BEFORE THE
NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF Dayton Heidelberg Distributing Co. d/b/a Heidelberg Distributing Company -and- Teamsters Local Union No. 284	CASE No. 09-CA-156105

POST-HEARING BRIEF ON BEHALF OF DAYTON HEIDELBERG DISTRIBUTING CO.

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I. STATEMENT OF THE CASE

This case concerns the negotiations between Dayton Heidelberg Distributing Co., d/b/a Heidelberg Distributing Company ("Heidelberg" or the "Company"), and Teamsters Local Union No. 284 ("Local 284"). Local 284 alleges that the parties came to a meeting of the minds on an initial Collective Bargaining Agreement ("CBA") and a "Global Settlement" during negotiations in May and June of 2015. However, the bargaining history, and more importantly, the written proposals for these two alleged "agreements" show that (1) there was no meeting of the minds on the two alleged agreements, and (2) even if there was a meeting of the minds on both documents, the explicit conditions were not satisfied to create a binding CBA with Local 284. Moreover, even if the alleged CBA could be considered independent from the proposed Global Settlement, the Company still lawfully withdrew its proposal on the CBA before it was accepted, approved, and ratified.

A. Background

Local 284 was certified as the exclusive bargaining representative of a bargaining unit of drivers and warehouse workers at Heidelberg's Columbus, Ohio facility on February 15, 2013. (Tr. 511; Stip. Exh. 1; Joint Exh. 1 at ¶ 2). Bargaining for an initial CBA in Columbus commenced in April, 2013, and continued until April, 2014, when formal negotiations ceased. (Tr. 511-512, 517-518; Joint Exh. 1 at ¶ 3). In August, 2014, employees filed a petition to decertify Local 284 at the Columbus facility that was signed by approximately 60% of the bargaining unit members. (Tr. 529-530). Faced with direct evidence that Local 284 no longer possessed majority status, the Company withdrew recognition of Local 284 as the exclusive bargaining representative of the drivers and warehouse workers in Columbus. (Tr. 530).

Local 284 filed unfair labor practice ("ULP") charges alleging, among other things, that the withdrawal of recognition was unlawful. (Tr. 532). The charges were consolidated into a

single complaint by Region 9 of the National Labor Relations Board ("NLRB" or "Board") and proceeded to a hearing before Administrative Law Judge ("ALJ") Amchan in December 2014. The parties settled the complaint at the hearing. (Tr. 532-534; Stip. Exh. 2; Joint Exh. 1 at ¶ 4). The terms of the Settlement Agreement, which was approved by Judge Amchan, included, among other things, a non-admissions clause and the resumption of bargaining with Local 284 through May 1, 2015.[1] (Tr. 533-535; Stip. Exh. 2). As of May 1, assuming compliance with the Settlement Agreement, the decertification petition would be processed. (*Id.*).

The parties resumed bargaining on January 20, 2015. (Tr. 538). Negotiations continued into the spring. On April 29, Local 284 offered to exchange union security – a sticking point in negotiations – for a decertification election. (Tr. 570-571, 786-787). The Company rejected this offer in May, but explained it would be willing to accept Local 284's offer as part of a Global Settlement that would satisfactorily address all issues throughout the State – cessation of a corporate campaign against the Company, extension agreements for expiring contracts at other Company facilities, an initial CBA including union security in Columbus, and a decertification election in Columbus. (Tr. 573-575, 787-789). On May 26, the parties negotiated over terms of a Global Settlement. (Tr. 588-608, 792, 794-804). At the end of the meeting, Craig Brown, the Company's chief spokesman, stated he would draft what he believed the parties discussed during the meeting. (Tr. 606, 608, 803-804). Within days, Mr. Brown completed his draft and submitted it to John Doll, chief spokesman for Local 284. (Tr. 614-616; Stip. Exhs. 7 & 8).

Mr. Doll disputed a number of the terms in the draft Mr. Brown prepared. (Tr. 620-621; Stip. Exh. 9). The parties met again on June 8, at which time they continued negotiating the Global Settlement. (Tr. 626-638, 641, 644, 646-652, 657). The meeting on June 8 concluded with the Company making the last proposal to Local 284. (Tr. 654, 815).

[1] All dates are 2015 unless otherwise noted.

Local 284 did not reply to the Company's proposal until June 19. On that day, Local 284 made a counterproposal, but Company representative Brooke Hice was unavailable to review the draft. (Tr. 664-669, 673-674, 676-676, 679-680, 816). Therefore, the Company did not make a comprehensive counterproposal. However, when the Company presented a partial counterproposal on one aspect of the Global Settlement – the Duration Clause of the proposed initial CBA with Local 284 in Columbus, which was a part of the Global Settlement package proposals and contingent by its express terms on the overall satisfaction of all the terms of the Global Settlement – Local 284 rejected the partial counterproposal and negotiations broke off. (Tr. 699-701, 703, 705). When negotiations fell apart that evening it appeared to destroy any potential Global Settlement. (Tr. 703-704, 708).

After negotiations collapsed, Local 284 scheduled a ratification vote on the CBA in Columbus even though it was contingent on the satisfaction of all the terms of the Global Settlement. (Stip. Exh. 21). Prior to the vote, the Company advised Local 284 that the contingent CBA was not on the table as a standalone proposal for ratification without the Global Settlement. (Stip. Exh. 23). The Company also provided a copy of its final standalone proposal made prior to the negotiations over a Global Settlement. Local 284 went forward with a vote on the contingent CBA anyway. (*Id.*). Local 284 then informed Mr. Brown that the CBA was ratified and offered to sign a consent election agreement on the decertification petition in exchange for the Company's agreement to sign the CBA. (Tr. 712-713, Stip. Exh. 24). The Company refused because the alleged CBA was unacceptable to the Company as it was contingent on an overall Global Settlement with respect to which there was never an agreement between the parties. (Stip. Exh. 25). Local 284 ultimately filed the ULP which is the subject of this proceeding. (Tr. 535).

B. Legal Definition of Meeting of the Minds

Counsel for the General Counsel bears the burden of proving the allegations contained in the Complaint by a preponderance of the evidence. *Printing Industries of Northern California*, 204 NLRB 329, 334 (1973). In this case the General Counsel must prove the existence of a meeting of the minds on two (2) separate occasions on two (2) separate alleged agreements. However, unlike the typical case of two standalone agreements, the General Counsel here must prove that there was a meeting of the minds on the Global Settlement FIRST in order to establish a meeting of the minds on the CBA in Columbus.

To prove a meeting of the minds, Counsel for the General Counsel must prove that the parties' objectively manifested intent, as demonstrated by their communications with each other, shows that they agreed on all substantive issues and material terms contained in the alleged agreements. *Crittenton Hospital*, 343 NLRB 717, 718 (2004); *MK-Ferguson Co.*, 296 NLRB 776 fn. 2 (1988). In other words, Counsel for the General Counsel must prove that the parties intended to agree to all of the substantive terms in the contract reflected by the alleged meeting of the minds. *The Buschman Co.*, 334 NLRB 441, 442 (2001); *B & M Linen Corp.*, 338 NLRB 5, 12 (2002); *Sanitation Salvage Corp.*, 342 NLRB 449, 455 (2004).

In this case, the General Counsel must prove that the parties reached a meeting of the minds on BOTH the Global Settlement AND the CBA in Columbus. Such a meeting of the minds occurs only when the parties agree on all substantive issues and material terms of the agreement. *Windward Teachers Association*, 346 NLRB 1148, 1150 (2006); *Crittenton Hosp.*, 343 NLRB at 718; *MK-Ferguson Co.*, 296 NLRB 776 fn.2. Where the alleged agreement is reduced to writing, the Counsel for the General Counsel bears the burden of showing that the written agreement accurately reflects the alleged meeting of the minds. *Windward Teachers*, 346 NLRB at 1150; *Crittenton*, 343 NLRB at 718. Where the written terms of an agreement are

unambiguous, a meeting of the minds is based on the objective terms of the written agreement, not the parties' subjective understandings. *Hempstead Park Nursing Home*, 341 NLRB 321, 323 (2004); *Vallejo Retail Trade Bureau*. 243 NLRB 762, 767 (1979), enfd. 626 F.2d 119 (9th Cir. 1980). In contrast, where the terms of an agreement are ambiguous, a meeting of the minds cannot be established. *Hempstead*, 342 NLRB at 322-323; *Meat Cutters Local 120 (United Employers, Inc.)*, 154 NLRB 16, 26-27 (1965).

In this case there are only two possible outcomes: either (1) there is an agreement on the alleged Global Settlement that unambiguously required satisfaction of the terms of the Global Settlement in order to render the contingent CBA effective; or (2) the terms of the Global Settlement are ambiguous, and therefore, there is no meeting of the minds. Under the first scenario, there cannot be a CBA in Columbus because the unambiguous terms of the Global Settlement were never satisfied. Under the second scenario, ambiguity of the terms of the Global Settlement prevents finding a meeting of the minds, and therefore, the contingent CBA is not effective. Either way, the Company did not violate the National Labor Relations Act ("NLRA" or "Act") by refusing to sign the alleged CBA because there is no enforceable CBA to sign.

C. The Undisputed Terms of the Global Settlement and the Parties' Actions Are Dispositive That the Parties Did Not Come to a Meeting of the Minds

This case is very simple. It comes down to whether or not Heidelberg reached a meeting of the minds with Local 284 on two alleged agreements, the CBA and a Global Settlement which included a number of other Teamsters Local Unions in Ohio (Local 20 in Toledo, Local 957 in Dayton, and Local 293 in Cleveland). The facts in this case will show that (1) the proposed contingent CBA in Columbus was only effective if the terms of the Global Settlement were satisfied; and (2) there was no meeting of the minds on a Global Settlement. Thus, neither the Global Settlement nor the CBA became binding agreements.

After considering the testimony of eight witnesses and 49 exhibits submitted in this case, the result is clear. A series of package proposals on the Global Settlement were exchanged by the parties during May and June, in addition to numerous emails between counsel for the parties, Craig Brown and John Doll, discussing the substantive terms of the Global Settlement. Two paragraphs were consistently included in the proposals: (1) Paragraph 1, describing the contingent status of the CBA in Columbus as part of the overall package proposed for a Global Settlement was present in every draft (Tr. 230); and (2) an Execution Clause was included in every draft after Mr. Doll added it to the Local 284 counterproposal on June 8 (Stip. Exhs. 12 & 13). The language and meaning of these two paragraphs are undisputed.

Paragraph 1, drafted by the Company, clearly defines the contingent relationship between the Global Settlement and the CBA in Columbus – the CBA simply does not exist without agreement upon and satisfaction of all the terms of the Global Settlement. (Tr. 230-232). Specifically, Paragraph 1 states that "*[c]ontingent upon the complete satisfaction of all the terms of this Settlement Agreement* the Company and Local 284 have entered into a tentative agreement for an initial Collective Bargaining Agreement, subject to the outcome of the decertification election in Case No. 09-RD-134933[.]" To avoid any uncertainty as to which proposed CBA this Paragraph referenced, the contingent CBA was then identified as an exhibit to the Global Settlement.

The language of the Global Settlement explicitly states that the CBA in Columbus is contingent on the "complete satisfaction" of the Global Settlement. In the Company's last proposal for a Global Settlement on June 8, seven terms were listed that required satisfaction before the CBA became effective:

- The parties enter a Consent Election Agreement in Case No. 09-RD-134933 for the purposes of conducting a decertification election in Columbus;
- Local 284 withdraws any and all pending ULP charges and agrees not to file or re-file any ULP charges against the Company regarding events that occurred prior to the execution of the Global Settlement;
- Local 284 immediately suspends its corporate campaign and requests that the International Brotherhood of Teamsters ("IBT"), the Ohio Conference of Teamsters, and other Union parties similarly suspend their corporate campaign activities;
- Local 20 agrees to extend its current CBA to July 17, 2015;
- Local 957 agrees to extend its current CBA to July 17, 2015;
- Local 293 agrees to extend its current CBA to July 17, 2015;
- Local 377 agrees to withdraw its Objections to the Conduct of the Election in Case No. 08-RD-140375 and agrees it will not file additional, amended or supplemental Objections in that case.

Local 284 did not accept this proposal. Its last counterproposal dated June 19 – the last proposal made in the Global Settlement negotiations – did not include Local 377 and included material and substantive differences from the Company's June 8 proposal. Therefore, there was no meeting of the minds on the terms proposed by the parties.

Thus, it is no surprise that none of the terms of the Global Settlement was ever satisfied. A Consent Election Agreement was never reached. Only after demanding that Heidelberg sign the "ratified" CBA in Columbus did Local 284 actually offer to enter into a Consent Election

Agreement.[2] Moreover, Local 284 and the other parties continued their corporate campaign activities, and Locals 20, 957, and 293 never signed extension agreements. Finally, Local 377 never withdrew its objections in Case No. 08-RD-140375. Because the terms of the Global Settlement were not satisfied, the contingent CBA with Local 284 in Columbus was never effective pursuant to the first paragraph of the Global Settlement.

The Execution Clause, as drafted by Local 284, is equally unambiguous. It requires that (1) the Global Settlement, (2) the Consent Election Agreement regarding Local 284 and the decertification election in Case No. 09-RD-134933, (3) the contingent CBA between the Company and Local 284, and (4) extension agreements with Locals 20, 293, and 957 "will be signed and become effective on the same date." As in Paragraph 1, the parties each proposed this language because they were not prepared to go forward with the Global Settlement and the contingent CBA in Columbus unless there was complete agreement and satisfaction of all the terms and conditions of the Global Settlement and all the affiliated documents, evidenced by signatures on those agreements. This Clause reflects the parties' manifest intent that all the documents be reduced to writing and executed before the contingencies related to the CBA in Columbus are considered fulfilled. None of the agreements was ever signed. In fact, while Local 284 seeks to enforce the alleged CBA, it has not sought to enforce the Global Settlement or any other affiliated documents and has never sought execution of those other documents. Thus, it is impossible to find that the terms of the Global Settlement were satisfied and that any (or all) of the agreements were effective. Without execution, *none* of the affiliated agreements are effective. Furthermore, without execution of *all* the affiliated agreements, the contingent

[2] The Union's actions in this regard put one of the conditions precedent (execution of the Consent Election Agreement) after the contingent result (enforceability of the CBA in Columbus). This order of events turns contract law on its head and renders the concept of conditions precedent meaningless. Notably, and as contemplated by the alleged Global Settlement, the parties have never entered into a Consent Election Agreement – a necessary precondition to the CBA.

conditions precedent in Paragraph 1 of the Global Settlement are not satisfied and the proposed CBA in Columbus cannot be effective.

Additionally, the behavior of the parties, specifically Local 284 and the IBT, demonstrates the absence of an agreement or meeting of the minds. Although Local 284 and the IBT subsequently claimed there was a meeting of the minds on the Global Settlement on June 19, they acted inconsistently with that alleged Global Settlement immediately after June 19. This is a sure sign that Local 284 did not believe there truly was a meeting of the minds on the Global Settlement on June 19.

First, although the Global Settlement included extension agreements with all the Locals currently operating without CBAs (thus, extending no strike, no lockout protection under those contracts), Local 20 spokesman Martin Jay made it clear on June 19 that a strike was imminent if an agreement was not reached on a CBA with Local 957 *and* the Global Settlement. In fact, in response to the veiled threats made by Mr. Jay, the Company prepared for a strike beginning on June 22. Even representatives of Local 957, which would have been subject to an extension agreement prohibiting a strike had there truly been a meeting of the minds on a Global Settlement, were resigned to the fact that a strike was imminent and asked that the Company not blame employees for the strike and/or recognizing a picket line if one was in effect. Strike preparations would have been unnecessary if the affiliated extension agreements were in place as part of the Global Settlement.

Moreover, although the Global Settlement explicitly required Local 284 to cease its corporate campaign (and request the IBT to do the same),[3] such activities continued in Columbus on June 22 and thereafter at the 2015 Women's World Cup soccer tournament in Canada.

[3] It was explained that Local 284 could not require the IBT to cease the campaign, but that the IBT would honor a "request" from Local 284 to cease the campaign. Thus, the request would essentially end the campaign.

Finally, Local 284 took no affirmative actions contemplated by the Global Settlement. It did not offer to enter into a Consent Election Agreement on the decertification petition and it did not withdraw its ULP against the Company dated May 11 (Case No. 09-CA-152946).[4]

Clearly, the behavior of Local 284 demonstrates that it and the IBT did not believe there was a meeting of the minds on the Global Settlement. Otherwise, there is no explanation as to why their actions would directly conflict with the terms of an agreement that Local 284 maintains was made just days before. Nonetheless, Local 284 now contends that there was a meeting of the minds – an assertion inconsistent with the unambiguous text of the proposed Global Settlement and contingent CBA, as well as its own actions.

D. Credibility Determinations are Unnecessary

While there was conflicting testimony regarding certain events during the relevant bargaining sessions, the fact is credibility findings are unnecessary to resolve this case. Regardless of any credibility determinations regarding conflicting testimony, the written documents comprising the Global Settlement and contingent CBA proposals are sufficient and dispositive by themselves to resolve whether or not a meeting of the minds occurred.

Regardless of any individual's testimony in this case, the language of the proposals does not change. If there was a meeting of the minds and the applicable language is unambiguous, then it plainly shows that the terms of the Global Settlement were not met and the contingent CBA never went into effect. In the alternative, if the language of the Global Settlement proposals

[4] Perhaps after learning that Region 9 was about to dismiss that charge, Local 284 withdrew it on July 8. More likely, this was part of a strategy to retroactively resurrect a meeting of the minds on June 19 by withdrawing the charge on July 8, scheduling the ratification vote for July 11 and offering to enter into a Consent Election Agreement on the decertification petition on July 13. The timing of those actions appears to show that Local 284 tried to satisfy as many conditions of the Global Settlement as possible in a desperate attempt to support the allegation that the parties reached a meeting of the minds on June 19. Such after the fact shenanigans do not support a finding of a meeting of the minds.

is ambiguous, there legally can be no meeting of the minds. Either way, there can be no agreement on either a Global Settlement or a CBA in Columbus.

While credibility is not determinative in this case, any credibility findings favor the Company. Testimony from witnesses for Local 284 was inconsistent with each other and internally. Moreover, those witnesses (particularly Martin Jay) did not exhibit candor, forthrightness, or honesty on cross-examination. Upon a review of the facts and timeline of this case, it should come as no surprise that witnesses for Local 284 were driven to fabricate their testimony in an attempt to revise history. The record shows that Local 284 tried to bring increased pressure on the Company to force agreement on a CBA that included union security in Columbus. To obtain that agreement, the IBT, Ohio Conference of Teamsters, and other Locals throughout Ohio all participated in bargaining negotiations to create the impression and threat of a statewide strike that would cripple the Company. In addition, Local 284 and the IBT engaged in an aggressive corporate campaign against the Company.

Those efforts led to the negotiations over the Global Settlement, a part of which was the proposed contingent CBA with Local 284. Never once during the course of negotiations over the Global Settlement did Local 284 ever claim there was agreement on the Global Settlement. Not until well after June 19 did Local 284 ever take the position that there was such an agreement. To the contrary, the Company consistently maintained, including contemporaneously with the June 19 meeting, that there was no agreement on the Global Settlement.

With the breakdown in negotiations on June 19 and the subsequent ratification of a CBA with Local 957 on June 20, it became apparent to Local 284 that its leverage against the Company had been severely weakened. With the settlement of CBAs with Local 957 and 293, the ineffectiveness of the corporate campaign, a pending TA with Local 20, and the loss of the

challenge to the decertification election regarding Local 377, Local 284, the Ohio Conference of Teamsters and the IBT realized they no longer had currency with which to buy a CBA with Local 284 that included union security. It was then – and only then – that Local 284 attempted to resurrect the TA and go through the artifice of a bogus ratification. When Local 284 and Counsel for the General Counsel recognized that the contingent CBA was unenforceable without the Global Settlement, they then crafted a theory unsupported by reliable testimony regarding an alleged meeting of the minds on the Global Settlement to breathe life into the CBA in Columbus. All of the arguments and testimony raised by Local 284 constitute an after-the-fact construction inconsistent with their own actions and the consistent testimony of the Company's witnesses.

II. STATEMENT OF THE FACTS

A. Bargaining Background and Procedural History

Heidelberg is a distributor of wine, beer, and nonalcoholic beverages throughout the State of Ohio. (Tr. 510). The Company has bargaining relationships in a number of its locations with various Teamster Local Unions covering its warehouse and delivery operations. In Cleveland, the employees are represented by Teamsters Local Union No. 293 ("Local 293"), in Toledo by Teamsters Local Union No. 20 ("Local 20"), in Dayton by Teamsters Local Union No. 957 ("Local 957"), in Cincinnati by Teamsters Local Union No. 1199 ("Local 1199"), and in Columbus by Local 284.[5] (*Id.*; Joint Exh. 1 at ¶ 5). At all relevant times, each Local except for Local 284 has had an existing bargaining relationship and CBA with the Company; Local 284 was negotiating an initial CBA. (Tr. 772-776; Joint Exh. 1 at ¶¶ 3, 5).

Relevant to this matter, the Company and Local 284 resumed bargaining pursuant to the Settlement Agreement in Case Nos. 09-CA-132510, 09-CA-133891, and 09-CA-136182 (see

[5] The Company had a bargaining relationship covering its delivery operation in Youngstown, Ohio with Local 377. That bargaining unit was decertified on November 3.

Section II.B.3, *supra*) on January 20, 2015. The Company consistently bargained in good faith with Local 284; although, Local 284 complained to Region 9 of the NLRB on several occasions that the Company was not fulfilling its obligations under the Settlement Agreement and the Act. In response to those allegations, Heidelberg submitted two lengthy position statements to Region 9 demonstrating its compliance with all aspects of the Settlement Agreement. Region 9 advised the Company it was in compliance with the Settlement Agreement, but the ULP Charge in this case had just been filed making that conclusion moot. (Tr. 535). Region 9 issued a Complaint on this Charge. The Complaint was limited to assertions that the parties had a meeting of the minds on a CBA in Columbus on May 26. At the hearing, confronted with the reality that the alleged May 26 TA was expressly contingent on satisfaction of the terms of a Global Settlement, the General Counsel took the position that there was also a meeting of the minds on a separate Global Settlement on June 19.[6] The Complaint went to a three-day hearing beginning on December 7, 2015.

B. Certification and Bargaining Background

1. Certification of Local 284 and Bargaining Through April 2014

On February 15, 2013, Local 284 was certified as the bargaining representative of all full-time and regular part-time drivers and warehouse employees employed by Heidelberg at its Columbus, Ohio facility in Case No. 09-RC-095648. (Tr. 511; Stip. Exh. 1). Soon after the unit was certified, the Company and Local 284 began negotiating for an initial CBA on April 3, 2013. (Tr. 511-512; Joint Exh. 1 at ¶ 3). The parties agreed that each would have the unilateral right to add to, modify, or delete proposals throughout the course of negotiations, subject to an overall agreement. (Tr. 512-513; 777). Many package proposals were made during negotiations, with the understanding that if any piece of a package was rejected, the entire package was no longer on

[6] The General Counsel never amended the Complaint to raise this allegation.

the table. (Tr. 777-778). Indeed, during negotiations, the parties even reopened executed tentative agreements ("TAs") on certain occasions and made modifications to those TAs. (Tr. 513). Changes in other areas of negotiations necessitated such changes. (*Id.*). Examples of modified TAs include jury duty, leaves of absence, and bereavement leave. (*Id.*).

Bargaining continued through April 4, 2014. By April 4, approximately 10 issues remained unresolved. (Tr. 514). The parties exchanged package proposals bundling all the outstanding issues at that time, with agreement contingent upon the satisfaction of all issues. (*Id.*). The parties reached conceptual agreement on all but three of the issues – in other words, the package proposals ceased to modify those seven terms. (Tr. 514-515). The remaining outstanding issues were wages (a lump sum ratification bonus), the effective date of a cost sharing[7] formula in the health care proposals, and union security. (Tr. 515-516). The Company was not willing to agree to union security because the election was reasonably close and the Company feared that requiring the payment of union dues to Local 284 as a condition of employment could alienate long-term employees. (Tr. 516-517). Specifically, the Company believed imposing dues on traditionally non-union employees could cause a number of them to leave the Company. (Tr. 517). After April 4, 2014, formal negotiations ceased, although the parties remained in communication. (Tr. 517-518).

Beginning in the summer of 2014, Local 284 and the IBT commenced a corporate campaign against Heidelberg in Columbus that included publicizing the dispute on a Facebook page, leafleting of Heidelberg's customers, critical press releases, and threatening Heidelberg's customers with publicized health code violations if business with Heidelberg continued. (Tr. 525-526, 780-781). In 2015, the corporate campaign continued with leafleting in Columbus. One such leaflet stated that food at Marcella's, a restaurant and Heidelberg customer in Columbus,

[7] The court reporter mistakenly transcribed "cautionary" instead of "cost sharing." (Tr. 515).

was unhealthy, and another stated that wine distributed by the Company contained arsenic. (Tr. 527). Local 284 and the IBT also publicized the dispute through the use of billboards and aerial banners pulled by planes above public events. (Tr. 527, 781-783). Local 284 also leafleted the National Hockey League All-Star game in Columbus because Labatt, a supplier for Heidelberg, is a sponsor of the NHL. (Tr. 527-528, 781-782). Outside of Ohio, the corporate campaign arose at a Buffalo Bills game, again because of Labatt's ties with that team and the Company, as well as the Women's World Cup in Canada. (Tr. 528).

2. Sixty Percent of Columbus Employees Sign a Petition to Decertify Local 284, but Settlement of Unfair Labor Practice Charges Require Continued Bargaining

The initial certification year for Local 284 ended February 15, 2014. (Tr. 529). On August 13, 2014, the Company received a petition for decertification from bargaining unit members with supporting signatures from 49 of the 82 members of the bargaining unit (approximately 60%). (Tr. 529-530). At the time, the Company withdrew recognition of Local 284 as the exclusive bargaining representative of its Columbus employees because it no longer enjoyed majority representative status. (Tr. 530).

Local 284 filed a ULP charge alleging an unlawful withdrawal of recognition, which was consolidated with other outstanding charges. (Tr. 532). All of them were resolved by an informal Board Settlement Agreement approved by ALJ Amchan in the first week of December, 2014. (Tr. 532-534; Joint Exh. 1, ¶ 4; Stip. Exh. 2). The relevant terms for purposes of this case are (1) the Company's agreement to recognize and negotiate with Local 284 through May 1, 2015, and (2) after May 1, the decertification petition would be unblocked and processed. (Tr. 533-535; Stip. Exh. 2).

3. Bargaining with Local 284 Resumes in January of 2015

Negotiations with Local 284 resumed on January 20, 2015. (Tr. 538). While negotiations in 2013 and 2014 had been between representatives for Local 284 and the Company, Local 284 was now joined by representatives from each of the other locals in Ohio with which the Company had a bargaining relationship, representatives from the Ohio Conference of Teamsters, and representatives from the IBT. (Tr. 538-540). The Company received the message: settle with Local 284 or suffer consequences throughout the State of Ohio. (Tr. 541). The Company was simultaneously negotiating with Locals 20 in Toledo, 293 in Cleveland, 377 in Youngstown, and 957 in Dayton, and all the Locals, the IBT, and the Ohio Conference of Teamsters insisted on being present at all of the other Locals bargaining meetings to reinforce that message. With the addition of so many other participants, negotiations were difficult to coordinate and schedule. (Tr. 542). Despite the hurdles, Mr. Brown met with the Locals approximately 25 times to negotiate the various CBAs. (Tr. 544).

Prior to commencing negotiations on January 20, Mr. Brown wrote a letter to Mr. Doll describing the status of negotiations when they ended in April, 2014. (Tr. 544, 554). The correspondence identified approximately 25 formal TAs that were reached and seven articles upon which conceptual agreement was reached in April, 2014, based on package proposals that had been exchanged. (Tr. 554-555). Mr. Brown also identified the three unresolved issues (wages, health care, and union security). (Tr. 555). Mr. Doll did not respond. (*Id.*).

At the bargaining meeting on January 20, Mr. Doll advised Mr. Brown that he would not recognize the conceptual agreements because they were part of package proposals. (Tr. 556). Because the parties did not agree to *all* the terms and contingent aspects of the packages, Mr. Doll maintained that Local 284 was free to revert to earlier bargaining positions. (Tr. 556-557). Although Mr. Brown felt that this was not productive to the negotiations, he recognized Mr.

Doll's right to modify or withdraw package proposals that had not been accepted in their entirety. (Tr. 557). Given Mr. Doll's position, the outstanding issues now included wages, health care, and union security as well as duration, grievance/arbitration, management rights, no strike/no lockout, and an entire agreement or zipper clause.[8] (Tr. 558-559).

The Company and Local 284 continued bargaining through the end of April. By April 29, 2015, most of these issues (if not all) remained unresolved. (Tr. 559).

4. Expiration of Other CBAs and a Tentative Agreement with Local 293

While negotiations with Local 284 continued, the CBA with Local 957 in Dayton expired on March 1 (Tr. 536), and the CBAs with Locals 20 and 293 in Toledo and Cleveland expired on April 1. (*Id.*). Each of these agreements was extended – in writing – to April 30, 2015. (Tr. 547-548; Stip. Exh. 5). As the Company began negotiating these agreements, a core objective was to ensure that Cincinnati (which had not expired), Dayton, and Columbus were not coterminous.[9] (Tr. 205-206, 350-351, 784).

In the third week of April, 2015, a TA was reached on a CBA with Local 293 in Cleveland. Internal rules and regulations of the IBT's beverage division required prior approval of a TA from the IBT before it could be submitted to the members for ratification. (Tr. 174, 549). In this case, the IBT did not approve the TA and allow the bargaining unit members to vote to ratify the CBA even though the local bargaining committee unanimously approved it.[10] (Tr. 548-549). Eventually, April 30 passed without a ratification vote and the Cleveland facility operated without a contract, despite this recommended TA. (Tr. 550-551). Without the no strike clauses

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[8] There may have been a few other outstanding issues. (Tr. 559).

[9] In fact, Cincinnati and Dayton had never been coterminous. (Tr. 784). With the Columbus facility now represented by Local 284, the Company sought to maintain staggered expiration dates for its largest facilities, which now included Columbus. (*Id.*).

[10] Mr. Doll contends that the IBT simply did not approve the TA rather than prevent the vote. This is a distinction without a difference. The IBT held up ratification (and no strike/no lockout protection for Heidelberg) in Cleveland to assert continued pressure on the Company.

present in the CBAs with Locals 20, 293, and 957, beginning May 1, the Company was vulnerable to a picket line and/or a strike. (Tr. 552).

5. Simultaneous Decertification of Local 377 in Youngstown

In Youngstown, the Company was negotiating another initial CBA with Local 377.[11] Local 377 was certified in October, 2013, to represent a bargaining unit of drivers only. (*Id.*). In October, 2014, a decertification petition was filed and an election was scheduled for December of that year. (Tr. 537). However, Local 377 filed a ULP charge the day before the election. (*Id.*). The election went forward, but the ballots were impounded. (*Id.*). Negotiations continued through March of 2015. (*Id.*). An additional ULP charge was pending, but ultimately dismissed. (*Id.*). The ballots were opened and counted on June 2, 2015. (*Id.*).

C. Negotiations Turn to Global Settlement and Contingent CBA with Local 284

1. April 17 Meeting

On April 17, Mr. Brown met Messrs. Doll and William ("Bill") Lichtenwald of the Ohio Conference of Teamsters for breakfast in Columbus. (Tr. 560). The men discussed the unresolved issues with Local 284, in particular union security. (Tr. 561). Mr. Lichtenwald was clear that, absent an agreement, the Ohio Conference of Teamsters would fight Heidelberg for union security, regardless of the viability of such a strategy. (Tr. 561). He specifically alluded to picket lines and a strike. (Tr. 562).

Later on April 17, the Company bargained with Local 284. Local 284 made a package proposal on all outstanding issues. (Tr. 563). Mr. Brown acknowledged that the proposal was the most meaningful and comprehensive since January. (*Id.*). However, General Counsel for Heidelberg, Brooke Hice, was not present at negotiations that day. (Tr. 564). Thus, Mr. Brown

[11] The negotiations with Local 377 included participants from all the other Locals and the IBT.

informed Local 284 that he would provide a response at their next meeting on April 29 after discussing the proposal with Ms. Hice. (*Id.*).

2. April 29 Meeting

During the next bargaining session on April 29, the Company responded to the package proposal made by Local 284 on April 17. Because the package contained union security, which the Company was not prepared to accept, the Company rejected the package. (Tr. 565). Despite the rejection, Mr. Brown recognized the viability of many pieces of the package proposal and decided to try to accelerate the bargaining process. (*Id.*). He unbundled the package and offered certain terms as standalone proposals in an effort to settle as many issues as possible with the goal of reducing the number of unresolved issues. (*Id.*). Local 284's acceptance of a number of the unbundled proposals resolved a number of outstanding issues. (*Id.*).

Also on April 29, a small committee representing Local 284 – Mr. Doll, Martin Jay (business representative for Local 20), and Mr. Verst (business representative for Local 1199 and co-chair of the Ohio Conference of Teamsters Beverage Council) – requested an off-the-record side-bar meeting with the Company. (Tr. 567-568, 785-786). Mr. Brown and Ms. Hice met with this group. (Tr. 569, 785-786). Local 284 proposed that it would agree to a consent election on the pending decertification petition if the Company included union security in a CBA in Columbus.[12] (Tr. 570-571, 786-787). At that time, Mr. Brown and Ms. Hice did not have the authority to agree to union security, but the Company's executive leadership team was meeting in the near future, so Ms. Hice promised to present the offer to that team.[13] (Tr. 571-572, 786-787).

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[12] Mr. Doll testified that the concept of a Global Settlement was raised during this meeting, but that assertion is incorrect. (Tr. 579-580, 789-790). That concept arose days later at the Company's executive leadership meeting and was first presented to Mr. Doll during a phone call with Mr. Brown in May.

[13] While the Company's negotiators were imbued with substantial authority on the issues, it was not unlimited and

The executive leadership team unanimously rejected the offer from Local 284 because it did not address the numerous other issues percolating throughout the State. (Tr. 573; 787). The executive leadership team would not agree to union security without resolving other issues existing throughout Ohio, such as the delay in the negotiations over contracts in Toledo, Dayton, and Cleveland because of issues in Columbus; the corporate campaign; and the dispute in Youngstown. (Tr. 574, 787). However, the executive leadership team authorized Mr. Brown to explore a settlement encompassing all of the outstanding, statewide issues. (Tr. 574-575, 788-789).

3. Phone Calls Between Brown and Doll Regarding Global Settlement

With this authority, Mr. Brown called Mr. Doll in mid-May. Mr. Brown relayed the Company's rejection of the Local 284 offer to exchange union security for a consent decertification election. (Tr. 576). Mr. Brown also suggested a Global Settlement encompassing all statewide issues. (*Id.*). Mr. Brown identified the Global Settlement issues: Local 284 contract issues; the corporate campaign; extensions for Locals 20, 293, and 957; resolution of the dispute with Local 377 regarding counting impounded ballots; and a ratification vote in Cleveland by employees represented by Local 293. (*Id.*).

On May 21, Mr. Doll and Mr. Brown again spoke on the phone regarding a possible Global Settlement. (Tr. 581-583; Resp. Exh. 3). They discussed the unresolved issues related to the CBA in Columbus. (Tr. 583-585). Mr. Doll agreed that the extension agreements, cessation of the corporate campaign, and a ratification vote in Cleveland would be acceptable. (Tr. 585-586). He also stated that he would attempt to secure the agreement of Local 377. (Tr. 585). While other contract terms with Local 284 remained, a Global Settlement appeared possible.

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discretionary. Mr. Brown and Ms. Hice had to obtain additional authority to accept a union security proposal. Moreover, Mr. Brown, as counsel, was not authorized to bind the Company unless he had obtained Ms. Hice's authorization.

4. May 26 Meeting

The next bargaining meeting was on May 26. At the outset of the meeting, the Company made a package proposal for a Global Settlement. (Tr. 588). The package proposal included the extension agreements with Locals 20, 293, and 957; the cessation of the corporate campaign; a vote for members of Local 293 on the TA in Cleveland; resolution of the outstanding issues with Local 377 in Youngstown to permit the counting of ballots; a consent election agreement directing a decertification election in Columbus for Local 284; union security in the CBA with Local 284; and proposed expiration dates for all the CBAs in Ohio.[14] (Tr. 588-590; Resp. Exh. 4).

Mr. Brown stated that the expiration dates were critically important and a core objective of the Company to ensure that contracts in Columbus, Dayton, and Cincinnati were not coterminous. (Tr. 591-592, 794-796; Resp. Exh. 5). Mr. Brown acknowledged that, given their smaller size and geographically separate locations, contracts in Toledo and Cleveland could be coterminous. (*Id.*). The proposed expiration dates were as follows: Columbus in 2017, Cincinnati in 2016 and 2020, Cleveland in 2019, Toledo in 2019, and Dayton in 2018. (Tr. 593-594; Resp. Exh. 4).

The package proposal contained a proposed contract with Local 284. (Tr. 595). Mr. Brown explained that the proposed CBA with Local 284 was contingent on the Global Settlement. (Tr. 595-596, 792).

The parties continued to exchange package proposals contingent on the agreement of all outstanding issues throughout the day. (Tr. 596-605, 797-803). Indeed, there was significant back-and-forth regarding staggered expiration dates in the context of the proposals to Local 284. While the Company initially proposed 2017 in order to keep Cincinnati, Dayton, and Columbus

[14] There were a few other items, but for purposes of this case, these were the relevant terms.

staggered, Local 284 countered with a November 2018, expiration. (Tr. 593, 597). The Company was forced to reject this proposal because it would cause the CBA to expire at the outset of the busy holiday season. (Tr. 597). Notably, however, the November expiration proposed by Local 284 acknowledged the Company's desire to maintain staggered expiration dates. (Tr. 597). As a compromise, the Company proposed an expiration of February 2019, which still staggered Dayton (2018), Cincinnati (2020), and Columbus and also provided the longer contract in Columbus that Local 284 sought. (Tr. 599-601). The proposals showed both sides' understanding of the need for staggered dates and represented the efforts they both made to achieve such staggered dates. Furthermore, the chief negotiators for Cincinnati, Columbus, and Dayton were all present on May 26 and were aware of the proposals. Therefore, the Company concluded that its objective of staggered dates was achieved and understood by all the Locals. By changing the proposed expiration date in Columbus to 2019, the Company accepted that the Toledo, Cleveland, and Columbus CBAs would have coterminous expirations, but maintained its core objective that its three largest facilities (Dayton, Cincinnati, and Columbus) not have contracts that expire in the same year. (Tr. 600, 801).

By the end of the day, only two issues remained – wages for Local 284 and the inclusion of Local 377 in the Global Settlement. (Tr. 604-605). The Company agreed to withdraw Local 377 from the Global Settlement if Local 284 accepted the Company's wage proposal. (Tr. 605). Local 284 agreed. (*Id.*). The meeting adjourned with Mr. Brown stating his intention to prepare a draft of the Global Settlement based on his understanding of the framework discussed on May 26. (Tr. 606, 608, 803-804).

No written proposals encompassing the Global Settlement or the entire CBA in Columbus were exchanged on May 26. (Tr. 606-607, 802-803). No agreement was reached and

no TAs were signed or initialed.[15] (Tr. 607, 804). Instead, the parties spoke in generalities and simply discussed the underlying principles of a possible agreement. (Tr. 606-607, 803). Given the contentious and complex nature of these negotiations, it was important to reduce all understandings to writing to ensure the parties were in agreement. (Tr. 607-608). As Mr. Brown testified, "the devil is in the details," so until the text was finalized, the agreement was not complete and any statement to the contrary was premature. (Tr. 608).

Nonetheless, later that day, the Union announced on its Facebook page that Local 284 and the Company reached a TA on a CBA in Columbus. (Tr. 608-609; GC Exh. 7). Ms. Hice was surprised at the announcement because the proposed CBA was tied to the execution of a Global Settlement, which was complex and not written. (Tr. 804-805). The Company, believing that there was no agreement regarding the CBA, felt it needed to clarify the negotiations. (Tr. 609-610, 805).

Two days later, the Company distributed a letter to its employees explaining why a TA was announced. (Tr. 610-611, 806; Stip. Exh. 6). The Company, knowing that a majority of its employees signed a decertification petition and did not want representation from Local 284, explained that the TA would also permit a decertification election to finally provide them the opportunity to vote on representation by Local 284. (Tr. 611-612, 806-807).

The details of the Global Settlement were not included in the letter as much of it involved other facilities. (Tr. 612, 807). Inclusion of the additional details would distract the employees in Columbus, and possibly alienate them if they believed their representation decision was being hijacked by other issues throughout the State. (*Id.*).

Furthermore, although the Company did not believe a TA existed, the letter used the term "TA" to describe the framework because that was the term Local 284 used and consistency made

[15] The Company provided written proposals on certain provisions of the proposed CBA with Local 284.

the letter easier to understand. (Tr. 613-614). Also, even though the Company knew the proposed CBA was contingent on the rest of the Global Settlement, it was optimistic they would reach a Global Settlement, rendering the distinction moot. (Tr. 614).

5. Brown Emails Draft of Global Settlement Proposal to Doll

On May 29, Mr. Brown sent a draft of the Global Settlement to Mr. Doll. Mr. Brown noticed a typographical error that misidentified a Local Union and sent a corrected document on June 3. (Tr. 614-616). The Company believed these drafts reflected the understandings reached at the May 26 meeting. (Tr. 615, 808). For example, Mr. Brown included the IBT as a party because he believed it was orchestrating the corporate campaign that would cease as part of the Global Settlement. (Tr. 617-619). Notably, both of these drafts, as well as every subsequent draft produced by both parties, contained language in Paragraph 1 identifying the contingent nature of the CBA with Local 284 in Columbus. Specifically, that paragraph stated, "[c]ontingent upon the complete satisfaction of all the terms of this Settlement Agreement the Company and Local 284 have entered into a tentative agreement for an initial Collective Bargaining Agreement, subject to the outcome of the decertification election in Case No. 09-RD-134933 which is currently pending[.]" (Stip. Exhs. 7 at ¶ 1 & 8 at ¶ 1). The Company included this language to be clear that the proposed CBA in Columbus was contingent upon the complete satisfaction of every term in the Global Settlement. (Tr. 808-809). From the outset, this contingency was expressly stated and undisputed by the parties. (Tr. 230-232).

6. Brown and Doll Disagree on Terms of the Global Settlement

Soon after Mr. Brown sent the corrected draft on June 3, it became apparent that the parties had not reached an agreement. On June 3, Mr. Doll responded, expressing the following disagreements with the draft: (1) the inclusion of Local 1199 and the IBT as part of the Global Settlement; (2) that the parties had not agreed to a date for a decertification election regarding

Local 284; (3) that Local 284 and the IBT could not agree to prohibiting future corporate campaign conduct without "significant revisions;" and (4) that the parties had not agreed to specific durations or expiration dates for the contracts in Dayton or Toledo. (Tr. 620-621; Stip. Exh. 9). Mr. Doll also stated that he was still reviewing the "proposed collective bargaining agreement," implying that it was just a proposal and not a TA. (Tr. 621; Stip. Exh. 9).

That same day, Mr. Brown replied to Mr. Doll's email. (Tr. 621; Stip. Exh. 10). Mr. Brown disagreed with Mr. Doll's assertion that Local 1199 was not a party to the proposed Global Settlement because Mr. Verst was present on behalf of Local 1199 and all parties knew the Company's stated core objective to avoid coterminous expiration dates, which necessarily implicated Local 1199 and its own CBA with the Company. (Tr. 205-206, 622-623). Mr. Brown reasonably believed Mr. Verst could act on behalf of Local 1199. (Tr. 624). Mr. Brown also reiterated the Company's proposed expiration dates throughout Ohio, demonstrating its core objective to avoid coterminous expiration dates in Cincinnati, Columbus, and Dayton. (Tr. 625; Stip. Exh. 10). Notably, Mr. Brown stated that his draft constituted the "Company's proposal for a 'Global Settlement'" and that differences as to language and mutual understanding could be resolved. (Stip. Exh. 10). However, he also noted that if Mr. Doll chose to completely disregard the Company's stated objectives for entering a Global Settlement and other core substantive terms as identified in his email, they would be unable to resolve the dispute in this manner.[16] (Stip. Exh. 10).

The next day, Mr. Doll responded noting his disagreement regarding Mr. Brown's Global Settlement proposal and summary of the May 26 events. (Tr. 625; Stip. Exh. 11). Such disagreements are compelling evidence that the parties failed to have a meeting of the minds on

[16] The question of whether or not the dispute could be resolved shows that there was no agreement.

May 26. Indeed, subsequent events and the parties' attempts to resolve their differences reinforce this fact.

7. June 8 Meeting

a. Proposals From Local 284

The parties did not discuss the Global Settlement further until their next bargaining meeting on June 8. This meeting was originally scheduled to negotiate the Local 957 contract in Dayton, but the discussion soon shifted to the Global Settlement proposals. (Tr. 626-627). Like the bargaining session on May 26, the parties exchanged drafts and proposals on the Global Settlement. To start the day, Messrs. Doll, Jay, and Verst met with Mr. Brown and Ms. Hice and provided Local 284's counterproposal on the Global Settlement. (Tr. 627-628, 813-814; Stip. Exh. 12; Resp. Exhs. 2 & 6). This counterproposal contained revisions to the substantive terms of the Global Settlement.[17] (Tr. 629-633). First, Mr. Brown noted that Locals 293 and 1199 were not included as parties. (Tr. 629). The counterproposal also removed language that Local 284 would not challenge the decertification petition in Columbus. (Tr. 631-632). Mr. Doll believed this language was unnecessary if Local 284 agreed to a Consent Election Agreement as directed by the Global Settlement. (Tr. 632). Mr. Brown wanted to ensure there were no loopholes to challenge the decertification election and was unsure at the time whether he could agree to the removal of that language. (*Id.*). As the decertification election was a key goal of the Company, this language was clearly substantive. Mr. Doll's proposal also removed specific expiration dates that created staggered contracts and a release that Mr. Brown had previously proposed. (Tr. 633).

[17] Mr. Jay asserted that there were no substantive revisions to the Global Settlement proposals after May 26, but a simple review of the draft proposals that were exchanged shows evidence to the contrary.

In the early afternoon, Mr. Doll emailed Mr. Brown another draft of the Global Settlement, which he described as "Local 284 draft SA."[18] (Tr. 635-636; Stip. Exh. 13). Mr. Doll had revised this document after his discussion that morning with Mr. Brown. (Tr. 636). Mr. Doll removed the IBT as a party, but declined to add Local 293 as Mr. Brown had requested. (Tr. 638).

Notably, Paragraph 1, which was drafted and proposed by the Company, contained explicit language regarding the contingent nature of the CBA with Local 284 and was unchanged. (Tr. 629, 814; Stip. Exh. 12; Resp. Exhs. 2 & 6). Significantly, Mr. Doll and Local 284 drafted and proposed adding the Execution Clause to the Global Settlement. (Tr. 814; Stip. Exh. 12 at ¶ 8 & Stip. Ex. 13 at ¶ 7). Local 284's proposed Execution Clause explicitly provides that the Global Settlement, "the Consent Election Agreement, the *contingent* Collective Bargaining Agreement between the Company and Local 284, the Extension Agreement between the Company and Local 20 and the Extension Agreement between the Company and Local 957 will be signed and become effective on the same date." (Stip. Exh. 13 at ¶ 7) (emphasis added). This language required and anticipated that there had to be a signed Global Settlement agreement before the terms of the CBA would become effective. (Tr. 814). This Execution Clause, modified only to add Local 293, remained in every subsequent draft proposal of the Global Settlement.

b. Brown Inquires Into Doll's Review of the Proposed CBA

Mr. Brown also inquired into the status of the proposed CBA with Local 284, as Mr. Doll previously represented that he had not finished his review. (Tr. 633-634). Mr. Doll still had not completed the review, but noted that there was no language regarding D.R.I.V.E., a Political

[18] Mr. Doll's description of this document as a draft shows that there was not a "meeting of the minds" on the Global Settlement.

Action Committee of the IBT, in the union security article.[19] (Tr. 634). Mr. Brown replied that the parties had not agreed to include language addressing a voluntary payroll deduction to D.R.I.V.E. (*Id.*). Mr. Doll replied that inclusion was necessary if the Company allowed other voluntary contributions to PACs. (*Id.*). Again, because this substantive language is absent (in fact, it was in dispute) there cannot be agreement on the substantive terms, which prohibits finding a meeting of the minds.[20]

c. Objections to Election Results in Youngstown Filed by Doll Influence Heidelberg's Counterproposal

While he was negotiating the Global Settlement on June 8, Mr. Brown was served with objections to the decertification election in Youngstown filed by Mr. Doll on behalf of Local 377. (Tr. 642-643). Heidelberg won the election five to two with one challenged ballot. (Tr. 642). The ballots were counted on June 2 and the objections were filed on June 5. (*Id.*). The Company previously removed Local 377 from its proposals regarding the Global Settlement because Mr. Doll represented that he did not have authority over the outstanding ULP and pending matters related to Local 377. (Tr. 643-644). In fact, he stated he did not represent Local 377. (Tr. 644). However, now there was a new fight in Youngstown *initiated by Mr. Doll.* (Tr. 644). As it was apparent that Mr. Doll represented Local 377, the Company – consistent with its goal to include all the relevant Locals in the Global Settlement – reinserted Local 377 into a counterproposal that Mr. Brown hand-delivered to Mr. Doll at 3:30 or 4:30 p.m. (Tr. 641, 644; Resp. Exh. 9).[21] The counterproposal also added Local 293 as a party and included language addressing extension agreements with Locals 20, 293, and 957. (Tr. 657).

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[19] Mr. Doll inconsistently testified that the draft proposal of the CBA in Columbus he received on May 29 comported to what he believed the parties agreed even though the D.R.I.V.E. language was not included. (Tr. 235).
[20] Mr. Brown later confirmed that the Company did allow such deductions, but the language in the proposed union security article was never modified to include D.R.I.V.E. as there was never an agreement on the CBA or the Global Settlement. (Tr. 721).
[21] At this point, Mr. Brown – according to notes taken by Mr. Doll's associate, Matt Crawford – actually told the

d. Doll's Verbal Counterproposal Includes Disagreement on Substantive Terms

Mr. Doll then provided a verbal counterproposal to Mr. Brown, which Mr. Brown noted on a copy of the proposal he hand-delivered. (Tr. 646). Local 284 proposed deleting Local 377 as a party. (Tr. 646; Resp. Exh. 9). It also deleted language requiring Local 284 (and the IBT)[22] to cease any and all communications to current or potential customers and suppliers or the general public (i.e., the corporate campaign) in the context of any decertification election campaign. (Tr. 647-648; Resp. Exh. 9 at ¶ 2). The Company initially included this language to prevent Local 284 and the IBT from using the decertification election campaign as an excuse to continue the corporate campaign. (Tr. 648). The Company rejected these counterproposals. (*Id.*).

The parties also disagreed as to the date through which the corporate campaign must cease – Local 284 proposed the date of the decertification election and the Company proposed the certification date of the decertification election results. (Tr. 651). Mr. Brown marked this disagreement with a star, highlighting it as a "high priority area of concern" – clearly identifying it as a substantive disagreement. (Tr. 651; Resp. Exh. 9 at ¶ 4).

A second star in that paragraph reflected Mr. Brown's concern that Local 284's request to add "all" and "in any way" to language regarding permitted decertification election campaign activities could be used as a loophole to otherwise continue the corporate campaign by claiming activities were related to the decertification election campaign. (Tr. 652; Resp. Exh. 9 at ¶ 4). Again, the star signified a significant substantive disagreement.

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group representing Local 284 in the sidebar that he "sensed that [they were] blowing up [the] global settlement." (Tr. 462-463; GC. Exh. 14).

[22] The note in Paragraph 4 of Respondent's Exhibit 9 addresses Local 284's representation that it could not direct the IBT to do anything, such as cease the corporate campaign, but could request such cessation. (Tr. 649-650, Resp. Exh. 9 at ¶ 4). Local 284 stated that such a request would be honored by the IBT. (Tr. 649-650).

e. Heidelberg Makes the Last Proposal on June 8

The Company provided the last counterproposal of the day at 5:17 p.m. (Tr. 654, 815; Stip. Exh. 14). The proposal corrected typographical errors in the prior draft and provided Heidelberg's response to Mr. Doll's verbal counterproposal. (Tr. 654). The Company also added language requiring Local 284 to request that the IBT cease the corporate campaign. (Tr. 655-656; Stip. Exh. 14 at ¶ 4). Specifically, Mr. Brown added language in Paragraph 4 regarding the cessation of the corporate campaign to not only suspend, but also refrain from initiating, all corporate campaign activities. (Tr. 649-650; Resp. Exh. 9 at ¶ 4; Stip. Exh. 14 at ¶ 4). Heidelberg again sought to close any loophole that allowed Local 284 and the IBT to cease existing corporate campaign activities but then start new activities.[23] (Tr. 650). The counterproposal also shows that the Company rejected Local 284's counterproposals regarding the "all" and "in any way" language related to the corporate campaign and the removal of Local 377 from the Global Settlement. (Tr. 656; Stip. Exh. 14). The meeting adjourned without an agreement. (Tr. 814-815). No TAs were signed or initialed.

8. June 19 Meeting

a. Local 284's Last Proposal for a Global Settlement

On June 19, the parties met again to discuss a contract with Local 957 in Dayton. Before commencing negotiations, Mr. Brown spoke to Mr. Jay and inquired about the status of the Global Settlement proposals. (Tr. 662). The Company had not heard from Local 284 regarding the Global Settlement since its proposal on June 8 and was not sure if a Global Settlement was still possible. (Tr. 659-660, 662, 816-817; GC Exh. 9). If not, Mr. Brown articulated the

[23] The specific terms of the cessation of the corporate campaign contained in the proposals were not addressed on May 26 when the framework of a potential Global Settlement was first discussed. (Tr. 650). In fact, because the framework was not written at that time, resolving the details of this issue would have been impossible. (*Id.*). Because ending the corporate campaign was a core objective of the Company, these proposals were clearly substantive. (*Id.*).

Company's concern about a potential work stoppage beginning on June 22 with July 4th holiday business looming. (Tr. 662-663; GC Exh. 9). Strike prevention measures, such as hiring security, could cost the Company approximately $700,000, which could reduce the funds available in bargaining negotiations.[24] (Tr. 399, 662-663; GC Exh. 9.). Extension agreements with Locals 20, 293, and 957, as part of the Global Settlement, would provide sufficient protection from a strike, but it appeared the Locals were stalling in order to engage in a work stoppage during Heidelberg's busiest season. (Tr. 663-664).

Soon after this conversation, Mr. Doll sent an email to Mr. Brown which provided an attached counterproposal on the Global Settlement. (Tr. 664; Stip. Exh. 15; Resp. Exh. 10). The email was described as "Local 284 Proposal SA June 19, 2015."[25] (*Id.*). The proposal from Local 284 made modifications to the last proposal from the Company, provided on June 8, which Mr. Brown noted on his copy of the counterproposal. (Tr. 665, 671; Resp. Exh. 12). Mr. Doll proposed a July 17 date to finalize a consent election agreement regarding the decertification election for Local 284. (Tr. 665; Stip. Exh. 15; Resp. Exhs. 10 & 12). Mr. Brown was unsure July 17 was realistic as it was less than a month away and noted on his copy that July 31 may be more realistic. (Tr. 674; Resp. Exh. 12).

In paragraphs 2 and 4, Local 284 rejected the Company's language regarding limits to, and the cessation of, the corporate campaign. (Tr. 666-667; Stip. Exh. 15; Resp. Exhs. 10 & 12). Specifically, Mr. Doll rejected (1) explicitly prohibiting campaign activities directed at current

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[24] Although Mr. Jay claimed the Company did not share any concerns regarding a strike, he also testified that Mr. Brown asked him on June 19 if the Company needed to call a security company as part of strike preparations, which would cost the Company about $700,000. (Tr. 397, 399). Mr. Jay said he did not know if it was necessary. (Tr. 399). Tellingly, Mr. Jay did not represent such expensive precautions were *not* necessary, maintaining the threat of a strike, which would have been a breach of the Global Settlement, had he truly believed there was an enforceable Global Settlement.

[25] This description shows that Mr. Doll and Local 284 did not believe there was a meeting of the minds regarding the Global Settlement at this time. They characterize the attachment as a "proposal," indicating that the offer was not yet accepted and no contract or agreement was finalized. Because the Company did not accept this (the final) proposal for a Global Settlement, no meeting of the minds ever existed.

and potential customers and suppliers in the context of the decertification election campaign, and (2) rejected language requiring Local 284 to "refrain" from corporate campaign activities (in addition to suspending them). (*Id.*). Mr. Doll also rejected the Company's proposal that the corporate campaign cease until the certification of the decertification election results and again proposed that the cessation only last until the date of the decertification election. (Tr. 676; Resp. Exh. 12). Mr. Doll again added language ("all lawful conduct" and "in any way") to broaden permissible election campaign conduct – additions the Company previously rejected because they created loopholes to continue the corporate campaign. (Tr. 667; Stip. Exh. 15; Resp. Exhs. 10 & 12). Given the importance the Company placed on the cessation of the corporate campaign – a core issue – these changes were unmistakably substantive. (Tr. 676-677).

Finally, Mr. Doll proposed extending the CBAs with Locals 20, 293, and 957 to July 17 and removed the Company's proposed automatic seven-day extension beyond the date of a decertification election for Local 284 if the election occurred after the extensions expired. (Tr. 667-668; Stip. Exh. 15; Resp. Exhs. 10 & 12). Although the proposal added Local 293 as a party, it also removed Local 377 as a party and any reference to the withdrawal of objections in that decertification case. (Tr. 665, 668; Stip. Exh. 15; Resp. Exhs. 10 & 12).

Mr. Brown advised Messrs. Jay and Doll that he would have to confer with Ms. Hice (who was traveling and not at the bargaining meeting) to review the proposal in an attempt to reach agreement on the remaining, unresolved issues.[26] (Tr. 668-669, 673, 679-680, 816). Mr.

[26] Messrs. Doll and Jay testified that Mr. Brown reviewed the proposal and stated he did not see any problems, but that "he had to run it by Brooke." (Tr. 89, 320). To the extent that Mr. Brown's testimony contradicts these accounts, it should be credited. Indeed, while Mr. Brown admits he needed to review the proposal with Ms. Hice, it is also undisputed that Mr. Brown identified substantive differences between the Company's June 8 and Local 284's June 19 proposals. (Tr. 668-669, 673, 679-680). But even if Messrs. Doll and Jay are credited and Mr. Brown said he had to "run it by Brooke," this statement alone demonstrates beyond doubt that Ms. Hice's approval was necessary for an agreement on the Global Settlement proposal. Even Mr. Jay recognized this fact later that day when he inquired as to Ms. Hice's review and threatened the viability of the CBA with Local 957 without an agreement on the Global Settlement. (Tr. 691-693, 736, 757-758). It is undeniably clear that everyone knew Ms. Hice needed to

Brown received an electronic version of the proposal from Mr. Doll at 12:08 p.m. and forwarded it to Ms. Hice at 12:17 p.m. (Tr. 668, 673; Stip Exhs. 15; Resp. Exhs. 10 & 11). Because he had not yet conferred with his client, Mr. Brown did not believe there was a meeting of the minds on the terms of a Global Settlement – in fact, he had noted substantive differences on his copy of the counterproposal that were not accepted. (Tr. 679-680; Resp. Exh. 12).

b. Negotiations With Local 957

The parties' collective attention then turned to the contract with Local 957. (Tr. 680). Negotiations were between Mr. Brown for the Company and Messrs. Doll and Jay for Local 957, who caucused with the Local 957 committee. (Tr. 681). Throughout the day's negotiations, the Company maintained its need for a 2018 expiration date in Dayton to avoid coterminous expiration agreements in Columbus, Dayton, and Cincinnati. (Tr. 681-682, 728-729, 752). Messrs. Doll and Jay maintained that Local 957 preferred a 2019 expiration date, to the point where they turned down a more lucrative CBA with a 2018 expiration date to continue fighting for a 2019 expiration. (Tr. 682). This position was suspicious to Mr. Brown as it was inconsistent with the bargaining unit members' best interest. (*Id.*). He believed the IBT or the Ohio Conference of Teamsters was manipulating the process in order to obtain coterminous expiration dates. (Tr. 682-683).

When Mr. Brown expressed this concern (even stating outright that he did not believe Mr. Doll), Mr. Doll responded that Mr. Brown would not have trouble obtaining a 2020 expiration date in Cincinnati with Local 1199. (Tr. 683-684). However, Mr. Doll also said he would deny ever making that statement. (Tr. 684). Mr. Brown replied that it would be a "considerable leap of faith" for him to accept such a representation when he could not repeat it,

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review the proposal. Therefore, there can be no meeting of the minds because Ms. Hice did not review the proposal until June 22, and she never agreed to it. (Tr. 821).

Mr. Doll would deny it, and there was nothing to bind Mr. Doll to that statement. (Tr. 684). Even if he did believe Mr. Doll that Cincinnati would agree to a 2020 expiration, Mr. Brown still did not believe Local 957 would act against its own self-interest. (*Id.*).

c. Local 957 Bargaining Committee Meets with Brown

Later in the day, Darrell Paschal, an officer and bargaining representative for Local 957, met with Mr. Brown regarding the duration of the contract in Dayton. (Tr. 685). Mr. Paschal stated his desire for a four-year agreement to expire in 2019. (Tr. 685, 753). Mr. Brown again expressed skepticism at Local 957's desires and questioned whether it was driven by the IBT because the three-year proposal provided a better economic package to employees represented by Local 957. (Tr. 685, 730-731, 753-754). Mr. Paschal became angry because he thought Mr. Brown was calling him a liar. (*Id.*). Soon after this exchange, Mr. Paschal and the Local 957 committee came to the Company's caucus room and insisted on a 2019 expiration, stating that they always had four-year agreements and were not concerned about the desires of Local 284 or the IBT. (Tr. 686-687, 754-755). They also said they were not willing to give up a four-year agreement because of what was happening in Columbus. (Tr. 686, 731-732, 754-755).

d. Expiration for Local 957 Changed to 2019

Mr. Brown and the Company's committee then consulted with Ms. Hice via phone. (Tr. 688, 733, 756, 819-820). Ms. Hice authorized a 2019 expiration for Local 957, but stated that the expiration with Local 284 would have to be changed to 2018 to accommodate the request.[27] (Tr. 688, 733, 756-757, 768-769, 820-821). Given her travels, she had not been able to review the counterproposal on the Global Settlement.[28] (Tr. 700-701, 818-819, 821).

The Company then met with the bargaining committee for Local 957 and agreed to an

[27] Ms. Hice did not care which agreement expired in 2018 and which expired in 2019 as long as they did not expire at the same time. (Tr. 688).
[28] Ms. Hice was unable to review this proposal until the following Monday, June 22. (Tr. 821).

expiration of 2019 for the contract in Dayton. (Tr. 689). Mr. Brown did not discuss with Local 957 the Company's position on the duration of the Columbus contract with Local 284. (Tr. 697-698). At that time, Mr. Brown was negotiating the contract with Local 957 – which was not part of the Global Settlement negotiations – and Local 957 had no authority to bind Local 284. (Tr. 697). Furthermore, Mr. Brown did not want to torpedo the negotiations with Local 957 by inserting the expiration of the Columbus contract into the discussions. In addition to the futility of introducing the term to a party with no authority to bind Local 284, Mr. Brown was concerned that Local 957 would allege that the Company bargained in bad faith by inserting a permissive subject of bargaining related to Local 284 into the Local 957 negotiations. (Tr. 697). Instead, in light of the changed circumstances regarding the expiration of the contract with Local 957, Mr. Brown decided to discuss the modified Columbus expiration with Messrs. Doll and Jay after presenting the Company's final proposal to Local 957 on their own contract. (Tr. 699-700).

The parties continued to discuss and resolve the details of the CBA with Local 957. (Tr. 689-690). During these discussions, Mr. Brown characterized the Company's proposal as "strike avoidance," which clearly alerted Mr. Doll and members of the Locals who were present that the Company believed a strike was realistic.[29] (Tr. 464). When the details were resolved, Mr. Brown then left to prepare the final proposal to Local 957. (Tr. 690).

e. Jay Threatens Viability of CBA in Dayton if Global Settlement Is Not Finalized

While Mr. Brown was preparing and printing the final proposal, Mr. Jay inquired as to the progress of the Global Settlement and whether or not Ms. Hice had had an opportunity to review the proposal. (Tr. 691-692, 736, 757-758). Mr. Brown replied that he had not discussed it

[29] Had there been a meeting of the minds on a Global Settlement, the contracts with Local 957, Local 20, and Local 293 would have been extended and there would be no possibility of a strike. Nobody disavowed Mr. Brown of his concern and for good reason – all the contracts had expired and a strike was a distinct possibility.

with Ms. Hice. (Tr. 693, 736, 758). Mr. Jay then threatened that there would be no CBA with Local 957 if there was no Global Settlement.[30] (Tr. 693, 736, 758-759). Based on this representation by Mr. Jay, Mr. Brown feared that the CBA with Local 957 could fall apart, that the IBT was in charge of the negotiations, and that there could be a strike as soon as Monday (3 days later). (Tr. 693). At this time, the IBT still had not permitted Local 293 to vote on their own TA and the parties had not agreed to contract extensions. (Tr. 693-694).

f. Brown Explains Risks of Coterminous Contracts to Local 957

Mr. Brown met again with the bargaining committee for Local 957, reviewed the final offer, and secured the committee's unanimous recommendation for ratification. (Tr. 694-695, 704). Brown advised Local 957 that having coterminous expirations for the contracts in *Dayton, Cleveland, and Toledo* was risky. Indeed, it had led to the very risks the Company faced during the 2015 negotiations, but he attributed these risks to the disputes in Columbus and Youngstown. However, he was confident the problems in Youngstown and Columbus would be resolved by 2019. (Tr. 695, 760-761, 768). Therefore, the Company was prepared to assume the risk of having *these three contracts* expire at the same time again in 2019.[31] (*Id.*).

g. Brown Revises Expiration of CBA Proposal in Columbus to Avoid Coterminous Expiration Dates

Mr. Brown then met with Messrs. Jay, Doll and Matt Crawford (an associate of Mr. Doll's) regarding the Company's modification to its contingent, package proposal regarding the

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[30] Mr. Jay testified that he pressed Mr. Brown to finish the Global Settlement at this time even though he also testified that the Global Settlement was completed on May 26. (Tr. 392-394). This inconsistent testimony demonstrates that Mr. Jay constructed his testimony to fit an outcome in an attempt to avoid the obvious and inescapable conclusion that there was no Global Settlement on either May 26 or June 19.

[31] The General Counsel may argue that Mr. Brown conceded on behalf of the Company that the contracts in Dayton, Columbus, Toledo, and Cleveland would all expire in 2019. This is clearly false as Messrs. Brown, Oakes, and Neece all testified he was referring to Dayton, Toledo, and Cleveland. Indeed, Ms. Hice had already advised Mr. Brown to change the Columbus expiration date to 2018 and, moments later, Mr. Brown advised Local 284 that the Columbus expiration had been changed to 2018. It is simply absurd to conclude that Mr. Brown was referring to a 2019 expiration date in Columbus, a statement for which he had no authority and which was directly contradicted by his actions *immediately* following his meeting with the Local 957 bargaining committee.

CBA in Columbus. (Tr. 699-700). As authorized by Ms. Hice, Mr. Brown modified the duration of the proposed CBA in Columbus to expire in 2018 instead of 2019 in view of the changed expiration of the contract with Local 957. (Tr. 700; Stip. Exh. 16). Mr. Brown noted that Ms. Hice was still reviewing Local 284's counterproposal on the Global Settlement, but that they had discussed expiration dates given the demands of Local 957's bargaining committee. (Tr. 700-701).

Messrs. Jay and Doll angrily responded that the Company could not modify the duration clause in the CBA with Local 284 because it was a TA (even though standing alone it was not signed, initialed, approved, or ratified). (Tr. 701). Mr. Jay accused Mr. Brown of reneging.[32] (*Id.*). Mr. Brown reminded Messrs. Jay and Doll that the CBA with Local 284 was contingent on the Global Settlement package proposal, which was clearly not agreed to, as evidenced by Local 284's counterproposal earlier that day. (Tr. 703, 705). All of the terms of the Global Settlement, including the Local 284 contract, were contingent on one another as part of a package, which could be modified in the context of that package.[33] (Tr. 705). Nevertheless, Messrs. Jay and Doll maintained that the alleged TA with Local 284 was separate from the package (despite explicit language in the Global Settlement stating otherwise). (Tr. 703, 705).

h. Meeting Ends Without Agreement and With a Threat of Strike

The meeting then adjourned.[34] Based on Mr. Jay's earlier assertion that there was no TA with Local 957 without a Global Settlement and the IBT's prior refusal to allow Local 293 to

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[32] This was the second time Mr. Jay made such an accusation. (Tr. 701-702). Moreover, the corporate campaign also had attacked Mr. Brown's integrity, reliability, and trustworthiness. (Tr. 702). Faced with another personal attack on his character, Mr. Brown became angry. (*Id.*).

[33] Significantly, Mr. Brown and Mr. Doll previously discussed the nature of package proposals in January, 2015, when *Mr. Doll took the position that package proposals could be modified and were not binding until accepted in their entirety and that parties could change positions or revert to earlier positions*. (Tr. 556-557).

[34] Mr. Brown returned to apologize to Messrs. Doll, Jay, and Crawford for his earlier angry outburst and there was a short discussion on the contingent nature of the CBA in Columbus on the Global Settlement and the need to speak to Ms. Hice. (Tr. 466-467, 704-705; GC Exh. 13).

conduct a ratification vote on its own TA, the Company believed that the IBT would continue to prevent ratification of the TAs with Locals 293 and 957. (Tr. 703-704, 708). Because the parties had not agreed to the Global Settlement, no extension agreements were in place, either. Thus, the Company was vulnerable to a strike at all locations in Ohio (except Cincinnati where a CBA was in effect). (Tr. 703-704, 708). The Company left the bargaining meeting preparing for a work stoppage. (Tr. 707, 738, 762-763). In fact, Dayton Operations Managers Terry Neece (wine division) and Brian Oakes (Anheuser-Busch division) discussed the possibility of an imminent strike in the parking lot with members of Local 957, including Mr. Paschal, who asked the Company to understand that the Dayton employees did not want to go on strike but that everything was being orchestrated by the IBT. (Tr. 740, 763-764). The Company committee informed Ms. Hice of the events that evening. Ms. Hice conducted a conference call with general managers in Ohio the following day about preparations for a work stoppage on Monday, June 22. (Tr. 821-823).

Clearly, no agreements on the CBA in Columbus or the Global Settlement were reached at this meeting and no TAs on such matters were signed or initialed.

D. Post-June 19 Correspondence and Actions Inconsistent with a Settlement

Despite the breakdown in negotiations on June 19, members of Local 957 ratified the Company's final offer on the morning of June 20. (Tr. 709; Stip. Exh. 17). Mr. Brown was told there would not be a picket line the following Monday, June 22, so the Company tabled its strike preparations, which had been ongoing. (Tr. 710). Consistent with its approach to Local 293 in Cleveland, Mr. Doll notified Mr. Brown on June 22 that although the bargaining unit voted to ratify the agreement, the IBT did not approve it, thus there was no contract with Local 957. (Tr. 710; Stip. Exh. 17). Significantly, if there had been a Global Settlement at that time, the IBT certainly would have had to approve the agreement with Local 957 as it had pledged to do with

the Local 293 agreement (or at least agree to an extension until approval was obtained).[35] Mr. Doll also highlighted that additional revisions were needed to complete the Global Settlement, as discussed by Messrs. Jay, Doll, and Brown on June 19. (Stip. Exh. 17).

On June 22, the corporate campaign continued as well.[36] (Tr. 710, 823). Local 284 distributed leaflets in the Short North district of Columbus specifically attacking Marcella's, a restaurant maintaining a business relationship with Heidelberg. (Tr. 823-825; Resp. Exh. 8). Again, this behavior was inconsistent with the proposed terms of the Global Settlement. If an agreement existed, these actions would have violated the Global Settlement and constituted a failure to satisfy the contingencies, preventing the proposed CBA with Local 284 from becoming effective. Moreover, had Local 284 actually believed a Global Settlement existed, the corporate campaign should have ceased. Indeed, Local 284 – knowing there was no Global Settlement – even sent Mr. Brown an email on June 22 asking the parties to "complete [the Global Settlement] based on the review [Mr. Brown, Mr. Jay, and Mr. Doll] performed on [June 19,]" acknowledging that an agreement was not reached and further review and revisions were necessary. (Stip. Exh. 17). To the contrary, if Local 284 believed a Global Settlement existed, Mr. Doll instead would have simply sent Local 284's June 19 proposal and asked Mr. Brown to sign and honor it.

Soon after the leafleting in Columbus, the IBT's corporate campaign reemerged with handbilling at the Women's World Cup in Canada on June 25. (Tr. 825-827; Resp. Exh. 13). Similar to the NHL All-Star Game in January of 2015, Labatt's, a Heidelberg supplier, was the

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[35] Additionally, there is no evidence that the IBT *ever approved* the alleged CBA in Columbus, which, according to its internal rules, means it cannot be an enforceable or binding agreement. (Tr. 174, 549). Mr. Doll's July 13 letter to Mr. Brown merely notified him that the alleged TA was ratified by members of the bargaining unit.

[36] It is important to note that this activity took place before there was any communication between the Company and Local 284 or the IBT on the status of the Global Settlement following the negotiations on June 19. Clearly, Local 284 and the IBT knew on June 22 that there was no meeting of the minds on a Global Settlement on June 19.

target. (Tr. 827). Like the leaflets in Columbus, such conduct clearly violated the terms of the proposed Global Settlement and prevented the enforceability of the contingent CBA.

While this corporate campaign continued, Mr. Doll and Mr. Brown exchanged emails on June 24 and June 25 regarding the breakdown of negotiations on June 19. On June 24, Mr. Brown expressed confusion as to Mr. Doll's characterization of the Global Settlement. (Stip. Exh. 18). Mr. Brown reiterated that Mr. Doll and the Locals were aware the Company would not agree to coterminous expiration dates and that Local 957's insistence on a 2019 expiration constituted changed circumstances that necessarily required Local 284 to receive a 2018 expiration. (*Id.*). He also expressed disbelief at Mr. Doll's position that package proposals were not subject to revision prior to overall acceptance, particularly in light of changed circumstances directly related to core bargaining objectives. (*Id.*). Furthermore, given the rejection of the 2018 expiration in Columbus, Mr. Brown concluded that further pursuit of a Global Settlement was futile. (*Id.*). After Mr. Brown indicated that there was no Global Settlement because Local 284 rejected the expiration date in Columbus, Local 284 never presented the Global Settlement to Mr. Brown or the Company for signature even though they maintain it was finalized and needed to be signed. Curiously, this draft was Mr. Doll's own proposal and was in his possession, but he never sent it to Mr. Brown requesting a signature.

Mr. Doll responded the next day, asserting that a TA on a CBA in Columbus was reached as early as May 26. (Stip. Exh. 19). However, Mr. Doll then discussed conversations on June 8 regarding the inclusion of Local 377 in the Global Settlement and language regarding the D.R.I.V.E. Political Action Committee in the CBA. (*Id.*). Mr. Doll further described the exchange of proposals on the Global Settlement through June 19. (*Id.*). These disagreements on key terms show that the parties could not have reached an agreement on the Global Settlement or

the CBA in Columbus. Mr. Doll finally addressed the issue of expiration dates and – despite repeated statements from the Company that expiration dates could not be coterminous – erroneously claimed that Mr. Brown's proposal to change the expiration in Columbus to 2018 was the first time the Company took such a position. (*Id.*).[37] Mr. Doll also sought information regarding needed modifications to the Global Settlement stating that Mr. Brown never identified any on June 19. (*Id.*). However, Local 284's June 19 counterproposal made substantive changes to the Company's last proposal presented on June 8 (Tr. 665-668; 676-677; Stip. Exh. 15; Resp. Exh. 10 & 12) and Ms. Hice was not present for the June 19 meeting to review or approve the substantive changes. (Tr. 668-669, 673, 679, 816). Therefore, Mr. Brown neither accepted nor rejected the counterproposal. His silence cannot be interpreted as acceptance, particularly where so many substantive terms changed.

Mr. Brown sent a letter to Mr. Doll on July 2, again noting Mr. Doll's illogical and inconsistent position on package proposals, specifically regarding the right to modify the April 2014, packages. (Stip. Exh. 20). Mr. Brown stated that Mr. Doll's previous position was correct, but completely opposite of his current position. (*Id.*). Mr. Brown then proceeded to discuss the bargaining history since April 29, highlighting the contingent nature of the Columbus CBA and the Company's decision to modify the expiration date as part of the overall Global Settlement package. (*Id.*).

E. Local 284 Ratification Vote and Related Communications

Despite the contingent nature of the CBA and Mr. Brown's representations in his July 2 letter, Local 284 announced plans to hold a ratification vote on July 11 regarding the TA allegedly reached on May 26. (Stip. Exh. 21). On July 9, as soon as it learned of the planned vote, the Company sent a letter to its Columbus employees to explain that there was no TA.

[37] See footnote 33, *supra*.

(Stip. Exh. 22). The letter explained that the parties thought they had negotiated an "overall settlement on a number of issues" (i.e., the Global Settlement), but that the overall settlement agreement fell apart. (*Id.*). The Company further explained that the Global Settlement included a promise from Local 284 that the employees could finally vote in a decertification election, but, at the time of their July 11 ratification vote, there was no such promise and no offer from Local 284 to agree to a consent election. (*Id.*). The Company then clarified that the TA Local 284 planned to present on July 11 was not agreed upon by the Company or even proposed by the Company (because it was cherry-picked from the package proposal). (*Id.*). Thus, even if accepted, the alleged TA would not be effective.

That same day, Mr. Brown sent another letter to Mr. Doll, essentially providing the same clarification. (Stip Exh. 23). He explained, consistent with the language of the proposals of both the Company and Local 284, that the alleged TA was contingent on the Global Settlement. (*Id.*). Because the negotiations over the Global Settlement broke down, there was no TA between the Company and Local 284 upon which to base the July 11 vote. (*Id.*). Mr. Brown then admonished Mr. Doll for attempting to misrepresent the Company's position, bargaining history, and the status of negotiations to "craft a tentative agreement out of thin air." (*Id.*). Mr. Brown explained that if employees voted to ratify the improperly characterized TA, it would not form the basis of a contract and would not create a binding obligation on the Company. (*Id.*). Mr. Brown attached the Company's April 29 proposal to Local 284, the last standalone proposal that was unencumbered by any of the contingencies contained in the Global Settlement, to clarify the Company's position.[38] (*Id.*).

[38] Assuming Local 284 presented what it considered the TA from May 26 to the bargaining unit members, as prepared by Mr. Brown, it did not include D.R.I.V.E. language that Mr. Doll fought to include in the alleged CBA in June. (Tr. 235, 634, 721).

Despite these clarifications by the Company, Local 284 held the ratification vote anyway. Mr. Doll emailed Mr. Brown on July 13 to inform him that the bargaining unit voted to accept the mischaracterized "May 26, 2015 tentative agreement." (Tr. 712-713; Stip. Exh. 24). He also stated that Local 284 was willing to enter into a consent election agreement on the pending decertification petition in Columbus "as soon as Heidelberg signs the agreement[.]"[39] (Stip. Exh. 24). Mr. Doll then attempted to coax Mr. Brown into a post hoc agreement in which Local 284 would consent to the decertification election in exchange for the Company's agreement to not fight the viability of the allegedly "ratified" TA with Local 284. (*Id.*). Essentially, Mr. Doll re-proposed Local 284's April 29 offer of union security in exchange for a consent agreement on a decertification election – a position the Company rejected in May.[40] (Tr. 713; Stip. Exh. 24).

On July 16, Mr. Brown responded to Mr. Doll's email. (Stip. Ex. 25). Mr. Brown reiterated that there was no agreement on a TA in Columbus. (*Id.*). Without agreement on the Global Settlement, the contingent CBA could not survive. (*Id.*). He then informed Mr. Doll that he considered the July 13 email to be another proposal, separate from the Global Settlement negotiations, which he rejected. (Tr. 713; Stip. Exh. 25). Mr. Brown also stated that the Company was no longer interested in negotiating a Global Settlement or coupling a consent election agreement on the pending decertification petition with future proposals for a CBA with

[39] This demand reverses the proposal presented in the Execution Clause of the Global Settlement. That paragraph, when read with the contingency language in Paragraph 1, stated that the *Global Settlement* would become effective on the date it was signed. One of the terms of the Global Settlement included the Consent Election Agreement, which, according to the Execution Clause, must be signed before it became effective. Neither the Consent Election Agreement nor the Global Settlement agreement were ever finalized or signed. Thus, the contingency language of Paragraph 1 was never triggered and the CBA with Local 284 was never effective. To require the Company to sign the alleged CBA with Local 284 prior to the signing of the Consent Election Agreement or the Global Settlement obligates the Company to honor subsequent conditions prior to satisfaction of the conditions precedent in the Global Settlement. Such a result warps general principles of contract law and renders conditions precedent meaningless.

[40] In fact, this rejection is what led to the beginning of the Global Settlement negotiations. Heidelberg's executive leadership team unanimously rejected this proposal. Ms. Hice also testified that the Company would never accept that exchange. (Tr. 810). Not only did Mr. Brown lack the authority to accept this proposal, Ms. Hice, as Vice President and General Counsel for Heidelberg, was not authorized to accept union security without a Global Settlement. (Tr. 793, 810). Because the proposal was already rejected, Mr. Doll's email can only be described as an offer and not the formation (or reminder) of a contract.

Local 284. (Stip. Exh. 25). Mr. Brown (again) resubmitted the Company's proposals from April 29, 2015, prior to the commencement of Global Settlement negotiations. (*Id.*). Mr. Brown asked Mr. Doll to notify him when Local 284 would be prepared to resume those negotiations. (*Id.*). Mr. Doll never responded.

III. LAW AND ARGUMENT

There are a number of reasons why there is no binding CBA between the Company and Local 284. First, the facts show that there was no meeting of the minds between the parties on the proposed CBA and the proposed Global Settlement. Second, even if there was a meeting of the minds on these two proposals, the CBA was contingent on satisfaction of the terms of the Global Settlement, which were never satisfied. Finally, if the CBA was proposed as a standalone agreement independent of any Global Settlement, the Company could still withdraw from the TA or modify the proposal prior to acceptance or ratification by the bargaining unit.

A. There is No Meeting of the Minds on the Contingent CBA or the Global Settlement

The crux of this case is whether or not the parties came to a "meeting of the minds" on the CBA in Columbus *and* the Global Settlement.[41] Because the proposals on both were reduced to writing, there are only two possible outcomes: either (1) there is an agreement on the alleged Global Settlement that unambiguously required satisfaction of the terms of the Global Settlement to render the contingent CBA effective, and those terms were never satisfied; or (2) the terms of the Global Settlement are ambiguous and a meeting of the minds cannot be established. Either way, there can be no agreement on either a CBA in Columbus or a Global Settlement.

[41] Given the contingent nature of the alleged CBA in Columbus and the package proposal of which it was a part (the Global Settlement), a meeting of the minds regarding the terms of the CBA would not result in a binding contract without a corresponding meeting of the minds on the Global Settlement. Moreover, pursuant to the terms of the Global Settlement, the CBA would not go into effect until all terms of the Global Settlement were "satisfied."

A "meeting of the minds" is based on the objective terms of the contract, not the parties' subjective understanding of those terms. *Crittenton Hosp.*, 343 NLRB at 718; *Windward Teachers Association*, 346 NLRB at 1150; *MK-Ferguson Co.*, 296 NLRB 776 fn.2. The subjective understandings – or misunderstandings – of the meaning of the terms in an agreement are irrelevant to whether or not a "meeting of the minds" exists provided the terms themselves are unambiguous as "judged by a reasonable standard." *Hempstead*, 341 NLRB at 323; *Vallejo Retail*. 243 NLRB at 767. When the terms of a contract are ambiguous and the parties attach differing meanings to those terms, a "meeting of the minds" cannot be established. *Hempstead*, 342 NLRB at 322. When parties differ in their understanding of ambiguous terms for which neither or both parties are to blame, their facially apparent agreement will not create a contract. *Hempstead*, 342 NLRB at 322-323; *Meat Cutters*, 154 NLRB at 26-27.

Local 284 claims that the Company violated §8(a)(5) of the NLRA when it refused to sign an initial CBA with Local 284. However, the obligation to sign a CBA only arises if the parties had a "meeting of the minds" on all substantive issues and material terms of the agreement. *Crittenton*, 343 NLRB at 718; *Windward Teachers*, 346 NLRB at 1150; *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). Moreover, in a case like this where the alleged agreement is reduced to writing, Counsel for the General Counsel bears the burden of showing not only that a "meeting of the minds" exists, but also that the document the company refused to sign accurately reflects the agreement. *Windward Teachers*, 346 NLRB at 1150; *Crittenton*, 343 NLRB at 718. Here, there are two agreements that must meet this standard – the CBA in Columbus and the Global Settlement. If there is a meeting of the minds on the terms of the CBA, it is still contingent on the Global Settlement and is not effective without a meeting of the minds on the latter.

If the Judge determines that the written proposals on the contingent CBA and Global Settlement are unambiguous, then they clearly establish the contingent nature of the CBA, which requires satisfaction of all the terms in the Global Settlement before becoming effective. Paragraph 1 of the Global Settlement explicitly states "*[c]ontingent upon the complete satisfaction of all the terms of this Settlement Agreement* the Company and Local 284 have entered into a tentative agreement for an initial Collective Bargaining Agreement, subject to the outcome of the decertification election in Case No. 09-RD-134933[.]" Further, the Execution Clause requires signatures on the following documents for them to become effective: (1) the Global Settlement; (2) the Consent Election Agreement regarding Local 284 and the decertification election in Case No. 09-RD-134933; (3) the contingent CBA between the Company and Local 284; and (4) extension agreements with Locals 20, 293, and 957. It is undisputed that the terms of the Global Settlement were never satisfied and that these enumerated documents never became effective because they were either never drafted or never signed. Moreover, the corporate campaign continued. Thus, any reasonable reading of the documents shows that they were never finalized or satisfied in a manner that would render either the CBA or the Global Settlement binding on either party. In the alternative, if the terms of the Global Settlement are ambiguous, there cannot be a meeting of the minds.

As the Company has consistently maintained, negotiations on the CBA with Local 284, contingent upon the agreement and complete satisfaction of all the terms outlined in the Global Settlement, were largely resolved. In fact, by June 19, the parties "were able to resolve every issue except for Duration – including Union security." (GC Exh. 17, p. 8). However, a number of substantive terms contained in the Global Settlement proposals were still being negotiated on

June 19 as evidenced by the differences between the Company's last proposal on June 8 and Local 284's counterproposal on June 19 as follows:

Heidelberg's June 8 Proposal (Stip. Exh. 14)	**Local 284's June 19 Proposal (Stip Exh. 15)**
Included language requiring Local 284 and the IBT to not only "suspend" but also "refrain" from corporate campaign activities. (Tr. 649-650).	Rejected addition of "refrain." (Tr. 666-667).
Included language that prohibited directing corporate campaign activities at current or potential customers and suppliers, and the general public. (Stip. Exh. 14 at ¶ 4).	Rejected prohibition on corporate campaign activities directed at potential customers and suppliers of the Company in the context of the decertification election. (Tr. 666-667).
Rejected "all lawful conduct" and "in any way" language that broadened permissible conduct in the context of the corporate campaign. (Tr. 656).	Resubmitted the rejected "all lawful conduct" and "in any way" language. (Tr. 667).
Directed cessation of corporate campaign activities until resolution of the decertification process and certification of the decertification election results. (Stip. Exh. 14 at ¶ 4).	Directed cessation of corporate campaign activities until the date of the decertification election. (Tr. 676).
Added Local 293 and Local 377. (Tr. 656).	Rejected addition of Local 377. (Tr. 665, 668).

Counsel for the General Counsel will attempt to eliminate these obvious substantive differences by maintaining that the Company tacitly accepted those substantive changes after they were proposed on the morning of June 19. Counsel for the General Counsel offered no evidence that the Company accepted that proposal. In fact, Ms. Hice was not present and unable to review the proposal, Mr. Brown told Local 284 that he had to review the proposal with Ms. Hice, and Mr. Jay maintained that there was no agreement with Local 957 without a Global Settlement, indicating his personal understanding that the Global Settlement was not resolved. (Tr. 668-669, 673, 679-680, 691-693, 736, 757-759, 816), Nonetheless, Mr. Jay testified that he believed the Company agreed to the June 19 proposal because – after Mr. Brown stated he had to

review the proposal with Ms. Hice – Local 284 did not hear anything from him for the rest of the morning. (Tr. 320).

Faced with those obvious and substantive material differences, Local 284 attempted at the hearing to prove the differences had been resolved. Counsel for the General Counsel's case is necessarily contingent on the Global Settlement. Therefore, he will argue that the parties reached a TA on the contingent CBA in Columbus on May 26 and reached an alleged meeting of the minds regarding the Global Settlement on the morning of June 19 – prior to the Company's proposal to change the duration of the CBA in Columbus. There is no evidence to support this conclusion other than Mr. Jay's self-serving testimony that the Company agreed to the June 19 proposal by failing to voice any concerns *for the rest of the morning*. (Tr. 320). The record shows that Ms. Hice was not available to review the proposal that morning. In fact, she was not able to do so until the following Monday. (Tr. 821). Mr. Brown also represented that he would have to confer with Ms. Hice before responding to the proposal, and even told Mr. Jay later that evening that he had not spoken with her regarding the proposal. (Tr. 668-669, 673, 679-680, 691-693, 736, 757-758). Moreover, although the Company did not respond to the proposal in full, it did provide a counterproposal *that evening* when it proposed the 2018 expiration in Columbus. (Tr. 700; Stip. Exh. 16).

Furthermore, while witnesses for the Company maintain no meeting of the minds was ever reached, witnesses for Local 284 disagree on when the alleged meeting of the minds on the Global Settlement occurred. Mr. Doll claimed that the parties agreed to the Global Settlement on June 19. (Stip. Exh. 19). However, Mr. Jay adamantly testified agreement was reached on May 26 – prior to any draft of, or written notes regarding, the Global Settlement (which required execution of the written document to become effective). (Tr. 362-363). Moreover, Mr. Jay could

not even bring his own mind into agreement as he also testified that the parties agreed to a Global Settlement on April 29 – *before the concept of a Global Settlement was first raised* at the Company's executive leadership meeting. (Tr. 363-364, 574-575, 788-789). Mr. Jay also testified that he told Mr. Brown he wanted the Global Settlement completed on June 19, which (1) shows there was no agreement and (2) is the third different day he identified. (Tr. 393).

B. Fundamental Contract Principles Prevent Finding the Formation of a Contract

Longstanding principles of contract law prevent finding agreement on the contingent CBA in this case. First, the CBA was part of a package proposal that was not accepted – Local 284 cannot cherry-pick favorable terms and ignore the rest of the package. Second, the conditions precedent in the Global Settlement were never satisfied which prevents finding the contingent CBA enforceable. Third, a company can legally modify a proposal or withdraw from an alleged TA prior to acceptance or ratification by the bargaining unit.

1. The Nature of Package Proposals Prevents Local 284 From Accepting Select Provisions Without Accepting the Entire Package

The explicit language included in the Global Settlement proposal clearly states that the CBA in Columbus is contingent upon complete satisfaction of the terms of the Global Settlement. Thus, the proposed CBA in Columbus was part of the larger package proposal that was encompassed by the Global Settlement. The alleged CBA cannot stand alone without the rest of the Global Settlement – such is the nature of package proposals.

Longstanding Board precedent supports the principle that a party may package terms (mandatory and non-mandatory) and that such terms cannot be removed from the package and accepted in isolation. The packaged terms, "as a function of cost, bear upon" the other terms of the proposal. *Good GMC, Inc.,* 267 NLRB 583, 584 (1983); *Nordstrom, Inc.*, 229 NLRB 601, 601 (1977). In other words, by packaging the terms in a contingent proposal, a party "is merely

indicating the substance of what it is willing to offer ... if a particular [term] is included." *Community Television of Southern California*, 312 NLRB 15 (1993) (explaining *Good GMC*). No agreement is reached where one party selectively accepts parts of a package proposal. *Good GMC*, 267 NLRB at 584. A union is "not entitled to pick and choose those contract proposals which [suit] its needs and demand execution of a collective-bargaining agreement limited to those proposals." *Id.* Thus, a party cannot violate §8(a)(5) of the Act by refusing to execute an alleged agreement that cherry-picks desirable portions of a package proposal. *Id.* at 584-585.

Rather, when a party attempts to remove portions of a package proposal from the table, that party cannot accept the package it revised. *Nordstrom* at 601-602. The opposing party cannot disregard portions of a package proposal, accept the remaining terms from the package, and create a binding CBA that the offeror is required to execute. *Aztec Bus Lines, Inc.*, 289 NLRB 1021, 1024 (1988). Instead, such "acceptance" is more accurately described as a counteroffer to the package which the offeror is not required to accept.[42] *Id.*at 1023. Instead, once the disagreeable terms are removed, the proponent of the original package is permitted to alter its proposal in light of the removed terms. *Nordstrom* at 601; see also *Aztec*, 289 NLRB at 1024.

This case is nearly identical to the cases discussed above. Heidelberg made a package proposal (the Global Settlement proposal) that included the proposed CBA in Columbus. By the explicit terms of the Global Settlement package, the CBA in Columbus was contingent upon satisfaction of the Global Settlement the Company proposed on June 8. Local 284 did not accept that proposal but submitted its own package proposal on June 19. The Company never accepted that proposal but offered a partial counterproposal on the duration of the CBA in Columbus.

[42] In fact, the Board in *Aztec* stated that the union and its attorney "*could not in fact have held a good-faith belief*" that the parties reached an agreement upon the differing terms. *Aztec*, 289 NLRB at 1023 (emphasis added).

However, by asserting that a binding, enforceable CBA exists in Columbus, Local 284 is now attempting to accept the CBA separate and apart from the package proposal and without agreeing or adhering to the remaining terms of the Global Settlement. Thus, this case falls under the well-established principles set out in *Good GMC* and *Nordstrom*, which prevent finding an enforceable CBA that was cherry-picked from a contingent, package proposal.

As contemplated in those cases and expressed by the Company, the terms of the CBA in Columbus would have differed if negotiated in isolation without the other terms of the Global Settlement. On April 29, Local 284 initially offered decertification in exchange for union security in Columbus. This offer was rejected by the Company in May. The Company responded that it was only willing to accept union security in Columbus in exchange for decertification if it could resolve other state-wide issues including the corporate campaign and extension agreements to avoid a strike. By isolating the CBA in Columbus, Local 284 is attempting to accept select terms of the package that would not have been offered in that context and in fact had been rejected. Consistent with Board precedent and Mr. Brown's own communications to counsel for Local 284 on July 16, 2015, Local 284's actions are accurately described as a counterproposal, which Mr. Brown rejected. (Stip. Ex. 25).

Moreover, if Local 284 could pull the contingent CBA out of the Global Settlement and accept it as a standalone contract proposal (which was never actually made), the Company would not receive any consideration or benefit – the extension agreements, cessation of the corporate campaign, a ratification vote for Local 293, resolution of issues with Local 377 – that provided the basis for the Company's willingness to agree to union security in Columbus. Simply put, Local 284 is trying to extract a CBA in Columbus that contains union security without providing

the consideration proposed by the Company in its last proposal dated June 8 to make union security acceptable to the Company.

2. Because the Conditions Precedent in the Global Settlement Were Never Satisfied, the Contingent CBA with Local 284 Is Not Effective

According to the explicit terms of the Global Settlement proposal, the CBA in Columbus was contingent upon the complete satisfaction of all the terms of the Global Settlement. Few, if any, of the terms of the Global Settlement were ever satisfied. Therefore, the CBA in Columbus was never effective or enforceable.

The Board will not alter or remove a condition precedent which was agreed to but not satisfied when it otherwise prevents the formation of an enforceable agreement. *Kent Engineering, Inc.*, 180 NLRB 86, 89 n.6 (1969) (citing *Brotherhood of Painters, Decorators and Paperhangers of America, Local 850*, 177 NLRB 155 (1969)). In *Kent*, an employer and a union agreed to a new CBA upon satisfaction of a condition precedent that the employer would be absolved of any obligation in a related lawsuit. *Id.* at 88. The condition precedent was not met because the employer was not absolved of $315 in attorneys' fees in that lawsuit. *Id.* The Board found that the employer did not violate §8(a)(5) by refusing to sign the CBA because the condition precedent was never satisfied. *Id.* Although the Board acknowledged that it was "unwise" for the union to agree to such a condition, there was no basis to nullify it. *Id.* at 89. Moreover, the Board determined that finding a violation of §8(a)(5) under these facts would require it to alter the agreement of the parties, which would constitute an inappropriate exercise of its power under the Act. *Id.* The only means for removing a condition precedent is through further bargaining, not Board action. *Id.* at 89 n. 6. Because the condition precedent was not met, the employer was not legally bound by the terms of the contingent CBA. *Id.*

Following *Kent*, it would be an inappropriate exercise of Board power to find and enforce a CBA in Columbus. Such a finding would ignore the condition precedent contained in the Global Settlement proposal. Thus, even if the ALJ finds that the parties agreed to the terms of the CBA in Columbus *and* the terms of the Global Settlement, there is still no binding, enforceable CBA in Columbus because the express terms of the Global Settlement include conditions precedent and it is undisputed that these conditions were not satisfied.

3. Principles of Contract Law Permit a Party to Modify or Withdraw a Tentative Agreement Prior to Acceptance

Counsel for the General Counsel will likely argue that there was a CBA in Columbus on May 26 contingent on a Global Settlement, which was allegedly agreed to on June 19. The Company maintains that this position is unsupported by the evidence in the record. However, even if Counsel for the General Counsel is correct, the CBA in Columbus was subject to ratification by the bargaining unit members and approval by the IBT pursuant to the IBT's internal rules. (Tr. 174, 549). Until both ratification and approval occurred, there was no enforceable CBA in Columbus.[43] Thus, even if Heidelberg had a TA on an initial contract in Columbus with Local 284, the Company was entitled to modify the TA in the face of changed circumstances. Furthermore, the Company was entitled to withdraw the TA prior to ratification by the bargaining unit.

[43] In fact, the IBT's position in Cleveland regarding the TA with Local 293 proves that the CBA in Columbus could not be binding under the IBT's own rules. With regard to Local 293, the Company and Local 293's bargaining committee agreed to the terms of the CBA and the bargaining committee recommended ratification. However, the IBT prevented Local 293 from holding a ratification vote by declining to approve the TA. Because no extension agreement was in place and the TA was not approved or ratified, it was not enforceable and the Company could not benefit from the TA's no strike/no lockout provision. Thus, even though there was a TA present, the Company was vulnerable to a strike in Cleveland because that TA was not enforceable. Counsel for the General Counsel's position that the Company could not modify or withdraw from the TA in Columbus prior to approval or ratification is completely opposite of the position the IBT took with regard to the same scenario in Cleveland. Both positions cannot be correct and Counsel for the General Counsel's position here contradicts the IBT's internal rules and past practice.

a. Changed Circumstances and Good Cause Justify a Party's Modification of a Tentative Agreement

Changed circumstances in Dayton required a modification of the expiration of the alleged CBA in Columbus. Where circumstances change during the bargaining period, the Board has allowed parties to withdraw from TAs to reflect those changes. In *Food Service Company*, 202 NLRB 790, 803 (1973), an employer retained outside counsel to negotiate on its behalf after beginning negotiations for a new CBA and agreeing to a number of TAs. On the advice of the newly retained counsel, the employer withdrew from two TAs that could restrict the future sale of the company and the company's current operating procedures. *Id.* The Board recognized the plausibility of the company's decision to withdraw from the TAs – newly received advice of counsel not available when the TAs were initially accepted – and found that the withdrawals did not evidence a lack of good faith bargaining. *Id.*

In *Olin Corp.*, 248 NLRB 1137, 1141 (1980), lengthy negotiations and an imminent work stoppage justified an employer's decision to withdraw from TAs as it prepared for the work stoppage on the basis of changed circumstances regarding the bargaining relationship and the employer's operations. In that case, an employer re-staffed its facility after failing to reach a CBA, but the new workforce expressed concern over joining the union. *Id.* To placate its new employees, the employer withdrew from a TA on union security the day before a scheduled ratification vote. *Id.* No agreement had been reached and ratification had not yet occurred. *Id.* The Board found that the withdrawal and a refusal to bargain about the withdrawal did not violate §8(a)(5). *Id.*

In this case, the contingent nature of the Global Settlement package proposals necessitated some give-and-take regarding proposals with the various Locals, in particular regarding the expiration dates of the CBAs. It is undisputed that the Company's main bargaining

objective was that the CBAs in Cincinnati, Dayton, and Columbus not be coterminous. (Tr. 205-206, 350-351). Consistent with this objective, Heidelberg originally proposed a 2018 expiration date in Dayton and a 2019 expiration in Columbus (Cincinnati expired in 2016 and, presumably, 2020). However, when it agreed to Local 957's proposal for a four-year agreement in Dayton to expire in 2019, the expiration date for the proposed CBA in Columbus had to be changed to 2018. In fact, when the Company's bargaining committee discussed the issue with Ms. Hice, she explicitly stated that Dayton could only have a 2019 expiration if Columbus expired in 2018. (Tr. 688, 733, 756-757, 768-769, 820-821).

Any alleged ambiguity in how this message was initially relayed to the Locals and the IBT does not outweigh the fact that they knew Heidelberg would not agree to coterminous contracts.[44] Thus, when the bargaining committee in Dayton bargained for a 2019 expiration date, the only logical consequence was that the CBA proposed to Local 284 in Columbus would necessarily reflect that move and expire in 2018 – a fact Mr. Brown communicated to Local 284 immediately after Local 957 agreed to recommend the Company's final proposal that included a 2019 expiration in Dayton.[45]

Therefore, even if the Judge finds a TA existed regarding the CBA in Columbus, Board law prevents finding an enforceable agreement. The TA Local 284 ratified contains the 2019 expiration date. Where good cause exists, parties are free to modify or withdraw from TAs prior to acceptance or ratification. Here, prior to acceptance by Local 284 as part of the Global

[44] In fact, if Local 284 is arguing that Mr. Brown decided to forego coterminous contracts, such a decision was not authorized by the Company. Where counsel for a party negotiates beyond his or her granted authority and notifies the opposing party prior to ratification or acceptance, the party does not violate 8(a)(5) because the withdrawal from the TA does not indicate a lack of good faith. *Merrell M. Williams*, 279 NLRB 82, 83 (1986).

[45] As part of a contingent package Global Settlement proposal, the Company was free to change any term of the package prior to acceptance anyway. (See *Good GMC* and *Nordstrom*, *supra*).

Settlement and before the ratification vote, the Company lawfully modified the expiration in Columbus to 2018 given the changed circumstances in Dayton.

b. The Alleged Tentative Agreement Was Withdrawn Prior to Ratification by the Bargaining Unit

Any proposed CBA required approval from the IBT and ratification by the bargaining unit before it could be binding. (Tr. 549). Thus, even if the Judge finds a meeting of the minds on the contingent CBA, Mr. Brown's July 9 letter nonetheless constituted a lawful withdrawal of the "May 26 Tentative Agreement" because it occurred prior to the ratification on July 11.

Withdrawal of a TA "reached prior to the formation of a legally enforceable contract represents only one factor to be considered in determining good- or bad-faith bargaining." *Merrell M. Williams*, 279 NLRB at 83. An alleged unlawful withdrawal of a TA is not evaluated in a vacuum. The Board will look at the totality of circumstances surrounding the party's bargaining frame of mind at the time to determine whether or not the withdrawal was in bad faith. *Id.*; *Olin Corp.*, 248 NLRB at 1141 (changed circumstances justified the withdrawal of the offer prior to acceptance).

Thus, the Company – pursuant to *Merrell M. Williams* and *Olin Corp.* – could still lawfully modify or withdraw the alleged TA prior to acceptance. When the Company learned that Local 284 was planning a ratification vote on just the contingent CBA without accepting or satisfying the Global Settlement, the Company immediately withdrew the alleged TA and clarified the status of the negotiations with Local 284 (i.e., the contingent CBA was not eligible for independent acceptance and the active offer for an independent CBA did not include union security). (Stip. Exh. 22).

In this case, the totality of the circumstances shows that the Company's decision to withdraw the alleged TA prior to ratification by the bargaining unit was valid. Withdrawal is just

one factor to consider in evaluating whether or not the Company acted unlawfully. Here, other factors include (1) changed circumstances, in particular the changing expiration dates in Dayton and Columbus relative to the Company's known objective to avoid coterminous expiration dates (see discussion of *Olin Corp.* in Section III.B.3.a & b, *supra*); (2) the nature of package proposals (see discussion of *Good GMC* and *Nordstrom* in Section III.B.1, *supra*, and *Kent Engineering* in Section III.B.2, *supra*); (3) the threat and fear of an imminent strike due to facilities operating without CBAs; (4) the ongoing corporate campaign; and (5) Local 284's efforts to cherry-pick and enforce the contingent CBA without agreeing to the Global Settlement package (see *Good GMC* and *Nordstrom*, *supra*).

When viewed in the totality of the circumstances, the Company's actions do not demonstrate bad faith, but rather show that it was not willing to agree to union security without receiving any benefits in exchange for such a bargain – the benefits contemplated under the Global Settlement. The Company demonstrated that the contingent CBA with Local 284 was only acceptable if packaged with the rest of the Global Settlement. The Locals never agreed to the Global Settlement and never satisfied those terms. Thus, the contingent CBA could not be final or binding.

Furthermore, the bargaining unit's ratification vote cannot create obligations on the Company pursuant to the contingent CBA. Prior to the vote, the Company informed Local 284 that the contingent CBA was not enforceable as a standalone agreement. Thus, even if there was a meeting of the minds for a standalone CBA with Local 284 on May 26, the Company legally withdrew the TA prior to acceptance.[46] In effect, the ratification vote did not actually ratify a CBA; it merely offered pre-ratification of a possible CBA if the parties agreed to those terms.

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[46] In fact, a party may withdraw from a TA *after* ratification or acceptance if the withdrawal is effectuated prior to the party *learning of* the ratification or acceptance. *Loggins Meat Co., Inc.*, 206 NLRB 303 (1973). In *Loggins*, the

Either the Company was correct that the contingent CBA could not be ratified independently or the Company's attempted clarification and submission of its earlier April proposal constituted a withdrawal of the contingent CBA and a new offer prior to ratification or acceptance. Because Heidelberg is free to modify the proposal or TA in good faith prior to acceptance without violating § 8(a)(5) of the Act, the alleged offer was legally withdrawn.

IV. CONCLUSION

Established Board precedent and the written proposals are dispositive in this case. The Counsel for the General Counsel cannot show that the written proposals are consistent with the alleged meeting of the minds because, instead, the written proposals directly contradict a meeting of the minds. Indeed, the written proposals explicitly and unambiguously require satisfaction of the terms of the Global Settlement before the contingent CBA in Columbus can become effective but those terms were never satisfied. Thus, the alleged meeting of the minds does not reflect the written documents as required.

Moreover, even if there was a meeting of the minds, numerous Board precedents regarding contingent proposals and the withdrawal of TAs allow the Company to legally withdraw or modify a proposal prior to acceptance. Further, the totality of the circumstances and the changed expirations justified the modification in order to maintain the Company's bargaining objectives. In fact, such a modification was required as maintaining a 2019 expiration in Columbus would have exceeded Mr. Brown's bargaining authority. Finally, because acceptance is not finalized until approval by the IBT and the Ohio Conference of Teamsters and employee

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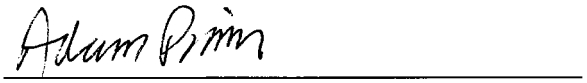
Board upheld the ALJ's determination that there was no acceptance of a contract proposal the union had not yet presented to the bargaining unit for a ratification vote. *Id.* at 307. Moreover, once the bargaining unit voted to ratify, acceptance was not effective until communicated to the company. *Id.* at 307-308. When the company withdrew the offered contract after the ratification vote, but before learning of the results of the vote, acceptance of the offer was not perfected and the ALJ found there was no contract. *Id.* at 308.

ratification, the Company could legally withdraw from the TA any time prior to full acceptance. Any subsequent vote or approvals after withdrawal cannot bind the Company.

For these reasons, the Company respectfully requests that the Judge find that no meeting of the minds requiring the Company to execute the alleged CBA in Columbus existed and dismiss the Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Post-hearing Brief on Behalf of Dayton Heidelberg Distributing Co.* has been electronically filed via the Board's electronic filing system. A copy of same was served via regular U.S. mail this 19th day of January, 2016 upon:

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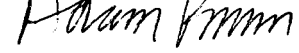

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