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terms of the global settlement agreement were satisfied,” as well as the basis for this finding and conclusion (ALJD 22:18-20)

3. To the ALJ’s finding that “[W]hile the bargaining notes of the parties reflect that by the end of the day, they believed there were two remaining issues – wages and whether Local 377 would be a party to the Global agreement (which were shortly thereafter agreed to), the evidence does not establish that all the material and substantive terms of the Global agreement were discussed and agreed upon. . . . Instead, the parties discussed the underlying principles of a Global agreement and spoke in generalities,” as well as the basis for those findings and conclusions. (ALJD 21:43-47)
4. To the ALJ’s finding that “[W]hen Doll reviewed that draft, it became apparent that the parties did not have a ‘meeting of the minds’ on all of the material and substantial terms of the Global agreement,” as well as the basis for that finding and conclusion. (ALJD 22:42-45, 23:1-2)
5. To the ALJ’s finding that “[T]he record and credible testimony of the Respondent’s witnesses revealed that the terms of which entities and locals were to be part of the global agreement, and what the duration and expirations of the contracts were going to be, were materially significant and substantial terms of the global agreement. The undisputed approach and intent of the global Agreement to resolve the collective bargaining agreement issues not only for Local 284, but for the other locals that represented the Respondent’s employees, supports finding that such terms were material and substantial,” as well as the basis for said findings and conclusions. (ALJD 24:1-7)
6. To the ALJ’s finding that “[C]ontrary to the General Counsel’s and the Union’s assertions in this case, the credible evidence does not support that there was a meeting of the minds on May 26. . . . Instead, the parties exchanged emails explaining their disagreement as to whether the terms of the global agreement had been agreed upon. Such undisputed facts constitute compelling evidence that there was no meeting of the minds on those important aspects of the global agreement,” as well as the basis for those findings and conclusions. (ALJD 24:9-15)
7. To the ALJ’s finding that “I further find that the General Counsel’s and the Union’s assertions that there was a meeting of the minds on May 26 are simply not credible as such assertions were contradicted by the statements and actions of the General Counsel’s own witnesses,” as well as the basis for said finding and conclusions. (ALJD 24:33-35)
8. To the ALJ’s finding that “The evidence does not establish that the parties agreed on all the substantive issues and material terms contained in the alleged agreements (citation omitted) in addition, the credible evidence fails to establish that the parties intended to agree to all of the substantive terms in the contract reflected by the

alleged meeting of the minds,” as well as the basis for said findings and conclusions. (citations omitted) (ALJD 25:22-27)

9. To the ALJ’s finding that “I find that the Respondent’s update (dated May 28, 2015) did not evince a meeting of the minds on all the substantive terms of the global agreement, but instead served as a vehicle to campaign for the employees’ support in the decertification election,” as well as the basis for said findings and conclusions. (ALJD 26:4-7)
10. To the ALJ’s finding that “I find that the General Counsel failed to carry its burden of showing that the parties had the requisite ‘meeting of the minds’ on May 26 or June 19 for the agreements, and also that there was a document which the respondent refused to execute that accurately reflected those agreements,” as well as the basis for said findings and conclusions. (ALJD 27:30-34) (citations omitted)
11. To the ALJ’s finding that “I find that even if there was a meeting of the minds on the global agreement and the Local 284 Agreement, the terms and conditions of the Agreement were never satisfied so as to create a binding collective-bargaining agreement with Local 284,” as well as the basis for said findings and conclusions. (ALJD 27:40-42)
12. To the ALJ’s finding that “[B]ased on the record evidence in this case, and the well-established Board law discussed above, I find that the General Counsel failed to meet its burden of showing that the Union and the Respondent had the requisite ‘meeting of the minds’ on a global agreement or on a contingent Local 284 collective-bargaining agreement. Accordingly, I find that the Respondent has not violated Section 8(a)(5) and 8(a)(1) of the Act as alleged,” as well as the basis for said findings and conclusions. (ALJD 28:9-13)

## BRIEF IN SUPPORT OF EXCEPTIONS

### **I. Introduction**

Charging Party Teamsters Local Union No. 284, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, has filed herewith Exceptions to the Decision and Order of the Administrative Law Judge Thomas M. Randazzo, which issued in the above-captioned case on June 8, 2016. The Charging Party excepts to certain factual findings and legal conclusions of the ALJ, as well as his ultimate ruling that “the Respondent has not violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.” (ALJD p. 28) Local 284 further excepts to certain findings of fact and legal conclusions as set forth more fully in the Exceptions to the Decision and Order of the ALJ which this Brief supports.<sup>1</sup>

### **II. Statement of the Facts**

At the beginning of the hearing the parties reported to the ALJ that they had entered into a number of stipulations set forth in a three (3) page document and entered into evidence at the hearing as stipulations containing twenty-six (26) paragraphs. (JX 1) Additionally, the parties reported to the ALJ that the parties had stipulated to twenty-five (25) exhibits as part of the stipulations, all of which were entered into evidence without objection. (SX 1-25) Based on the stipulations, the stipulated exhibits and the other evidence introduced at the hearing, the ALJ determined that “the operative facts of this case are essentially undisputed, . . .” (ALJD 5:44)

Respondent is engaged in the distribution of beer, wine and other beverages with multiple locations in the State of Ohio for this purpose. (T. 27, 510) Four (4) of Respondent’s locations

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<sup>1</sup> Citations to Joint exhibits, Stipulated exhibits, General Counsel exhibits, or Respondent’s exhibits are referenced parenthetically as JX \_\_\_\_, SX \_\_\_\_, GCX \_\_\_\_ and RX \_\_\_\_, respectively. Citations to the Transcript pages are referenced parenthetically as T. \_\_\_\_.

have been represented by four (4) separate Teamsters Local Unions for long periods of time including Teamsters Local Union No. 20 (hereinafter "Local 20") in Toledo, Ohio for approximately twenty (20) years, Teamsters Local Union No. 293 (hereafter "Local 293") in Cleveland, Ohio for approximately twenty (20) years, Teamsters Local Union No. 957 (hereinafter "Local 957") in Dayton, Ohio for over forty (40) years and Teamsters Local Union No. 1199 (hereinafter "Local 1199") in Cincinnati, Ohio for approximately twenty (20) years. In 2013 Teamsters Local Union No. 377 (hereinafter "Local 377") organized a bargaining unit of employees in the Youngstown, Ohio area for a location Respondent had recently purchased and was doing business as Ohio Wine Imports Company, Inc. After negotiating in excess of one (1) year without reaching an agreement, a decertification petition was filed in which Local 377 was ultimately unsuccessful.

Local 284 was certified as the collective bargaining representative for the driver and warehouse employees of Respondent's Columbus, Ohio facility on February 15, 2013 (JX 1, ¶ 2) Local 284 and Respondent began bargaining for an initial collective bargaining agreement shortly thereafter through the beginning of April, 2014 without success. (JX 1, ¶ 3; T. 517) A petition to decertify Local 284 as the collective bargaining representative of the bargaining unit employees was filed in August of 2014 and the Employer withdrew recognition of Local 284 as the collective bargaining representative of the bargaining unit employees after receiving a copy of the decertification petition from the Petitioner. (T. 529-530)

Local 284 filed an unfair labor practice charge against the Employer for unlawfully withdrawing recognition of Local 284 as the collective bargaining representative for the bargaining unit employees. Region 9 issued a consolidated complaint on the charge filed by Local 284, including other previously filed unfair labor practice charges over disciplinary actions

taken by the Employer. On December 3, 2014, during the second day of the scheduled trial, Respondent and Local 284 entered into a settlement agreement regarding the allegations contained in the consolidated complaint which was approved by Administrative Law Judge Amchan. (JX 1, ¶ 4; SX. 2) As part of the settlement entered into between Local 284 and Respondent, Respondent was obligated to, among other things, “recognize and bargain in good faith with the International Brotherhood of Teamsters Local Union No. 284” and if an agreement was reached during said good faith bargaining the Respondent was obligated to “sign a document containing that Agreement, . . .” (SX 2, p. 2)

Pursuant to the December 3, 2014 settlement agreement, negotiations between Local 284 and Respondent began on January 20, 2015. (T. 32 and 538) Respondent and Local 284 had additional negotiations sessions on February 11, 2015, February 19, 2015, March 17, 2015, April 8, 2015 and April 9, 2015. (T. 35) While proposals were exchanged between the parties during these negotiation sessions and one or two of the outstanding issues were resolved through tentative agreements, very little, if any progress was made on the major outstanding issues between the parties. (T. 38)

As previously mentioned, Local 377 had been certified as the collective bargaining representative for approximately eight (8) bargaining unit employees in the Youngstown, Ohio area. In November of 2014 a decertification petition was filed by a sufficient number of the bargaining unit employees at that location to obtain an election scheduled for early December, 2014. Local 377 filed an unfair labor practice charge against the Respondent alleging bad faith bargaining which, because of the timing of the filing of the charge in relationship to the election date, did not block the election. However, Region 8 decided to impound the ballots following the election without conducting a tally of ballots. The ballots for the Local 377 decertification

election were not counted until early June, 2015 resulting in the decertification of Local 377. Local 377 filed objections to the conduct of the election alleging that the Excelsior list provided by Respondent contained two incorrect addresses, involving twenty-five percent (25%) of the bargaining unit. (T. 597)

At the first bargaining session between Respondent and Local 284 following the December settlement agreement, Attorney John Doll became the principal spokesperson for Local 284 for the negotiations. (T. 32) Mr. Doll had also previously served as the principal spokesperson for Local 957 in its negotiations with the Employer and the newly elected officers of Local 957 requested Mr. Doll to act as its chief spokesperson in the upcoming negotiations with the Employer since its contract was scheduled to expire at the end of February, 2015. (T. 33-34)

At the April 17, 2015 Local 284 negotiation session, Local 284 made a substantial change to its negotiation proposals and submitted to Respondent a package proposal accepting a number of Respondent's proposals that had previously been rejected by Local 284. After presenting its new package proposal to Respondent and explaining the proposal to Respondent's representatives, the parties agreed to take a lunch break. (T. 38-39) After the lunch break, Craig Brown, Chief Negotiator for Respondent, and Greg Maurer, Respondent's Operation's Manager for the Columbus facility, met with Mr. Doll, Randy Verst, Co-Chair of the Ohio Conference of Teamsters Beverage Division and President of Local 1199, and Martin Jay, Trustee and Business Representative for Local 20, along with the FMCS Mediator Mike Salmon. (T. 41) During this meeting, Mr. Brown stated that the Union had made a very serious offer that deserved very serious consideration by the Employer. Mr. Brown further stated that since Brooke Hice, the Employer's Vice President and General Counsel, who normally attended the negotiation sessions

but was absent on this date, was not present he would have to take Local 284's proposal back to Ms. Hice and other management officials for consideration. (T. 41) There were no further meetings between Respondent and Local 284 on April 17, 2015. (T. 42)

Respondent and Local 284 next met for negotiations on April 29, 2015. (T. 43) At the beginning of this negotiation session, Respondent rejected the Union's package proposal of April 17, 2015 and presented a proposal on all open issues as individual proposals and not as a package. (T. 45 and 566) However, Respondent maintained its position on union security and stated that it would not agree to Local 284's union security proposal because of its concerns that its long term employees may quit. (GCX 5) After a short recess in negotiations the Employer representatives returned to the bargaining table at which time the parties had a discussion concerning some of the outstanding issues including union security, wages and health insurance. There was also a discussion concerning the pending decertification petition that had been blocked because of the pending unfair labor practice charges. Dan Kirk, Vice President of Local 284 stated that the bargaining unit employees elected Local 284 as their bargaining representative in 2013, fair and square. (GCX 5; T. 49-50)

After a lunch break, Mr. Doll, Mr. Verst and Mr. Jay met away from the bargaining table with Mr. Brown and Ms. Hice to see if there was something the parties could do to reach an agreement. (T. 50) During this discussion the "global agreement" concept was brought up by Mr. Brown to try to resolve issues with the other Teamster Local Unions in negotiations with Respondent including Local 377, Local 20, Local 293 and Local 957. (T. 50-53) No agreements were reached during this away from the table meeting, but the parties agreed to get back together to see if an agreement could be reached as discussed. (T. 54)

The next negotiation session between Respondent and Local 284 occurred on May 26, 2015. (T. 57; GCX 6) While this negotiation session was previously scheduled to include all representatives of Respondent and Local 284, Respondent and Local 284 continued their meeting away from the bargaining table with Mr. Doll, Mr. Verst and Mr. Jay representing Local 284 and Mr. Brown and Ms. Hice representing Respondent. (T. 57-58, 193-194, 304) Mr. Brown started the meeting by reviewing the open issues for the Local 284 collective bargaining agreement including duration, wages, management rights, no strike/no lockout and grievance procedure. Mr. Brown then reviewed the items the Employer wanted to include in the "global agreement" including the discontinuance of the corporate campaign against Respondent, contract extensions for Local 293, Local 20 and Local 957, the approval for the Local 293 members to vote on the tentative agreement, an agreement that Local 377 would withdraw its unfair labor practice charges so the decertification ballots could be counted and an agreement that Local 284 would stipulate to a decertification election, withdrawing its pending unfair labor practice charges. Mr. Brown stated that Respondent would agree to union security in the Local 284 collective bargaining agreement if Local 284 agreed to stipulate to a decertification election.

Mr. Brown then went through Respondent's proposals on the open issues in the collective bargaining agreement negotiations for Local 284. For the duration Mr. Brown reviewed that Respondent had a contract with Local 1199 until 2016, the tentative agreement with Local 293 had a 2019 expiration date, Local 20 was going to have a 2019 expiration date, the Respondent had proposed a 2018 expiration for Local 957 and Respondent was proposing a two year agreement for Local 284. In regard to the no strike/no lockout clause, Mr. Brown explained that Respondent wanted its language to be accepted by Local 284. In regard to wages Respondent proposed \$.45 increase effective 11/1/2015 and \$.20 increase effective 11/1/2016.

For the “global agreement” Mr. Brown proposed that the corporate campaign be stopped, that contract extensions be granted for Local 293, Local 957 and Local 20. Mr. Brown also proposed that Respondent wanted an agreement from all Teamster Unions in Ohio not to organize the Respondent’s three (3) non-union locations. Mr. Verst and Mr. Jay immediately responded that the non-organizing proposal was a complete non-starter. (T. 59, 63, 66, 206-209, 218-219, 290, 308, 415-417, 423, 591 and 794; GCX 6)

The Union responded to Respondent’s proposals by offering the expiration date of the collective bargaining agreement with Local 284 to be November 1, 2018, a wage proposal beginning May 1, 2015 through November 1, 2017, the Union’s previously proposed starting wage schedule, that the parties would work out their differences on the no strike/no lockout article, and that the Respondent and Local 284 would work out their differences on the management rights clause related to the effects bargaining issue. Respondent was advised that there could be no agreement on Respondent’s proposal that Teamster Local Unions in Ohio would not organize Respondent’s non-union locations, the contract extension proposal by Respondent was acceptable, and Respondent was advised that Local 377 would not withdraw the unfair labor practice charges blocking the counting of the decertification ballots. Local 284 made no proposal regarding the corporate campaign or agreeing to the withdraw of the unfair labor practice charge blocking the decertification petition in return for Union security because those items were not objectionable. (T. 60, 68, 70, 306-308, 415-418, 596-597; JX 6)

Respondent and Local 284 exchanged additional proposals during the day on May 26, 2015 with the last two open issues being the Respondent’s proposal to have Local 377 withdraw its unfair labor practice charge so the decertification ballots could be counted and Respondent maintaining its last wage proposal. After a caucus the Respondent agreed to withdraw its

proposal that Local 377 be part of the “global agreement” but would not change its wage proposal. The Union accepted the last Respondent proposal that excluded Local 377 from being included as part of the “global agreement” and the Respondent’s last wage proposal. The parties shook hands and agreed that Mr. Brown would draft the necessary documents for review and signature. (T. 62, 72-73, 308-312, 418-419, and 605; GCX 6, RX 4, 5) No additional bargaining sessions were scheduled as the negotiations between Respondent and Local 284 had been completed. (T. 262, 310)

On May 27 or May 28 Mr. Doll drafted a negotiation update for Local 284 and dated it May 26, 2015, the date Respondent and Local 284 reached a tentative agreement for a collective bargaining agreement. (T. 73, 226, 266; GCX 7) The negotiation update dated May 26, 2015 was emailed to Local 284 either late in the day on May 27 or early on May 28, 2015. (T. 226) Respondent distributed a letter on May 28, 2015 to the Local 284 bargaining unit employees reporting on the successful negotiations with Local 284. (JX 1, ¶ 7; SX 5; T. 611, 833-834)

On May 29, 2015 Mr. Brown, on behalf of Respondent, sent an email to Mr. Doll transmitting a draft of the collective bargaining agreement between Respondent and Local 284 and a draft of the “global agreement.” (T. 74; SX 7) According to Mr. Doll, the draft collective bargaining agreement between Respondent and Local 284 was consistent with the agreement reached on May 26, 2015. (T. 76) On June 3, 2015 Mr. Doll sent an email to Mr. Brown setting forth numerous areas of the proposed “global agreement” the parties had not discussed and on which the parties had not reached agreement on May 26, 2015. (SX 9) Areas on which there had been no discussions and/or on which no agreement was reached on May 26, 2015 included having the International Brotherhood of Teamsters, hereinafter IBT, be a party to the “global agreement,” having Local 1199 be a party to the “global agreement,” setting forth a specific date

for the decertification election to be held for the Columbus bargaining unit employees represented by Local 284, including a release that had not been discussed and having specific expiration dates for Local 20, Local 293, Local 957 and Local 1199 contracts. (T. 75-76; SX 9; GCX 6; RX 4 and 5)

On June 3, 2015 Mr. Brown, on behalf of Respondent, sent Mr. Doll an email setting forth Respondent's position regarding the June 3, 2015 email sent by Mr. Doll to Mr. Brown. (SX 10) Mr. Doll responded to the June 3, 2015 email from Mr. Brown with a June 4, 2015 email again explaining the areas in which no discussion was held and/or no agreement was reached on May 26, 2015 for the "global settlement." (SX 11)

Respondent and Local 957 had a negotiation session scheduled for June 8, 2015. (T. 77) Prior to any negotiations occurring between Respondent and Local 957 on that date, Mr. Brown and Ms. Hice for Respondent and Mr. Doll, Mr. Verst and Mr. Jay for Local 284 met to discuss the discrepancies contained in the proposed "global agreement" drafted by Mr. Brown and the agreement the parties reached on May 26, 2015. During this meeting Mr. Doll explained to Mr. Brown that Local 1199 and the IBT would not be a part of the "global agreement." (T. 78-79, 238, 247 and 314) Following this meeting, Mr. Doll emailed Mr. Brown Local 284's draft of the proposed Settlement Agreement. (T. 80; SX 13)<sup>2</sup>

Later in the afternoon on June 8, 2015 Mr. Brown requested another meeting concerning the "global agreement" (T. 80-81 and 318) During this afternoon meeting, Mr. Brown explained that he had just learned that Mr. Doll had filed objections on behalf of Local 377 in regard to the decertification election alleging that Respondent had provided bad addresses on the Excelsior list. (T. 81-82, 427-428 and 444). At the end of that meeting, Respondent provided Local 284 a

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<sup>2</sup> The Settlement Agreement and Release (SAR) prepared by Mr. Brown, the Settlement Agreement prepared by Mr. Doll and the terms "global agreement" and "global settlement" were used interchangeably during the hearing.

revised draft of the Settlement Agreement which now included Local 377 as a party. (T. 81-82, 644; SX 14)

The last scheduled negotiation session between Respondent and Local 957 occurred on June 19, 2015. (T. 82) Respondent and Local 957 negotiating teams met across the table beginning at approximately 9:54 a.m. to continue their negotiations for a new collective bargaining agreement. This first session ended at 10:12 a.m. and for the rest of the day, negotiations between Respondent and Local 957 occurred away from the bargaining table. (GCX 8)

At 11:20 a.m. on June 19, 2015 Mr. Brown sent an email to Mr. Doll regarding the “global agreement.” (T. 85; GCX 9) Mr. Doll emailed Mr. Brown a revised draft settlement agreement from Local 284 in the early afternoon of June 19, 2015. (T. 87; JX 1, ¶ 15; SX 15) Later in the afternoon Mr. Doll, Mr. Jay and Mr. Brown met to review and compare Local 284’s June 19 revised draft settlement agreement with Respondent’s June 8, 2015 draft for the “global agreement.” Ms. Hice was not present. (T. 84-85, 88) During this meeting the parties compared the two documents paragraph by paragraph with Mr. Brown commenting that each paragraph contained in Local 284’s June 19, 2015 proposed settlement agreement was “okay” or there was “no problem” with each of the paragraphs. (T. 88, 272)

Later that same afternoon Mr. Brown, Mr. Doll and Mr. Jay had a conversation concerning the expiration date of the Local 957 collective bargaining agreement. Respondent had been proposing a three (3) year collective bargaining agreement while Local 957 had consistently proposed a four (4) year collective bargaining agreement. (T. 89) During the discussion in the afternoon, Respondent, through Mr. Brown, offered higher wage rates for the Local 957 bargaining unit employees if they would accept a three (3) year collective bargaining

agreement. After lengthy discussions, the bargaining unit employees decided to maintain their position that only a four (4) year collective bargaining agreement would be acceptable. (T. 89-90, 322, 682) Mr. Brown told Mr. Doll and Mr. Jay that he would get back with them after a decision had been made. A short time later Mr. Brown informed Mr. Doll and Mr. Jay that "I got you your four year deal." (T. 90, 322)

After obtaining a tentative agreement on the length of the Local 957 collective bargaining agreement, Mr. Brown, Mr. Doll and Mr. Jay met on some of the other open issues away from the bargaining table and, after discussions going back and forth on those issues, there was a frame work for an agreement on the "core economic piece," but operational issues still had to be worked out. (T. 688-690) Mr. Brown then indicated that he would prepare a last, best and final proposal for the consideration by the Local 957 bargaining unit members. (T. 690-691, 694)

By early evening Mr. Brown completed Respondent's last, best and final offer to present to the Local 957 full negotiating committee. After Mr. Brown passed out the Respondent's last, best and final offer he stated that the Employer understood by making this last, best and final proposal to Local 957 all of the collective bargaining agreements expiration dates were going to be lined up together and that the Employer was taking a big risk in doing so but that Respondent believed that the Teamster Unions would operate in good faith and that Respondent would not again experience the problems that it experienced during the 2015 negotiations. (T. 92, 324, 448)

After leaving the meeting room where Mr. Brown had presented the Employer's last, best and final offer, Mr. Brown returned a few minutes later and asked to speak with Mr. Doll and Mr. Jay. (T. 94) Mr. Doll, Mr. Jay and Matt Crawford, an associate in Mr. Doll's law firm, followed Mr. Brown back to the small conference room where prior meetings that day had

occurred. (T. 94-95, 325-326, 449-450) After all four individuals were in the conference room, Mr. Brown distributed a proposal to change the expiration date of the Local 284 collective bargaining agreement, which had been agreed to on May 26, 2015, from February 9, 2019 to February 9, 2018. (T. 95, 278-279, 326; SX 16) Mr. Doll and Mr. Jay both advised Mr. Brown that Respondent could not now change the expiration date of the Local 284 collective bargaining agreement, that there was already an agreement for the duration clause for the Local 284 collective bargaining agreement and that Respondent's proposal to change the expiration date for the Local 284 collective bargaining agreement was unacceptable. (T. 95, 326, 450) Mr. Brown immediately became upset, yelling that Respondent could change the expiration date for the Local 284 collective bargaining agreement and slammed his fist on the table cursing at Mr. Doll, Mr. Jay and Mr. Crawford. (T. 95-96, 325-327, 450-451)

On the following Monday, June 22, 2015, Mr. Doll sent an email to Mr. Brown advising him that the Local 957 membership ratified the last, best and final proposal submitted by the Employer on June 19, 2015. Mr. Doll also advised Mr. Brown that the settlement agreement ("global agreement") had to be completed. (SX 17) Mr. Brown sent an email dated June 24, 2015 in response to the June 22, 2015 email from Mr. Doll. (SX 18) In his June 24, 2015 email Mr. Brown stated that Respondent was "puzzled" by Local 284's request to finalize the "Global Settlement Agreement," since Respondent only presented a change in the expiration date of the Local 284 collective bargaining agreement. (SX 18) Mr. Brown further stated in his June 24, 2015 email: "Thus, when Local 957 and the Dayton negotiating committee insisted on a 2019 expiration it only stood to reason that the Company would adjust the expiration date of the Columbus contract, the only contract subject to negotiation at this time." (SX 18) Mr. Brown further stated in his June 24, 2015 email: "However, given the Union's (Local 284's) strident and

final rejection of the Company's proposal to change the expiration date of the Columbus contract to February, 2018, we see no reason to engage in a meaningless exercise of addressing other remaining issues of contention with respect to the Global Settlement Agreement." (SX 18)

Mr. Doll responded to Mr. Brown's June 24, 2015 email (SX 18) with an email dated June 25, 2015. (SX 19) In addition to countering the statements made by Mr. Brown in his June 24, 2015 email, Mr. Doll stated: ". . . during our discussion on the Settlement Agreement on June 18 you never identified any modifications that needed to be made to the June 19 version of the Settlement Agreement. Please advise as to the modifications you now state are needed to the Settlement Agreement." (SX 19)

Mr. Brown responded to Mr. Doll's June 25, 2015 email with a letter dated July 2, 2015 sent electronically. (SX 20) In his July 2, 2015 letter Mr. Brown reviewed the discussions that led to the tentative collective bargaining agreement between Respondent and Local 284 and the discussions that occurred on June 8, 2015 and June 19, 2015 related to both Local 957 and Local 284. (SX 20) In regard to the Local 284 June 19, 2015 draft of the "global agreement" Mr. Brown wrote: "A number of the disputed issues were resolved either by compromise or developments through the course of time (i.e., concerns related to Local 377). The Company is also prepared to withdraw certain settlement conditions on the basis of good faith assurances by the Union (i.e., that the IBT would cease its support in activities regarding the corporate campaign). I indicated that the proposal was constructive and that I saw no areas of contention that likely could not be resolved, but that it would have to be reviewed by Company General Counsel Brooke Hice. . ." (SX 20, p. 8) Mr. Brown further stated in his July 2, 2015 letter that "If the Union still objects to an expiration date of February, 2018 in Columbus, then the Company has no interest in entering into any Global Settlement Agreement." (SX 20, p. 9)

On July 11, 2015 the Local 284 bargaining unit members employed at Respondent's Columbus facility ratified the collective bargaining agreement between Local 284 and Respondent agreed to on May 26, 2015. (T. 99-100; SX 7 and SX 21) On July 13, 2015 Mr. Doll sent an email to Mr. Brown advising him of the results of the ratification vote and that Local 284 was "prepared to enter into a stipulated election agreement on the pending decertification petition as soon as Heidelberg signs the agreement accepted by the bargaining unit employees." (SX 24) Respondent refused to sign the ratified collective bargaining agreement between Respondent and Local 284 and responded to Mr. Doll's July 13, 2015 email with a letter dated July 16, 2015 (SX 25) taking the position that its proposal submitted on April 29, 2015 was the Employer's current collective bargaining proposal for the Local 284 negotiations. (T. 100; SX 25)

### **III. Legal Analysis and Argument**

#### **Respondent Is Obligated To Sign The Agreed Upon Collective Bargaining Agreement And "Global Agreement."**

Long ago in H.J. Heinz Co. v. National Labor Relations Board, 311 U.S. 514, 7 LRR Man. 291 (1941) the Supreme Court held that an employer had to sign a collective bargaining agreement it had reached with a union. In doing so the Court held: "A businessman who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining." 7 LRR Man. at 297 Since the Heinz

decision, the Board has issued a number of decisions that held part of the obligation of Section 8(d) of the Act requires either party, upon the request of the other party to execute a written collective bargaining agreement incorporating an agreement reached during negotiations. See, Windward Teachers Association, 346 NLRB 1148, 1150 (2006); Hempstead Nursing Home, 341 NLRB 321, 174 LRRM 1460 (2004); Graphic Communications Union, District Council No. 2 (Riverwood International USA), 318 NLRB 983, 990 (1995). The obligation to execute a written collective bargaining agreement incorporating an agreement reached during negotiations, however, only arises if the parties had a “meeting of the minds” on all substantive issues and material terms of the agreement. Windward Teachers Association at 1150; Hempstead Park Nursing Home, 341 NLRB 321 (2004)

The Board has also held that a “meeting of the minds” is dependent upon the objective terms of the collective bargaining agreement rather than the subjective understandings of the terms by the parties. Additionally, the Board has consistently applied the reasonable objective standard in determining whether a “meeting of the minds” has occurred. Vallejo Retail Trade Bureau, 243 NLRB 762, 767 (1979)

The Board has also consistently held that an employer violates Section 8(a)(5) and 8(a)(1) of the Act when an employer refuses to execute a written collective bargaining agreement that incorporates the agreement reached during contract negotiations. New Orleans Stevedoring Co., 308 NLRB 1076, 1081 (1992).

Based upon the documentary evidence alone introduced at the hearing and the case authority set forth above, Local 284 submits that on May 26, 2015 Respondent and Local 284 reached a “meeting of the minds” on a full and complete collective bargaining agreement and a full and complete “global agreement” resolving all issues between Respondent and Local 284.

At the conclusions of the May 26, 2015 meeting, the representative of the parties shook hands and agreed that Mr. Brown would draft both the collective bargaining agreement for Local 284 and the “Global Agreement.” (T. 73)

The negotiation notes introduced at during the hearing (GCX 6, RX 4 and RX 5) demonstrate that the parties had a “meeting of the minds” on all material and substantial terms of the collective bargaining agreement between Local 284 and Respondent and in regard to the “global agreement.” The first page of Mr. Brown’s notes (RX 4) reflects a meeting with Ms. Hice and discussions Mr. Brown had with Ms. Hice prior to a meeting with the Union later that morning. The notes from Ms. Hice (RX 5) and Mr. Doll (GCX 6) indicate the first meeting between the parties occurred at 11:00 a.m., according from the notes from Ms. Hice, and 10:48 a.m. according to the notes from Mr. Doll. However all three versions of the notes indicate that the parties discussed open items for the collective bargaining agreement between Local 284 and Respondent that included Duration, Management Rights, Wages, No-Strike/No Lockout and Grievance Procedure. In regard to the “global agreement” areas of concern, the parties discussed ending the corporate campaign, contract extensions with Local 20, Local 293 and Local 957, permitting the Local 293 members to vote on the tentative agreement, allowing the ballots to be counted for the Local 377 decertification petition and an agreement for Local 284 to enter into a stipulation for election on the pending decertification petition in return for Respondent granting Union security in the collective bargaining agreement with Local 284.

In regard to the duration of the agreement with Local 284, Mr. Brown reviewed the duration tentative agreements with Local 293 and Local 20 as being in 2019 and that Respondent had proposed a three year agreement expiring in 2018 for Local 957. Mr. Brown explained that the Respondent did not want to have coterminous expiration dates for all of its collective

bargaining agreements and proposed a two year agreement for Local 284. All three bargaining notes reflect that proposal that in regard to the no strike/no lockout clause, the Respondent wanted its last proposal to be accepted by Local 284 and, in addition, wanted Local 284 to accept Respondent's last proposal on the management rights clause acknowledging the only difference between the parties was the "effects bargaining" provision included in the last Local 284 proposal.

In regard to wages, Mr. Brown explained that since the Respondent proposed a two year agreement beginning on May of 2015, the Respondent was proposing a forty-five cent (\$.45) increase on November 1, 2015 and another increase of twenty cents (\$.20) in November 1, 2016. Respondent further proposed that the corporate campaign end, that extensions be granted for the current contracts for Local 293, Local 957 and Local 20, that the Ohio Teamster Unions would agree not to organize the Respondent's non-union locations and that Local 377 be a part of the agreement to permit the ballots for the decertification vote be counted.

After a caucus beginning at 11:02 a.m. (GCX 6, p. 3), the parties met again at 11:58 a.m. (RX 5, p. 2; GCX 6, p. 4) Local 284 submitted its proposal with a duration of a new collective bargaining agreement expiring on November 18, 2018, an approximate three and one-half (3½) year agreement. The Union further proposed a wage increase of twenty-five cents (\$.25) beginning May 1, 2015, twenty cents (\$.20) on November 1, 2015, forty-five cents (\$.45) on November 1, 2016 and forty-five cents (\$.45) on November 1, 2017. The Union proposed starting wages to be the same as its previous proposal and agreed that the parties would be able to work out their differences on the no strike/no lockout language and on the management rights proposal. Mr. Doll explained that there could be no agreement in regard to not organize the Respondent's non-union locations, as that proposal had been previously rejected prior to the

caucus beginning at 11:02 a.m. Extensions of the collective bargaining agreements for Local 293, Local 20 and Local 957 were agreeable as part of the “global settlement.” Mr. Brown asked about Local 377 being included in the “global agreement” and was advised that Local 377 did not want to be a part of the agreement with the explanation that Local 377 had evidence that on the excelsior list for the decertification election at Local 377 the Respondent provided two wrong addresses. (RX 5, p. 2; RX 4, p. 2)

After a lunch break Respondent offered a duration clause through February 9, 2019; the Respondent offered wage increases of forty-five (\$.45) on November 1, 2015, forty-five cents (\$.45) on November 1, 2016, forty-five cents (\$.45) on November 1, 2017 and twenty-five cents (\$.25) on November 1, 2018; Respondent offered starting wages of \$11.50 for warehouse employees, \$13.00 for non-CDL drivers and \$15.00 for CDL drivers, the same starting pay that had been previously proposed by the Respondent. The Respondent presented a new written proposal for the no strike/no lockout clause and a new written proposal for the management rights provision. The Respondent also submitted its April 29, 2015 proposal for the grievance procedure.

In regard to the “global agreement,” the Respondent proposed that there would be a stand down on the corporate campaign, that Local 957, Local 20 and Local 293 extend their current collective bargaining agreements including and through July 10, 2015; that Local 284 withdraw all of its challenges to the pending decertification petition and agree to a stipulated election agreement. The Respondent withdrew its proposal that no organizing efforts take place at the Respondent’s non-union locations, but maintained its position that there would have to be a counting of the ballots on the Local 377 decertification petition and no objections be filed over that election.

After another caucus, the parties got back together at 3:32 p.m. at which time Local 284 submitted another proposal to Respondent on both the collective bargaining agreement and the “global agreement.” In regard to the collective bargaining agreement, Local 284 accepted the expiration date of February 9, 2019 as proposed by the Respondent. In regard to wages, the Union proposed a twenty cent (\$.20) wage increase on the first pay period after ratification, twenty-five cent (\$.25) increase on November 1, 2015, a forty-five cent (\$.45) increase on November 1, 2016, forty-five cent (\$.45) increase on November 1, 2017 and a twenty-five (\$.25) increase on November 1, 2018. The Union also agreed to the Respondent’s starting pay proposal, the Respondent’s no strike/no lockout proposal, the Respondent’s grievance procedure proposal, and the Respondent’s management rights proposal.

In regard to the “global agreement,” the Union agreed to the extensions of the Local 20, Local 293 and Local 957 current collective bargaining agreements to July 10, 2015, the Union agreed to stand down on the corporate campaign as requested by the Respondent, the Union repeated that the Respondent had withdrawn its proposal on not organizing the Respondent’s non-union locations, Local 284 agreed that it would withdrawal all unfair labor practice charges and all objections to the pending decertification petition in Columbus with the Respondent agreeing to Union security in the Local 284 collective bargaining agreement. Mr. Brown asked about Local 377 being part of the “global agreement” and the Union responded that Local 377 would not agree to be part of the “global agreement.” A brief discussion followed on why the Respondent wanted to include Local 377 in the “global agreement.”

There was a caucus at 3:45 p.m. with the parties returning for further discussions at 4:36 p.m. (GCX 6, p. 8; RX 5, p. 3) When the parties got together Mr. Brown proposed that the Respondent would go forward with the “global agreement” without including Local 377 but that

Respondent would not modify its wage proposal for the collective bargaining agreement with Local 284. Mr. Brown also stated that those two issues – Local 377 not being part of the “global agreement” and the wage proposal for the Local 284 collective bargaining agreement were the only two items not resolved. Mr. Doll responded that Mr. Brown was correct. (GCX 6, p. 8) Local 284 took a caucus and came back with the Respondent at 5:05 p.m. at which time Local 284 agreed with the Respondent’s last wage proposal with the understanding that the Respondent had agreed to go forward without Local 377 being part of the “global agreement.” As the notes from Mr. Brown, Ms. Hice and Mr. Doll indicate, Local 284 and the Respondent had reached a complete agreement on all issues for the Local 284/Heidelberg initial collective bargaining agreement and further had reached a complete agreement on all material and substantial terms on the “global agreement.”

As all of the bargaining notes taken on May 26, 2015 clearly indicate, there was no discussion and no agreement that the International Brotherhood of Teamsters would be a party to the “global agreement;” there was no discussion and no agreement that Local 1199 would be a party to the “global agreement;” there was no discussion and no agreement for specific expiration dates for the to be negotiated collective bargaining agreements for Local 1199, Local 957 and Local 20 to be included in the “global agreement;” there was no discussion and no agreement that a “release” would be included in the “global agreement;” there was no discussion and no agreement that a specified election date for the pending decertification petition at the Columbus location would be included in the “global agreement.”

In his decision, the ALJ found that “[T]he bargaining notes of all of the parties reflect that by the end of the day (May 26), there were two remaining issues – wages and whether Local 377 would be a party to the global agreement. At the conclusion of that bargaining session, the

Union accepted the Respondent's proposal on wages and the Respondent agreed that Local 377 would not be a part of the global settlement agreement." (ALJD 8:29-33) The ALJ later stated in his Decision and Order that "[W]hile the bargaining notes of the parties reflect that by the end of the day, they believed there were two remaining issues – wages and whether Local 377 would be a party to the global agreement (which were shortly thereafter agreed to), the evidence does not establish that all of the material and substantial terms of the global settlement agreement were discussed and agreed upon." (ALJD 22:43-47)

The bargaining notes demonstrate just the opposite. As the parties narrowed the issues between them on both the Local 284 collective bargaining agreement and the "global agreement," at the end of the day there were two unresolved issues – the wage issue and the issue as to whether Local 377 would be a party to the "global agreement." Mr. Brown acknowledged at the end of the negotiation session on May 26, 2015 that those two issues – wages and whether Local 377 would be part of the "global agreement" – were the only two remaining unresolved issues; a statement that Mr. Doll acknowledged as being correct. It is undisputed that those two remaining issues were resolved on May 26, 2015. There is no evidence in the record that either Mr. Brown or Ms. Hice stated at any time on May 26, after the parties resolved those two remaining issues, that there were material and substantial terms of the "global agreement" yet to be discussed upon agreed upon.

The ALJ went on to state that "[W]hen Doll reviewed that draft (May 29), it became apparent that the parties did not have a 'meeting of the minds' on all of the material and substantial terms of the global settlement agreement." (ALJD 23:6-8) In Teamsters Local 771 (Ready-Mixed Concrete), 357 NLRB No. 173, slip op. at 6-7 (2011) the Board recognized that

efforts to modify contract terms after an agreement has been reached do not change the fact that the original agreement is a binding and enforceable contract.

The ALJ stated in his Decision and Order that “[B]rown’s assertion that he believed there was an understanding that Local 1199 was part of the global agreement is not only credible, it is also plausible when considering the facts and the structure of the negotiations which were aimed at resolution of not only the Local 284 issues, but also the issues at the other locations which included duration and expiration dates of other local contracts, such as Local 1199.” ALJD 23:19-23) As set forth above, the Board standard of whether there has been a “meeting of the minds” is dependent on the objective terms of the collective bargaining agreement rather than the subjective understandings of one of the parties. Vallejo Retail Trade Bureau, 243 NLRB at 767. If Respondent, through Mr. Brown and/or Ms. Hice, considered the inclusion of Local 1199 to be a material and substantial term of the “global agreement,” then, at the very least, Respondent would have made a proposal during the May 26 negotiation session to include Local 1199 as a party to the “global agreement.” No such proposal was made by the Respondent during the May 26 negotiation session.

The ALJ also stated that “I find it plausible and believable that the Respondent would have believed that the IBT would be a part of the global settlement agreement.” (ALJD 23:42-44) Once again, the Respondent’s subjective understanding of what was to be included in the “global agreement” is not the standard followed by the Board. The Board has consistently applied the reasonable objective standard in determining whether there is a “meeting of the minds.” Id. at 767. If Respondent, through Mr. Brown or Ms. Hice believed that including the IBT as a party to the “global agreement” was a material and substantial term of the “global agreement,” it would be reasonable to conclude that Respondent would have proposed at some

time during the May 26 negotiation session that the IBT be a party. The evidence is clear that no such proposal was ever made by Respondent during the May 26 negotiation session.

The ALJ further concluded that because the “parties exchanged emails explaining their disagreement as to whether the terms of the global agreement had been agreed upon. . . (was) compelling evidence that there was no meeting of the minds on those important aspects of the global agreement.” (ALJD 24:13-15) The Union submits the Respondent’s attempts to modify the “meeting of the minds” reached by the parties on May 26 by adding provisions that were never discussed or agreed to, and the rejection of those modifications by Local 284, does not change the fact that the agreements reached on May 26 are still binding and enforceable. See Mack Trucks, Inc. v. Auto Workers, 856 F.2d 579 (3<sup>rd</sup> Cir. 1988) (quoting Granite State Distributors, 266 NLRB 457, 461 (1983)) (“Subsequent efforts to modify terms are ‘in no way inconsistent with the existence of the previously arrived-at agreement. It is not unusual of the parties to an agreement to discuss its terms, or even to seek modifications thereof, after the agreement has been arrived at.’”)

Local 284 submits that Respondent’s attempts to modify the agreements reached by the parties on May 26 and Local 284’s attempts to reduce to writing the agreements that were actually reached during the May 26 negotiation session, including the email correspondence beginning on May 29 and the documents exchanged between May 29 and June 19, do not change or alter the “meeting of the minds” and the agreements reached during the May 26 negotiation session.

The ALJ’s willingness to ignore the undisputed evidence contained in the bargaining notes of the May 26 negotiation session and rely on the subjective beliefs of Respondent’s representatives of what they believed should have been in the “global agreement” is

incomprehensible. Additionally, the ALJ's willingness to ignore the fact that the parties did not schedule any additional negotiation sessions after May 26 and shook hands recognizing that the parties had reached an agreement on the collective bargaining agreement between Respondent and Local 284 and on the "global agreement" simply makes no common sense. (T. 262, 310) Finally, the ALJ's willingness to ignore the announcements by the Respondent and Local 284 that the parties had not only reached an agreement on a collective bargaining agreement but also on the "global agreement" that was going to give the bargaining unit employees an opportunity to vote on whether they wanted to continue to be represented by Local 284 for collective bargaining purposes is likewise incomprehensible. (GCX7; SX5)

Because the ALJ relied on the subjective understandings of Respondent's representatives as to whether the parties had a "meeting of the minds," the ALJ ignored Board precedent requiring that the ALJ's Decision and Order be rejected in its entirety. Instead, the Charging Party submits that a finding be made by the Board that Counsel for the General Counsel had met its burden of proof that the Respondent violated Section 8(a)(5) and Section 8(a)(1) of the Act as alleged in the Complaint and issue the appropriate remedy.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document was served upon Counsel for the General Counsel, Jonathan D. Duffey, Esq. (jonathan.duffey@nlrb.gov) and Counsel for the Respondent, Stephen J. Sferra, Esq. (ssferra@littler.com) and Craig M. Brown, (cmbrown@littler.com), by electronic mail on this 27<sup>th</sup> day of July, 2016.

A handwritten signature in black ink, appearing to read "John A. Dell", is written over a horizontal line. The signature is cursive and stylized.