSTRUCTION  
SERVICES, INC.,**

Case No. 7-RC-64603

Employer,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND**

**CEMENT MASONS' INTERNATIONAL  
ASSOCIATION OF THE UNITED STATES AND  
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF  
BRICKLAYERS AND ALLIED CRAFTWORKERS,  
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

**INTERNATIONAL UNION OF BRICKLAYERS  
AND ALLIED CRAFTWORKERS, AFL-CIO,**

Intervenor,

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**DEMARIA BUILDING COMPANY, INC.,**

Case No. 7-RC-64870

Employer,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND  
CEMENT MASONS' INTERNATIONAL  
ASSOCIATION OF THE UNITED STATES AND  
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF  
BRICKLAYERS AND ALLIED CRAFTWORKERS,  
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

**LOCAL 9, INTERNATIONAL UNION OF**

**BRICKLAYERS AND ALLIED CRAFTWORKERS,  
AFL-CIO,**

Intervenor Local 9,

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**AMALIO CORPORATION, INC.,**

Case No. 7-RC-64611

and

**E.L.S. CONSTRUCTION, INC.,**

Case No. 7-RC-64787

Employer,

**LOCAL 514, OPERATIVE PLASTERERS' AND  
CEMENT MASONS' INTERNATIONAL  
ASSOCIATION OF THE UNITED STATES AND  
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 9, INTERNATIONAL UNION OF  
BRICKLAYERS AND ALLIED CRAFTWORKERS,  
AFL-CIO,**

Intervenor,

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**RONCELLI, INC.,**

Case No. 7-RC-66599

and

**BARTON MALOW COMPANY,**

Case No. 7-RC-66611

and

**ALBANELLI CEMENT CONTRACTORS, INC.,**

Case No. 7-RC-66641

Employers,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND  
CEMENT MASONS' INTERNATIONAL**

**ASSOCIATION OF THE UNITED STATES AND  
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF  
BRICKLAYERS AND ALLIED CRAFTWORKERS,  
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

**LOCAL 9, INTERNATIONAL UNION OF  
BRICKLAYERS AND ALLIED CRAFTWORKERS,  
AFL-CIO,**

Intervenor Local 9,

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**LOCAL 514, OPERATIVE PLASTERERS' AND CEMENT MASONS'  
INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA,  
AFL-CIO'S RESPONSE IN OPPOSITION TO  
EMPLOYERS' REQUEST FOR REVIEW**

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NOW COMES Petitioner Local 514, Operative Plasterers and Cement Masons International Association of the United States, and Canada, AFL-CIO, by and through its attorneys, Miller Cohen, P.L.C., for its Response in Opposition to the Employers' Request for Review, and states as follows:

## I. INTRODUCTION

The employers have requested review of the Regional Director's May 8, 2012 Decision and Direction of Election (DDOE), which granted Petitioner Local 514's petitions seeking 9(a) elections comprising three multi-employer construction associations and several independent construction companies.

The Employers argue that the DDOE was inappropriate because multi-employer bargaining units are completely inappropriate—a proposition that enlarges the meaning of *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987) beyond its explicit terms and ignores other well-established Board precedent. The Regional Director correctly applied the applicable standard; namely, “to overcome the single-employer presumption and find a multiemployer bargaining unit appropriate, the Board requires ... evidence of an unequivocal intent to be bound by group action manifested by either participation in the group bargaining or delegation of authority to another to engage in such bargaining.” *Arbor Construction Personnel, Inc.* 343 NLRB 257, 258 (2004), *see also Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991). Here, the multi-employer associations have existed for forty to fifty years and have been given direct authority to negotiate over all labor agreements on behalf of their members either through executed powers of attorneys or through a history of abiding by the terms of the negotiated agreements.

Furthermore, there exists a significant community of interest between the employees in the requested bargaining units. All of the employees are cement masons performing the same kind of work for various employers, requiring the same skills, using the same equipment, and transferring from employer to employer under the same terms and conditions of employment. Petitioner is merely requesting an appropriate craft unit of these cement masons

The Employers also argue that the geographic scope is too large and should be constrained by the prior 8(f) agreements. Once again, The Employers simply ignore Board precedent in their rush to denounce the Regional Director's DDOE. Under Board law, the appropriate trade unit is one without any geographical limitations. *Premier Plastering*, 342 NLRB 1072, 1073 (2004). Carving out geographical regions is appropriate if those regions are already represented under 9(a) leaving the other employees to fall into a residual unit. *G.L. Milliken Plastering*, 340 NLRB 1169 (2003).

Finally, The Employers attempt to enforce the Peace Agreements between Petitioner and Bricklayers and Allied Craftworkers (BAC) against the DDOE. Specifically, the Peace Agreements were agreed to between the unions at the time when the unions would negotiate a standard 8(f) agreement for all the employers in the associations as well as the independent signatories. The Peace Agreements stated that no certification petition would be filed by any of the parties to the agreement for the duration of the 2006-2009 contracts. However, the petitions in this case were not filed during that duration, so the Peace Agreements are unenforceable given the circumstances by their explicit terms.

Consequently, The Employers' Request for Review should be denied, the DDOE affirmed, and the elections should move forward to provide the employees with free choice to decide their union representation.

## II. PRELIMINARY FACTS

Local 514 filed petitions to represent the cement masons that are employed at various contractors. Local 514 filed petitions on the three multiemployer groups that it negotiates 8(f) agreements with and these include the Associated General Contractors of Michigan (“AGC”), the Construction Association of Michigan (“CAM”), and the Associated Concrete Contractors of Michigan (“ACCM”). These petitions cover all of the cement masons working in the State of Michigan excluding the County of Monroe<sup>1</sup> that are employees of any of the contractors that have voluntarily given one of the associations the legal authority to bargain on their behalf.

The only limitation on this is on the AGC petition where one of the employers has a 9(a) relationship with another union and negotiated a single employer agreement. One such situation is Sorenson Gross, which has a 9(a) certification under a year old for all cement mason work in the State of Michigan with OPCMIA Local 16 that covers the entire State. It has been entirely excluded from the AGC petition. Fessler Bowman also has a 9(a) relationship with Local 16. However, the agreement between Local 16 and Fessler Bowman excludes the counties of Macomb, Oakland, Wayne, Hillsdale, and Lenawee. Therefore, Fessler Bowman is included only for the purposes of cement mason work performed in the excluded counties in the Local 16 collective bargaining agreement.

Local 514 also filed petitions for two contractors that are independent signatories to the CAM agreement with Local 514. They have not granted CAM the authority to bargain on their behalf. However, they independently agreed to be bound by that agreement. These contractors are ELS and Amalio. Due to collective bargaining agreements with out of state unions, the

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<sup>1</sup> The county of Monroe is excluded to avoid issues with OPCMIA Local 886, which has jurisdiction that covers Monroe County. Local 886 has 9(a) relationships with some of the employers in the associations and the AGC itself. (Tr. 796)

geography of the ELS petition was limited to the State of Michigan, except for Monroe County. There was no such evidence of any relationship with another union in regard to Amalio.

Local 514 has also filed petitions to represent four contractors that it does not have any contractual relationship. The cement masons for these contractors are represented by BAC Local 1 and in some cases, BAC Local 9. Barton Malow is a member of AGC and has granted it power of attorney to negotiate with the BAC. It has a 9(a) relationship with Local 9. That contract specifically excludes the counties of Wayne, Oakland, Macomb, St. Clair and Monroe, as well as the Upper Peninsula. It also has agreements with out of state unions. Therefore, Local 514's petition only seeks to represent a unit consisting of Wayne, Oakland, Macomb, and St. Clair. This is consistent with the scope of the 8(f) agreement Barton Malow has with Local 1.

Roncelli is an independent signatory to the CAM agreement with Local 1. It also has a 9(a) contract with Local 9. Therefore, Roncelli's petition does not seek any geographic area covered by the 9(a) agreement with Local 9.

DeMaria had been an independent signatory to the CAM Agreement with Local 1. They issued a power of attorney to AGC in April 2011.

Albennelli is an independent signatory to ACCM. It has a 9(a) contract with Local 9 and Local 1 that covers only heavy highway work. Therefore, Local 514's petition only covers the work performed under their 8(f) agreement—building and heavy construction.

**A. Bargaining History Regarding Associations**

**(1) AGC:** According to Local 514 Business Manager, Jim Oakley, the bargaining relationship between the AGC and Local 514 goes back 40 or 50 years. (Tr. 642) Prior to 2006, Local 1 and Local 514 bargained with the AGC jointly. In 2004, Local 514 sought to obtain an election to give the workers a choice in their bargaining representative. The NLRB blocked the

petition and held that the jointly bargained CBA, although an 8(f) contract, was a bar to the election. (Tr. 643). That particular CBA expired in 2006. Local 514 decided that it no longer desired to bargain a joint contract with Local 1 and the AGC. Local 514 and AGC negotiated separate agreements in 2006, 2009, and 2011.

There are exists the independent MITA Agreement. Some employers separate work based on whether the work is “inside” meaning work in or five feet around a building, or “outside” meaning road work. The MITA Agreement covers the “outside” work of a handful of AGC members. So far, as the record shows, the only contractors that are alleged to be a part of the MITA Agreement in the AGC are Fessler Bowman and Angelo Iafate Construction Company. (Tr. 176, 314) However, no signature pages or any other documentation of this agreement were introduced. The parties were warned at the hearing that any party seeking 9(a) contract bars would have to introduce signature pages of the agreements. This was not done.

At any rate, the union signatory to the MITA agreement is the OPCMIA International. OPCMIA International Vice President Daniel Rouke testified at the hearing that he could speak on behalf of the International. (Tr. 770) He admitted that the International had notice of these proceedings. (*Id.*) He admitted that the International chose not to intervene and not to seek a contract bar. (*Id.*)

Although the MITA Agreement is negotiated with the international, the Union members that perform the work are members of Local 514 and the fringe funds flow back to the Local. (Tr. 730) For all intent and purposes, the union in the MITA agreement is the same union here.

**(2) CAM:** CAM began negotiating contracts with trade unions around 2003. (Tr. 489) In 2003, it negotiated a joint agreement with Local 514 and Local 1. (J.Ext 32) CAM then negotiated separate collective bargaining agreements in 2006, 2009, and 2011. (Tr. 560) In

2003, 2006, and 2009, CAM did not negotiate with Local 514 at the same time as the AGC and ACCM. (*Id.*) In 2011, it did negotiate alongside the other associations. (*Id.*) The CAM agreement is largely identical to the other associations' agreements but there are some minor differences. (*Id.*)

**(3) ACCM:** According to Local 514 Business Manager, Jim Oakley, the bargaining relationship between the ACCM and Local 514 goes back forty or fifty years. (Tr. 642) Prior to 2006, Local 1 and Local 514 bargained with the ACCM jointly. In 2004, Local 514 sought to obtain an election to give the workers a choice in their representative. The NLRB blocked the petition and held that the jointly bargained CBA, although an 8(f) contract, was a bar to the election. (Tr. 643) That particular CBA expired in 2006. Local 514 decided that it no longer desired to bargain a joint contract with Local 1 and the ACCM. Local 514 and ACCM negotiated separate agreements in 2006, 2009, and 2011. All of the ACCM contractors have regular cement mason crews. (Tr. 395)

Petitioner Exhibit 13 is a list of contractors that AGC and ACCM delivered to Local 514. (Tr. 727) These are the contractors that have assigned a power of attorney to AGC or ACCM to negotiate with Local 514. (*Id.*) These are the same contractors that appear in the petition for AGC and ACCM. Petitioner Exhibit 9 is a list of contractors that CAM delivered to Local 514. (Tr. 725-26) These are the contractors that have assigned a power of attorney to CAM to negotiate with Local 514. (*Id.*) These are the same contractors that appear in the petition for CAM.

**B. Bargaining History Regarding Independent Signatories**

**(1) Barton Malow:** Barton Malow is a member of AGC. (Tr. 334) It has bargained in the AGC for a long time. (Tr. 345) It has given AGC the authority to negotiate only with Local 1

and Local 9 in regard to Cement Masons and it does not authorize the AGC to negotiate with Local 514. (Tr. 345) Barton Malow has a set crew of twelve cement masons. (Tr. 335) However, if it works outside of the Metro Detroit area, it will draw most of its employees from the local area, not its pool of regular cement masons. (Tr. 336) If it performs work out of the state, it will rarely use its set crew of cement masons from the Metro Detroit area. (Tr. 339).

Local 9 has a 9(a) agreement covering all of the counties of the Lower Peninsula, except for Wayne, Oakland, Macomb, St. Clair, and Monroe. (J. Ext. 8, pg. 2) Therefore, the Petition covers the area in Michigan where work is performed by the described core group of 12 cement masons, which is Macomb, Oakland, Wayne, and St. Clair Counties. This also happens to be the area excluded in the Local 9 agreement. Barton Malow is a member of the AGC in Ohio, which has a 9(a) relationship that includes Monroe County. (Tr. 796) Barton Malow does not separate out the different types of cement mason work. It is not a signatory to any “outside” agreement like the MITA agreement.

**(2) Roncelli:** The Parties stipulated that since the split in 2006, Local 514 has not had a bargaining history with Roncelli. (Tr. 128) Roncelli is not a member of an association. It is an independent signatory to the CAM/Local 1 agreement covering Macomb, Oakland, Wayne, St. Clair, and Monroe Counties. (Tr. 478) Roncelli has a core group of cement masons and pulls additional cement masons from “the Local” when necessary. (Tr. 478) When Roncelli performs work outside of the five county area described above, it does not use its normal crew, it pulls from the local area. (Tr. 479-80) Roncelli does not separate out the different types of cement mason work. It is not a signatory to any “outside” agreement like the MITA agreement. Nick Contesti of Roncelli testified that the company does “inside” and “outside” work. (Tr. 482) He

testified that the same employees perform both types of work. (Tr. 483) He also testified that he does both types of work under the Local 1 agreement. (*Id.*)

Local 9 has a 9(a) agreement covering all of the counties of the Lower Peninsula, except for Wayne, Oakland, Macomb, St. Clair, and Monroe. (J. Ext. 8, pg. 2) Petitioners are seeking a geographic scope consisting of all areas that are not covered in the 9(a) agreement with Local 9. The petitions are without geographic limitation with a carve-out for Local 1's Agreement. Roncelli has not assigned power of attorney over to any association. The non-petition agreement only applies to "Designated Contractors." (J Ext. 29, 30, and 31, ¶ 3) "Designated Contractors" are defined as [t]he Association's affiliates for whom the [AGC, ACCM, or CAM] possesses a Power of Attorney as of March 27, 2006." (J Ext. 29, 30, and 31, ¶ 1) There is no doubt that Roncelli is not a Designated Contractor; therefore, the non-petition agreement is not an issue in this petition.

**(3) Broadcast Designs & Construction Services, Inc. (BDC):** Since the split in 2006, Local 514 has not had a contractual relationship with BDC. (Tr. 128) Also, Local 9 has not had a contractual relationship with BDC. (Tr. 129) BDC is a member of CAM and is bound by CAM's 8(f) agreement with Local 1. (Tr. 228)

On or about January 2, 2007, BDC signed the agreement between the BAC International and the International Council of Employers of Bricklayers and Allied Craftworkers ("ICE Agreement"). (J. Ext. 23) The ICE Agreement was a three year agreement that automatically rolled over, unless notice of termination was given. It has automatically rolled over. BDC entered into the ICE agreement because it had a job in Maryland back in 2007. (Tr. 232) It has not used the agreement since. (Tr. 233) It only entered into that agreement for that one job. (Tr.

243) The agreement does not contain any provisions for wages, benefits, or other economic terms and conditions of employment. It leaves all of those terms to the area Local agreement.

BDC has a core group of cement masons and will use additional cement masons as needed. (Tr. 227, 28) BDC performs most of its work in the Macomb, Oakland, and Wayne county area. (Tr. 228) It rarely does work out of the State. (Tr. 229) BDC was a designated contractor to the CAM Peace Agreement and the arguments above would be equally applicable. It is also not a signatory to any “outside” agreement like the MITA agreement.

**(4) Demaria:** DeMaria is currently a member of the AGC. They only signed the power of attorney with the AGC recently in April 2011. (J Ext. 25) Prior to 2011, DeMaria was assigned its power of attorney to CAM. (Tr. 258-59) They are also members of the Washtenaw Contractors Association, which has an 8(f) agreement with Local 9. (J. Ext 14 and 16) It does not perform work outside of the State of Michigan. (Tr. 256) DeMaria assigned the power of attorney only to negotiate with a particular local, Local 1. (Tr. 260)

The peace agreement was no longer effective when DeMaria signed a power of attorney to the AGC. DeMaria was a “Designated Contractor” for CAM under the CAM peace agreement. (J. Ext. 30) That agreement states that the agreement not to file petitions “for as long as 1) the CAM retains the power of attorney for the Designated Contractors.” (*Id.* at ¶ 3)

In April 2011, DeMaria assigned its power of attorney to the AGC and CAM no longer retained the power of attorney for the Company. It revoked its power of attorney with CAM. (Tr. 265) Therefore, in addition to all of the reasons stated below, DeMaria was no longer bound by the peace agreement in April 2011. It is also not a signatory to any “outside” agreement like the MITA agreement.

**(5) Amalio:** Amalio is an independent signatory with Local 514 for many years. Most recently, it signed an agreement to be bound by the CAM – Local 514 agreement.<sup>2</sup> (P. Ext. 1) Amalio does not separate out the different types of cement mason work. It is not a signatory to any ‘outside’ agreement like the MITA agreement.

### III. ARGUMENT

**A. Board Precedent Provides that Association-Wide Units are Appropriate When There is “evidence of an unequivocal intent to be bound by group action manifested by either participation in the group bargaining or delegation of authority to another to engage in such bargaining.”**

Ironically, the Employers claim to stand for the voting rights and free choice of their employees, yet, they are the ones opposing the election. It, however, ignores the reality that the employees could have filed individual petitions if there was a true desire to limit the bargaining unit to single employers. As discussed elsewhere in this brief, the Board protects free choice of employees who work with 8(f) contracts to determine the unit of their choice by permitting them to file petitions for single employers or for the multiemployer group. Here, the employees have not filed a petition for the individual employers in the associations. Instead, they have filed one petition for each association. Due to the transient nature of employees in the trades, most cement masons do not likely have an identifiable long lasting relationship with one particular employer.

The Board need not determine the “most appropriate bargaining unit”—the Board merely determines whether the proposed bargaining unit is appropriate. *See e.g., MPC Restaurant Corp. v. NLRB*, 481 F.2d 75 (2d Cir. 1973); *Ochsner Clinic v. NLRB*, 474 F.2d 206 (5th Cir. 1973); *NLRB v. Bogart Sportswear Mfg. Co., Inc.*, 485 F.2d 1203 (5th Cir. 1973); *Local 627, Intern. Union of Operating Engineers, AFL-CIO v. NLRB*, 595 F.2d 844 (D.C. Cir. 1979). As discussed below the precedent before the Board is clear that when a petition involves an

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<sup>2</sup> The independent signatory page for ELS and for Amalio is a 9(a) agreement. With the petitions for these employers, Local 514 is seeking to certify a unit without geographic limitation.

association there are two analyses depending on whether the relationship between the union and the association is governed under 8(f) or 9(a) of the Act. If it is governed by 9(a), only an association-wide unit is appropriate and the Board will not entertain single employer units. On the other hand, if the relationship is governed by 8(f), the petitioner may seek an association-wide unit or a single employer unit because they are both appropriate.

The Employers attempt to re-write *John Deklewa & Sons Inc.* to make that case determinative in the present matter. 282 NLRB 1375 (1987). Deklewa dealt with an independent signatory to an 8(f) multi-employer agreement who decided to withdraw and immediately repudiate the contract. The Union filed an unfair labor practice charge alleging violations of 8(a)(5) and (1) arguing that the 8(f) agreement was converted into a 9(a) agreement because the employer had only hired its iron workers from the union's hiring halls.

*Deklewa* did not even deal with a representational petition or election nor did it address whether the multiemployer group in that case was appropriate; *Deklewa* merely dealt with immediate merger upon a showing that the union had majority support. That is not what Petitioner requested. Instead, Petitioner requested an election. The Board rendered its decision in *Deklewa* because "by allowing almost instantaneous conversions with an accompanying contract bar, the conversion doctrine effectively renders the second proviso nugatory. Such rules hardly advance the objective of employee free choice." *Id.* at 1383. Here, Petitioners are seeking an election—the very epitome of employee free choice.

While the Board held that "single employer units will normally be appropriate," there was more to *Deklewa* than the Employers insist. *Id.* at 1385. There is no dispute that "single employer units will normally be appropriate." *Deklewa*, 282 NLRB 1375, 1385 (1987). However, the Regional Director did not ignore that general rule as alleged in the Employers'

Request for Review. (Decision 16) Instead, the Regional Director avoided the pitfall that the Employers' analysis required him to make—specifically, the Employers ignored the rest of *Deklewa* where the Board punted on the issue presented here: “we do not imply that multiemployer associations and multiemployer bargaining are no longer appropriate in the construction industry... Specific representation case matters are beyond the scope of this opinion.” *Id.* 282 NLRB at 1390 fn 42.

In fact, as recognized by the Regional Director, multiemployer bargaining units have long had the approval of the United States Supreme Court and *Deklewa* did nothing to disturb that. *NLRB v. Truck Drivers Local No. 449*. 353 U.S. 87, 95-96, 77 S.Ct. 643 (1957). Moreover, in *NLRB v. Sheridan Creations*, 357 F.2d 245 (2d Cir. 1966), the Second Circuit upheld the Board's decision finding that the multiemployer unit was the appropriate unit under Section 9(a) of the Act. *Id.* at 248; *see also NLRB v. Sklar*, 316 F.2d 145, 149 (6th Cir. 1963), finding that multiemployer unit is appropriate, unless individual employers give intent to withdraw.

The Employers attempt to confuse those who read their Brief into thinking that this case deals with the Merger Doctrine, which is simply untrue. The Merger Doctrine deals with single employers that newly join an established multi-employer association and whether the single employer is merged to the 9(a) relationship of the existing multiemployer group without an election or other showing of majority support. Here, the employers who are members of the AGC, CAM, or ACCM have been members and allowed those associations to bargain on their behalf for forty or fifty years. While *Deklewa* was about the Merger Doctrine, this case is not. This distinction is important because the issue of consent becomes an issue if a single employer is freshly “merged” into an association. However, when there is a long-term bargaining

relationship on an association-wide basis, it makes little sense in the interest of industrial stability to disturb that relationship. Importantly, these units will have an election.

The Board should avoid the Employers' cursory analysis and apply the following well-grounded Board standard for determining whether a multi-employer bargaining unit is appropriate: "[T]o overcome the single-employer presumption and find a multiemployer bargaining unit appropriate, the Board requires ...evidence of an unequivocal intent to be bound by group action manifested by either participation in the group bargaining or delegation of authority to another to engage in such bargaining." *Arbor Construction Personnel, Inc.* 343 NLRB 257, 258 (2004), *see also Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991).

The Employers incorrectly state the law regarding the applicability of bargaining history to a determination of the appropriateness of a multi-employer bargaining unit. In fact, the Board has explicitly given great weight to bargaining history to overcome the single employer presumption: "The Board will not disturb an established bargaining relationship unless required to do so by the dictates of the Act or other compelling circumstance." *Centra Inc.*, 328 NLRB 407, 409 (1999)(finding that an 8 year multiemployer bargaining history was sufficient to overcome single employer presumption.)

On the other hand, there are circumstances that the Board may find that a multiemployer unit is not appropriate because it "is a heterogeneous aggregation of distinct groups of employees with widely differing interests and concerns." *Maramount Corp.*, 310 NLRB 508, 511 (1993).

In *Taylor Motors Inc.*, 241 NLRB 711 (1979), an individual filed a decertification petition covering all six employers of a multiemployer bargaining unit. The union argued that the multiemployer unit was not appropriate and only single employer units would be appropriate. The Board found that only a petition on a multiemployer unit would be appropriate.

In *Donaldson Traditional Interiors*, 345 NLRB 1298 (2005), a BAC local filed three separate petitions for three single employer units. Each employer was a member of an association that had an agreement with an OPCMIA local. The sole issue in the case was whether the association/OPCMIA agreement was a 9(a) or 8(f) relationship. The Board found that the relationship with the association was a 9(a) relationship and, therefore, the single employer unit was not appropriate. *Id.* at 1300.

The 8(f) or 9(a) distinction is also shown in *Alley Drywall Inc.*, 333 NLRB 1005 (2001) where the employer was a member of a multiemployer unit that had an 8(f) agreement with the union. The Board found that a single employer unit was appropriate in that circumstance due to the 8(f) contract. *See also G.L. Milliken Plastering*, 340 NLRB 1169 (2003).

Perhaps the most comprehensive decision on this matter is *Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004). BAC Local 9 (a party in this case) petitioned for a single employer unit of an employer that was a member of an association that had a 9(a) collective bargaining relationship with OPCMIA Local 67. The Board held that an association-wide unit is appropriate when the single employers have demonstrated through bargaining history or delegation of authority to another to engage in such multi-employer bargaining. *Id.* at 258. This applies to both 8(f) and 9(a) relationships. However, if the relationship is governed by section 9(a) of the Act, “a petition for a single-employer will not be entertained.” *Id.*

Here, there is no dispute that all three associations have a history of bargaining with Local 514 on behalf of the contractors named in the petitions. Each association has negotiated with Local 514 separately in 2006, 2009, and 2011. CAM negotiated a joint Local 1/Local 514 agreement in 2003 and AGC and ACCM had done so for many years.

In *Sands Point Nursing Home*, 319 NLRB 390 (1995), the Board reversed the Regional Director's decision finding that a single employer is appropriate based on the multiemployer bargaining history. The Board found that there was no evidence that the single employer ever negotiated its own terms and conditions of employment and only a multiemployer unit would be appropriate in that 9(a) situation. *Id.* at 391. The same is here, a multiemployer unit is appropriate because there is no evidence that the contractors have or would ever want to negotiate individual agreements with Local 514.

Each of the single employers named in the association petitions have given the associations the power of attorney specifically to negotiate with Local 514. (AGC Ext. 3, see also CAM Ext 1 and ACCM Ext 1) This is relevant because this is an odd situation. The power of attorney is limited to a specific union by the explicit terms of the power of attorney form or by subsequent statement of preference after the 2006 decision to negotiate separate contracts. Therefore, the bargaining history and the scope of the voluntary agreement to relinquish bargaining authority to the association limits the appropriate unit to the employers covered under the Local 514 agreement with the association.

The Employers attempt to argue that the Regional Director ignored the following dicta from *Deklewa*: “the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association.” (Intervenor Brief 5) (quoting *Deklewa*, 282 NLRB at 1385 fn 42). Yet, in the Employers' following paragraph, the Employers discuss how the “DDOE trumps employee voting rights and free choice.” Specifically, the Regional Director considered both employee free choice and industrial stability and found that both would be served by granting the petitions:

[N]o individual Employer petitions have been filed for the Association employers; thus the employees' rights to self

organization and freedom of choice will not be compromised in proceeding to an election in a multi-employer unit, whereas the stability of labor relations between Petitioner and the Associations would be compromised if the instant petitions could not go forward in light of Petitioner's long standing bargaining relationships with the Associations.

(Decision 18) Moreover, the quoted section of the Deklewa decision must be read in context of the merger doctrine that was at issue, not the issue here. The Merger Doctrine would prevent the employees from indicating their choice of representative because no election or other indication of majority support would ever be required. In this case, there is an election

The Employers argue that some of the single employers that are named in the petitions for the associations should not be part of the petition because they either do not currently have any cement masons, may not have had any cement masons for many years, or are currently not operating.

This argument is contrary to Board precedent. The individual elements of the single employers is immaterial in a multi-employer bargaining unit. *Century Papers, Inc.*, 284 NLRB 1151,1186 (1987). The rationale behind this rule is clear. Employers typically join multiemployer bargaining groups because they are small employers. They join with fellow employers to pool their resources and consolidate bargaining strength. In the construction industry, the employers utilize trade workers based on their needs on the job. Sometimes they may need a cement mason, sometimes they may not.

In the only case in which the Board has addressed this issue, that Petitioner could uncover, the Board found that companies in the multiemployer group that do not currently employ any individuals in the bargaining unit and those companies that are not currently operating still remain part of the multiemployer bargaining unit. *Sewanee Coal Operators' Association, Inc.* 152 NLRB 663 (1965).

This rationale makes perfect sense. It is the Board's duty to determine an appropriate unit for purposes of bargaining. Once it determines that a multiemployer group is appropriate, the individual indicia of the single employers is immaterial. *Century Papers, Inc., supra*. The only issue for the Board to determine is whether the single employer has given an unequivocal intent to be bound by group action. *Arbor Construction Personnel, Inc.*, 343NLRB at 258.

Peter Basile and Sons is the exception that shows the rule. This company indicated its desire to leave the association prior to negotiations in 2011. This company is no longer a member of the association. Petitioner agreed to amend the petition to exclude this company because they are not a member of the association.

However, there is no doubt that all of the other employers, those that do currently have cement masons, those that do not, and those that are not operating have given their unequivocal intent to be bound by group action through the respective power of attorney forms. Moreover, there is no harm if the single employers without cement masons are maintained in the group. So long as they do not have any cement masons, they have no obligations under the agreement. This is probably why they have continued to give the association the ability to bargain on their behalf. Just in case they need a cement mason in the future, they have a contract with Local 514 to provide such an employee.

The Employers cite to easily distinguishable and unrelated cases. The first case that the Employers rely on to support their claim that the DDOE bargaining units are not appropriate is *Comtel Systems Technology*, 305 NLRB 287 (1991). Yet, *Comtel* does not even deal with the appropriateness of a 9(a) multi-employer bargaining unit; instead, that case dealt with whether a 9(a) agreement could act as a contract bar for future elections with a single-employer that assented to inclusion in one multi-employer bargaining unit, but not another when the two multi-

employer units merged. The facts in this case are starkly inapposite in that the Petitioner is actually seeking an election, not trying to prevent one. Also, the single-employers in this case have all provided their assent either by signing power of attorney to the associations or adopting the 8(f) agreements. However, the Employers are correct in that *Comtel* stands for the proposition that denying employee voting rights in contrary to Board law—a principle that directly support Petitioner’s position that an election should be held.

The second case is an unpublished Regional Director decision that was not reviewed by the Board. *Mason Contractors Assoc. of St. Louis*, Case 14-RC-12596 (April 21, 2006). The Regional Director was correct to point out that *Mason* was merely persuasive authority. (Decision 16 fn 13) Instead, the Regional Director noted that the correct test is found in *Donaldson Traditional Interiors*—as stated above, the test for whether a multi-employer bargaining unit is appropriate is “whether the members of the group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action.” 345 NLRB 1298 (2005); *see e.g.*, *Architectural Contractors Trade Assoc.*, 343 NLRB 259 (2004); *Centra*, 328 NLRB 407 (1999).

Regardless, *Mason* is easily distinguishable from the facts currently before the Board. In *Mason*, the association only had authority to negotiate an 8(f) agreement. Here, the associations had the authority to enter into any form of labor agreement, not just an 8(f) agreement—many of the single-employers provided power of attorney to the respective associations. (Tr. 414, 596; ACCM Ext. 1; CAM Ext. 1. Fax pg. number 33/37) Also, there is not only a great deal of evidence in the record regarding the similarity of skills, works rules, and compensation, but also cement masons are routinely transferred from employer to employer—some even being transferred to several employers in the span of a week. (Tr. 85-86, 177-78, 181-82, 188, 751)

Thankfully, the Employers attempt to distinguish cases cited by the Regional Director as this attempt actually further support Petitioner's position. Namely, the Intervenor argues that *Arbor Construction Personnel*, 343 NLRB 257 (2004) and *Architectural Contractors Trade Association*, 343 NLRB 259 (2004) are distinguishable because the existing bargaining units in those cases were 9(a) multi-employer units like the kind the Regional Director found appropriate in the DDOE. As the Employers helpfully point out, "Where an employer is part of a multiemployer bargaining relationship governed by Section 9(a), a petition for a single-employer unit will not be entertained." *Architectural Contractors*, 343 NLRB at 259. This further weakens the Employers' argument that multi-employer bargaining units are inappropriate because the Board actually found supported the existence of a multi-employer 9(a) bargaining unit over a petition for a single-employer election.

The Employers distinguish *Arbor* and *Architectural* on the basis that the pre-existing bargaining relationship was a 9(a) multi-employer agreement, not an 8(f) agreement, but those cases were only cited by the Regional Director to state what was necessary to create a multi-employer bargaining unit. (Decision 17) Petitioner has met that test. The Employers argue that *Arbor* is further distinguishable because of the Peace Agreement that had expired by the time that the petitions were filed and the MITA agreement regarding outside work that Petitioner has already agreed to remove from the petitioned bargaining unit. The agreements that the multiemployer groups have with the unions are not relevant in this case as to the extent that the single employers indicate their intent to be bound by group action. That is demonstrated by the single employers agreements with the multiemployer group. There is no indication in the agreements, called powers of attorney, between the associations and the single employers that

their bargaining authority is limited to 8(f) agreements or limited to building and heavy construction work.

The Employers argue that they are also part of MITA, another multiemployer group and the authority conflicts. However, the agreements that the individual employers have with MITA was not argued or admitted into evidence in this case. The Employers leave the Board guessing as to whether there is a conflict. What is not in dispute is that the single employers have agreed with the associations to authorize the associations to bargain on their behalf and bind them to agreements with Local 514 for cement mason work. There is no such limitation in the agreements as to inside or outside work.

Accordingly, Local 514 has presented the appropriate evidence to find that multi-employer units are appropriate.

**B. Even if the Test is Community of Interest, the DDOE Bargaining Units Include Employees Who All Engage in the Same Work, Require the Same Skills, and Share Terms and Conditions of Employment.**

The unit sought is no more than a statutorily appropriate craft unit. Section 9(b) of the Act states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, **craft unit**, plant unit, or subdivision thereof.

There is specific instruction in the section protecting craft units; Section 9(b) continues:

Provided, that the Board shall not... (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation

There is no doubt that cement masons constitute an acceptable craft for purposes of forming an appropriate craft unit.

The Employers are attempting to cut the craft unit in half. They claim that the scope of the unit should be limited to building and heavy construction work. The Employers argue that there is some sort of dichotomy among its members in regard to inside work, i.e. buildings, and outside work, i.e., roads, sidewalks, parking lots, and curbs. In making this argument, they themselves fall victim to the same “absurd results” that they claim that the DDOE creates—namely, an employee’s terms and conditions of employment would depend upon the arbitrary five-foot rule based on the Employers argument.

The Regional Director aptly pointed out that the only difference between outside and inside work is a “five foot dividing line” between work that is inside buildings or around the curtilage and work that is outside. (Decision 28) “The record shows that inside and outside masons perform the same type of work and that the skills are interchangeable.” (*Id.*)

Whether a group of employees share a sufficient community of interest to constitute an appropriate unit, the Board weighs several factors including similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the employer’s other construction sites; and the parties bargaining history. *Alley Drywall Inc.*, 333 NLRB 1005, 1006 (2001).

It must be noted that these traditional factors are a little sloppy to apply because these are largely the same employees. Work inside finishing cement, falls under one contract. For a handful of contractors, when their cement finishers walk outside to work on the parking lot, they are working under another agreement. Just like in *A.C. Pavement Stripping Company, Inc.*, 296 NLRB 206, 210 (1989), “[a]ny differences that do exist are solely the result of differences in benefits set out in the collective bargaining agreements.”

In *A.C. Pavement*, the Board stated that it will not give controlling weight “to bargaining history that contrary to clearly established Board policy regarding the composition and scope of bargaining units.” *Id.* Accordingly, the separate bargaining history for cement masons should not carry any weight in this decision as is the focus of the Employers’ Brief.

Furthermore, the Board in affirming the ALJ’s decision in *A.C. Pavement* found that splitting up a “clearly identifiable and homogeneous group” of employees into two units renders the units inappropriate. *Id.* The reasoning in that case was that “[t]he record reveals no identifiable characteristics which would separate and identify employees in one unit from those in the other unit in terms of job functions and characteristics.” *Id.*

The testimony establishes that the skills, training, and tools for cement mason work are identical whether it is inside or outside. Angelo Iafrate of Iafrate Construction testified that his company has experience with both inside and outside work, and both are very similar. (Tr. 177-78) The only difference is the compensation rate they the contractor pays, even though the cement mason is in the same union. (Tr. 181-182) Similarly, Scott Fessler of Fessler Bowman testified that his company does both types of work and that the skills are similar. (Tr. 188) Charles Brickel of Brenca admitted that the cement mason work inside and outside is interchangeable. (Tr. 320) In fact, the same cement masons perform the different work. (*Id.*)

A few of the contractors are listed on the Associations’ petitions and are also a member of MITA. (Tr. 772) They include Fessler Bowman, Iafrate Construction, and Brenca. Fessler Bowman and Iafrate are part of the AGC agreement. Brenca has given power of attorney to CAM. On the other hand, many contractors perform outside work under the building and heavy construction contract. Victor Ferrini of Ferrini Construction, an ACCM contractor, performs outside work under the Local 514 contract. (T 274)

There is nothing in the Association agreement with Local 514 that prevents the employer from using that contract to perform “outside” work. Mr. Oakley and Mr. Santos testified that typically when one of the association contractors perform outside work, they pay employees under the association contract with Local 514. (Tr. 657-58, 733) Mr. Santos also testified that some contractors pay under the association contract for outside work even if they are signatories to the MITA agreement. (Tr. 732)

At any rate, it is appropriate for a petitioning party to seek a unit that is broader than its 8(f) contract, especially when the petitioned for unit is more consistent with the traditional community of interests factors than the unit description in the 8(f) contract. *Alley Drywall, supra*. The Employers argue that “Associations are not monolithic groupings. Employer in the respective Associations have substantial differences in terms of the scope of work performed.” (The Employers’ Brief 32) That is exactly the reason why a broader definition of the covered work is better than the narrow “building and heavy construction” and “highway construction” dichotomy. No matter what, the broader “cement mason work” terminology used in the DDOE covers the various kinds of similar work.

It is clear that the job skills, training, and tools for finishing cement work are very similar whether the work is outside or inside. For whatever the reason, the trade unions have agreed to give a lower compensation package for road work. That alone is not an acceptable reason to split up a craft, especially because most of the association contractors are not signatories to the MITA agreement. Those that are signatories do not always pay the MITA rates when performing outside work. If the associations would have their way, the outside work that is currently covered under the association contracts would not be subject to the certification. Therefore, there would be a susceptibility of the associations asserting that this work is non-union unless the

contractor is signed to the MITA agreement. There is no reason to limit the scope of this craft unit to building and heavy construction cement mason work.

As for Albanelli, that employer has given the authority to the ACCM to bargain on its behalf as to Local 1 only. Albanelli is bound by the 8(f) agreement between the ACCM and Local 1. It is also a signatory to the Heavy and Highway Agreement with the BAC Locals 1 and 9. (J. Ext. 13) This agreement is a 9(a) agreement for “outside” work, which explicitly excludes work performed on buildings according to Article I Scope of Agreement. (JE 13) In addition, Wayne Albanelli, owner of the company, testified during the hearing that the Heavy and Highway Agreement only applied to cement mason work performed more than five feet from a building. (Tr. 408-10) This is a 9(a) contract that splits the craft into two units. When it works “inside” it used the 8(f) multiemployer ACCM agreement with Local 1. When it works “outside”, it uses the same employees, but pays wages and benefits under the Heavy and Highway Agreement. Therefore, the Employers are wrong when they state on page 34 of their Brief that the “Heavy and Highway Agreement already covers the geographic area (tri-county area) sought by Local 514 and no residual unit exists.”

The reason why Albanelli work under the Heavy and Highway Agreement must be carved out is because there is a pre-existing 9(a) agreement regarding outside work. That being said, the existence of a 9(a) agreement over outside work does not and cannot preclude a 9(a) agreement as to inside work. The Employers advocate for a position that the cement masons do not have a right of self-determination under the Act. At the end of the 8(f) agreement covering the cement masons that work inside, the employer could leave the association and chose to end its relationship with the union. If the Board decides, consistent with the Employers’ argument, these cement masons would lose their right to have a bargaining representative for “inside” work

because they could not file a petition for representation due to the 9(a) contract for ‘outside’ work. That is a ludicrous result. Therefore, it was proper for the Regional Director to reject the Employers’ argument that the petition must be dismissed due to the Heavy and Highway Agreement.

The Employers claim such a situation disrupts labor stability, but that could not be further from the truth. If anything, the DDOE unit maintains that status quo where employees who moved from inside work to outside work may be working under a different agreement; certainly, this is a silly result, but it is the only result that preserves the status quo while providing employees their right of self-determination.

As an aside, the Employers argue that the DDOE expands the scope of each voluntary association. While 8(f) agreements are voluntary, the DDOE did not order 8(f) agreements—it ordered an election to determine certification under 9(a). The Employers seem to be under the mistaken impression that employers decide the scope of a 9(a) bargaining unit when that authority and discretion is in the hands of the Board.

**C. The Employers Attack the DDOE on the Basis of Geographic Proximity, an Issue Well-Established in Board Precedent in Favor of Petitioner.**

The petitioned for unit for the three associations covers the State of Michigan minus Monroe. This is the broadest possible geographic unit. This is the area consistent with the authority that the individual employers grant to the associations to represent them for purposes of collective bargaining.

The AGC has a 9(a) agreement with OPCMIA Local 886. (Tr. 775) The geographic coverage of this agreement covers Monroe County Michigan. (*Id.*) The individual employers give the AGC the ability to negotiate contracts in the State of Michigan.

Normally the proper unit for a craft unit in the construction industry “where an Employer uses a core group of employees to work at its various worksites regardless off job location . . . is one without geographic limitation.” *Premier Plastering*, 342 NLRB 1072, 1073 (2004)(citing *Alley Drywall*, 333 NLRB 1005, 1008 (2001)). Historical limitations on bargaining are a factor to consider, but they are not conclusive. *Id.*

Frequent litigation between OPCMIA and BAC Locals have aided this analysis. In *G.L. Milliken Plastering*, 340 NLRB 1169 (2003), BAC Local 9 sought a unit consisting of all plasterers of the employer, without geographic limitation. OPCMIA Local 16 had a 9(a) contract with the employer covering the Lansing and Jackson area. Local 9 carved that geographical area out of the petitioned for unit. The Board held that the residual unit was appropriate, but remanded to the Regional Director to determine the effect, if any, of the traveler provisions of the Local 16 agreement.

This case is informative in this Petition because it provides that it is appropriate to carve out 9(a) agreements that are of limited geography and request a residual unit of all other employees. The remaining geography will constitute an appropriate unit. For example, the AGC bargaining unit has been modified to avoid any 9(a) issues with other unions. Sorenson Gross has a 9(a) certification and agreement with OPCMIA Local 16 that covers the entire State of Michigan. (see P. Ext 12 and 18) Similarly, Fessler Bowman has a 9(a) certification and contract with Local 16. (see P. Ext. 5 and 17) The contract there is not state-wide, instead, the contract between Fessler Bowman and Local 16 does not cover the counties of Wayne, Oakland, Macomb, Lenawee, and Hillsdale. (P. Ext. 17, pg. 1)<sup>3</sup> Hence, a residual unit of the other employees not covered by the 9(a) agreement would be appropriate under *G.L. Milliken*.

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<sup>3</sup> It must be noted that Fessler Bowman and Sorenson Gross no longer negotiate as part of a multi-employer group within the geography of their contracts with Local 16. They have negotiated individual contracts.

Similarly, in *Premier Plastering, Inc.*, 342 NLRB 1072 (2004), the Board addressed the appropriate geography for a trade unit. Again, not surprisingly, the case involved a BAC Local and OPCMIA Local. The petition sought a unit of all plasterers of the employer within a five county area. The employer and the petitioning union, OPCMIA Local 80, had an 8(f) agreement that covered one county. However, the employer often extended that contract across the five county area that was petitioned for. The employer also had other agreements with other OPCMIA locals for plasterer work in Ohio. It had an 8(f) agreement with OPCMIA Local 109 and a 9(a) agreement with OPCMIA Local 179, each for several Ohio counties. BAC Local 16 intervened because it had a 9(a) contract with the employer for bricklayers and cement masons.

BAC Local 16 argued that the 9(a) agreement with Local 179 for plasterers barred the petition in whole. It also argued that the geography must be limited to the one county jurisdiction of the Local 80 8(f) agreement. The Board found that the petitioned for five county area was not appropriate. *Id.* at 1073. It also found that the one county proposed unit was not appropriate. *Id.* The board found that the only appropriate unit was one without geographic limitation, except the geography covered in the Local 179 9(a) agreement. *Id.* The Board also rejected BAC Local 16's argument that a 9(a) agreement of limited geography blocks an election in all geographies. *Id.*

Furthermore, the association argument that the geography of the unit must be limited to the geography of the 8(f) agreement has been specifically rejected in *Alley Drywall, supra*; “to find as the Employers’ contend, that the unit sought... must... be confined geographically to the unit the petitioner represented under the 8(f) agreements only serves... to perpetuate an arbitrary geographical division of the same employees into separate units.” *Id.* at 1007.

The Petitioner in this case initially sought a unit without geographic limitation. However, at the hearing, the Petitioner amended the unit to include only the State of Michigan, minus Monroe County. This was amended for two purposes. One was to avoid any issues with out-of-state unions.

More importantly, the petition was amended to reflect the scope of the bargaining authority of the associations, which in each case is limited to Michigan. As to the AGC of Michigan, it is a state-wide organization. It has the power to negotiate contracts on behalf of its members throughout the State. (Tr. 596) Further, there is evidence in the record that establishes that Fessler, Granger, and Angelo Iafrate—employers within AGC—all employ a core group of cement masons to perform work at a variety of locations. (Tr. 175-76, 205, 216-17, 308, 751)

The ACCM argued that it only has authority to negotiate contracts in Macomb, Wayne, and Oakland Counties. However, that is not factually accurate. North Channel Construction, Hartwell Cement, Gilardone, Ferrini Cement, Creative Cement, and Albanelli Cement Contractors all signed power of attorney to the ACCM to negotiate cement mason contracts throughout “the State of Michigan.” (ACCM Ext. 1) The power of attorney agreements with V&O Cement and Simone Contracting have no geographic limitation. (*Id.*) Mr. Albanelli admitted that he was incorrect in his previous assertion that ACCM only had authority to negotiate in Macomb, Wayne, and Oakland. (Tr. 414) He admitted that ACCM had authority to bargain state-wide based on the language of the power of attorney form. (*Id.*) All of the ACCM contractors have regular cement mason crews. (Tr. 395)

The power of attorney form for CAM permits CAM to enter into binding agreements with Local 514 without geographic limitation. However, the limitation is implicit and understood because CAM, unlike the AGC, does not operate outside of the State of Michigan.

Moreover, the scope of the its bargaining covers the entire state. The most recent power of attorney form is the form for TDS Contractors signed 12/2009. (CAM Ext. 1. Fax pg. number 33/37) That form offers collective bargaining services well beyond Macomb, Oakland, and Wayne. It includes, Livingston, Monroe, and all “outstate Michigan Lower Peninsula,” in addition to the tri-county area. (*Id.*)

As for the independent signatories, the Employers engage in double-speak denying that the employer use a “core group of employees” even though they cite to the hearing transcript for the proposition that these employer do use a core group. Amalio’s finishers do not work everyday, so the company has a key group of people that it calls to fill the requirements of the job. (Tr. 80) Amalios’ set crew is four to five employees. (*Id.*) Broadcast has a core crew of four finishers and adds to that when additional help is needed. (Tr. 227-28) DeMaria has one permanent finishing foreman. (Tr. 225) Barton Marlow has a core group of twelve cement masons. (Tr. 335) Regardless, it is unclear why the Employers’ attempt to argue that the geographical expanse of these single-employer 9(a) units is too broad. After all, these units merely cover all of the cement mason work for these individual companies.

The Employers argue that it would be appropriate to limit the bargaining unit geographically because when the employers within the associations perform work outside of the area, they sometimes pay the local rate and sometime pay the rate in the Local 514. This argument was not well developed at the hearing. However, whether the employer pays wages and benefits under another 8(f) agreement with another union will not block an election or limit the geography of an appropriate unit.

For the reasons stated above, the petitioned for units’ geography is appropriate.

**D. The Peace Agreement is Not in Effect.**

1. Negotiations Leading to the Peace Agreement and the 2006 Collective Bargaining Agreements.

After Local 514 indicated that it wanted to negotiate separate contracts, the parties negotiated an agreement as to how that new arrangement would work for the 2006 negotiations. Mr. Oakley was the only person to testify that was involved in the negotiations of that agreement. He testified that the peace agreement only covered the 2006 negotiations. He described it as “an agreement that was developed that set out the terms and conditions of negotiating the 2006 successor agreement.” (Tr. 644). He testified further that in 2006, he was not contemplating any negotiations other than the negotiations for the 2006 collective bargaining agreement. (Tr. 647)

The parties negotiated three separate, but identical, peace agreements. Each association has an agreement jointly with Local 1 and Local 514.

The language of the agreements is consistent with Mr. Oakley’s testimony as to their scope. The peace agreements are specifically limited to the negotiations of the 2006-2009 CBA: “[t]he Parties agree that the following conditions shall govern negotiations of successor agreement to the current collective bargaining agreement between the parties.” (J Ext. 29, 30, and 31, pg. 1)

The peace agreement is an important historical document because it sets out the bargaining arrangement that would maintain industrial stability, but result in separate contracts. The contractors designated which Union that they wanted a relationship. The designation was noted on each peace agreement. In the future, contractors designated which union they would like the association to negotiate with by only giving the association the authority to negotiate

with one union at the exclusion of the other. (AGC Ext. 3, see also CAM Ext 1 and ACCM Ext 1)

The peace agreements also provide that the associations will bargain jointly with Local 1 and Local 514. (J Ext. 29, 30, and 31, ¶ 7) The associations agreed to negotiate parallel, but separate agreements with the unions. (J Ext. 29, 30, and 31, ¶ 7) The agreements would have equal terms and conditions of employment and scope of work. (J Ext. 29, 30, and 31, ¶ 8) The agreement was only applicable within Macomb, Oakland, and Wayne counties. (J Ext. 29, 30, and 31, ¶ 8)

The peace agreement also provided that the resultant collective bargaining agreements would have particular language as to subcontracting and anti-discrimination clauses regarding to members of the other union (in essence, members of the other union would be able to work under the other union's agreement). (J Ext. 29, 30, and 31, ¶ 9 and 10).

The parties came to an agreement on separate collective bargaining agreements for a term of 2006-2009. (the 2006-2009 agreements are admitted as AGC – Local 514, J Ext. 2, CAM – Local 514, J Ext. 4, ACCM – Local 514, J Ext. 5, AGC – Local 1, J Ext 18, CAM – Local 1, J Ext. 20, ACCM – Local 1, J Ext 19) These agreements incorporate portions of the peace agreements, but other portions were not incorporated. The anti-discrimination and subcontracting language was incorporated into the collective bargaining agreements. (Tr. 649) The agreement not to file petitions was not incorporated. (Tr. 648, see also 2006-2009 CBA's referenced above)

2. The Duration of the Peace Agreement Was Specifically for 2006 to 2009.

It seems that the Employers ignore the plain language of the peace agreements limiting the agreement not to file petitions to the duration of the successor agreements with the respective association and Local 1 or Local 514. The non-petition agreement states in full:

OPCMIA Local 514, BAC Local 1, and the AGC agree that, upon the execution of this agreement and for as long as (1) the (AGC CAM or ACCM) retains the power of attorney for the Designated Contractors; and (2) the (AGC CAM or ACCM) bargains in good faith toward a contract (“Successor Contract”) to succeed the joint (AGC CAM or ACCM)-OPCMIA Local 514/ BAC Local 1 collective bargaining agreement, then the parties hereto will not file any petition with respect to said Designated Contractors with the National Labor Relations Board **for the duration of the successor agreements.**

(J Ext. 29, 30, and 31, ¶ 3) The language is clear that the agreement not to file petitions has a duration limited to the successor agreements, which were the 2006-2009 agreements with each Local. The Regional Director was right for coming to this conclusion.

The Employers argue that the duration covers every successor agreement that parties ever enter into for the next fifty years of the relationship. This is not supported by the evidence or the peace agreement as a whole. First, as stated above, Mr. Oakley testified that the document was only intended to cover the 2006 negotiations. The document itself is expressly limited to governing the 2006 negotiations. (J Ext. 29, 30, and 31, pg. 1) Moreover, when the term “agreements” or “contracts” are used in the plural in the remainder of the document, it is clear that the word or phrase is referring to the separate 2006 collective bargaining agreements of the unions, not future collective bargaining agreements of one particular union. (see J Ext. 29, 30, and 31, ¶ 5, 7, 8 , and 9) For example, the agreement states, [t]he resulting agreements shall include...” (J Ext. 29, 30, and 31, ¶ 8)

The Employers chiefly rely on paragraph 4 of the ACCM Peace Agreement, which states that the prohibition against filing representational petitions “shall continue past May 31, 2006 unless terminated by that date by advance written notice to all parties.” (JX 31) However, that provision is limited in scope by the explicit durational language found in paragraph 3 right above that—the provision stating that paragraph 3 will only remain in effect “for the duration of the

successor agreements.” (*Id.*) In other words, the parties agreed not to file representational petitions for the duration of the 2006-2009 successor agreements, unless one of the parties provided advance written notice of that provision’s termination.

There is no good faith argument that the language of this agreement waives their members’ right forever from having a choice in their union representation.

3. Mr. Santos’ Understanding that Agreement to Have Parallel, Separate Agreement Was in Place in 2011 Is of No Relevance.

Local 514 Business Manager Joel Santos testified that he believed in 2011 that the agreement to maintain parallel, but separate collective bargaining agreements, was in effect. (Tr. 718) He was not Business Manager at the time of the 2006 peace agreements. In fact, at the time in July/August of 2011, he had only been the Business Manager for three or four months. He testified that “he assumed” it was in effect. Moreover, the language of the peace agreements is somewhat unclear as to the agreement to have parallel, separate agreements. There is a duration, as shown above, in the paragraph regarding the filing of petitions. However, that durational language is limited only to the agreement not to file petitions and it is not applicable to the remainder of the agreement; “parties hereto will not file any petition with respect to said Designated Contractors with the National Labor Relations Board **for the duration of the successor agreements.**” There is no durational language for the remainder of the document that is as clear. Therefore, it was reasonable for Mr. Santos to believe that the agreement to have parallel, but separate, agreements was still in force, even if the agreement not to file petitions had expired by its terms. Moreover the obligation to have parallel, but separate, agreements was incorporated into the collective bargaining agreement, the agreement not to file petitions was not. (J Ext. 2, 4 and 5, are identical to J. Ext. 18, 19, and 20)

After closer review of the agreement, Mr. Santos now believes that the entire agreement is no longer in force. That is also a reasonable interpretation because the agreement was limited to governing “negotiations of a successor agreement [sic] to the current collective bargaining agreement between the parties.” (J Ext. 29, 30, and 31, pg. 1)

At any rate, whether Mr. Santos believed that the agreement to have parallel, but separate agreements, was still in force matters little as to whether the agreement not to file petitions was still in force because the agreement not to file petitions had a different duration clause.

Moreover, the understanding of one party or all parties is never sufficient to base a waiver of the workers’ statutory right to choose their exclusive bargaining representative. The Board will only enforce such waivers if the agreement is “clear, knowing and unmistakable.” *Springfield Terrace LTD*, 355 NLRB No. 168 (2010). It is a “strict standard.” *Id.* The Associations must “supply any contract language or other express agreements” that demonstrates that those 2006 agreements remain in force. *Id.*

The waiver cannot be based upon an “alleged understanding of the parties during contract negotiations.” *The Cessna Aircraft Company*, 123 NLRB 855 (1959). Mr. Baker testified that his understanding is that the agreement not to file petitions continues forever until a party gives notice. (Tr. 542) He admitted the agreement itself does not provide the basis for his understanding. (Tr. 542-543)

Moreover, in *Briggs Indiana*, 63 NLRB 1270 (1945), the Board held that such agreements would only be enforced if they are “for a reasonably short period.” *Id.* Apparently, the associations interpret the agreement as having no end, which also raises evergreen issues. It has been five and one half years since the parties entered into the agreement have not negotiated any extensions to it. This is not reasonably short.

The Employers interpret *Briggs Indiana* to be applicable to only employees who have no other representation. (The Employers' Brief 37) The Board never made such a limitation on its decision, which is probably the reason why The Employers could not cite to anything in *Briggs Indiana* for that proposition. (Id.) In fact, the Board stated quite the opposite in describing what *Briggs Indiana* was all about:

The question here is not whether we should enforce the agreement so as to deny an individual Briggs plant-protection employee the right to select a UAW affiliate as his representative or so as to deny the protection of Section 8 (3) of the Act to such an employee. It is merely whether it is the proper function of the National Labor Relations Board to expend its energies and public funds to confirm a result which the Union agreed it would refrain, temporarily, from seeking to achieve.

*Briggs Indiana*, 63 NLRB at 1273.

Notably, the Employers do not even approach the most analogous case, which is *Walt Disney World Co.*, 215 NLRB 421 (1974). In that case, a separate non-petition agreement was included in a recognition agreement. The parties then negotiated a collective bargaining agreement that did not include or incorporate the non-petition agreement. The Employer argued that the parties operated under the understanding that the agreement continued. The Board refused to enforce the non-petition agreement because the express agreement did not extend into the subsequent collective bargaining agreement.

Similarly, the provision currently before the Board providing that the parties cannot file petitions had a specific duration limited to the term of the successor agreement. Unlike many of the other provisions of the peace agreements, this agreement not to file petitions was not incorporated into any of the collective bargaining agreements and its term ended with the successor agreement in 2009.

4. The Parties Did Not Extend the Agreement Not to File Petitions.

Prior to the 2009 negotiations, Mr. Fisher sent a letter terminating all agreements including “the 2006-2009 AGC/OPCMIA collective bargaining agreement as well as any Memorandum of Agreement entered into by the AGC.” (P Ext 14) He stated that the AGC intended to “renegotiate all provisions” of the parties’ agreements. (*Id.*)

He then sent a separate letter indicating that the AGC intended to continue to negotiate jointly with Local 514 and Local 1 and come to an agreement with parallel, but separate agreements. (P Ext 15) There was no mention of petitions.

Mr. Oakley negotiated the 2009-2011 collective bargaining agreement with the associations. (Tr. 649) Wayne Albanelli was involved in the 2009 negotiations on behalf of ACCM. (Tr. 421) Patrick Baker was involved in the 2009 negotiations on behalf of CAM. (Tr. 536) Scott Fisher was involved in the 2009 negotiations on behalf of AGC. (Tr. 607) All of the witnesses agreed that the peace agreement was never raised and there was no agreement or discussion regarding the filing of petitions.

Therefore, if the agreement ended in 2009, there was no agreement to continue the agreement not to file petitions. On the other hand, Mr. Fisher cancelled all agreements that the AGC had with Local 514. The parties did not agree to not file petitions. On the other hand, the AGC did agree to negotiate separate but parallel collective bargaining agreements with the two unions.

5. The Associations’ Material Breach of the Peace Agreement Nullified Any Obligation of the Local 514 to Not File Petitions.

The Board is clear that it follows the general contract principle that a material breach of an agreement by one party excuses performance of the other party. See *Arlan’s Department Store of Michigan Inc.*, 133 NLRB 802 (1961).

Obviously, Local 514 believes that the peace agreement expired in 2009. However, assuming arguendo that the agreement continued into 2011, Local 514's obligations under the agreement ended with the associations' material breach on August 3, 2011. The evidence demonstrates that as of August 3, 2011, the associations materially breached all of their obligations under the peace agreement.

The Associations' obligations under the peace agreement are clear. The obligation is to negotiate jointly with Local 514 and Local 1. They negotiate parallel but separate collective bargaining agreements and the resulting agreements will have equivalent terms and conditions of employment. (J Ext. 29, 30, and 31, ¶¶ 7 and 8) That means that unless both unions agree to equivalent terms and conditions of employment, all the parties have to continue to bargain.

Mr. Albanelli admitted that after August 3, 2011, ACCM stopped bargaining jointly with Local 1 and Local 514 and would only bargain with Local 514. (Tr. 428) He admitted that after August 3, 2011 ACCM did not have equivalent contracts with the two unions. (Tr. 429) They had different overtime and wage provisions. (*Id.*) He admitted that when he signed the agreement with Local 1 on behalf of ACCM, there would be different terms and conditions of employment for the two unions.

Similarly, Mr. Baker testified that he knew when he signed the Local 1 agreement on August 3, 2011, they would start applying separate terms and conditions of employment to the two unions. (Tr. 534-535) He admitted that CAM no longer had parallel agreements with the two unions. (Tr. 535) He admitted that CAM no longer bargained jointly after that date. (*Id.*)

Similarly, Mr. Fisher testified the same on behalf of the AGC. (Tr. 611-612) In fact, Mr. Fisher admitted that AGC had an obligation under the peace agreement to negotiate separate parallel agreements with the two unions. (Tr. 612) He admitted that in 2011 the AGC "did not

negotiate parallel separate agreements.” (*Id.*) He also admitted that AGC did not bargain jointly with the two unions after August 3, 2011. (Tr. 613)

At the hearing, the associations attempted to elicit testimony regarding the ratification vote in some sort of attempt to argue that it was Local 514’s fault that it is no longer following the agreement. However, all of that is irrelevant. The ratification vote was 39-1 against the contract. Local 514 does not have the luxury of Local 1. It cannot unilaterally accept a concessionary contract without membership ratification.

It is undisputed that all of the parties knew that Local 514 did not ratify the agreement. They all knew that Local 514 could not bind its members to that agreement. The three associations went ahead and signed the agreement with Local 1 with full knowledge that Local 514 could not agree to those terms. The associations knew that they would be in violation of the peace agreement.

Insofar that any parties’ understanding of the peace agreement weighs into this analysis, which would frankly be incorrect, the Regional Director should also include the understandings of Local 1 and the associations. Mr. Baker and Mr. Fisher did not seem to know much about the peace agreement at all. (Tr. 717, 785) Mark King, Business Manager of Local 1, did not think that it was worth the paper it was written on. (Tr. 718, 786)

Accordingly, on August 3, 2011, the associations, and Local 1 for that matter, were in material breach of the peace agreement and Local 514 was under no duty to adhere to the peace agreement. On August 8, 2011, Mr. Santos sent a letter to all of the Associations indicating that they were in breach of the parallel, but separate, provisions of the peace agreements. (P Ext 8, AGC Ext 7, ACCM Ext 5)

6. All Contractual Agreements Ended on September 1, 2011.

The associations each extended their agreements with Local 514 until August 31, 2011. (P Ext 16) According to Fisher and Santos, the parties met on or about August 31, 2011 and they did not come to an agreement. (Tr. 614, 721) Local 514 asked for another extension. (*Id.*) The associations refused to grant an extension. (Tr. 615) The parties met again on September 15, 2011. (*Id.*) The contract was extended on that day. (*Id.*) On September 15, 2011, the parties made no agreement regarding the peace agreement or the filing of petitions.

There was no contractual relationship between the parties in any manner between September 1 and September 15, 2011. Local 514 filed the petitions regarding the associations on September 15, 2011. Admittedly, the record is unclear whether the petitions were filed first or the extension was agreed to first. At any rate, the entire contractual relationship extinguished as of September 1, 2011. The parties only agreed to extend the terms of the 2009-2011 collective bargaining agreements.

On or about September 27, 2011, the parties agreed to extend the 2009-2011 collective bargaining agreements to May 31, 2012 with some minor changes to the collective bargaining agreement. (ACCM Ext 4) The Local 514 membership ratified this agreement.

Accordingly, the agreement not to file petitions expired in 2009. If not, it expired on August 3, 2011 due to the material breach. If not then, it expired on August 8, 2011; the date of the notice of material breach. If not then, it expired on September 1, 2011. Even if it did not expire, it was for an unreasonable duration, over five years, and should not be enforced. See *Briggs Indiana, supra*.

The Employers attempt to argue in reverse that Petitioner is suffering from “buyer’s remorse” because it argues that BAC breached the contract by bargaining the Table Agreement.

However, as the Employers pointed out in their Brief, there is no durational language pertaining to the entirety of the peace agreements. (The Employers' Brief 41) Instead, the durational language that is in the peace agreements only applies to the non-petition clause, i.e., paragraph 3 discussed above. Therefore, the Employers' argument that Petitioner is trying to "have its cake and eat it too" is disingenuous and was rightfully ignored by the Regional Director considering the clear language of the peace agreements.

#### IV. CONCLUSION

The Employers' Request for Review raises objections to the DDOE that are clearly contrary to law. Consequently, the Request for Review should be denied.

Respectfully submitted,

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Dated: June 25, 2012