UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.	:	
Respondent,	:	Case No.: 8-CA-152192
and	:	
LOCAL 1982, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO	:	
Charging Party	:	

RESPONDENT MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.'S MOTION TO ENFORCE SETTLEMENT AGREEMENT AND DISMISS COMPLAINT

Now Comes Respondent, Midwest Terminals of Toledo International, Inc. ("Midwest" or "Respondent"), by and through Counsel and hereby requests Chief Administrative Law Judge Giannasi to enforce the terms of the agreed upon settlement agreement and dismiss the remaining allegations of the Complaint. In the alternative, Midwest requests Chief ALJ Giannasi to accept Midwest's proffered Settlement Agreement attached hereto as Ex. 1[1] pursuant to the Board's ruling in *UPMC and SEIU Healthcare Pennsylvania CTW, CWC*, 365 NLRB No. 153. Under *UPMC*, Your Honor is permitted to accept settlement agreement over the objection of both the charging party and General Counsel if the terms of the settlement satisfy the "reasonableness" standard set forth in *Independent Stave*, 287 NLRB 740 (1987).

I. PROCEDURAL BACKGROUND

On May 14, 2015 the charging party ("union") file an unfair labor practice charge (8-CA-152192) alleging that Midwest violated the Act because certain polices were over broad and/or

[1] Respondent corrected its inadvertent omission and noted that it will provide notice to the employees of the rescission/revisions to the policy handbooks at issue herein.

were unilaterally implemented without providing the union with notice and opportunity to bargain. On August 28, 2015 the Regional Director for Region 8 issued a Complaint and Notice of Hearing ("Complaint"). The Complaint alleged violations of § 8(a)(1) of the Act and § 8(a)(5) and (1) of the Act. Specifically, the Complaint alleged that certain of Midwest's policies set forth in its 2015/2016 Policy Handbook and Safety Handbook were overly broad and, therefore, violated Section 8(a)(1) of the Act. See, ¶¶ 6 and 7 of the Complaint attached hereto as Exhibit 2. Additionally, the Complaint alleged that certain policies in the Handbooks and the ILA Standard Operating Procedures were unilaterally promulgated and implemented without providing the union the notice and opportunity to bargain. See, ¶ 9 of the Complaint.

On September 19, 2016 ALJ Eric Fine issued a Decision finding that Midwest violated the Act as alleged in the Complaint. In particular, ALJ Fine used the Board's analytical framework in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to determine that particular parts of certain Midwest policies violated Section 8(a)(1) of the Act. On October 31, 2016, Midwest timely filed Exceptions and Brief in Support of Exception to ALJ Fine's decision. Prior to ruling on Midwest's Exceptions, the Board issued a Notice to Show Cause as to why the proceeding should not be remanded to ALJ Fine in light of the Board's December 14, 2017 Decision in *The Boeing Company*, 365 NLRB No. 164 (2017). In *Boeing* the Board overruled *Lutheran Heritage Village-Livonia*. Both Respondent and Counsel for the General Counsel (the "General Counsel") filed timely responses to the Board's Notice to Show Cause. Notably, the union did not file a pleading related to the Board's Notice to Show Cause, the union was represented by Counsel at the hearing nor did the union file a post hearing brief. On February 1, 2019 the Board issued an Amended Order remanding the *entire* proceeding to the ALJ for further proceedings.

II. SETTLEMENT DISCUSSIONS

Chief ALJ Giannasi contacted the parties and scheduled a teleconference for February 7, 2019. The union was represented by trustee William Yockey ("Yockey") and Prentis Hubbard ("Hubbard"). The General Counsel was represented by Noah Fowle ("Fowle") and Gregory Gleine ("Gleine"). Midwest was represented by Ronald Mason ("Mason") and Aaron Tulencik ("Tulencik"). Among other things, the parties discussed the possibility of settlement in lieu of reopening the record and/or further briefing. Chief ALJ Giannasi inquired as to the union's position on settlement and Yockey unambiguously stated the union was following the General Counsel's lead. The parties agreed to participate in another telephone conference on February 15, 2019 at 2:00 p.m. ET.

Prior to the February 15, 2019 teleconference, the General Counsel submitted its settlement proposal to Midwest. Specifically, the General Counsel would agree to dismiss ¶¶ 6(A)(iii) and 7(A)(i-vi) of the Complaint because said rules were lawful under the Board's new analytical framework set forth in *Boeing*. With respect to 6(A)(i),(ii), (iv) and (v) of the Complaint the General Counsel required that Midwest either rescind or rewrite the purported unlawful language to make it clear to the employees that Midwest was not interfering with their Section 7 rights. The General Counsel did not make any proposal with respect to the 8(a)(5) allegations. On February 14, Tulencik requested that Fowle highlight the specific language that the General Counsel maintained was unlawful. Fowle did so later that day. See, 2.14.19 Tulencik/Fowle e-mails attached hereto as Ex. 3.

The parties participated in second teleconference on February 15, 2019. The union was represented by Yockey, Hubbard and union trustee Mike Baker ("Baker"). The General Counsel was represented by Fowle and Gleine. Midwest was represented by Mason and Tulencik.

During the teleconference the parties continued to discuss settlement. Counsel for Midwest notified the parties that Midwest was in receipt of General Counsel's settlement proposal and had yet to formulate a formal, written counter proposal. Notwithstanding, Midwest's Counsel stated it was not opposed to rewriting the specific portions of the policies so as to conform to *Boeing*. Midwest also noted that if the parties were to settle the policy language, it sought a dismissal of the 8(a)(5) allegations without any Notice posting. Midwest's reasoning was twofold and Tulencik explained as follows:

1. Even though the General Counsel had acknowledged that three of the policies at issue did not violate § 8(a)(1) per the Board's ruling in *Boeing*, the General Counsel would nevertheless seek to the rescission of these same rules under its 8(a)(5) theory of the case. As such, the General Counsel's proposed settlement was anything but.

2. On September 18, 2014, the union filed an ulp charge (8-CA-137044) against Midwest alleging violations of § 8(a)(1) and 5 of the Act. The union alleged in relevant part that Midwest disseminated policy changes (2014 Policy and Safety Handbooks) without notifying or bargaining with the union over these changes. On November 28, 2014, the Regional Director for Region 8 dismissed the charge. Midwest followed the same procedure in 2012, 2013, and 2015 as it did in 2014 when the Region determined that Midwest's actions did not violate the Act. (Tulencik did not reference dates during the teleconference. Only that the union had filed a nearly identical charge in 2014 and the Region dismissed the charge).

The General Counsel maintained that any action with respect to the 8(a)(5) would be improper because only the 8(a)(1) allegations had been remanded. Tulencik and Mason noted that the Amended Board Order remanded the entire proceeding. The parties agreed to schedule a third teleconference for February 25, 2019.

On February 20, 2019, Gleine sent the following correspondence to the parties:

> We wish to take this opportunity to reiterate the General Counsel's position regarding discussions centered upon the work rules that remain at issue in this case and to clarify any misunderstandings prior to our next conference call on Monday, February 25, 2019. As stated in our first conference call, the General Counsel takes the position that the following work rules are now lawful pursuant to *Boeing* and should be dismissed:

- Non-Disclosure/Confidentiality Policy #2500 Referring to Photography and Recording;
- the Handbook's Camera, Cell, Digital Device Policy #3100; and
- the Incident Reporting Policy #1600

The work rules that will be the subject of our next conference call remain as follows:

- Non-Disclosure/Confidentiality Policy #2500;
- Confidentiality Policy #2500;
- Workplace Environment Policy #4500

As requested by Chief Judge Giannasi, Counsel for the General Counsel and Respondent's Counsel have reviewed, in detail, the language at issue in the remaining work rules. Counsel for the General Counsel is optimistic that a settlement can be reached and will make every effort to resolve this case. However, it should be noted that Counsel for the General Counsel is not authorized to revise or approve revised rule language as part of these discussions, as the remedy sought is that the rules be rescinded.

See, 2.20.19 Gleine e-mail attached hereto as Exhibit 4.

On the morning of February 25, 2019 Midwest submitted its formal, written counter proposal to the General Counsel. Specifically, Midwest would rescind and/or rewrite certain portions of its policies that the General Counsel still maintained was unlawful. Additionally, Midwest would alert the union and the employees of the rescission and/or revised policies. In so doing, Midwest required that the General Counsel to dismiss the § 8(a)(5) and (1) allegations of the Complaint and Midwest would not be required to post a Notice. Midwest's proposal was as follows:

Noah/Greg:

Below is the Handbook language in question, including Noah's yellow highlighted portions of the rule which the Region is seeking Midwest to rescind. I have included the language for the policies in their entirety for contextual purposes. Midwest will agree to rescind only the highlighted language that is struck through. I have included additional language in green highlights. Midwest has rescinded only those portions of the policies which related to employees. Any portions of the policy related to customer/client information should not be rescinded. Minimal language (four words) have been added to make clear we are

only referencing customer/client data. If we simply agreed to rescind Noah's highlighted language, we are left with incomplete sentences that in some instances do not make sense (I fully understand Noah was merely highlighting the language per my request).

In regards to policy 4500 we will agree to rescind the language concerning the expectation of privacy and we have defined the jobsite in the loitering section so as to fully comply with Tri-County Medical Center, 222 NLRB 1089 (1976) wherein the Board set forth the criterion for a valid no access rule.

Additionally, as the entire case has been remanded per the Board's Order, once these policy revisions/rescissions are approved, the Complaint must be dismissed in its entirety for the following reasons:

1) The Region maintains that certain rules are lawful on their face per the Boeing decision. Notwithstanding, the Region is seeking to rescind those same rules based upon its 8(a)(5) violation; and

2) On September 18, 2014 the union filed and 8(a)(5) and (1) violation regarding policy changes made to the Handbooks without bargaining with the union. That charge was dismissed on November 28, 2014. On May 14, 2015 the union filed the same charge regarding policy changes made to the Handbooks without bargaining with the union. The Region inexplicably decided to issue a Complaint in the matter herein. As noted in the briefing and the record evidence, Midwest did nothing different in regards to its handbooks in 2014 vs. 2015.

In summary, Midwest will agree to the policy revisions/rescissions outlined below if, and only if the entire Complaint is dismissed.

From: Aaron Tulencik <atulencik@maslawfirm.com>
Sent: Thursday, February 14, 2019 9:52 AM
To: Fowle, Noah <Noah.Fowle@nlrb.gov>
Cc: Aaron Tulencik <atulencik@maslawfirm.com>
Subject: Midwest Handbook [Language]

Noah:

Good morning. Below is the language from Policy 2500 and 2550. Could you please highlight or underline or italicize the specific language you are requesting that Midwest rescind. I am clear on the language the language you are requesting that Midwest rescind from Policy 4500. Thank you.

Policy #2500 Non-Disclosure/Confidentiality Policy

The protection of confidential business information and trade secrets is vital to the interests and success of MWTTI and MWTT. Photography and all

types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by clients, contractors, employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

Employees who improperly use or disclose trade secrets or confidential business information~~, to include information regarding labor relations~~, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer (including all contact information and all accounting data) ~~all personnel information, and union related business~~ are considered confidential business information and should be guarded as such. Password-protect and lock your computers when not in use, safe guard files, and keep good accountability of all electronic media (e.g. CD, DVD, and memory sticks), photographs and recordings.

Employees who violate this policy will be subject to disciplinary action, up to and including employment termination.

Employees are required to sign in acknowledgement that they have read and understand this policy and the potential disciplinary consequences of violating it.

This policy will be reviewed periodically, and enforced at all times.

Policy #2550 Confidentiality Agreement Policy

Use of Confidential Information by Employees

I, _____, as an Employee of Midwest Terminals of Toledo International, Inc. (MWTTI) or Midwest Terminals of Toledo, Inc. (MWTT) I do hereby acknowledge that I must comply with a number of State and Federal Laws that regulate the handling of confidential and personal information regarding both customers/clients of this company and its other employees. These laws may include but not be limited to FACTA, HIPAA, GINA, The Economic Espionage Act, The Privacy Act, Gramm/Leach/Bliley ID Theft Laws (where applicable), Trade Secrets Protections, and Implied Contract Breach.

I understand that I must maintain the confidentiality of ~~ALL documents,~~ customer/client credit card information~~, and personal information of any type~~ and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should I misuse or breach, ~~any personal information or~~

the expectation of privacy of said clients ~~and/or employees~~; I understand that I will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

I further agree to follow the rules and regulations this company has in place as regards to the handling of confidential information so as to protect the privacy of all involved.

Policy 4500 Safe Workplace Environment

Employees found participating in any of the following activities on any jobsite will be subject to immediate discharge (firing).

- ~~Violating others' expectation of privacy.~~

Employees found participating in any of the activities listed below are subject to disciplinary actions up to and including discharge:

- Loitering or presence on the jobsite without authorization before or after assigned shift is completed. The jobsite is defined as the areas of Facility 1 inside the gates.

See, 2.25.19 Tulencik e-mail to Fowle and Gleine attached hereto as Ex. 5.

During the February 25, 2019 teleconference call the parties discussed Midwest's counter offer. Present on the call for the union were Yockey and Hubbard. Fowle and Gleine were present for the General Counsel. Mason and Tulencik were present for Midwest. During the teleconference the General Counsel indicated that if it was going to agree to withdraw or dismiss the § 8(a)(5) allegations, Midwest would have to agree to rescind any discipline(s) issued to employees for a violation of any of the policies at issue in this matter. Counsel for Midwest noted that it could not recollect any such disciplines, but agreed to look into the matter and discuss the General Counsel's request with its client. Fowle indicated that one such employee did receive such discipline. The parties scheduled a fourth teleconference for March 8, 2019.

At the conclusion of the teleconference Tulencik sent an e-mail to Fowle requesting a copy of the discipline he referenced during the teleconference. See, 2.25.19 Tulencik e-mail to

Fowle attached hereto as Ex. 6. On February 28, 2019 Fowle notified Tulencik that Hubbard was disciplined on or about September 20, 2017 for a violation of Policy #3100. Later that morning Tulencik e-mailed Fowle and Gleine in regards to the Hubbard discipline. Tulencik stated as follows:

> Noah:
>
> I just tracked down this charge. We submitted our Position Statement on December 1, 2017. The charge was filed in October 2017. For reasons unknown the charge[ ] is still open.
>
> While Hubbard was disciplined under policy 3100 he was also disciplined under CBA work rule # 12 regarding the prohibition of cell phones. CBA work rule #12 is undoubtedly a proper work rule and numerous employees have been disciplined for such. Further union a union steward, Mr. Russell, was terminated for violating this work rule. All that being said, we certainly will look into dropping the reference to policy #3100 in the discipline but the client may not be willing to drop a discipline issued for violation of a lawful work rule.

See, 2.28.19 Tulencik e-mail to Fowle and Gleine attached hereto as Ex. 7. On March 7, 2019 Tulencik and Fowle exchanged e-mails prior to the previously scheduled March 8, teleconference. Fowle stated as follows:

> Aaron,
>
> Just an update heading into tomorrow's call.
>
> We are prepared to settle the work rules via a non-board settlement in the manner we have previously discussed where the offensive language of the rules are changed/removed, and employees receive some notification on the updates to the rules.
>
> But it's our position that we want an informal settlement on the 8a5 unilateral change allegation. This case deals with two separate and distinct issues – overly broad rules and unilaterally implemented rules. The remedy to a unilaterally changed work rule is a rescission of all discipline issued under the unilaterally changed work rule regardless of the unilaterally changed rule's lawfulness.
>
> We are willing to condition the informal settlement of the 8a5 allegation on the on the result of the withdraw of recognition issue.

Tulencik responded as follows:

> Noah:
>
> It appears the Region's position is that the entire discipline issued to Prentis must be rescinded, not just the portion related to 3100. Is that correct? Please advise.
>
> Second, during the conference call, the Region all but indicated it would dismiss the 8(a)(5) if Midwest rescinded the discipline issued to Prentis. We have indicated [our] willingness to do so and now the Region is reneging. Further, under the Region's initial proposal, the Region only required that Midwest rescind the overly broad rules. There was zero mention of rescinding the discipline. You continue to move the target. Again, in November 2014 your Region dismissed an identical 8(a)(5) charge filed by the union over the Handbooks. We'll just have to wait and see how the Chief Judge would like to proceed.

See, 3.7.19 Tulencik/Fowle e-mail string attached hereto as Ex. 8.

On March 8, 2019 the parties reconvened for their fourth and ultimately final teleconference. During the teleconference the parties discussed the status of settlement negotiations. Midwest indicated its willingness to rescind Hubbard's discipline in its entirety, even though the discipline was lawful under CBA work rule #12, if the General Counsel would dismiss the § 8(a)(5) allegations and/or the union would withdraw the § 8(a)(5) allegations. Further, Midwest would not be required to post a Notice. At the conclusion of the call it was understood that the General Counsel would contact the parties on Monday, May 11 to alert the parties of its intentions with respect to settlement.

On March 11, 2019 Gleine sent an e-mail to the parties announcing that the General Counsel would agree to the terms as discussed during the March 8, 2019 teleconference. See, 3.11.19 Gleine e-mail attached hereto as Ex. 9. In response to Gleine' s e-mail, ALJ Giannasi sent the parties an email acknowledging the settlement and instructing the General Counsel and Midwest to submit a Joint Motion to dismiss the complaint on the basis of the settlement and the motion would be granted. The e-mail stated as follows:

> That settlement sounds good to me. If the GC would submit a joint motion with the Respondent to dismiss the complaint on the basis of the settlement described, I would grant the motion. That should end the case. Thank you to all the parties on this resolution of the matter.

See, 3.11.19 ALJ Giannasi e-mail attached hereto as Ex. 10. Two days later Fowle contacted Tulencik and asked Tulencik to draft the non-board settlement agreement and that he was currently drafting the Joint Motion requested by ALJ Giannasi. It was clear by the General Counsel's actions that it had agreed to the terms of the settlement agreement. One day later the General Counsel alerted the parties that it could not join in any motion to dismiss the allegations, rather, the § 8(a)(5) allegations needed to be withdrawn. See, e-mail string from 3.14.19 attached hereto as Ex. 11. Again, based upon all of the above, it is unequivocally clear that the parties had an agreement.

On March 20, 2019, Fowle notified the parties that Joseph Mando ("Mando") filed a Notice of Appearance in the matter herein on behalf of the union and that Midwest should send the Settlement Agreement to Mando for his review. On March 29, 2019, Tulencik sent the Settlement Agreement to Mando and Fowle. See, 3.29.2019 Tulencik e-mails to Mando and Fowle attached hereto as Exs. 12 and 13.

On April 5, 2019 Fowle contacted Tulencik and inquired whether Mando had contacted him to discuss the Settlement Agreement. Tulencik instructed Fowle that Mando had not yet contacted him. Fowle further inquired if there was a particular reason the Settlement Agreement provided that Midwest would provide notice to the union that rescissions and/or changes were made to the policies at issue but not the employees. Tulencik notified Fowle it was an inadvertent oversight that could corrected before the Agreement was submitted to Chief ALJ Giannasi.

On April 8, 2019, Chief ALJ Giannasi requested an update from the parties. Fowle responded soon thereafter and stated as follows:

> Your honor,
>
> I believe the Employer is still waiting to hear back from the Union's attorney about the proposed non-board settlement agreement.
> There is one procedural issue that ought to be addressed. Currently, the agreement that Respondent's counsel drafted speaks about the charge being "withdrawn," however, given that the charge, and the entire case, is before you, the Region does not have the authority to approve a withdrawal. I have explained this issue to Respondent's counsel, and I believe he will me making the necessary adjustments on how to best dispose of the case pursuant to your instructions.

See, 4.8.19 Fowle e-mail attached hereto as Ex. 14. Soon thereafter, Mando notified the parties that the union was reneging on the deal. Mando stated as follows:

> Your Honor and Counsel:
>
> I have had the opportunity to review the proposed settlement agreement and to discuss the same with our client representatives. We have two major issues with the proposed settlement agreement, which objections may likely strike to the core of the terms that Midwest and the Region have agreed to accept. The Union's specific objections are as follows:
>
> Upon review of Judge Fine's Decision in Case No. 08-CA-152192, the Union has identified four (4) key components to his order: (i) the finding that Midwest violated the Act by refusing to recognize and bargain with Local 1982, including with respect to the changes to its work rules (and by unilaterally implementing said changes); (ii) the finding that Midwest violated the Act by enacting certain work rules that were inherently destructive to its employees' Section 7 rights/and the directive to rescind such unlawful rules; (iii) the directive that Midwest rescind employee discipline assessed under the unlawful work rules; and (iv) the directive that Midwest post the required Notice to employees related to its unfair labor practices. The Union believes that the draft settlement agreement only addresses two (2) of these issues. Specifically: (i) requiring changes to certain work rules; and (ii) rescinding the discipline assessed to bargaining unit member Prentis Hubbard.
>
> I recognize that there were obviously significant settlement discussions occurring in this Case prior to my appearance on behalf of Local 1982, and I regret that this message will likely complicate this matter in several respects. However, it is my understanding that these discussions mainly occurred by and through Prentis Hubbard. As you may know, Local 1982 remains in trusteeship, with Messrs. Mike Baker and William Yockey serving as the organization's co-Trustees. At all

> relevant times, with respect to the settlement terms here at issue, Mr. Hubbard is a bargaining unit member – he has no power or authority to bind Local 1982 as an organization. Having spoken with Mr. Yockey, neither he nor Mr. Baker approved or authorized the settlement of the above referenced case under the outlined terms. Mr. Hubbard is the charging party in Case No. 08-CA-207426; he clearly has the right to determine that case as he sees fit, but he has no authority to bind Local 1982 in the above referenced case.
>
> In any event, ILA Local 1982 is unwilling to voluntarily settle the above referenced case unless Midwest is required to post a notice, wherein it acknowledges its violations of the Act by refusing to recognize and bargain with Local 1982, including with respect to the work rules, in addition to the agreed upon matters (i.e., rescinding certain changes to work rules and removing Prentis Hubbard's discipline). Local 1982 has other specific objections to Midwest's proposed settlement agreement, but these identified matters are threshold issues. And I suspect that Midwest is unwilling to agree to a settlement agreement that contains these provisions, which the Union requires. Hence, I wanted to raise these issues immediately, prior to marking up Midwest's proposed settlement document.
>
> While I trust that this message is clear with respect to Local 1982's position, please contact me if a clarification is needed. Likewise, I am available for a conference call to discuss these issues.

See 4.8.19 Mando e-mail attached hereto as Ex. 15.

Both Tulencik and Mason responded to Mando's e-mail and reminded the parties that Yockey informed announced on the first teleconference conference that the union was following the General Counsel's lead. Further, each of the concerns raised by Mando had been previously discussed during the four teleconferences of which Yockey and Baker attended as outlined above. See, 4.8.19 Tulencik and Mason e-mails attached hereto as Ex. 16. Just two days later the General Counsel announced that it too was reneging the previously agreed to terms of the settlement agreement and further indicated it would oppose the settlement since the union was backing out of the deal. See, Fowle 4.10.19 e-mail attached hereto to as Ex. 17. Rather than acting as an independent agency, the General Counsel merely followed the direction of the union.

III. THE SETTLEMENT AGREEMENT MEETS THE REASONABLENESS STANDARD OF *INDEPENDENT STAVE*

In the alternative, even if the union and General Counsel oppose the settlement, Your Honor is not prohibited from accepting the agreement. See, UPMC, 365 NLRB No. 153 (2017). As the Board stated in *UPMC*, "it is the Board's adjudicatory duty, not that of the prosecuting General Counsel and certainly not that of the charging party, to make the final determination that settlement terms are reasonable." See, Id. at p. 5. When evaluating settlements under *Independent Stave* in order to order to determine whether the settlement will effectuate the purposes and policies of the Act, the Board will consider the following:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

See *UPMC* 365 NLRB No. 153, slip. op. p. 4, citing *Independent Stave*, 287 NLRB 740, 743 (1987).

A. Position of the Parties

As illustrated above, the union and the General Counsel originally agreed to be bound by the terms of agreement. Yockey informed the parties during the first teleconference that the union was following the lead of the General Counsel. Accordingly, the parties spent a significant amount of time, including 4 teleconferences over a 28 day period hashing out the terms of the Agreement. Clearly the General Counsel would not have wasted significant time and resources if the charging party was not on board from the very beginning. It was not until March 20, 2019 – approximately 3 ½ years after the Complaint at issue herein was filed, some

165 days after the Board issued its Notice to Show Cause and approximately 40 days after the parties conducted their first teleconference – that Mando decided to filed a Notice of Appearance in this matter and subsequently notify the parties that the union was reneging on the terms of the settlement. Mando's objection on behalf of his client (Yockey and Baker) who attended the teleconferences as noted above hold no merit. Further, both Yockey and Baker were included on calendar invites for the teleconferences. See, Calendar invites attached hereto as Exhibit 18. The union was well aware what was going on and had no objections.

B. The Settlement is Reasonable in Light of the Nature of the Violations Alleged

The alleged violations are related to certain handbook policy language that is purportedly overbroad and could possibly chill employees' § 7 rights. As part of the original agreement, Midwest agreed to rescind and/or rewrite the particular portions of the policies that were troubling to the General Counsel. The terms of the Settlement Agreement also required that the remainder of the Complaint allegations [§ 8(a)(5)] be dismissed. Midwest's reason for doing so was as follows: (1) Even though the General Counsel had acknowledged that three of the policies at issue did not violate § 8(a)(1) per the Board's ruling in *Boeing*, the General Counsel would nevertheless seek to the rescission of these same rules under its § 8(a)(5) and (1) theory of the case and (2) On September 18, 2014, the union filed an ulp charge (8-CA-137044) against Midwest alleging violations of 8(a)(1) and 5 of the Act. The union alleged in relevant part that Midwest disseminated policy changes (2014 Policy and Safety Handbooks) without notifying or bargaining with the union over these changes. On November 28, 2014, the Regional Director for Region 8 dismissed the charge. Midwest followed the same procedure for disseminating its Policy Handbooks (and any changes therein) in 2012, 2013, and 2015 as it did in 2014 when the Region determined that Midwest's actions did not violate the Act. Accordingly, Mando's

concerns regarding the § 8(a)(5) allegations and Notice posting were addressed during the teleconferences which Yockey and Baker attended.

C. Midwest Did Not Coerce the Union or the General Counsel to Agree to the Terms of the Settlement

Neither the union nor the General Counsel has alleged they are no longer adhering to the previously agreed to terms of the settlement due Respondent engaging in fraud, coercion or duress.

D. History of Violations of Act/Breach of Past Settlement Agreements

1. History of violations of the Act

As was alluded to during the final teleconference, Midwest currently has three separate appeals pending before the D.C. Circuit; Case Nos. 18-1017 and 18-1049, 17-1238 and 18-1094 and 17-1239 and 18-1093. Two of those appeals are related to Board Orders with cease and desist orders regarding changing terms and conditions of employment without first providing the union the opportunity to bargain. Your Honor noted during the last teleconference, that the General Counsel does not need to proceed with the matter herein in the hopes of obtaining another cease and desist order. Further and as previously noted above, Region 8 dismissed the union's 2014 8(a)(5) allegation that Midwest failed to bargain over the policy changes in the 2014 Policy Handbooks. Midwest followed the same procedure in 2015 as it did in 2014 when the Region dismissed this allegation.

In Case Nos. 18-1017 and 18-1049 Midwest is appealing the Board's finding of certain violations of § 8(a)(1) and (3) and 8(d) of the Act. Oral argument was conducted in November 2018 and the parties are currently awaiting the Court's ruling. In Case Nos. 17-1238 and 18-1094 Midwest is appealing the Board's finding of certain violations of 8(a)(1), (3), (4) and (5) of the Act. Oral argument was conducted in November 2018 and the parties are currently awaiting

the Court's ruling. In Case Nos. 17-1239 and 18-1093 Midwest is appealing the Board's finding of certain violations of 8(a)(1), (3) and (5) of the Act. Oral argument was conducted in November 2018 and the parties are currently awaiting the Court's ruling.

2. Past settlement agreements

Midwest maintains that it has not breached any settlement agreements that resolved unfair labor practices. Notwithstanding, the parties were involved in litigation before the Honorable Jeffrey Helmick, District Court Judge in the Northern District of Ohio. The controversy surrounded Midwest's refusal to arbitrate certain grievances. Midwest refused to arbitrate the grievances arguing that the 2010 CBA had expired. The union maintained that the 2010 Agreement automatically renewed pursuant to an evergreen clause and, in the alternative, argued that the parties agreed to withdraw unfair labor practice charges filed against one another and proceed to arbitration. Counsel for Midwest has never been presented with copy of the aforementioned agreement. Notably, Judge Helmick did not ever rule on the union's allegation of a purported "agreement" to arbitrate.

IV. CONCLUSION

Based upon all of the above, it is unequivocally clear that the parties had an agreement to settle this matter until the union and then the General Counsel inexplicably reneged on the agreement. Accordingly, Midwest respectfully Chief ALJ Giannasi to to enforce the terms of the already agreed upon settlement agreement.[2] Notwithstanding, Midwest's proffered terms of settlement satisfy the reasonableness standard set forth in *Independent Stave*. As such, Midwest

[2] See, *Smith v. ABN AMRO Mortgage Group, Inc*., 434 Fed. Appx. 454, 461 (6th Cir. 2011) ("existence of a valid agreement is not diminished by the fact that the parties have yet to memorialize the agreement. When parties have agreed on the essential terms of a settlement, and all that remains is to memorialize the agreement in writing, the parties are bound by the terms of the oral agreement"), citing *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 646 (6th Cir. 2001).

alternatively respectfully requests Chief ALJ Giannasi to accept Respondent's proffered settlement and dismiss the 8(a)(5) allegations of the Complaint over the objections of the General Counsel and the union pursuant to *UPMC*.

Respectfully submitted,

/s/ Aaron T. Tulencik

Ronald L. Mason
Aaron T. Tulencik
Mason Law Firm Co., LPA
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Counsel for Respondent, Midwest Terminals of Toledo International, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 17, 2019 an electronic original of Respondent's Motion to Enforce Settlement Agreement and Dismiss Complaint was transmitted the National Labor Relations Board, Division of Judges, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing Motion Answer were transmitted to the following individuals by electronic mail:

Greg Gleine, Esq.
Noah Fowle, Esq.
National Labor Relations Board, Region 8
Anthony J. Celebreeze Federal Building
1240 E. Ninth Street, Room 1695
Cleveland, OH 44199-2086
Gregory.Gleine@nlrb.gov
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Joseph D. Mando
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One International Place
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Counsel for the Charging Party

Prentis Hubbard
phubbard63@yahoo.com

/s/ Aaron T. Tulencik
Aaron T. Tulencik

SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

Charging Party Local 1982, International Longshoremen's Association, AFL-CIO ("ILA Local 1982" or "Union") and Respondent Midwest Terminals of Toledo International, Inc. ("Midwest" or Company") (collectively the "Parties"), by and through their undersigned counsel, agree to settle any and all claims the Union had or may have had against the Company, regarding the claims asserted in the matter entitled *Midwest Terminals of Toledo International, Inc. and International Longshoremen's Association, Local 1982, AFL-CIO* before the National Labor Relations Board ("NLRB") Case No. 8-CA-152192 and in NLRB Charge No. 08-CA-207426 (the "Charge") still pending before Region 8 of the NLRB and agree as follows:

RECITALS

WHEREAS, the Union filed an unfair labor practice charge (8-CA-152192) against the Company which resulted in an Administrative Law Judge issuing the decision and order in *Midwest Terminals of Toledo International Inc.*, JD-89-16 (September 19, 2016) ("ALJ Decision").

WHEREAS, on or about October 31, 2016, the Company filed an appeal of the ALJ Decision with the National Labor Relations Board.

WHEREAS, on or about October 10, 2018 the Board issued a Notice to Show Cause as to why the case should not be remanded to an Administrative Law Judge for further proceedings consistent with the Board's adoption and implementation of a different standard to determine the lawfulness of Handbook Policies/Rules as set forth in *The Boeing Co.*, 365 NLRB No. 154, slip op. (2017) ("Boeing").

WHEREAS, on or about January 25, 2019, the Board issued an Order remanding the case back to the ALJ for further proceedings.

WHEREAS, on or about February 1, 2019, the Board issued an Order remanding the case back to the ALJ for further proceedings.

WHEREAS, on or about September 22, 2017, the Company issued discipline to Prentis Hubbard for violating Policy #3100 – Camera, Cell, Digital Device Policy and CBA work rule # 12.

WHEREAS, on or about October 4, 2017 the Union filed an unfair labor practice charge (8-CA-207426) against the Company alleging the discipline was unlawful based upon §8(a)(3) and (1) and 8(a)(5) and (1) of the Act.

WHEREAS, Region 8 has not yet made a determination regarding 8-CA- 8-CA-207426.

WHEREAS, the Parties wish to avoid further litigation between them.

NOW THEREFORE, in consideration of the execution of this Agreement by each of the Parties hereto and the mutual covenants hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

TERMS AND CONDITIONS

1. The Union concedes that three of the Company's policies at issue in this litigation are lawful per the Board's criterion set forth in *Boeing*. Those polices are as follows: Policy #2500 – Non-Disclosure/Confidentiality Policy referring to photography and recording; Policy #3100 – Camera, Cell, Digital Device Policy; and Policy #1600 – Incident Reporting Policy. These policies remain in full force in effect. See, Complaint ¶¶ 6(A)(iii) and 7(A)(i-vi), attached hereto as Exhibit A.

2. The Union and Company will provide a copy of this Agreement to Region 8. Once approved by Region 8, the Union will withdraw, with prejudice, each and every remaining allegation in the Complaint not specifically addressed in this Agreement. Further, the Union will withdraw, with prejudice, ULP charge 8-CA-207426 in its entirety. This Settlement Agreement is conditioned on the Union's aforementioned withdrawals. See, Complaint and ULP charge 8-CA-207426 attached hereto as Exhibit B.

3. As part of this Settlement Agreement, the Company is not required to post a Board Notice. This Settlement Agreement is conditioned on the Region's assent to the aforementioned request and the approval of the Union's aforementioned withdrawals.

4. The Company will rescind any purported unlawful language in the following policies: Policy #2500 Non-Disclosure/Confidentiality Policy; Policy #2550 Confidentiality Agreement Policy; and Policy #4500 Safe Workplace Environment.

5. Per paragraph 4 of this Agreement, ***Policy #2500 Non-Disclosure/Confidentiality Policy*** now reads as follows:

   > The protection of confidential business information and trade secrets is vital to the interests and success of MWTTI and MWTT. Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by clients, contractors, employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.
   >
   > Employees who improperly use or disclose trade secrets or confidential business information, ~~to include information regarding labor relations,~~ will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer (including all contact information and all accounting data) ~~all personnel information, and union related business~~ are considered confidential business information and should be guarded as such. Password--protect and lock your computers when not in use, safe guard files, and keep good accountability of all electronic media (e.g. CD, DVD, and memory sticks), photographs and recordings.

Employees who violate this policy will be subject to disciplinary action, up to and including employment termination.

Employees are required to sign in acknowledgement that they have read and understand this policy and the potential disciplinary consequences of violating it.

This policy will be reviewed periodically, and enforced at all times.

6. Per paragraph 4 of this Agreement, ***Policy #2550 Confidentiality Agreement Policy*** now reads as follows:

   Use of Confidential Information by Employees

   I, _____, as an Employee of Midwest Terminals of Toledo International, Inc. (MWTTI) or Midwest Terminals of Toledo, Inc. (MWTT) I do hereby acknowledge that I must comply with a number of State and Federal Laws that regulate the handling of confidential and personal information regarding both customers/clients of this company and its other employees. These laws may include but not be limited to FACTA, HIPAA, GINA, The Economic Espionage Act, The Privacy Act, Gramm/Leach/Bliley ID Theft Laws (where applicable), Trade Secrets Protections, and Implied Contract Breach.

   I understand that I must maintain the confidentiality of ~~ALL documents,~~ customer/client credit card information, ~~and personal information of any type~~ and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should I misuse or breach, ~~any personal information or~~ the expectation of privacy of said customers/clients ~~and/or employees~~; I understand that I will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

   I further agree to follow the rules and regulations this company has in place as regards to the handling of confidential information so as to protect the privacy of all involved.

7. Per paragraph 4 of this Agreement, ***Policy #4500 Safe Workplace Environment*** now reads as follows:

Teamwork, safe work behaviors and cooperation from all employees will help provide a safe and efficient work environment. Any employee who refuses or fails to follow the standards set forth herein will be subject to disciplinary action up to and including discharge. In cases not specifically mentioned, employees are expected to use good judgment and refer any questions to a supervisor.

Employees found participating in any of the following activities on any jobsite will be subject to immediate discharge (firing).

- Fighting or attempting a willful act to cause bodily injury upon another person – which constitutes Violence in the Workplace.
- Insubordination, threatening, or intimidating a supervisor, another employee or other site personnel – which constitutes Violence in the Workplace.
- Possession and/or use at any time of a prohibited weapon on Company property, in any facility maintained by the Company, and/or in Company-supplied vehicles or in personal vehicles while on Company property. Exceptions to this policy must have prior approval from the Company President.
    - Prohibited weapons include any form of weapon and any form of explosive restricted under local, state, or federal regulation. This includes all firearms, or other weapons covered by the law, regardless of whether the person is licensed to possess and/or use a weapon or not.
- Refusing to submit to a search when requested by management in accordance with this policy.
    - Upon reasonable suspicion, the Company reserves the right to conduct searches of any person, vehicle, or object on Company property at any time. Pursuant to this provision, the Company or its agent, is authorized to search lockers, desks, purses, briefcases, baggage, toolboxes, lunch sacks, clothing, vehicles parked on Company property, and any other personal effect or item in which a weapon may be hidden.

- ~~Violating others' expectation of privacy.~~

- Failing or refusing to cooperate with any investigation relating to a possible violation of this Safe Workplace Environment Policy

Employees found participating in any of the activities listed below are subject to disciplinary actions up to and including discharge:

- Violations of safety rules or OSHA standards;
- Harassment (of any form), horseplay, pranks, malicious mischief, or immoral conduct or other conduct affecting the right of others, or which violates the common decency of fellow associates;
- Failure to comply with TWIC/gate admittance procedures;
- Loitering or presence on the jobsite without authorization before or after assigned shift is completed. The jobsite is defined as the areas of Facility 1 inside the gates.

- Failing or refusing to report a known violation of this Safe Workplace Environment Policy.

This Safe Workplace Environment Policy does not constitute a contractual undertaking by the Company and the Company does not through this Policy, assume or offer to assume any obligations beyond that which may be imposed by applicable law. The Company reserves the right to alter, amend, or discontinue any Policy or program included in the Safe Workplace Environment Policy without notice at its sole discretion. The failure of the Company to exercise any function in any particular way shall not be considered a waiver of the Company's right to exercise such function or preclude the Company from exercising that prerogative in some other way.

The Safe Workplace Environment Policy establishes clear guidelines that address prohibiting weapons, fighting, harassment and violence in the workplace to ensure a safe work environment.

I do hereby certify and acknowledge that I have received and read the Safe Workplace Environment Policy. I understand that engaging in prohibited behavior under the policy may result in discipline, up to and including removal from Midwest Terminals of Toledo International, Inc. (MWTTI) and/or Midwest Terminals of Toledo, Inc. (MWTT) premises, termination and legal action. I agree to uphold the Safe Workplace Environment Policy.

I release and agree to hold harmless MWTTI and MWTT, and its directors and associates for any action taken by the Company in compliance with the provisions of this policy.

A photocopy/facsimile of this authorization and release shall have the same force and effect as the original.

8. Within 14 days of the execution of this Agreement, the Company will notify the Union and the employees, in writing, of the affirmative actions noted in paragraphs' 5, 6 and 7 of this Agreement.

9. Within 14 days of the execution of this Agreement, the Company will expunge from Prentis Hubbard's personnel file the September 22, 2017 discipline for violating Policy #3100 – Camera, Cell, Digital Device Policy and CBA work rule # 12 and notify both the union and Prentis Hubbard of said action.

10. The Union, within 7 days of receiving notice of the actions described in paragraphs' 8 and 9 noted immediately above, will withdraw, with prejudice, each and every remaining allegation set forth in 8-CA-152192 and withdraw, with prejudice, 8-CA-207426 in its entirety.

11. This Agreement constitutes an integration of the entire understanding and agreement of the Parties with respect to the subject matter hereof. Any representations, warranties, promises, or conditions, whether written or oral, not specifically and expressly incorporated in this Agreement, shall not be binding on any of the Parties, and each of the Parties acknowledges

that they have not relied, in entering into this Agreement, on any representation, warranty, promise or condition, not specifically and expressly set forth in this Agreement. All prior discussions and writings have been, and are, merged and integrated into, and are superseded by, this Agreement.

12. This Agreement may be executed in multiple counterparts, each of which, when solely executed, shall be deemed an original, but all such counterparts together shall constitute one and the same instrument.

13. The Parties understand and agree that entering into this Agreement and carrying out of any of the terms of this Agreement shall not constitute an admission of any violation of any law or breach of any duty by the Company, nor does it constitute an admission of any allegation of wrongdoing or illegal conduct on the part of Company. The Parties recognize that Midwest specifically denies each one of the allegations of wrongdoing and illegal conduct made by the Union. The Company denies liability for any claim alleged by the Union by the Union and is resolving this dispute in order to avoid the inconvenience of further controversy and for no other reason.

Dated: March __, 2019	Dated: March __, 2019
LOCAL 1982, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO	**MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.**
By :_____	By :_____
Title: _____	Title: _____

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.	
And	**CASE 08-CA-152192**
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1982, AFL-CIO	

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Longshoremen's Association, Local 1982, AFL-CIO (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Midwest Terminals of Toledo International, Inc. (Respondent) has violated the Act as described below.

1. (A) The charge in Case 08-CA-152192 was filed by the Union on May 14, 2015, and a copy was served by regular mail on Respondent on May 14, 2015.

(B) The first amended charge in Case 08-CA-152192 was filed by the Union on July 28, 2015, and a copy was served by regular mail on Respondent on July 28, 2015.

2. (A) At all material times Respondent, an Ohio corporation with a place of business located at 3518 St. Lawrence Drive, Toledo, Ohio, (Respondent's facility) has been engaged in providing stevedoring services to shipping companies that are engaged in interstate and foreign commerce.

Exhibit A

(B) Annually, Respondent, in conducting its business operations described above in Paragraph 2(A), derives gross revenues in excess of $500,000 for these services.

3. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Alex Johnson	-	President and CEO
Christopher Blakely	-	Human Resource Manager
Terry Leach	-	Director of Operations
Brad Hendricks	-	Operations Manager

6. (A) At all relevant times, Respondent has maintained the following policies and/or work rules in its 2015-2016 Policy Handbook:

(i) The Non-Disclosure/Confidentiality Policy #2500 provides the following:
Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by...employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

Employees who improperly use or disclose...confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such.

(ii) The Confidentiality Agreement Policy #2550 provides that employees must: [M]aintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should [employees] misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; [employees] understand that [they] will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company. (emphasis in original)

(iii) The Camera, Cell, Digital Device Policy #3100 provides:

(a) In the Policy Overview, that employees and visitors are prevented from "the improper disclosure of company trade secrets and confidential business information."

(b) Under the General Policy, Digital Equipment Usage, that the "[u]se of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other devices, whether digital or conventional film cameras—while on duty or when performing any function for or on behalf of the company –is **restricted**. This policy applies to all full-time and part-time employees and visitors." (emphasis in original)

(c) Under Cellular Telephone Use, that "[o]n-duty use of cell phones to send electronic mail is expected to comply with company rules and policies including sexual harassment, discrimination, ethics, code of conduct, confidentiality and workplace violence."

(d) Under Camera Use, that "[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee."

(e) Under Camera Use, that "[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee."

(f) Under Camera Use, that "[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes

any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device."

(g) Under Camera Use, that "[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.

Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others."

(h) Under Camera Use, that "[e]mployees may not take or use images or recording to harass, embarrass, annoy others and/or violate an individual's expectation of privacy. All company policies, including policies on harassment, discrimination, and processional conduct, apply to photographs and/or recordings taken."

(iv) Safe Workplace Environment #4500 policy prohibits an employee from "[v]iolating others' expectation of privacy".

(v) Safe Workplace Environment #4500 prohibits "[l]oitering or presence on the jobsite without authorization before or after assigned shift is completed;"

7. (A) At all relevant times, Respondent has maintained the following policies and/or work rules in its 2015-2016 Safety Handbook:

(i) The Incident Reporting Policy #1600 that states that "Because it is likely that incidents involving hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs...shall be marked as follows: "PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION."

(ii) The Incident Reporting Policy #1600 that states that "[n]o incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO."

(iii) The Driver Safety Requirements that states that "[p]hotography and recording are restricted at this facility at all times."

(iv) The Visitor Safety Requirements that states that "[p]hotography and recording are restricted at this facility at all times."

8. (A) The following employees of Respondent, (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *The terms members of the collective bargaining unit, employee or employees, as used in the Agreement, mean employees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, fork-lift operators, end-loaders, material handlers, checkers, signalmen, winchmen, linemen, line dispatcher, and hatch leaders.*

(B) Since at least January 1, 2006, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit and since at least on or about January 1, 2006, the Union has been recognized as the representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, one of which was effective by its terms from January 1, 2006 through December 21, 2010.

(C) At all times since on or about January 1, 2006, and at all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

9. (A) Since on or about March 1, 2015, Respondent unilaterally changed the 2015-2016 Policy Handbook's Nondisclosure/Confidentiality Policy #2500 by promulgating new rules pertaining to camera usage.

(B) Since on or about March 1, 2015, Respondent unilaterally changed the 2015-2016 Policy Handbook's Camera, Cell, Digital Device Policy #3100 by promulgating new rules pertaining to camera, digital device, and email usage.

(C) Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented the 2015-2016 Safety Handbook's Driver Safety Requirement.

(D) Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented the 2015-2016 Safety Handbook's Visitor Safety Requirement.

(E) Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented a 2015-2016 ILA Standard Operating Procedures policy.

(F) The subjects set forth above in paragraphs 9(A) through 9(E) relate to wages, hours and working conditions of employment and are mandatory subjects for the purposes of collective bargaining.

(G) Respondent engaged in the conduct described above in paragraph 9(A) through 9(E) without prior notice to the Union and without affording the Union with an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

10. By the conduct described above in Paragraphs 6 and 7 and their subparagraphs, Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

11. By the conduct described above in Paragraph 9 and its subparagraphs, Respondent has been failing and refusing to bargain collectively with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

12. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before September 11, 2015, or postmarked on or before September 10, 2015**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional

means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on the 3rd day of December 2015, at 10:00 a.m., in a court room of the Wood County Courthouse, One Courthouse Square, Bowling Green, Ohio, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Cleveland, Ohio this 28th day of August 2015.

/s/ Allen Binstock

ALLEN BINSTOCK
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 08-CA-152192

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

TERRY LEACH
MIDWEST TERMINALS OF TOLEDO INC.
3518 SAINT LAWRENCE DR
TOLEDO, OH 43605-1079

RON MASON, ESQ.
AARON T. TULENCIK, ESQ.
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PO BOX 398
DUBLIN, OH 43017-0398

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1982
2300 ASHLAND AVE
TOLEDO, OH 43620

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link:

www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence.** If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

Exceptions to the ALJ's Decision: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
08-CA-207426	10-4-17

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Midwest Terminals of Toledo International , Inc.		b. Tel. No. (419)698-8171
		c. Cell No. (419)697-2743
d. Address (street, city, state ZIP code) 3518 Saint Lawrence Dr, Toledo, OH 43605-1079	e. Employer Representative Chris Blakely	f. Fax No. (419)697-2744
		g. e-Mail chris.blakely@mwtti.com
		h. Dispute Location (City and State) Toledo, OH
i. Type of Establishment (factory, nursing home, hotel) Dock Warehouse	j. Principal Product or Service Stevedore	k. Number of workers at dispute location 30

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1), (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

Since on or about September 21, 2017, the Employer issued a verbal warning to Prentis Hubbard because of his activities and support for International Longshoremen Association, Local Union No. 1982 (Union).

Since on or about September 21, 2017, the Employer refused to bargain with the International Longshoremen Association, Local Union No. 1982. Specifically, the Employer issued a verbal warning to Prentis Hubbard on the basis of a unilaterally implemented work rule, Cell Phone/Mobile Device Policy #3100.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*) International Longshoremen Association, Local 1982	
4a. Address (street and number, city, state, and ZIP code) 2300 Ashland Ave Ste 225, Toledo, OH 43620-1280	4b. Tel. No.
	4c. Cell No. (419)280-4300
	4d. Fax No. (419)754-2678
	4e. e-Mail ilalocal1982@yahoo.com
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)	

RECEIVED
OCT - 4 2017
NLRB REGION 8
CLEVELAND, OH

6. DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**		Tel. No.
By: Prentis Hubbard (signature of representative or person making charge)	Prentis Hubbard Dock Steward Print Name and Title	Office, if any, Cell No. (419)280-4300
Address: 2300 Ashland Ave Ste 225, Toledo, OH 43620-1280	Date: 04 Oct 17	Fax No. (419)754-2678
		e-Mail ilalocal1982@yahoo.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

1-2083852855

Exhibit B

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.	
And	**CASE 08-CA-152192**
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1982, AFL-CIO	

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Longshoremen's Association, Local 1982, AFL-CIO (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Midwest Terminals of Toledo International, Inc. (Respondent) has violated the Act as described below.

1. (A) The charge in Case 08-CA-152192 was filed by the Union on May 14, 2015, and a copy was served by regular mail on Respondent on May 14, 2015.

(B) The first amended charge in Case 08-CA-152192 was filed by the Union on July 28, 2015, and a copy was served by regular mail on Respondent on July 28, 2015.

2. (A) At all material times Respondent, an Ohio corporation with a place of business located at 3518 St. Lawrence Drive, Toledo, Ohio, (Respondent's facility) has been engaged in providing stevedoring services to shipping companies that are engaged in interstate and foreign commerce.

(B) Annually, Respondent, in conducting its business operations described above in Paragraph 2(A), derives gross revenues in excess of $500,000 for these services.

3. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Alex Johnson	-	President and CEO
Christopher Blakely	-	Human Resource Manager
Terry Leach	-	Director of Operations
Brad Hendricks	-	Operations Manager

6. (A) At all relevant times, Respondent has maintained the following policies and/or work rules in its 2015-2016 Policy Handbook:

(i) The Non-Disclosure/Confidentiality Policy #2500 provides the following:
Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by...employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

Employees who improperly use or disclose...confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such.

(ii) The Confidentiality Agreement Policy #2550 provides that employees must: [M]aintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should [employees] misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; [employees] understand that [they] will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company. (emphasis in original)

(iii) The Camera, Cell, Digital Device Policy #3100 provides:

(a) In the Policy Overview, that employees and visitors are prevented from "the improper disclosure of company trade secrets and confidential business information."

(b) Under the General Policy, Digital Equipment Usage, that the "[u]se of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other devices, whether digital or conventional film cameras—while on duty or when performing any function for or on behalf of the company –is **restricted**. This policy applies to all full-time and part-time employees and visitors." (emphasis in original)

(c) Under Cellular Telephone Use, that "[o]n-duty use of cell phones to send electronic mail is expected to comply with company rules and policies including sexual harassment, discrimination, ethics, code of conduct, confidentiality and workplace violence."

(d) Under Camera Use, that "[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee."

(e) Under Camera Use, that "[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee."

(f) Under Camera Use, that "[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes

any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device."

(g) Under Camera Use, that "[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.

Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others."

(h) Under Camera Use, that "[e]mployees may not take or use images or recording to harass, embarrass, annoy others and/or violate an individual's expectation of privacy. All company policies, including policies on harassment, discrimination, and processional conduct, apply to photographs and/or recordings taken."

(iv) Safe Workplace Environment #4500 policy prohibits an employee from "[v]iolating others' expectation of privacy".

(v) Safe Workplace Environment #4500 prohibits "[l]oitering or presence on the jobsite without authorization before or after assigned shift is completed;"

7. (A) At all relevant times, Respondent has maintained the following policies and/or work rules in its 2015-2016 Safety Handbook:

(i) The Incident Reporting Policy #1600 that states that "Because it is likely that incidents involving hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs...shall be marked as follows: "PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION."

(ii) The Incident Reporting Policy #1600 that states that "[n]o incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO."

(iii) The Driver Safety Requirements that states that "[p]hotography and recording are restricted at this facility at all times."

(iv) The Visitor Safety Requirements that states that "[p]hotography and recording are restricted at this facility at all times."

8. (A) The following employees of Respondent, (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *The terms members of the collective bargaining unit, employee or employees, as used in the Agreement, mean employees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, fork-lift operators, end-loaders, material handlers, checkers, signalmen, winchmen, linemen, line dispatcher, and hatch leaders.*

(B) Since at least January 1, 2006, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit and since at least on or about January 1, 2006, the Union has been recognized as the representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, one of which was effective by its terms from January 1, 2006 through December 21, 2010.

(C) At all times since on or about January 1, 2006, and at all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

9. (A) Since on or about March 1, 2015, Respondent unilaterally changed the 2015-2016 Policy Handbook's Nondisclosure/Confidentiality Policy #2500 by promulgating new rules pertaining to camera usage.

(B) Since on or about March 1, 2015, Respondent unilaterally changed the 2015-2016 Policy Handbook's Camera, Cell, Digital Device Policy #3100 by promulgating new rules pertaining to camera, digital device, and email usage.

(C) Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented the 2015-2016 Safety Handbook's Driver Safety Requirement.

(D) Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented the 2015-2016 Safety Handbook's Visitor Safety Requirement.

(E) Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented a 2015-2016 ILA Standard Operating Procedures policy.

(F) The subjects set forth above in paragraphs 9(A) through 9(E) relate to wages, hours and working conditions of employment and are mandatory subjects for the purposes of collective bargaining.

(G) Respondent engaged in the conduct described above in paragraph 9(A) through 9(E) without prior notice to the Union and without affording the Union with an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

10. By the conduct described above in Paragraphs 6 and 7 and their subparagraphs, Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

11. By the conduct described above in Paragraph 9 and its subparagraphs, Respondent has been failing and refusing to bargain collectively with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

12. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before September 11, 2015, or postmarked on or before September 10, 2015**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional

means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on the 3rd day of December 2015, at 10:00 a.m., in a court room of the Wood County Courthouse, One Courthouse Square, Bowling Green, Ohio, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Cleveland, Ohio this 28th day of August 2015.

/s/ Allen Binstock

ALLEN BINSTOCK
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 08-CA-152192

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

TERRY LEACH
MIDWEST TERMINALS OF TOLEDO INC.
3518 SAINT LAWRENCE DR
TOLEDO, OH 43605-1079

RON MASON, ESQ.
AARON T. TULENCIK, ESQ.
MASON LAW FIRM CO. LPA
PO BOX 398
DUBLIN, OH 43017-0398

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1982
2300 ASHLAND AVE
TOLEDO, OH 43620

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link:

www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence.** If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

Exceptions to the ALJ's Decision: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

From: Fowle, Noah
To: Aaron Tulencik
Subject: RE: Midwest Handbook Langauge
Date: Thursday, February 14, 2019 1:54:03 PM

See below

Noah Fowle
Field Attorney, NLRB – Region 8
1240 E. 9th Street, Room 1695
Cleveland, OH 44199-1086
216 303 7365 (office)
202 674 2311 (cell)
216 522 2418 (fax)
noah.fowle@nlrb.gov

From: Aaron Tulencik <atulencik@maslawfirm.com>
Sent: Thursday, February 14, 2019 9:52 AM
To: Fowle, Noah <Noah.Fowle@nlrb.gov>
Cc: Aaron Tulencik <atulencik@maslawfirm.com>
Subject: Midwest Handbook Langauge

Noah:

Good morning. Below is the language from Policy 2500 and 2550. Could you please highlight or underline or italicize the specific language you are requesting that Midwest rescind. I am clear on the language the language you are requesting that Midwest rescind from Policy 4500. Thank you.

Policy #2500

Employees who improperly use or disclose trade secrets or confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such. Password--protect and lock your computers when not in use, safe guard files, and keep good accountability of all electronic media (e.g. CD, DVD, and memory sticks), photographs and recordings.

Policy #2550

I understand that I must maintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such

information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should I misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; I understand that I will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

AARON T. TULENCIK | Mason Law Firm Co., L.P.A. | P.O. Box 398 | Dublin, Ohio 43017
P 614.734.9442 | F 614.734.9451 | atulencik@maslawfirm.com | www.maslawfirm.com

**********NOTICE from Mason Law Firm, Co., LPA**********
This message may be protected by the attorney-client privilege. If you believe that it has been sent to you in error, do not read, print or forward it. Please reply to the sender that you have received the message in error. Then delete it. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. Thank you.
****

From: Gleine, Gregory
To: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Giannasi, Robert (ALJ)
Cc: Fowle, Noah
Subject: RE: Call: MIDWEST TERMINAL 08-CA-152192
Date: Wednesday, February 20, 2019 2:36:31 PM

Chief Judge Giannasi and Party Representatives,

We wish to take this opportunity to reiterate the General Counsel's position regarding discussions centered upon the work rules that remain at issue in this case and to clarify any misunderstandings prior to our next conference call on Monday, February 25, 2019. As stated in our first conference call, the General Counsel takes the position that the following work rules are now lawful pursuant to *Boeing* and should be dismissed:

- Non-Disclosure/Confidentiality Policy #2500 Referring to Photography and Recording;
- the Handbook's Camera, Cell, Digital Device Policy #3100; and
- the Incident Reporting Policy #1600

The work rules that will be the subject of our next conference call remain as follows:

- Non-Disclosure/Confidentiality Policy #2500;
- Confidentiality Policy #2500;
- Workplace Environment Policy #4500

As requested by Chief Judge Giannasi, Counsel for the General Counsel and Respondent's Counsel have reviewed, in detail, the language at issue in the remaining work rules. Counsel for the General Counsel is optimistic that a settlement can be reached and will make every effort to resolve this case. However, it should be noted that Counsel for the General Counsel is not authorized to revise or approve revised rule language as part of these discussions, as the remedy sought is that the rules be rescinded.

Respectfully,
Noah Fowle
Gregory Gleine
Counsel for the General Counsel
National Labor Relations Board
1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 303-7365 direct
(202) 316-0859 cell
gregory.gleine@nlrb.gov
noah.fowle@nlrb.gov

From: Jenkins, Rechona
Sent: Monday, February 4, 2019 4:25 PM
To: Aaron Tulencik <atulencik@maslawfirm.com>; Ron Mason <rmason@maslawfirm.com>; phubbard63@yahoo.com; Fowle, Noah <Noah.Fowle@nlrb.gov>
Cc: Gleine, Gregory <Gregory.Gleine@nlrb.gov>
Subject: Call: MIDWEST TERMINAL 08-CA-152192
Importance: High

Good afternoon:

Counsel are to call the Conferencing Operator at the appointed time Feb. 7th @ 2pm/ET or 1pm/CT.

1-202-273-4260 PASS Code 71450#

From: Aaron Tulencik
To: Fowle, Noah; "Gleine, Gregory (Gregory.Gleine@nlrb.gov)"
Cc: "Aaron T. Tulencik (atulencik@maslawfirm.com)"; Ron Mason
Subject: RE: Midwest Handbook Langauge
Date: Monday, February 25, 2019 6:28:00 AM
Importance: High

Noah/Greg:

Below is the Handbook language in question, including Noah's yellow highlighted portions of the rule which the Region is seeking Midwest to rescind. I have included the language for the policies in their entirety for contextual purposes. Midwest will agree to rescind only the highlighted language that is struck through. I have included additional language in green highlights. Midwest has rescinded only those portions of the policies which related to employees. Any portions of the policy related to customer/client information should not be rescinded. Minimal language (four words) have been added to make clear we are only referencing customer/client data. If we simply agreed to rescind Noah's highlighted language, we are left with incomplete sentences that in some instances do not make sense (I fully understand Noah was merely highlighting the language per my request).

In regards to policy 4500 we will agree to rescind the language concerning the expectation of privacy and we have defined the jobsite in the loitering section so as to fully comply with Tri-County Medical Center, 222 NLRB 1089 (1976) wherein the Board set forth the criterion for a valid no access rule.

Additionally, as the entire case has been remanded per the Board's Order, once these policy revisions/rescissions are approved, the Complaint must be dismissed in its entirety for the following reasons:

1) The Region maintains that certain rules are lawful on their face per the Boeing decision. Notwithstanding, the Region is seeking to rescind those same rules based upon its 8(a)(5) violation; and
2) On September 18, 2014 the union filed and 8(a)(5) and (1) violation regarding policy changes made to the Handbooks without bargaining with the union. That charge was dismissed on November 28, 2014. On May 14, 2015 the union filed the same charge regarding policy changes made to the Handbooks without bargaining with the union. The Region inexplicably decided to issue a Complaint in the matter herein. As noted in the briefing and the record evidence, Midwest did nothing different in regards to its handbooks in 2014 vs. 2015.

In summary, Midwest will agree to the policy revisions/rescissions outlined below if, and only if the entire Complaint is dismissed.

From: Fowle, Noah [mailto:Noah.Fowle@nlrb.gov]
Sent: Thursday, February 14, 2019 1:54 PM
To: Aaron Tulencik

Subject: RE: Midwest Handbook Langauge

See below

Noah Fowle
Field Attorney, NLRB – Region 8
1240 E. 9th Street, Room 1695
Cleveland, OH 44199-1086
216 303 7365 (office)
202 674 2311 (cell)
216 522 2418 (fax)
noah.fowle@nlrb.gov

From: Aaron Tulencik <atulencik@maslawfirm.com>
Sent: Thursday, February 14, 2019 9:52 AM
To: Fowle, Noah <Noah.Fowle@nlrb.gov>
Cc: Aaron Tulencik <atulencik@maslawfirm.com>
Subject: Midwest Handbook Langauge

Noah:

Good morning. Below is the language from Policy 2500 and 2550. Could you please highlight or underline or italicize the specific language you are requesting that Midwest rescind. I am clear on the language the language you are requesting that Midwest rescind from Policy 4500. Thank you.

Policy #2500 Non-Disclosure/Confidentiality Policy

The protection of confidential business information and trade secrets is vital to the interests and success of MWTTI and MWTT. Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by clients, contractors, employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

> Employees who improperly use or disclose trade secrets or confidential business information~~, to include information regarding labor relations~~, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.
>
> Marketing documents specific to a customer (including all contact information and all accounting data) ~~all personnel information, and union related business~~ are considered confidential business information and should be guarded as such. Password--protect and lock your computers when not in use, safe guard files, and keep good accountability of all electronic media (e.g. CD, DVD, and memory sticks), photographs and recordings.

Employees who violate this policy will be subject to disciplinary action, up to and including employment termination.

Employees are required to sign in acknowledgement that they have read and understand this policy and the potential disciplinary consequences of violating it.

This policy will be reviewed periodically, and enforced at all times.

Policy #2550 Confidentiality Agreement Policy

Use of Confidential Information by Employees

I, _____, as an Employee of Midwest Terminals of Toledo International, Inc. (MWTTI) or Midwest Terminals of Toledo, Inc. (MWTT) I do hereby acknowledge that I must comply with a number of State and Federal Laws that regulate the handling of confidential and personal information regarding both customers/clients of this company and its other employees. These laws may include but not be limited to FACTA, HIPAA, GINA, The Economic Espionage Act, The Privacy Act, Gramm/Leach/Bliley ID Theft Laws (where applicable), Trade Secrets Protections, and Implied Contract Breach.

I understand that I must maintain the confidentiality of ~~ALL documents,~~ customer/client credit card information~~, and personal information of any type~~ and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should I misuse or breach, ~~any personal information or~~ the expectation of privacy of said clients ~~and/or employees~~; I understand that I will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

I further agree to follow the rules and regulations this company has in place as regards to the handling of confidential information so as to protect the privacy of all involved.

Policy 4500 Safe Workplace Environment

Employees found participating in any of the following activities on any jobsite will be subject to immediate discharge (firing).

- ~~Violating others' expectation of privacy.~~

Employees found participating in any of the activities listed below are subject to disciplinary actions up to and including discharge:

- Loitering or presence on the jobsite without authorization before or after assigned shift is completed. The jobsite is defined as the areas of Facility 1 inside the gates.

AARON T. TULENCIK | Mason Law Firm Co., L.P.A. | P.O. Box 398 | Dublin, Ohio 43017
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****

From: Aaron Tulencik
To: "Fowle, Noah"; "Gleine, Gregory (Gregory.Gleine@nlrb.gov)"
Cc: "Aaron T. Tulencik (atulencik@maslawfirm.com)"; Ron Mason
Subject: RE: Midwest Handbook Langauge
Date: Monday, February 25, 2019 11:07:00 AM

Noah:

Would you please send the discipline information you referenced during the call so we can look into it. Thank you.

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From: Aaron Tulencik
Sent: Monday, February 25, 2019 6:29 AM
To: Fowle, Noah; 'Gleine, Gregory (Gregory.Gleine@nlrb.gov)'
Cc: 'Aaron T. Tulencik (atulencik@maslawfirm.com)'; Ron Mason
Subject: RE: Midwest Handbook Langauge
Importance: High

Noah/Greg:

Below is the Handbook language in question, including Noah's yellow highlighted portions of the rule which the Region is seeking Midwest to rescind. I have included the language for the policies in their entirety for contextual purposes. Midwest will agree to rescind only the highlighted language that is struck through. I have included additional language in green highlights. Midwest has rescinded only those portions of the policies which related to employees. Any portions of the policy related to customer/client information should not be rescinded. Minimal language (four words) have been added to make clear we are only referencing customer/client data. If we simply agreed to rescind Noah's highlighted language, we are left with incomplete sentences that in some instances do not make sense (I fully understand Noah was merely highlighting the language per my request).

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Additionally, as the entire case has been remanded per the Board's Order, once these policy

From: Aaron Tulencik
To: Fowle, Noah; Gregory Gleine
Cc: Ron Mason
Subject: Re: Midwest Handbook Langauge
Date: Thursday, February 28, 2019 11:50:23 AM

Noah:

I just tracked down this charge. We submitted our Position Statement on December 1, 2017. The charge was filed in October 2017. For reasons unknown the charges is still open.

While Hubbard was disciplined under policy 3100 he was also disciplined under CBA work rule # 12 regarding the prohibition of cell phones. CBA work rule #12 is undoubtedly a proper work rule and numerous employees have been disciplined for such. Further union a union steward, Mr. Russell, was terminated for violating this work rule. All that being said, we certainly will look into dropping the reference to policy #3100 in the discipline but the client may not be willing to drop a discipline issued for violation of a lawful work rule.

Sent from my iPad
Aaron Tulencik, Esq.
Mason Law Firm Co., LPA
P.O. Box 398
Dublin, Ohio 43017
t: 614.734.9450
f: 614.734.9451

On Feb 28, 2019, at 11:33 AM, Fowle, Noah <Noah.Fowle@nlrb.gov> wrote:

> 08-CA-207426
>
> I don't have a copy of the discipline.
>
> Noah Fowle
> Field Attorney, NLRB – Region 8
> 1240 E. 9th Street, Room 1695
> Cleveland, OH 44199-1086
> 216 303 7365 (office)
> 202 674 2311 (cell)
> 216 522 2418 (fax)
> noah.fowle@nlrb.gov
>
> ---
>
> **From:** Aaron Tulencik <atulencik@maslawfirm.com>
> **Sent:** Thursday, February 28, 2019 11:30 AM
> **To:** Fowle, Noah <Noah.Fowle@nlrb.gov>
> **Cc:** Ron Mason <rmason@maslawfirm.com>; Gleine, Gregory <Gregory.Gleine@nlrb.gov>

From: Aaron Tulencik
To: Fowle, Noah
Subject: RE: Midwest Handbook Langauge - update on settlement before tomorrow"s call
Date: Thursday, March 7, 2019 2:47:00 PM

Noah:

It appears the Region's position is that the entire discipline issued to Prentis must be rescinded, not just the portion related to 3100. Is that correct? Please advise.

Second, during the conference call, the Region all but indicated it would dismiss the 8(a)(5) if Midwest rescinded the discipline issued to Prentis. We have indicated we are willingness to do so and now the Region is reneging. Further, under the Region's initial proposal, the Region only required that Midwest rescind the overly broad rules. There was zero mention of rescinding the discipline. You continue to move the target. Again, in November 2014 your Region dismissed an identical 8(a)(5) charge filed by the union over the Handbooks. We'll just have to wait and see how the Chief Judge would like to proceed.

MASON LAW FIRM

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****

From: Fowle, Noah [mailto:Noah.Fowle@nlrb.gov]
Sent: Thursday, March 7, 2019 2:28 PM
To: Aaron Tulencik
Subject: RE: Midwest Handbook Langauge - update on settlement before tomorrow's call

Aaron,

Just an update heading into tomorrow's call.

We are prepared to settle the work rules via a non-board settlement in the manner we have previously discussed where the offensive language of the rules are changed/removed, and employees receive some notification on the updates to the rules.

But it's our position that we want an informal settlement on the 8a5 unilateral change allegation. This case deals with two separate and distinct issues – overly broad rules and unilaterally implemented rules. The remedy to a unilaterally changed work rule is a rescission of all discipline

issued under the unilaterally changed work rule regardless of the unilaterally changed rule's lawfulness.

We are willing to condition the informal settlement of the 8a5 allegation on the on the result of the withdraw of recognition issue.

Noah Fowle
Field Attorney, NLRB – Region 8
1240 E. 9th Street, Room 1695
Cleveland, OH 44199-1086
216 303 7364 (office)
202 674 2311 (cell)
216 522 2418 (fax)
noah.fowle@nlrb.gov

From: Aaron Tulencik <atulencik@maslawfirm.com>
Sent: Thursday, February 28, 2019 11:50 AM
To: Fowle, Noah <Noah.Fowle@nlrb.gov>; Gleine, Gregory <Gregory.Gleine@nlrb.gov>
Cc: Ron Mason <rmason@maslawfirm.com>
Subject: Re: Midwest Handbook Langauge

Noah:

I just tracked down this charge. We submitted our Position Statement on December 1, 2017. The charge was filed in October 2017. For reasons unknown the charges is still open.

While Hubbard was disciplined under policy 3100 he was also disciplined under CBA work rule # 12 regarding the prohibition of cell phones. CBA work rule #12 is undoubtedly a proper work rule and numerous employees have been disciplined for such. Further union a union steward, Mr. Russell, was terminated for violating this work rule. All that being said, we certainly will look into dropping the reference to policy #3100 in the discipline but the client may not be willing to drop a discipline issued for violation of a lawful work rule.

Sent from my iPad
Aaron Tulencik, Esq.
Mason Law Firm Co., LPA
P.O. Box 398
Dublin, Ohio 43017
t: 614.734.9450
f: 614.734.9451

On Feb 28, 2019, at 11:33 AM, Fowle, Noah <Noah.Fowle@nlrb.gov> wrote:

From: Gleine, Gregory
To: Giannasi, Robert (ALJ)
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah
Subject: FW: MIDWEST TERMINAL 08-CA-152192
Date: Monday, March 11, 2019 2:55:18 PM

Your Honor,

The Region has given me the authority to announce that the Regional Director would approve a withdrawal request from the Charging Party in connection with the non-Board settlement of this case, the terms of which would include the following:

1. Expungement of Mr. Hubbard's discipline (issued on / about September 20, 2017 for policy #3100 and CBA work rule #12), as well as written notification to Mr. Hubbard notifying him that the discipline has been expunged from his record and will not be used against him.
2. Rescission of the unlawful portions of the work rules addressed in earlier e-mails between Mr. Tulencik and Mr. Fowle, with notification to employees of the same, in a manner consistent with the Employer's usual method of communicating to employees.
3. Union requests withdrawal of charge.

The Region has been in communication with the Charging Party representative Mr. Hubbard. It is my understanding that he will agree to the terms outlined herein.

Please advise as to whether you wish to schedule another conference call to facilitate the settlement or discuss any other matters.

Regards,
Gregory M. Gleine
Supervisory Field Attorney
National Labor Relations Board
1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 303-7365 direct
(202) 316-0859 cell
gregory.gleine@nlrb.gov

From: Giannasi, Robert (ALJ)
To: Gleine, Gregory
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah
Subject: Re: MIDWEST TERMINAL 08-CA-152192
Date: Monday, March 11, 2019 4:01:02 PM

That settlement sounds good to me. If the GC would submit a joint motion with the Respondent to dismiss the complaint on the basis of the settlement described, I would grant the motion. That should end the case. Thank you to all the parties on this resolution of the matter.

From: Gleine, Gregory
Sent: Monday, March 11, 2019 2:55:07 PM
To: Giannasi, Robert (ALJ)
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah
Subject: FW: MIDWEST TERMINAL 08-CA-152192

Your Honor,

The Region has given me the authority to announce that the Regional Director would approve a withdrawal request from the Charging Party in connection with the non-Board settlement of this case, the terms of which would include the following:

1. Expungement of Mr. Hubbard's discipline (issued on / about September 20, 2017 for policy #3100 and CBA work rule #12), as well as written notification to Mr. Hubbard notifying him that the discipline has been expunged from his record and will not be used against him.
2. Rescission of the unlawful portions of the work rules addressed in earlier e-mails between Mr. Tulencik and Mr. Fowle, with notification to employees of the same, in a manner consistent with the Employer's usual method of communicating to employees.
3. Union requests withdrawal of charge.

The Region has been in communication with the Charging Party representative Mr. Hubbard. It is my understanding that he will agree to the terms outlined herein.

Please advise as to whether you wish to schedule another conference call to facilitate the settlement or discuss any other matters.

Regards,
Gregory M. Gleine
Supervisory Field Attorney
National Labor Relations Board
1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 303-7365 direct
(202) 316-0859 cell
gregory.gleine@nlrb.gov

From: Giannasi, Robert (ALJ)
To: Gleine, Gregory
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah
Subject: Re: MIDWEST TERMINAL 08-CA-152192
Date: Thursday, March 14, 2019 12:15:15 PM

I think the region should proceed to get an agreement from all parties as you originally described, including the withdrawal of all charges. That agreement should then be submitted to me for approval.

From: Gleine, Gregory
Sent: Thursday, March 14, 2019 12:11:16 PM
To: Giannasi, Robert (ALJ)
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah
Subject: RE: MIDWEST TERMINAL 08-CA-152192

You Honor,

Respectfully, it is my understanding that the Union would agree to withdraw all allegations in Case 08-CA-152192, as outlined in my earlier e-mail, including the 8(a)(5) unilateral change allegations in that specific case. This understanding should be confirmed by the Union.

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National Labor Relations Board
1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 303-7365 direct
(202) 316-0859 cell
gregory.gleine@nlrb.gov

From: Giannasi, Robert (ALJ)
Sent: Thursday, March 14, 2019 12:05 PM
To: Gleine, Gregory <Gregory.Gleine@nlrb.gov>
Cc: Aaron Tulencik <atulencik@maslawfirm.com>; Ron Mason <rmason@maslawfirm.com>; phubbard63@yahoo.com; Fowle, Noah <Noah.Fowle@nlrb.gov>
Subject: Re: MIDWEST TERMINAL 08-CA-152192

You don't answer my question. Does the union agree to the withdraw the 8a5 unilateral change.

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From: Gleine, Gregory <gregory.gleine@nlrb.gov>
Sent: Thursday, March 14, 2019 12:00 PM
To: Giannasi, Robert (ALJ)
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah

Subject: RE: MIDWEST TERMINAL 08-CA-152192

Your Honor,

My understanding is that the Union would agree to withdraw all allegations in Case 08-CA-152192 in exchange for the Respondent to provide written notification to Mr. Hubbard that his discipline has been expunged, to provide written notification to the Union and the Region that the unlawful work rules have been rescinded, and to provide confirmation to the Union and the Region that the employees have been notified in writing of the rescission.

The Union should confirm this understanding.

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1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 303-7365 direct
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gregory.gleine@nlrb.gov

From: Giannasi, Robert (ALJ)
Sent: Thursday, March 14, 2019 11:51 AM
To: Gleine, Gregory <Gregory.Gleine@nlrb.gov>
Cc: Aaron Tulencik <atulencik@maslawfirm.com>; Ron Mason <rmason@maslawfirm.com>; phubbard63@yahoo.com; Fowle, Noah <Noah.Fowle@nlrb.gov>
Subject: Re: MIDWEST TERMINAL 08-CA-152192

Does the union agree to withdraw all charges including the unilateral 8a5?

Get Outlook for iOS

From: Gleine, Gregory <gregory.gleine@nlrb.gov>
Sent: Thursday, March 14, 2019 11:43 AM
To: Giannasi, Robert (ALJ)
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah
Subject: RE: MIDWEST TERMINAL 08-CA-152192

Your Honor,

The Region will not join in any motion to dismiss the complaint because the 8(a)(5) unilateral change has not been remedied. Moreover, such motion would be premature as there is no settlement document memorializing the terms of their agreement which could be the basis for the GC to object to the settlement. The Region expects that any non-Board agreement include that the Respondent will provide written notification to Mr. Hubbard that his discipline has been expunged, will provide written notification to the Union and the Region that the unlawful

work rules have been rescinded, and will provide confirmation that the employees have been notified in writing of the rescission.

Please advise as to whether you would like to schedule a follow-up conference call.

Gregory M. Gleine
Supervisory Field Attorney
National Labor Relations Board
1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 303-7365 direct
(202) 316-0859 cell
gregory.gleine@nlrb.gov

From: Giannasi, Robert (ALJ)
Sent: Monday, March 11, 2019 4:01 PM
To: Gleine, Gregory <Gregory.Gleine@nlrb.gov>
Cc: Aaron Tulencik <atulencik@maslawfirm.com>; Ron Mason <rmason@maslawfirm.com>; phubbard63@yahoo.com; Fowle, Noah <Noah.Fowle@nlrb.gov>
Subject: Re: MIDWEST TERMINAL 08-CA-152192

That settlement sounds good to me. If the GC would submit a joint motion with the Respondent to dismiss the complaint on the basis of the settlement described, I would grant the motion. That should end the case. Thank you to all the parties on this resolution of the matter.

From: Gleine, Gregory
Sent: Monday, March 11, 2019 2:55:07 PM
To: Giannasi, Robert (ALJ)
Cc: Aaron Tulencik; Ron Mason; phubbard63@yahoo.com; Fowle, Noah
Subject: FW: MIDWEST TERMINAL 08-CA-152192

Your Honor,

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The Region has been in communication with the Charging Party representative Mr. Hubbard. It is my understanding that he will agree to the terms outlined herein.

Please advise as to whether you wish to schedule another conference call to facilitate the settlement or discuss any other matters.

Regards,
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Supervisory Field Attorney
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1240 E. 9th St., Room 1695
Cleveland, OH 44199
(216) 303-7365 direct
(202) 316-0859 cell
gregory.gleine@nlrb.gov

From:	Aaron Tulencik
To:	mando@fhplaw.com
Cc:	"Aaron T. Tulencik (atulencik@maslawfirm.com)"
Subject:	Midwest and Local 1982 Proposed Settlment Agreement -- 8-CA-152192 and 207426
Date:	Friday, March 29, 2019 12:31:00 PM
Attachments:	Midwest and Local 1982 DRAFT Proposed Settlement Agreement -- 8-CA-152192 and 207426.docx 2015-08-28 - Complaint & Notice of Hearing.pdf NLRB-08-CA-207426.pdf
Importance:	High

Joe:

See the attached draft of the settlement agreement setting forth the terms already agreed to. I have included all of the handbook language in the settlement agreement so it is clear as to what the parties are agreeing to. The yellow highlighted language that is struck through is the language that Midwest has agreed to rescind. The language in green is the language that Midwest has added to make clear that employees are aware that there Section 7 rights are not being interfered with. If you have any thoughts or ideas to better go about this I'm all ears. Further, I understand you were not on any of the conference calls wherein this was being discussed amongst all involved including ALJ Gianaasi, so if you have any questions do not hesitate to call me. Thanks.

MASON LAW FIRM

AARON T. TULENCIK | Mason Law Firm Co., L.P.A. | P.O. Box 398 | Dublin, Ohio 43017
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****

From:	Aaron Tulencik
To:	Fowle, Noah
Subject:	FW: Midwest and Local 1982 Proposed Settlment Agreement -- 8-CA-152192 and 207426
Date:	Friday, March 29, 2019 1:53:00 PM
Attachments:	Midwest and Local 1982 DRAFT Proposed Settlement Agreement -- 8-CA-152192 and 207426.docx 2015-08-28 - Complaint & Notice of Hearing.pdf NLRB-08-CA-207426.pdf
Importance:	High

Noah:

Per your request.

AARON T. TULENCIK | Mason Law Firm Co., L.P.A. | P.O. Box 398 | Dublin, Ohio 43017
P 614.734.9442 | F 614.734.9451 | atulencik@maslawfirm.com | www.maslawfirm.com

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****

From: Aaron Tulencik
Sent: Friday, March 29, 2019 12:32 PM
To: mando@fhplaw.com
Cc: 'Aaron T. Tulencik (atulencik@maslawfirm.com)'
Subject: Midwest and Local 1982 Proposed Settlment Agreement -- 8-CA-152192 and 207426
Importance: High

Joe:

See the attached draft of the settlement agreement setting forth the terms already agreed to. I have included all of the handbook language in the settlement agreement so it is clear as to what the parties are agreeing to. The yellow highlighted language that is struck through is the language that Midwest has agreed to rescind. The language in green is the language that Midwest has added to make clear that employees are aware that there Section 7 rights are not being interfered with. If you have any thoughts or ideas to better go about this I'm all ears. Further, I understand you were not on any of the conference calls wherein this was being discussed amongst all involved including ALJ Gianaasi, so if you have any questions do not hesitate to call me. Thanks.

AARON T. TULENCIK | Mason Law Firm Co., L.P.A. | P.O. Box 398 | Dublin, Ohio 43017
P 614.734.9442 | F 614.734.9451 | atulencik@maslawfirm.com | www.maslawfirm.com

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****

From: Fowle, Noah
To: Giannasi, Robert (ALJ); Aaron Tulencik
Cc: phubbard63@yahoo.com; mando@fhplaw.com; Ron Mason; Gleine, Gregory
Subject: RE: MIDWEST TERMINAL 08-CA-152192
Date: Monday, April 8, 2019 9:57:19 AM

Your honor,

I believe the Employer is still waiting to hear back from the Union's attorney about the proposed non-board settlement agreement.

There is one procedural issue that ought to be addressed. Currently, the agreement that Respondent's counsel drafted speaks about the charge being "withdrawn," however, given that the charge, and the entire case, is before you, the Region does not have the authority to approve a withdrawal. I have explained this issue to Respondent's counsel, and I believe he will me making the necessary adjustments on how to best dispose of the case pursuant to your instructions.

Noah Fowle
Field Attorney, NLRB – Region 8
1240 E. 9th Street, Room 1695
Cleveland, OH 44199-1086
216 303 7364 (office)
202 674 2311 (cell)
216 522 2418 (fax)
noah.fowle@nlrb.gov

From: Giannasi, Robert (ALJ)
Sent: Monday, April 8, 2019 9:52 AM
To: Aaron Tulencik <atulencik@maslawfirm.com>
Cc: phubbard63@yahoo.com; mando@fhplaw.com; Ron Mason <rmason@maslawfirm.com>; Gleine, Gregory <Gregory.Gleine@nlrb.gov>; Fowle, Noah <Noah.Fowle@nlrb.gov>
Subject: RE: MIDWEST TERMINAL 08-CA-152192

Where are we on the settlement proposal?

From: Aaron Tulencik <atulencik@maslawfirm.com>
Sent: Friday, March 29, 2019 12:35 PM
To: Giannasi, Robert (ALJ) <Robert.Giannasi@nlrb.gov>
Cc: phubbard63@yahoo.com; mando@fhplaw.com; Ron Mason <rmason@maslawfirm.com>; Gleine, Gregory <Gregory.Gleine@nlrb.gov>; Fowle, Noah <Noah.Fowle@nlrb.gov>
Subject: RE: MIDWEST TERMINAL 08-CA-152192

Your Honor:

Pursuant to the General Counsel's request set forth below, I wanted to inform everyone

From:	Joseph Mando
To:	Giannasi, Robert (ALJ); Fowle, Noah; Aaron Tulencik
Cc:	phubbard63@yahoo.com; Ron Mason; Gleine, Gregory; acdvp@weyockey.com; "Michael Baker"; Joseph Hoffman Jr
Subject:	RE: MIDWEST TERMINAL 08-CA-152192
Date:	Monday, April 8, 2019 2:59:31 PM

Your Honor and Counsel:

I have had the opportunity to review the proposed settlement agreement and to discuss the same with our client representatives. We have two major issues with the proposed settlement agreement, which objections may likely strike to the core of the terms that Midwest and the Region have agreed to accept. The Union's specific objections are as follows:

Upon review of Judge Fine's Decision in Case No. 08-CA-152192, the Union has identified four (4) key components to his order: (i) the finding that Midwest violated the Act by refusing to recognize and bargain with Local 1982, including with respect to the changes to its work rules (and by unilaterally implementing said changes); (ii) the finding that Midwest violated the Act by enacting certain work rules that were inherently destructive to its employees' Section 7 rights/and the directive to rescind such unlawful rules; (iii) the directive that Midwest rescind employee discipline assessed under the unlawful work rules; and (iv) the directive that Midwest post the required Notice to employees related to its unfair labor practices. The Union believes that the draft settlement agreement only addresses two (2) of these issues. Specifically: (i) requiring changes to certain work rules; and (ii) rescinding the discipline assessed to bargaining unit member Prentis Hubbard.

I recognize that there were obviously significant settlement discussions occurring in this Case prior to my appearance on behalf of Local 1982, and I regret that this message will likely complicate this matter in several respects. However, it is my understanding that these discussions mainly occurred by and through Prentis Hubbard. As you may know, Local 1982 remains in trusteeship, with Messrs. Mike Baker and William Yockey serving as the organization's co-Trustees. At all relevant times, with respect to the settlement terms here at issue, Mr. Hubbard is a bargaining unit member – he has no power or authority to bind Local 1982 as an organization. Having spoken with Mr. Yockey, neither he nor Mr. Baker approved or authorized the settlement of the above referenced case under the outlined terms. Mr. Hubbard is the charging party in Case No. 08-CA-207426; he clearly has the right to determine that case as he sees fit, but he has no authority to bind Local 1982 in the above referenced case.

In any event, ILA Local 1982 is unwilling to voluntarily settle the above referenced case unless Midwest is required to post a notice, wherein it acknowledges its violations of the Act by refusing to recognize and bargain with Local 1982, including with respect to the work rules, in addition to the agreed upon matters (i.e., rescinding certain changes to work rules and removing Prentis Hubbard's discipline). Local 1982 has other specific objections to Midwest's proposed settlement agreement, but these identified matters are threshold issues. And I suspect that Midwest is unwilling to

agree to a settlement agreement that contains these provisions, which the Union requires. Hence, I wanted to raise these issues immediately, prior to marking up Midwest's proposed settlement document.

While I trust that this message is clear with respect to Local 1982's position, please contact me if a clarification is needed. Likewise, I am available for a conference call to discuss these issues.

Sincerely yours,

Joseph D. Mando
FAULKNER, HOFFMAN & PHILLIPS, LLC
One International Place
20445 Emerald Parkway Drive, Ste. 210
Cleveland, Ohio 44135-6029
Direct Dial: 216.453.0585.
Main: 216.781.3600.
Fax: 216.781.8839.
mando@fhplaw.com

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From: Giannasi, Robert (ALJ) <Robert.Giannasi@nlrb.gov>
Sent: Monday, April 8, 2019 10:00 AM
To: Fowle, Noah <Noah.Fowle@nlrb.gov>; Aaron Tulencik <atulencik@maslawfirm.com>
Cc: phubbard63@yahoo.com; Joseph Mando <mando@fhplaw.com>; Ron Mason <rmason@maslawfirm.com>; Gleine, Gregory <Gregory.Gleine@nlrb.gov>
Subject: RE: MIDWEST TERMINAL 08-CA-152192

I think it would be sufficient for the settlement to say that the GC agrees to the withdrawal—and, of

From: Ron Mason
To: Aaron Tulencik; Joseph Mando; Giannasi, Robert (ALJ); Fowle, Noah
Cc: phubbard63@yahoo.com; Gleine, Gregory; acdvp@weyockey.com; "Michael Baker"; Joseph Hoffman Jr
Subject: RE: MIDWEST TERMINAL 08-CA-152192
Date: Monday, April 8, 2019 3:28:26 PM

And I too agree with what Mr. Tulencik stated as well as My. Yockey's presence and agreement to the terms.

We should not have to file a Motion to Enforce the terms of the agreement but if necessary we will.

The Non-Board Settlement Agreement submitted for signature did not add to or subtract from the verbal agreement reached by ALL parties over the telephone.

Mr. Mando now simply wants to renegotiate something that has been settled before he made any appearance.

Midwest's position is that Mr. Mando is too late to the party and the case is now settled whether Mr. Yockey signs the written document or not.

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From: Aaron Tulencik <atulencik@maslawfirm.com>
Sent: Monday, April 8, 2019 3:18 PM
To: Joseph Mando <mando@fhplaw.com>; Giannasi, Robert (ALJ) <Robert.Giannasi@nlrb.gov>; Fowle, Noah <Noah.Fowle@nlrb.gov>
Cc: phubbard63@yahoo.com; Ron Mason <rmason@maslawfirm.com>; Gleine, Gregory <Gregory.Gleine@nlrb.gov>; acdvp@weyockey.com; 'Michael Baker' <mjbgldc@sbcglobal.net>; Joseph Hoffman Jr <Hoffman@fhplaw.com>
Subject: RE: MIDWEST TERMINAL 08-CA-152192

Your Honor:

It is my recollection that the union trustees (at least Mr. Yockey) was on every call but the last. Further, it is my recollection that Mr. Yockey indicated on the first teleconference that the union was following the lead of the General Counsel. Mr. Baker attended a single call and Mr. Mando did not attend any of the calls. Prior to the last call, the settlement was already agreed to and the only issue was whether General Counsel would accept the terms, which they subsequently did. Every single concern raised by Mr. Mando was addressed during the teleconferences.

I will point out that neither Mr. Mando nor his firm made an appearance in this case until after the terms were already agreed to, some 3 and ½ years ***after*** Complaint issued in this Case. Further, neither Mr. Mando nor his firm filed a response to the Board's Motion for show cause. I fail to see how the union's new found objections after the case has settled hold any merit.

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From: Joseph Mando [mailto:mando@fhplaw.com]
Sent: Monday, April 8, 2019 2:59 PM
To: Giannasi, Robert (ALJ); Fowle, Noah; Aaron Tulencik
Cc: phubbard63@yahoo.com; Ron Mason; Gleine, Gregory; acdvp@weyockey.com; 'Michael Baker'; Joseph Hoffman Jr
Subject: RE: MIDWEST TERMINAL 08-CA-152192

Your Honor and Counsel:

I have had the opportunity to review the proposed settlement agreement and to discuss the same with our client representatives. We have two major issues with the proposed settlement agreement, which objections may likely strike to the core of the terms that Midwest and the Region have agreed to accept. The Union's specific objections are as follows:

Upon review of Judge Fine's Decision in Case No. 08-CA-152192, the Union has identified four (4) key components to his order: (i) the finding that Midwest violated the Act by refusing to recognize and bargain with Local 1982, including with respect to the changes to its work rules (and by unilaterally implementing said changes); (ii) the finding that Midwest violated the Act by enacting certain work rules that were inherently destructive to its employees' Section 7 rights/and the directive to rescind such unlawful rules; (iii) the directive that Midwest rescind employee discipline assessed under the unlawful work rules; and (iv) the directive that Midwest post the required Notice to employees related to its unfair labor practices. The Union believes that the draft settlement agreement only addresses two (2) of these issues. Specifically: (i) requiring changes to certain work rules; and (ii) rescinding the discipline assessed to bargaining unit member Prentis Hubbard.

I recognize that there were obviously significant settlement discussions occurring in this Case prior to my appearance on behalf of Local 1982, and I regret that this

From:	Fowle, Noah
To:	Giannasi, Robert (ALJ); Aaron Tulencik; Joseph Mando
Cc:	phubbard63@yahoo.com; Ron Mason; Gleine, Gregory; acdvp@weyockey.com; "Michael Baker"; Joseph Hoffman Jr
Subject:	Re: MIDWEST TERMINAL 08-CA-152192
Date:	Wednesday, April 10, 2019 8:47:42 AM

The General counsel would oppose it, if the union is not on board

Noah Fowle
Field Attorney, NLRB – Region 8
1240 E. 9th Street, Room 1695
Cleveland, OH 44199-2086
216 303 7364 (office)
202 674 2311 (cell)
216 522 2418 (fax)
noah.fowle@nlrb.gov

From: Giannasi, Robert (ALJ)
Sent: Wednesday, April 10, 2019 7:56:06 AM
To: Aaron Tulencik; Joseph Mando; Fowle, Noah
Cc: phubbard63@yahoo.com; Ron Mason; Gleine, Gregory; acdvp@weyockey.com; 'Michael Baker'; Joseph Hoffman Jr
Subject: RE: MIDWEST TERMINAL 08-CA-152192

1. Please send me a copy of the draft settlement agreement.
2. What is the position of the GC on this? Is the GC good with the settlement without the withdrawal of the charge?

From: Aaron Tulencik <atulencik@maslawfirm.com>
Sent: Monday, April 8, 2019 3:18 PM
To: Joseph Mando <mando@fhplaw.com>; Giannasi, Robert (ALJ) <Robert.Giannasi@nlrb.gov>; Fowle, Noah <Noah.Fowle@nlrb.gov>
Cc: phubbard63@yahoo.com; Ron Mason <rmason@maslawfirm.com>; Gleine, Gregory <Gregory.Gleine@nlrb.gov>; acdvp@weyockey.com; 'Michael Baker' <mjbgldc@sbcglobal.net>; Joseph Hoffman Jr <Hoffman@fhplaw.com>
Subject: RE: MIDWEST TERMINAL 08-CA-152192

Your Honor:

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I will point out that neither Mr. Mando nor his firm made an appearance in this case until after the terms were already agreed to, some 3 and ½ years ***after*** Complaint issued in this Case.
Further, neither Mr. Mando nor his firm filed a response to the Board's Motion for show cause. I fail to see how the union's new found objections after the case has settled hold any merit.

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From: Joseph Mando [mailto:mando@fhplaw.com]
Sent: Monday, April 8, 2019 2:59 PM
To: Giannasi, Robert (ALJ); Fowle, Noah; Aaron Tulencik
Cc: phubbard63@yahoo.com; Ron Mason; Gleine, Gregory; acdvp@weyockey.com; 'Michael Baker'; Joseph Hoffman Jr
Subject: RE: MIDWEST TERMINAL 08-CA-152192

Your Honor and Counsel:

I have had the opportunity to review the proposed settlement agreement and to discuss

From:	Jenkins, Rechona
To:	Aaron Tulencik; Ron Mason; Fowle, Noah; acdvp@weyockey.com; mjbgldc@sbcglobal.net
Subject:	2nd/Call: MIDWEST TERMINAL 08-CA-152192
Date:	Thursday, February 7, 2019 3:33:04 PM
Importance:	High

Good afternoon: Please send confirmation...

Counsel are to call the Conferencing Operator at the appointed time Feb. 15th @ 2pm/ET or 1pm/CT.

1-202-273-4260 PASS Code 71450#

From:	Jenkins, Rechona
To:	Aaron Tulencik; Ron Mason; Fowle, Noah; acdvp@weyockey.com; mjbgldc@sbcglobal.net
Subject:	3rd/Call: MIDWEST TERMINAL 08-CA-152192
Date:	Friday, February 15, 2019 4:23:43 PM
Importance:	High

Good afternoon: Please send confirmation.

Counsel are to call the Conferencing Operator at the appointed time Feb. 25th @ 10 am/ET or 9 am/CT.

1-202-273-4260 PASS Code 71450#

From: Jenkins, Rechona
To: Aaron Tulencik; Ron Mason; Fowle, Noah; acdvp@weyockey.com; mjbgldc@sbcglobal.net
Subject: 4th/Call: MIDWEST TERMINAL 08-CA-152192
Date: Monday, February 25, 2019 11:43:03 AM
Importance: High

Good morning: Please send confirmation.

Counsel are to call the Conferencing Operator at the appointed time Mar. 8th @ 10 am/ET or 9 am/CT.

1-202-273-4260 PASS Code 71450#

Smith v. ABN AMRO Mortgage Group, Inc.

United States Court of Appeals for the Sixth Circuit

July 29, 2011, Filed

File Name: 11a0524n.06

Nos. 08-3948, 08-4011

Reporter
434 Fed. Appx. 454 *; 2011 U.S. App. LEXIS 15866 **; 2011 FED App. 0524N (6th Cir.)

AMY KATHLEEN SMITH; DEMETRIOUS YARDIF SMITH, Plaintiffs-Appellants/Cross-Appellees, v. ABN AMRO MORTGAGE GROUP INC. et al., Defendants-Appellees, CHASE MANHATTAN MORTGAGE CORPORATION et al., Defendants-Appellees/Cross-Appellants.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Motion granted by *Smith v. ABN AMRO Mortg. Group, Inc., 132 S. Ct. 1160, 181 L. Ed. 2d 1015, 2012 U.S. LEXIS 958 (U.S., 2012)*

US Supreme Court certiorari denied by, Motion granted by *Smith v. Abn Amro Mortg. Group, 2012 U.S. LEXIS 2439 (U.S., Mar. 26, 2012)*

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Smith v. ABN AMRO Mortg. Group, Inc., 2007 U.S. Dist. LEXIS 49708 (S.D. Ohio, July 10, 2007)

Counsel: For AMY KATHLEEN SMITH, DEMETRIOUS YADIRF SMITH (08-3948), Plaintiffs - Appellant Cross-Appellees: Rose Ann Fleming, Cincinnati, OH.

For ABN AMRO MORTGAGE GROUP INC. (08-3948), Defendant - Appellee: Adam R. Fogelman, Lerner, Sampson & Rothfuss, Cincinnati, OH; Michael James Waters, Vedder Price, Chicago, IL.

For CHASE MANHATTAN MORTGAGE CORPORATION (08-3948), Defendant - Appellee Cross-Appellant: Vladimir P. Belo, Nelson Marlin Reid, Justin W. Ristau, Bricker & Eckler, Columbus, OH.

JEFFREY A. HENRY (08-3948), Defendant - Appellee, Pro se, Cincinnati, OH.

For MID-AMERICA LAND TITLE AGENCY (08-3948), Defendant - Appellee Cross-Appellant: Robert D. Ross, Law Office, Dayton, OH.

For MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (08-3948), Defendant - Appellee Cross-Appellant: Vladimir P. Belo, Nelson Marlin Reid, Justin W. Ristau, Bricker & Eckler, Columbus, OH; Robert D. Ross, Law Office, Dayton, OH; Ryan C. Edwards, Maria Pape Vitullo, Taft, Stettinius & Hollister, Cincinnati, OH.

For NATIONAL MORTGAGE FUNDING (08-3948, 08-4011), Defendant - Appellee Cross-Appellant: David Kerwin Frank, Mazanec, Raskin, Ryder **[**2]** & Keller, Columbus, OH; Michael K. Ruberg, O'Hara, Ruberg, Taylor, Sloan & Sergent, Covington, KY.

CLEMON L. DEMUS (08-3948), Defendant - Appellee, Pro se, Cincinnati, OH.

For AEGIS FUNDING CORPORATION (08-3948), Defendant - Appellee: Paul Henry Shaneyfelt, Attorney, Dungan & LeFevre, Troy, OH.

ANGELA HENRY (08-3948), Defendant - Appellee, Pro se, Cincinnati, OH.

For DEMETRIOUS YADIRF SMITH, AMY KATHLEEN SMITH (08-4011), Plaintiffs - Appellant Cross-Appellees: Rose Ann Fleming, Cincinnati, OH.

For ABN AMRO MORTGAGE GROUP INC. (08-4011), Defendant: Michael James Waters, Vedder Price, Chicago, IL.

For MID-AMERICA LAND TITLE AGENCY (08-4011), Defendant - Appellee Cross-Appellant: Robert D. Ross, Law Office, Dayton, OH; Maria Pape Vitullo, Taft, Stettinius & Hollister, Cincinnati, OH.

For MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., CHASE MANHATTAN MORTGAGE

CORPORATION (08-4011), Defendants - Appellee Cross-Appellants: Vladimir P. Belo, Nelson Marlin Reid, Justin W. Ristau, Bricker & Eckler, Columbus, OH.

Judges: Before: MOORE and STRANCH, Circuit Judges; COHN, District Judge.*

Opinion by: JANE B. STRANCH **[**3]**

Opinion

[*456] JANE B. STRANCH, Circuit Judge. Demetrious and Amy Smith brought this action alleging that they were the victims of a fraudulent real estate flipping scheme. As discovery commenced, the district judge initiated and personally facilitated settlement discussions between the parties. The district court concluded that those discussions produced a binding and ***enforceable oral settlement agreement***. On appeal, the Smiths contend that no binding and ***enforceable*** settlement agreement was reached. They also challenge the district judge's failure to transfer the case or recuse himself from considering the existence and enforceability of the agreement. For the following reasons, we **AFFIRM** the judgment of the district court.

BACKGROUND

On January 26, 2006, Demetrious and Amy Smith filed this action in the United States District Court for the Southern District of Ohio. Initially proceeding *pro se*, the Smiths asserted a number of common-law and statutory claims against the defendants, a group of mortgage brokers, real estate appraisers, title companies, and lending agencies.[1] The Smiths allege that the defendants conspired to operate a fraudulent real estate flipping scheme, in which the Smiths **[**4]** were induced into purchasing three investment real estate **[*457]** properties at inflated prices based on fraudulent appraisals and loan documents. Jeffrey Henry, a mortgage broker for defendant NMF, allegedly brokered the transactions.[2] As a result of the scheme, the Smiths claim that they suffered substantial monetary losses and were forced to seek Chapter 13 bankruptcy protection. They also claim that all three of the properties became the subject of foreclosure actions. Given their financial condition, the district court allowed the Smiths to proceed *in forma pauperis* ("IFP") pursuant to *28 U.S.C. § 1915*.

Defendants filed motions to dismiss the case. The magistrate judge recommended that the case be dismissed in its entirety, concluding that the Smiths were estopped from raising their claims because they failed to disclose the claims as an asset in their Chapter 13 bankruptcy proceeding. The district court, however, declined to accept the magistrate judge's estoppel recommendation. The court concluded that the Smiths' failure to disclose was merely inadvertent and therefore did not preclude the Smiths from bringing this lawsuit. The court did dismiss some of the Smiths' claims on other grounds. Soon thereafter, counsel entered an appearance for the Smiths and discovery proceeded on the remaining claims.

A. The Settlement Conference

The district judge personally facilitated a day-long settlement conference on May 1, 2008. Although the record contains few details regarding the manner of the settlement discussions, the district judge acknowledged that he functioned as a mediator, talking to each side separately throughout the day and "go[ing] back and forth" between the parties to try to reach a settlement. JA1010.

At the end of the day, the district judge conducted a hearing **[**6]** on the record in his chambers. As the district judge explained, "I think we have reached a settlement in this case, and we're going to go around and just talk to everybody about it." JA655. The district judge then announced what he thought were "the basic settlement terms." JA656. The judge continued: "If anybody has any comments in terms of additions or deletions, we can discuss them. Then after we hammer all that out, we'll go around the table one more time to see if everybody agrees with what we have agreed to here." *Id.*

As summarized by the court, the settlement agreement awarded the Smiths specified sums of money from defendants NMF (Jeffrey Henry's former employer), Mid America, and MERS. Defendant ABN AMRO, mortgagee for two of the

---

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The primary defendants in the case, and those represented on appeal, are Chase Home Finance LLC (successor to Chase Manhattan Mortgage Corporation) ("Chase"), Mid America Land Title Agency ("Mid America"), Mortgage Electronic Registration Systems, Inc. ("MERS"), National Mortgage Funding ("NMF"), and ABN AMRO Mortgage Group, Inc. ("ABN AMRO").

[2] Public records establish that, in 2005, Jeffrey Henry pled guilty to criminal charges relating to his role as the mortgage broker in a multi-million dollar mortgage flipping scheme in the Cincinnati area. *See United States v. Henry*, No. 1:05-CR-00073 (S.D. Ohio 2005). **[**5]**

properties at issue, assumed ownership of those properties, which were subject to foreclosure proceedings. In exchange, ABN AMRO forgave all possible deficiency claims it had against the Smiths. Defendant Chase forgave all but a specified portion of a deficiency judgment already pending against the Smiths arising from a foreclosure sale on the third property. As a result of the settlement, all claims of any kind between the parties would be released **[**7]** and the Smiths' appeal of the bankruptcy case would be dropped. After concluding his summary of the agreement, the district judge asked: "Did I say anything incorrectly or does anybody want to add anything that's germane or did I hit the key points?" JA658.

[*458] Counsel for several of the parties raised a handful of issues requiring clarification. After addressing those issues, the district court asked the parties if they had "anything else they want[ed] to add." JA665. When nobody responded, the court continued:

> COURT: So let's start with the Smiths. You've heard everything I have discussed. Are you in agreement with that?
> MS. SMITH: Um, yes. Um, I got—if I wanted to write a book, could I change the names and just, you know, don't name anybody by name?
> [DEF. COUNSEL]: The answer would be no.
> COURT: The way the thing is set up now, probably not.
> MR. SMITH: I'm good with the terms.
> THE COURT: Mr. Smith is good with the terms. Mrs. Smith?
> MS. SMITH: Okay.
> THE COURT: Okay. Counsel?
> [PLS.' COUNSEL]: If my clients are happy, I'm happy.

JA665–JA666.

Counsel for the defendants and the bankruptcy trustee indicated their agreement. The court stated that it would "retain jurisdiction to enforce any terms of **[**8]** the settlement agreement" and asked counsel for defendant NMF to "take the first cut" at drafting the agreement and circulate it "so that it's ready to go in 30 days." JA667. The district judge scheduled a telephone status call for the following month "to find out if there are any problems," and concluded by stating his opinion that "[t]his is a good resolution of a thorny problem, and . . . we are all better off having it handled this way." JA668–JA669. The district court's docket entry for the hearing stated that the "matter has been resolved." DE166.

B. Motions for Modification and Enforcement of Oral Settlement Agreement

Less than two weeks after the settlement conference, the Smiths filed a "Request for Modification of the Settlement Agreement." Attached to the request were two virtually identical affidavits, one from each of the Smiths, stating their intention to withdraw from the settlement agreement. The affidavits acknowledged that the Smiths "made a settlement agreement on May 1, 2008," but claimed that they "can no longer agree to the terms of the settlement considering the damages [they] suffered," JA420, JA423. The Smiths alleged that they entered into the agreement under **[**9]** financial duress and had not realized the true financial consequences of the agreement. They requested ownership of the real estate properties at issue (or an equivalent value for the property that had already been sold in foreclosure), along with "fix-up money" allegedly promised by Jeffrey Henry as part of the flipping scheme. JA421, JA424.

On June 2, the defendants responded with a motion to enforce the alleged settlement and a separate sealed motion for sanctions against the Smiths. The motion to enforce argued that the parties reached an enforceable settlement agreement in the presence of the district judge and on the record, and that the Smiths' alleged duress and change of heart were not valid bases to modify the terms of the agreement. The motion for sanctions requested the district court to exercise its inherent authority to sanction the Smiths' litigation conduct by awarding attorneys' fees, costs, and expenses incurred as a result of the Smiths' attempt to modify or set aside the settlement agreement.

While the motions to modify and enforce were pending before the district court, the **[*459]** Smiths filed a *pro se* motion for change of venue and recusal. The Smiths stated that they **[**10]** were "seeking a 'Change of Venue' in hopes of being able to have a fair and equitable trial," JA800, which they thought was necessary because "too much racial prejudice exists in the Southern District Court of Ohio," JA799. They sought recusal of the district judge because they claimed it was inappropriate for him to adjudicate the existence and enforceability of the settlement agreement that he helped facilitate. They also sought recusal based on the judge's purported racial bias, pointing to his alleged statement "that mediation was better than a jury trial because [the Smiths] may get a jury from rural counties," from which the Smiths "inferr[ed] that [the jury] would be prejudice[d] to an Afro-American." JA801.[3]

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[3] The Smiths offer various summaries of the district judge's alleged statement. *See, e.g.,* Appellants' 1st Br. at 25 (claiming that the judge "persuaded [the Smiths] that they could not get a fair trial . . . because the population in the majority of counties . . . which constituted the jury pool . . . was white"); *id.* at 37 (the Smiths "did not want a jury trial because . . . the counties from which the jury pool would be drawn were largely white"); *id.* at 38 (district judge

On June 25, the court conducted a hearing on the Smiths' motion for change of venue or recusal. At the conclusion of the hearing, the district judge denied the motion without explanation. The following week, the court conducted a hearing on the existence and enforceability of the oral settlement agreement. At the hearing, the Smiths generally reiterated their arguments that they wanted the agreement modified or set aside because they did not enter into the agreement voluntarily and because it did not award them enough money. Mrs. Smith testified that her husband pressured her to agree to the settlement because of the trial judge's statements that "he couldn't get any more money" from the defendants, JA995, and "that [the] jury pool [would] probably be from citizens of Highland or Switzerland County, which are basically all-white counties," JA971. She also testified that she did not feel there was a binding **[**12]** agreement because "there were a lot of issues that hadn't been discussed during the Settlement Agreement." JA971. Mr. Smith agreed, testifying that he "felt coerced" and "pressured" to agree because the trial judge kept "saying '[w]ell, I can't get nothing else for you'" and "'[t]hey won't budge.'" JA1015–JA1016.

C. Final Opinion & Order

The district court issued an Opinion and Order on July 15, granting the defendants' motion to enforce the settlement agreement and denying the Smiths' motion to modify it. Applying Ohio contract law, the district court concluded that the Smiths were bound by the terms of the oral settlement agreement reached at the May 1 conference. According to the court, "the Smiths were represented by competent counsel . . . prior to and during the entire settlement process," JA636, and "[a]fter review of the essential negotiated terms of agreement, all parties acknowledged their acceptance of the terms," JA637. Because "the Smiths knowingly, intentionally and voluntarily entered into the settlement agreement," the district court concluded that the Smiths were bound by its terms. JA639. The Opinion and Order incorporated by reference an accompanying Order, which set **[**13]** forth the terms of the May 1 agreement as understood by the district court. The district court also denied the **[*460]** defendants' motion for sanctions without explanation.

D. Post-Judgment Matters

On July 28, the Smiths filed a timely notice of appeal. Defendants (with the exception of ABN AMRO) timely cross-appealed from the denial of their motion for sanctions. On August 7, the defendants also filed in the district court a motion to revoke the Smiths' IFP status on appeal. They argued that the appeal was "manifestly frivolous," JA480, and not taken in good faith, JA487. The Smiths opposed. On December 11, the district court granted the motion to revoke the Smiths' IFP status, finding "no factual or legal basis for [an] appeal" because the Smiths "entered into the settlement agreement knowingly, intentionally, and voluntarily." JA628.

ANALYSIS

I. EXISTENCE AND ENFORCEABILITY OF ORAL SETTLEMENT AGREEMENT

A. Standard of Review and Choice of Law

On appeal, the Smiths challenge the existence and enforceability of the oral settlement agreement. We review the district court's factual determination that the parties agreed to settlement for clear error. *Re/Max Int'l, Inc. v. Realty One, Inc., 271 F.3d 633, 645 (6th Cir. 2001)*. **[**14]** We review a district court's decision to enforce the agreement for an abuse of discretion. *Id.; Therma-Scan, Inc. v. Thermoscan, Inc., 217 F.3d 414, 419 (6th Cir. 2000)*. Because settlement agreements are a type of contract, the formation and enforceability of a purported settlement agreement are governed by state contract law. *Bamerilease Capital Corp. v. Nearburg, 958 F.2d 150, 152 (6th Cir. 1992)*. The pertinent events in this case occurred in Ohio, and the parties agree that Ohio contract law applies.

B. Existence of Settlement Agreement

Under Ohio law, "a valid settlement agreement is a contract between parties, requiring a meeting of the minds as well as an offer and acceptance." *Rulli v. Fan Co., 79 Ohio St. 3d 374, 1997 Ohio 380, 683 N.E.2d 337, 338 (Ohio 1997)* (syllabus). Although "[i]t is preferable that a settlement be memorialized in writing, . . . an ***oral settlement agreement*** may be ***enforceable*** if there is sufficient particularity to form a binding contract." *Kostelnik v. Helper, 96 Ohio St. 3d 1, 2002 Ohio 2985, 770 N.E.2d 58, 61 (Ohio 2002)*. "To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear." *Rulli, 683 N.E.2d at 339*.

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[11]** spoke of "the difficulty that the Smiths might have getting an essentially 'white' jury to be sympathetic to the Smiths' allegations"). At oral argument, counsel alleged for the first time that the district judge also referred to a possible jury as consisting of "white red necks."

1. Preliminary Negotiations

The Smiths first argue that no enforceable **[**15]** settlement agreement was reached during the May 1 settlement discussions because the discussions were "merely a set of preliminary negotiations leading up to a written, binding contract." Appellants' 1st Br. at 24. In support, the Smiths point out that the district judge's initial oral summary of the settlement agreement was not exhaustive—counsel for both sides engaged in a give-and-take discussion with the judge on a variety of issues that were not contained in his initial summary. They also note that, at the hearing's conclusion, defense counsel agreed to prepare a draft agreement for circulation and execution.

The Smiths' claim is belied by the record in this case. Soon after going on the record at the May 1 conference, the district judge summarized the "basic settlement terms," which included specified monetary awards to the Smiths from **[*461]** NMF, Mid America, and MERS, minus a specified portion of a deficiency judgment for Chase. The judge also explained that all pending actions would be dismissed. The parties then discussed several additional issues requiring clarification. After the parties concluded their discussion, all of the parties, including the Smiths and their counsel, expressly **[**16]** assented to the terms as stated on the record. The terms of this agreement as set forth in the record of the district court are "reasonably certain and clear," *Rulli, 683 N.E.2d at 339*, and are therefore enforceable under Ohio law.[4]

After the parties assented to the agreement, all that remained was to sort out the "general recital-type things that are standard to settlement agreements" and to put the agreement in writing. JA662. As this Court explained in a similar case applying Ohio contract law, "[t]he existence of a valid agreement is not diminished by the fact that the parties have yet to memorialize the agreement. When parties have agreed on the essential terms of a settlement, and all that remains is to memorialize the agreement in writing, the parties are bound by the terms of the oral agreement." *Re/Max Int'l, Inc., 271 F.3d at 646*. For these reasons, **[**17]** the district court did not err in concluding that the parties reached an oral settlement agreement.

2. Meeting of the Minds

The Smiths also argue that there was no meeting of the minds because they were not aware that the agreement required ABN AMRO and Chase to forgive any deficiency claims they had against the Smiths. We are not persuaded. At the settlement conference the district court summarized the proposed agreement as providing for the compromise of Chase's deficiency claim on one property and the total forgiveness of any deficiency claims held by ABN AMRO on the other two properties. It also subsequently clarified at the conference that the two properties financed by ABN AMRO "would be conveyed to [ABN AMRO] in [their] entirety" in lieu of foreclosure and ABN AMRO would "releas[e] any and all claims o[f] deficiency or anything else [it] would have against [the Smiths]." JA658–JA659. As noted above, the Smiths and their counsel agreed to the terms of the agreement. Objectively, the parties reached a meeting of the minds.[5]

3. Defendants' Failure to Submit Evidence

Reversal of the district court's decision is also required, the Smiths argue, because the defendants did not introduce any evidence to establish that the parties reached an agreement. Similarly, they contend that the defendants failed to introduce evidence demonstrating that the court-entered agreement contains the same terms as those actually agreed to by the parties during the May 1 conference. In support **[*462]** of their argument, they rely on *Powers v. MagiTech Corp., 2002 Ohio 1360, 2002 WL 445045 (Ohio Ct. App. 2002)*, where the court reversed a trial court's grant of a motion to enforce a settlement agreement because there was no evidence in the record establishing that the movant's drafted agreement reflected the oral **[**19]** agreement reached between the parties.

Unlike *Powers*, the evidence of a binding oral settlement agreement in the present case is contained in the district court record, particularly in the transcript of the May 1 settlement conference. Consequently, the district court did not err by failing to require defendants to introduce additional evidence to establish the existence of an agreement. Moreover, the

[4] The Smiths' claims to the contrary are further undermined by the fact that, in their motion to modify the agreement filed in the district court, they expressly acknowledged that they had "made a settlement agreement on May 1, 2008," but simply claimed that they could "no longer agree to the terms of the settlement." JA420, JA423.

[5] In a related argument, the Smiths argue that Chase's and ABN AMRO's waiver of their deficiency claims is insufficient consideration to support the agreement. **[**18]** The Smiths have not cited, and we have not found, any authority suggesting that the promise to forgo pursuit of the deficiency claims was insufficient consideration under Ohio law. *See, e.g., Mathis v. St. Alexis Hosp., 99 Ohio App. 3d 159, 650 N.E.2d 141, 144 (Ohio Ct. App. 1994)* (explaining that a promise to forbear pursuit of a legal claim is generally sufficient consideration provided the promisor subjectively believes the claim is valid).

Smiths do not point to any material differences between the oral agreement reached at the May 1 hearing and the district court's Order memorializing the agreement.

For all of these reasons, the district court did not err in finding that the parties reached an oral settlement agreement.

C. Enforceability of Settlement Agreement

Assuming that the parties reached an oral settlement agreement, the Smiths alternatively argue that the agreement should be modified or set aside on a number of other grounds.

1. Undue Pressure From District Judge

The Smiths contend that the agreement is unenforceable because they were subject to undue pressure during the settlement mediation process from the district judge. In support, the Smiths point to two statements allegedly establishing judicial coercion. First, **[**20]** they allege that the district judge told them "that they stood a better chance to get an award of money in a settlement agreement rather than in a jury trial because of the nature of the jury pool." Appellants' 1st Br. at 42. Second, they claim that the district judge told them "that he [could] not get any more money from the Defendants." Appellants' 1st Br. at 42-43.

We agree with the Smiths that, "[a]lthough judges should encourage and aid early settlement, . . . they should not attempt to coerce that settlement." *In re NLO, Inc., 5 F.3d 154, 157 (6th Cir. 1993)*; *accord* Code of Conduct for United States Judges Cannon 3A(4) (Commentary) ("A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts."). As the Seventh Circuit has explained, coercion generally "occurs when a judge threatens to penalize a party that refuses to settle." *Gevas v. Ghosh, 566 F.3d 717, 719 (7th Cir. 2009)*. The alleged statements in the present case evidence no judicial threat, express or implied, that the Smiths should settle the case or suffer court-imposed repercussions. Nor has our **[**21]** independent review of the record uncovered any conduct resembling coercion. Accordingly, the settlement agreement is not unenforceable on this ground.[6]

[6] At oral argument, counsel for the Smiths argued that the district judge's coercive statements and actions constituted fraud upon the court. Because this argument was neither raised in the court below nor in the Smiths' appellate briefs, we decline to consider it in the first instance. *See, e.g., Precaj v. Holder, 376 F. App'x 553, 563 (6th Cir. 2010)*.

2. Economic Duress

Second, the Smiths argue that the settlement agreement is unenforceable because of economic duress. They contend **[*463]** that as a result of defendants' fraudulent actions, they were put in an economic situation in which they had no choice but agree to the terms of the agreement. As Appellees correctly point out, the Smiths have forfeited any right to have this argument considered on appeal by not raising it in their opening brief. *See, e.g., Golden v. Comm'r, 548 F.3d 487, 493 (6th Cir. 2008)* (concluding that argument not raised in opening brief was forfeited).

Even assuming that the argument is preserved, it would nevertheless be insufficient to invalidate the agreement. Under **[**22]** Ohio law, "[a] person who claims to have been a victim of economic duress must show that he or she was subjected to a wrongful or unlawful act or threat, and that it deprived the victim of his unfettered will." *Blodgett v. Blodgett, 49 Ohio St. 3d 243, 551 N.E.2d 1249, 1251 (Ohio 1990)* (internal quotation marks and alterations omitted). As one Ohio court noted, "courts have rejected the proposition that when one executes a settlement or satisfaction merely because one cannot afford to wait for the outcome of the dispute, the settlement or satisfaction may be subsequently avoided." *Wilkinson v. Cincinnati Ins. Co., No. CA99-10-181, 2000 Ohio App. LEXIS 935, 2000 WL 270044, at *3 (Ohio Ct. App. Mar. 13, 2000)*. In the present case, the Smiths cite no evidence that the defendants forced them into settling the dispute rather than continuing to pursue the legal action. As a result, the district court correctly rejected the Smiths' economic duress argument.

3. Defendants' Failure to Circulate Drafted Agreement Within Thirty Days

The Smiths argue that the settlement agreement is unenforceable because the defendants did not circulate the settlement draft within thirty days, as requested by the district court at the May 1 hearing. We disagree. **[**23]** The oral settlement agreement became binding at the time the parties reached the agreement during the May 1 hearing. There is no indication in the record that the effectiveness of the settlement agreement was contingent on the circulation of a writing within thirty days. The thirty-day period was a request from the district court so that the drafts would be "ready to go" upon termination of the bankruptcy case and before a telephone status conference scheduled for June 5. The expectation that the memorialized agreement would be executed within thirty days was dashed by the Smiths' intervening motion to modify or set aside the agreement.

Thus, the defendants' failure to circulate the proposed draft within thirty days does not excuse the Smiths from the agreement.

4. Statute of Frauds

The Smiths argue that the oral settlement agreement is unenforceable because it violates Ohio's statute of frauds, *Ohio Rev. Code § 1335.05*, which generally requires transactions involving real estate to be reduced to writing. We decline to consider this issue because the Smiths did not raise it in their opening brief in this Court. *See Golden, 548 F.3d at 493*. We note, however, that the Smiths' argument **[**24]** would likely fail because Ohio law generally treats settlement agreements that are read into the record as outside the statute of frauds. *See, e.g., Thomas v. Thomas, 5 Ohio App. 3d 94, 5 Ohio B. 208, 449 N.E.2d 478, 484 (Ohio Ct. App. 1982)*.

5. Conclusion

The district court transcript of the May 1 settlement conference establishes that the parties reached a binding oral settlement agreement. The Smiths had the benefit of counsel both during and outside of the settlement discussions. "Where the **[*464]** parties enter into a settlement agreement in the presence of the court, such an agreement constitutes a binding contract. Neither a change of heart nor poor legal advice is a ground to set aside a settlement agreement." *Walther v. Walther, 102 Ohio App. 3d 378, 657 N.E.2d 332, 335 (Ohio Ct. App. 1995)* (citation omitted). The district court's decision on the existence and enforceability of the oral settlement agreement is affirmed.

II. SMITHS' MOTION FOR A CHANGE OF VENUE OR RECUSAL

The Smiths also challenge the district court's denial of their motion for a change of venue or recusal. They argue that the district court should have granted their motion for a change of venue pursuant to *28 U.S.C. § 1404(a)* on the ground that the jury pool in the Southern **[**25]** District of Ohio is racially prejudiced. They also contend that the trial judge erred by not recusing himself pursuant to *28 U.S.C. § 455*, based primarily on his personal involvement as a mediator during the settlement discussions. Defendants argue that the district judge correctly denied both motions. Defendants also contest this Court's jurisdiction to consider these issues because the Smiths' notice of appeal does not specifically designate the district court's denials of the recusal and transfer motions.

A. Appellate Jurisdiction

This Court has jurisdiction over appeals from "final decisions of the district courts." *28 U.S.C. § 1291*. A district court decision generally is "final" for purposes of *Section 1291* if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)*; *accord In re Saffady, 524 F.3d 799, 802 (6th Cir. 2008)*. The parties do not appear to dispute that the district court's Opinion and Order, along with the accompanying Order setting forth the terms of the binding settlement agreement, collectively constitute a final decision of the district court appealable under *28 U.S.C. § 1291*. **[**26]** The Opinion and Order conclusively resolved the litigation by compelling adherence to the terms of the settlement agreement set forth in the incorporated Order.

The parties dispute, however, whether the Smiths' notice of appeal referencing only these two contemporaneously entered orders is sufficient to confer jurisdiction on this Court to consider the district court's earlier denial of the Smiths' motion for recusal or change of venue.[7] Defendants rely primarily on *Federal Rule of Appellate Procedure 3(c)(1)(B)*, which requires a notice of appeal to "designate the judgment, order, or part thereof being appealed."

"It has long been the rule 'that an appeal of a final judgment draws into question all prior non-final rulings and orders.'" *Caudill v. Hollan, 431 F.3d 900, 904 (6th Cir. 2005)* (quoting *McLaurin v. Fischer, 768 F.2d 98, 101 (6th Cir. 1985))*. As this Court succinctly explained in *Caudill*, "our rule is that we will entertain arguments on all objections **[**27]** and asserted errors prior to the final disposition of a case if a party indicates in its notice of appeal that it appeals *either the final judgment or the final order in the case*." *431 F.3d at 906* (emphasis added) (concluding that a notice of appeal designating a final order was sufficient to give the Court jurisdiction to consider non-final ruling leading **[*465]** up to final order); *accord Gipson v. Vought Aircraft Indus., Inc., 387 F. App'x 548, 553 (6th Cir. 2010)* (unpublished) (same).

In the present case, the district court entered an Opinion and Order on July 15 that conclusively resolved the litigation by compelling adherence to the terms of the settlement agreement set forth in the accompanying Order. Although the Smiths' notice of appeal does not explicitly identify the

[7] The Smiths' notice of appeal designated, in relevant part, "the Opinion and Order (Sealed Doc. 199), entered July 15, 2008" and the "accompanying Order (Sealed Doc. 200), entered contemporaneously with its Opinion and Order." JA38.

district court's earlier non-final entry denying the motion for a change of venue or recusal, the notice of appeal specifically designates the simultaneously entered orders intended to function as the final decision of the district court. Such a notice of appeal is sufficient to bring up all non-final rulings upon which the court's final decision is predicated. *See Caudill, 431 F.3d at 906*. As a result, this Court has **[**28]** jurisdiction to consider the propriety of the district court's decision denying the Smiths' motion for change of venue or recusal.

B. Standard of Review

This Court reviews the denial of a motion for a change of venue for abuse of discretion. *Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 588 (6th Cir. 2007)*. A district judge's denial of a motion to recuse also is reviewed for abuse of discretion. *Johnson v. Mitchell, 585 F.3d 923, 945 (6th Cir. 2009)*.

C. Motion for Change of Venue

The Smiths argue that the district court should have granted their motion for a change of venue pursuant to *28 U.S.C. § 1404(a)* because they "do not believe that as African American[s] they can get justice in the Southern District of Ohio." Appellants' 1st Br. at 36. Instead, "[t]he Smiths want[] to be in a district of Ohio where the racial mix [i]s fairer," Appellants' 3d Br. at 30, in hopes of having a more sympathetic jury, Appellants' 1st Br. at 36. They specifically suggest the Northern District of Ohio because that district "is more liberal in interpreting minority cases." *Id.*

Counsel for the defendants conceded at oral argument that the Smiths' status as plaintiffs did not preclude them from **[**29]** seeking a change of venue pursuant to *28 U.S.C. § 1404(a)*. As this Court explained in *Philip Carey Manufacturing Co. v. Taylor, 286 F.2d 782 (6th Cir. 1961)*, "[t]he right to a transfer under [*28 U.S.C. § 1404(a)*] is available to a plaintiff as well as a defendant. A plaintiff is not bound by his choice of forums, if he later discovers that there are good reasons for transfer." *Id. at 784*; *accord* 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3844 (3d ed. 1989) (recognizing the "very substantial authority," including this Court's decision in *Taylor*, "for the proposition that [a] motion . . . may be made by the plaintiff").

Although the Smiths were not precluded from seeking a change in venue, the district court did not abuse its discretion in denying the Smiths' request. At the time the Smiths filed the request for a change of venue based on the alleged bias of the jury pool, the parties were disputing the existence and enforceability of the settlement agreement before the district judge. Consequently, at that time, there was no allegedly biased jury to avoid. Moreover, an unsubstantiated claim of jury bias, such as the one alleged here, is **[**30]** insufficient to compel a district court to transfer a case. The district court did not abuse its discretion in denying the Smiths' motion for a change of venue.

D. Motion for Recusal

The Smiths also challenge the district judge's denial of their motion for recusal under *28 U.S.C. § 455*. They argue recusal **[*466]** was required because the district judge (i) harbored racial bias and (ii) served as the judicial mediator of the settlement discussions that yielded the disputed settlement agreement.

1. Alleged Racial Bias of the District Judge

In their opening brief, the Smiths argue that the district judge should have recused himself because "he is biased against African Americans." Appellants' 1st Br. at 37. In their reply brief and at oral argument, however, the Smiths appeared to abandon the argument. To the extent the argument is being asserted on appeal, its sole basis appears to be the district judge's alleged statement to the Smiths to the effect "that the Smiths did not want a jury trial because in Southwestern Ohio the counties from which the jury pool would be drawn were largely white." Appellants' 1st Br. at 37.[8]

We have exhaustively reviewed the district court record and find it totally devoid of any evidence that the district judge harbored racial bias or prejudice. The alleged statement, if made, obviously was designed to clarify that any jury empaneled in the Southern District of Ohio would be drawn from the entire district, not just the Cincinnati metropolitan area, and to share the judge's candid assessment of trial risks based on his judicial experience. In fact, counsel for the Smiths acknowledged in the district court that even she "did not realize that the District Court chose its pool from ten counties." JA1189. Particularly in the context of a private mediation conference, such a statement does not indicate that the district judge harbored any racial bias or prejudice.

2. *Challenge to Serving as Judge and Mediator*

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[8] As noted above, the specifics of the alleged statement vary throughout the **[**31]** record. *See supra* note 3 and accompanying text.

The Smiths also argue that the district judge should have recused himself from considering the motions on the existence and enforceability of the oral settlement agreement given the judge's personal participation in the settlement discussions that produced the agreement.

Several provisions of the primary federal recusal statute, **[**32]** *28 U.S.C. § 455*, are potentially implicated by the Smiths' argument. *Section 455(b)* requires disqualification in certain situations, such as where the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *28 U.S.C. § 455(b)(1). Section 455(b)(5)(iv)* requires a judge to recuse himself in those instances where the judge "know[s]" that he is "likely to be a material witness in the proceeding." *Section 455(a)* also requires a district judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

We find it unnecessary to resolve the recusal question presented here, however, because recusal error, if any occurred, was harmless. *See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* (noting that "there is surely room for harmless error" in the recusal context because "[t]here need not be a draconian remedy for every violation of *§ 455(a)*"). Although we apply the harmless-error doctrine with great caution, we are convinced it applies in this case given the inescapable legal conclusion that the parties reached an ***enforceable*** ***oral settlement agreement***. **[**33]** *See Morgan v. Money, No. 99-3251, 210 F.3d 372,* ***[*467]*** *2000 WL 178421, at *2 (6th Cir. 2000)* (unpublished table decision) (holding that district judge's failure to recuse was harmless error where the underlying question was "patently clear" and so there was "no need to vacate the district court's decision and to remand to another district court judge to make the same clear determination"). Accordingly, we decline to determine whether the district judge abused his discretion by failing to recuse himself.

III. *IN FORMA PAUPERIS STATUS ON APPEAL*

Federal Rule of Appellate Procedure 24(a)(3) generally allows parties permitted to proceed *in forma pauperis* in the district court to proceed as such on appeal without further authorization, unless the district court "certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis." After the Smiths filed their notice of appeal from the district court's order compelling settlement, defendants moved the district court to revoke the Smiths' IFP status on appeal. The district court granted that motion on December 11, 2008, certifying in a separate order that this appeal was meritless.

To the **[**34]** extent the Smiths continue to seek IFP status, that issue is not before the Court for at least two reasons. First, litigants denied IFP status on appeal by a district court generally must seek relief in the court of appeals by filing a motion pursuant to *Federal Rule of Appellate Procedure 24(a)(5)*, rather than appealing from the district court's order. As we explained in *Callihan v. Schneider, 178 F.3d 800 (6th Cir. 1999)*, "[o]nce the district court denies the pauper motion, the litigant can file a motion for pauper status with this court in accordance with [*Rule 24(a)(5)*]. Any appeal from an order denying pauper status on appeal will not be entertained and shall be dismissed sua sponte." *Id. at 804*; *accord Fed. R. App. P. 24* (Advisory Committee Notes, 1967) (recognizing that "[t]he simple and expeditious motion procedure" set forth in *Fed. R. App. P. 24(a)(5)*, "rather than an appeal from . . . the certification of lack of good faith, [is] the proper procedure for calling in question the correctness of the action of the district court"). Because the Smiths did not file a motion with this Court to proceed on appeal *in forma pauperis* in compliance with *Rule 24(a)(5)*, the Smiths' IFP **[**35]** status is not properly before us.

Second, even assuming that the Smiths procedurally could appeal from the district court's revocation order, this Court lacks jurisdiction to consider the issue because the Smiths' notice of appeal did not designate the post-judgment order revoking the Smiths' IFP status. Unlike pre-judgment orders that merge into the district court's final judgment, post-judgment orders generally do not do so. The Court, therefore, does "not . . . entertain issues raised in post-judgment motions if the notice of appeal states only that the appeal is from the final order or the final judgment." *Caudill, 431 F.3d at 906*.

For these reasons, we are unable to consider the propriety of the district court's order revoking the Smiths' IFP status on appeal.

IV. DISTRICT COURT'S DENIAL OF SANCTIONS AGAINST THE SMITHS

Cross-Appellants challenge the district court's denial of their motion for sanctions against the Smiths seeking "attorneys fees, costs, and expenses incurred as a result of the egregious circumstances involving . . . Plaintiffs' failure to abide by the terms of the settlement." JA702. They argue that the district court erred by not imposing sanctions pursuant to its **[**36]** inherent **[*468]** authority to sanction litigation conduct, and particularly by not stating any reasons for its denial.

We review for abuse of discretion a district court's denial of sanctions. *Jones v. Ill. Cen. R.R. Co., 617 F.3d 843, 850 (6th Cir. 2010)*. Although a district court has inherent authority to sanction a party for litigation conduct, *Chambers v. NASCO, Inc., 501 U.S. 32, 50, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)*, such an award "*requires* a finding of bad faith or of conduct tantamount to bad faith," *BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 752 (6th Cir. 2010)* (internal quotation marks omitted). "[T]he mere fact that an action is without merit does not amount to bad faith. . . . [I]n order for a court to find bad faith sufficient for imposing sanctions under its inherent powers, the court must find *something more* than that a party knowingly pursued a meritless claim or action at any stage of the proceedings." *Id. at 753* (internal quotation marks omitted).

As Cross-Appellants correctly point out, this Court has "held, particularly in the 'close' or serious sanction cases, that the district court should set out its 'analysis and discrete findings' with respect to its decision on the allowance or rejection **[**37]** of sanctions." *Palmer v. Nationwide Mut. Ins. Co., 945 F.2d 1371, 1377 (6th Cir. 1991)* (quoting *In re Ruben, 825 F.2d 977, 991 (6th Cir. 1987))*. Although the district court "was remiss in not providing some explanation for" denying sanctions, the issue of sanctions in this case "is not so close . . . that the district court's lack of explanation constitutes an abuse of discretion." *Moross Ltd. P'ship v. Fleckenstein Capital, Inc., 466 F.3d 508, 520 (6th Cir. 2006)*.

We agree that the Smiths' motion to modify or set aside the oral settlement agreement lacked legal merit, but we can find no evidence in the record that the Smiths proceeded in bad faith or engaged in conduct tantamount to bad faith. The only evidence cited by Cross-Appellants in support of their claim for sanctions is the Smiths' motion to modify or set aside the oral settlement agreement.[9] As noted above, the fact that the Smiths may have filed a meritless motion does not, without more, establish the bad faith required to impose sanctions on litigants in this context. *See BDT Prods., 602 F.3d at 753*. And our review of the record convinces us that the Smiths genuinely believed that they were not bound by the oral settlement **[**38]** agreement and that the agreement's enforceability and terms should be determined by another judge. Accordingly, we conclude that the district court did not abuse its discretion by denying the motion for sanctions against the Smiths.

[9] Cross-Appellants try to support their claim for sanctions by pointing to the district court's revocation of the Smiths' IFP status. The district court's sanctions order, however, must be reviewed in light of the record that was before the district court at the time the order was issued. The fact that the district court subsequently revoked the Smiths' IFP status does not establish that the district court abused its discretion in denying sanctions five months earlier. Moreover, the exclusive basis of the district court's finding of bad faith in its revocation order was the meritless nature of the Smiths' claims on appeal, a finding that is insufficient to demonstrate the requisite bad faith for sanctions imposed pursuant to the court's inherent powers. *See BDT Prods., 602 F.3d at 753*.

V. MOTIONS FOR SANCTIONS FOR CONDUCT DURING APPEAL

Shortly after oral argument was heard in this case, Appellees NMF, Chase, MERS, Mid America, and ABN AMRO filed a motion seeking **[**39]** sanctions against the Smiths' counsel for conduct during appeal pursuant to *28 U.S.C. § 1927*. They allege counsel should be sanctioned for taking two actions. First, counsel notarized a *pro se* affidavit filed in this Court **[*469]** by her clients, after this Court had previously entered an order noting the impropriety of such filings and striking a similar *pro se* affidavit filed by her clients. Second, counsel erroneously filed in this Court (rather than the district court) a motion for relief from the district court's judgment pursuant to *Federal Rule of Civil Procedure 60(b)*. In response, counsel for the Smiths claims that she did not realize the Smiths intended to make the *pro se* filing, and points out that she (on behalf of her clients) subsequently moved for its withdrawal, a request that this Court granted. She also claims that she was unaware that the *Rule 60(b)* motion would be improper if filed in this Court.

Section 1927 of Title 28 of the United States Code provides that an attorney "who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because **[**40]** of such conduct." "The purpose of *§ 1927* is to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Garner v. Cuyahoga Cnty. Juvenile Court, 554 F.3d 624, 644 (6th Cir. 2009)* (internal quotation marks omitted). "[U]nlike sanctions imposed under a court's inherent authority, *§ 1927* sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642, 646 (6th Cir. 2006)*. Although our review of the record suggests that counsel's well-intentioned zeal in representing her clients may have affected her judgment at times during this litigation, we believe that the challenged conduct during this appeal is not sufficiently "unreasonabl[e] and vexatious[]" to justify sanctions under *§ 1927*.

Several months after filing their first sanctions motion, the same Appellees moved the Court for leave to file, under seal,

another already-prepared motion for sanctions, this time pursuant to *Federal Rule of Appellate Procedure 38*. To the extent Appellees remain intent on filing their motion for sanctions pursuant to *Rule 38*, **[**41]** they may do so under seal within five days of the filing of this opinion. Opposition briefs to any motion would be due ten days thereafter, with no replies. We remind the parties, however, that the awarding of sanctions under *Rule 38* "is a matter entrusted to our discretion," *Dubay v. Wells, 506 F.3d 422, 432 (6th Cir. 2007)*, and we do not exercise that discretion simply because an appellant's argument "may indeed be quite weak," *Uhl v. Komatsu Forklift Co., 512 F.3d 294, 308 (6th Cir. 2008)*.

CONCLUSION

For the aforementioned reasons, we **AFFIRM** the judgment of the district court.

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RE/MAX Int'l, Inc. v. Realty One, Inc.

United States Court of Appeals for the Sixth Circuit

July 31, 2001, Argued ; November 9, 2001, Decided ; November 9, 2001, Filed

No. 00-4235

Reporter
271 F.3d 633 *; 2001 U.S. App. LEXIS 24190 **; 2001 FED App. 0397P (6th Cir.) ***; 2001-2 Trade Cas. (CCH) P73,481; 51 Fed. R. Serv. 3d (Callaghan) 1389

RE/MAX INTERNATIONAL, INC., et al., Plaintiffs-Appellees, RE/MAX NORTHEAST OHIO LIMITED PARTNERSHIP, et al., Intervenors-Appellees, v. REALTY ONE, INC., Defendant-Appellant, SMYTHE, CRAMER COMPANY, Defendant.

Subsequent History: [1]** Certiorari Denied April 15, 2002, Reported at: *2002 U.S. LEXIS 2377*.

Prior History: Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 94-00062. James S. Gwin, District Judge.

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1999 U.S. App. LEXIS 6090 (6th Cir. Ohio 1999)

Disposition: Affirmed.

Counsel: ARGUED: Thomas O. Gorman, PORTER, WRIGHT, MORRIS & ARTHUR, Washington, D.C., for Appellant.

Daniel H. Bromberg, JONES, DAY, REAVIS & POGUE, Washington, D.C., for Appellees.

ON BRIEF: Thomas O. Gorman, PORTER, WRIGHT, MORRIS & ARTHUR, Washington, D.C., Hugh E. McKay, Gina L. Schaecher, PORTER, WRIGHT, MORRIS & ARTHUR, Cleveland, Ohio, for Appellant.

Daniel H. Bromberg, JONES, DAY, REAVIS & POGUE, Washington, D.C., Mark J. Andreini, Stephen J. Squeri, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, Edward W. Cochran, COCHRAN & COCHRAN, Shaker Heights, Ohio, Terrence R. Quinn, Day & Barker, Rapid City, South Dakota, for Appellees.

Judges: Before: CLAY, GILMAN and WALLACE, Circuit Judges. * CLAY, J., delivered the opinion of the court, in which GILMAN, J., joined. WALLACE, J., delivered a separate dissenting opinion.

Opinion by: CLAY

Opinion

[*2]** **[*636]** CLAY, Circuit Judge. Defendant, Realty One, Inc. ("Realty One"), appeals the district court's summary enforcement of a settlement **[**2]** agreement in this antitrust action instituted by rival northeast Ohio real estate brokerage firm RE/MAX International, Inc ("RE/MAX"). After the parties reached a settlement agreement, the district court dismissed the case with prejudice without incorporating the terms of the **[***3]** agreement into its order or explicitly stating that it was retaining jurisdiction to enforce those terms. On appeal, Realty One challenges the district court's jurisdiction to enforce the settlement agreement. Realty One also contends that even assuming the district court had jurisdiction to enforce the settlement agreement, it abused its discretion by not limiting its order to the terms in the transcript of the settlement proceedings. For the reasons that follow, we **AFFIRM** the district court's judgment.

BACKGROUND

A. Initial Proceedings

RE/MAX is a franchisor of a real-estate brokerage system which it sells to franchisees across the nation, including northeast Ohio. Intervenor RE/MAX Northeast Ohio Limited Partnership is the RE/MAX subfranchisor for the northeast Ohio region, which consists of Cleveland and the surrounding area. Defendants Realty One and Smythe, Cramer Company ("Smythe, **[**3]** Cramer") are the largest real estate brokerage companies in northeast Ohio in terms of market share. RE/MAX filed suit against Realty One and Smythe, Cramer in the United States District Court for the Northern District of Ohio, alleging that their practice of paying brokers associated with RE/MAX's franchisees lower commissions on

* The Honorable J. Clifford Wallace, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

split commission transactions violated the Sherman Antitrust Act and analogous state laws. This practice was known as an "adverse split" and was allegedly designed to drive RE/MAX out of business in northern Ohio by deterring its agents from doing business there. [1] The case was initially assigned to **[***4]** District Judge David Dowd, who granted Defendants' motions for summary judgment as to some of RE/MAX's claims. **See** ***RE/MAX Int'l Inc. v. Realty One, Inc.***, *924 F. Supp. 1474 (N.D. Ohio 1996)*. RE/MAX appealed and Realty One cross-appealed. We reversed in part and remanded for further proceedings. **See** ***RE/MAX [*637] Int'l, Inc. v. Realty One, Inc.***, *173 F.3d 995 (6th Cir. 1999)*.

[4]** The case proceeded to trial on April 10, 2000. Judge Dowd bifurcated the trial. After the presentation of the evidence, Judge Dowd instructed the jury to first decide whether Defendants had entered an agreement to issue adverse splits, which was an essential element of RE/MAX's federal antitrust claim. Following deliberations, the jury returned a verdict finding that Realty One and Smythe, Cramer had illegally agreed to restrain trade. Judge Dowd then instructed the jury to consider additional elements of RE/MAX's claims. During deliberations on these issues, the jurors posed a question that suggested they had misunderstood Judge Dowd's instructions regarding their earlier deliberations. Finding that the earlier misunderstanding could not be corrected, Judge Dowd declared a mistrial on June 26, 2000. On that same day, the case was transferred to District Judge James Gwin's docket and a new trial was scheduled for August 7, 2000. Settlement negotiations commenced shortly thereafter.

B. Settlement Negotiations

On June 29, 2000, Judge Gwin appointed Judge Dowd to mediate settlement discussions with the parties. After Judge Dowd's efforts to mediate the dispute proved unsuccessful, **[**5]** Judge Gwin conducted mediation sessions with the parties on July 11, 12, and 13, 2000. The settlement discussions focused on two areas - a multi-million dollar monetary settlement and limitations regarding future commission-splitting and related matters. After many hours of negotiations, the parties significantly narrowed their gap with regard to a monetary settlement. The parties then shifted their focus to the issues **[***5]** associated with their future commission-splitting relationship. On July 13, 2000, RE/MAX and Smythe, Cramer reached a comprehensive settlement agreement. Judge Gwin asked RE/MAX and Smythe, Cramer to state the general terms of their agreement on the record. The parties did so, and stated their understanding, confirmed by the court on the record, that they would complete a written settlement agreement within forty-five days.

At the time the RE/MAX-Smythe, Cramer settlement was reached, Realty One had refused to settle with RE/MAX and indicated that it was prepared to go to trial. [2] **[**7]** In particular, **[***6]** Realty One would not **[*638]** agree to the same limitations upon future conduct to which Smythe, Cramer had agreed. However, as RE/MAX and Smythe, Cramer confirmed **[**6]** their agreement on the record, Realty One's counsel unexpectedly stated that he desired a settlement on the same terms as Smythe, Cramer, except that Realty One would pay nearly twice as much in the settlement.

[1] The standard practice in the real-estate industry is that commissions are split equally when one broker brings the seller and another broker brings the buyer to a transaction. However, beginning in 1987, Realty One and Smythe, Cramer began notifying RE/MAX brokerages that there would be an adverse split of 70/30 or 75/25, in favor of the defendants, whenever a RE/MAX agent was on the other side of the table from a Realty One or Smythe, Cramer agent.

[2] The district court noted its belief as to why Realty One failed to settle earlier:

> Within itself, Defendant Realty One appeared to have different interests. These different interests impaired Realty One's willingness to settle.
>
> After summary judgment had been given but before the Sixth Circuit had reversed Judge Dowd's grant of summary judgment, the former owners of Realty One sold their interest in Realty One to Insignia Financial Group, Inc. As part of their sales agreement for Realty One, the former owners agreed to indemnify Realty One for expenses and any judgment associated with this case. After the Sixth Circuit reversed the grant of summary judgment, these former owners became contractually obligated to defend and indemnify Realty One for expenses and any judgment in this case. Because of this contractual obligation, these former owners have already indemnified many millions of dollars of expenses and fees including expenses and fees generated in the first trial that had lasted more than ten weeks.

[3] The next day, the district **[***7]** court entered an order dismissing the action with prejudice pursuant to *Federal Rule of Civil Procedure Rule 41(a)(2)*.

> In seeking to settle Plaintiff RE/MAX's claims against Defendant Realty One, the former owners were able to reach an agreement in principal [sic] for financial payments sufficient to satisfy Plaintiff RE/MAX. As to such financial payments on behalf Realty One, Insignia Financial Group, Inc. refused to make any contribution. Insignia Financial Group refused contribution even though some argument existed that the former owners' duty to indemnify and defend only extended to claims arising during their tenure, not to claims or damages arising during Insignia's ownership.
>
> Although the former owners of Defendant Realty One offered sufficient monies to settle Plaintiff RE/MAX's claim, the current management of Realty One refused to agree to the same limitations on conduct agreed to by Defendant Smythe Cramer. Of course, Smythe Cramer was paying its own expenses and would be risking its own assets if it proceeded to trial. In contrast, the current owner of Realty One, Insignia Financial Group, Inc. seemed willing to spend the former owner's monies on expenses and risk the former owner's assets to respond to any potential judgment.

(J.A. at 199 n.3.)

[3] As the proceedings continued, Realty One's Counsel, Thomas Gorman, suddenly decided to settle the matter:

> THE COURT: I look at my calendar, as against Realty One we are going to start it [the jury trial] on [August 7, 2000].
>
> MR. GORMAN: As to Realty One, we are in agreement to the financial terms we discussed earlier, same terms to the financial arrangement we discussed earlier. I don't know the number.
>
> MR. QUINN: So you are agreeing now to settle?
>
> MR. GORMAN: Yes.
>
> MR. QUINN: Same terms?
>
> MR. GORMAN: Same terms.
>
> MR. QUINN: 10 million - No, that's the total. $ 6,666,666.
>
> MR. GORMAN: $ 6,666,666 is for Realty One.
>
> THE COURT: Just to be clear, under the same terms, Mr. Gorman, with the exception being that Realty One would pay the sum of $ 6,666,666.
>
> MR. GORMAN: Yes, your Honor, Realty One would pay that sum coming from, as mentioned earlier, the two Avenis, Joe Aveni and Vince Aveni and Jim Miller [the former owners] on behalf of Realty One. And we adopt the same terms and **will draft the papers in the same time period**.

(J.A. at 1758-59 (emphasis added).) The district court noted that "with its change of face and speedy retreat from its professed willingness to allow a jury to decide its liability, Defendant Realty One agreed to pay much more than the amount agreed upon by Defendant Smythe Cramer." (J.A. at 199-200.)

[8] C. Post-Settlement Activities**

In the days that followed, Realty One issued a press release indicating that the "final details of the settlement . . . [were] being conducted by attorneys for the various parties." (J.A. at 1025.) Realty One also circulated a newsletter to its employees which stated "[Realty One has] reached an agreement, in principle, to settle our long-running lawsuit with RE/MAX. Though the details are still being finalized, the definitive agreement is expected by the end of August." (J.A. at 1025.) Over the course of the next month and a half, the parties engaged in continued talks, but failed to prepare a draft of the final agreement.

First, RE/MAX sent a draft of a written agreement to Realty One on July 25, 2000. Realty One did not respond to **[***8]** RE/MAX's draft for over three weeks. On August 17, 2000, Realty One informed RE/MAX that it was "not necessary to prepare any additional documentation concerning the settlement" **[*639]** because "the transcript dictated by Judge Gwin and agreed to by counsel and the parties in court on July 13, 2000, is the complete settlement of the parties." (J.A. at 1810). Realty One also claimed that RE/MAX's proposed draft **[**9]** contained "additional terms and provisions" not included in the July 13, 2000 settlement. Yet, Realty One failed to identify the allegedly different terms despite repeated requests to do so.

On August 24, Realty One's counsel sent a letter to RE/MAX's counsel which stated,

> The July 13 agreement does not require any additional written agreement (except the . . . [written] releases). However, as I indicated in our [August 17th] conversation, if plaintiffs believe that it may be useful to incorporate the terms of the agreement as dictated by Judge Gwin in a separate document we are willing to discuss preparing such a document.

(J.A. at 1812.)

RE/MAX responded the next day by again asking Realty One to identify the specific terms it found objectionable by providing a "black-lined" verison of the agreement, which Realty One failed to do. Instead, on August 28, the deadline for preparing a written agreement imposed by the district court, Realty One's counsel again wrote RE/MAX's counsel to reiterate his view of the terms of the settlement agreement:

> There is no need for any additional agreements as I have repeatedly stated to you. Your view that the July 13 agreement **[**10]** requires that the parties write an

> additional settlement agreement is not supported by the transcript. In dictating the terms of the agreement the court did not specifically state that the parties would negotiate and execute an additional agreement. Rather, the references **[***9]** to the preparation of papers, and the forty five day designation for doing so, refers to the preparation of the letters to withdraw the **special notices** and the releases plaintiffs are to furnish defendants."

(J.A. at 1816 (emphasis added).) Realty One further indicated that it was willing to execute a memorial agreement "which contains the terms of the July 13th agreement (an act which is clearly unnecessary in our view)," but was unwilling to execute a document that significantly varied from that agreement. (J.A. at 1816.) However, Realty One did not prepare or forward any draft at that time. That same day, Realty One tendered a payment in the amount of $ 3,666,666 to RE/MAX; however, RE/MAX did not accept the payment. In addition, Realty One sent a letter to existing RE/MAX franchisees withdrawing "any and all **special notices**" previously issued by Realty One. (J.A. at 1819 (emphasis **[**11]** added).) RE/MAX's counsel expressed his frustration with Realty One in a letter later the same day:

> We continue to have a huge disagreement in what the Court contemplated by the dictated terms of the July 13th transcript.
>
> . . .
>
> Frankly, in thirty years of practice I have never settled a case where there was not some type of a settlement agreement reached. I have always dictated the rough settlement into the record so that there is no misunderstanding as to the terms of the settlement agreement, but I've always understood those terms would have to be reduced to writing so that there is no misunderstanding in the future and so that the parties can avoid the potential for future litigation.
>
> Also, you indicate that you want us to furnish you with the appropriate releases. **[*640]** Once again, I remind you that the releases were contained in the proposed settlement agreement that was sent to you over a month ago. To **[***10]** date, we have never heard one word indicating what is objectionable within that agreement other than the fact that Realty One continues to indicate that the agreement contains terms which are not in the July 13th agreement. Specifically, I continue to ask you **[**12]** to tell us what terms you are referring to.
>
> Finally, you ask whether or not we still wanted you to "red-line" the agreement to eliminate the terms which have been "added" to the July 13th agreement. Yes, we have been asking Realty One to do this for a month. It was not until last week that I learned that Realty One was insistent on not signing a formal settlement agreement.
>
> . . .
>
> We have no alternative but to request a conference with Judge Gwin.

(J.A. at 1822.)

RE/MAX requested a status conference once it became clear that the district court's deadline for drafting a final agreement would not be met. In response, Realty One identified some of the terms it considered to be unwarranted or outside the contemplation of the parties. Two of Realty One's specific concerns were security promises the RE/MAX draft imposed on Realty One's parent entity and former owners as well as the requirement of quarterly payments with compounded interest. Significantly, neither of these provision was included in the district court's order which is the subject of the instant appeal. On Friday, September 1, 2000, Judge Gwin conducted an off-the-record conference call with the parties during **[**13]** which he instructed them to continue negotiating over the Labor Day weekend. He further instructed that a motion to enforce should be filed by 4:00 p.m. on the Tuesday after Labor Day if the parties had not reached an agreement by that time. Later on the same day, RE/MAX sent a letter to Realty One accommodating some of its stated objections and asking whether Realty One had **[***11]** additional objections. That evening, Realty One informed RE/MAX that it had "difficulties" with that draft, but failed to specify those problems.

On the evening of Monday, September 4, 2000, Realty One sent RE/MAX a list of nearly two dozen of its concerns. Realty One also proposed its own draft of the agreement, which had a cover letter attached reading, in part, "We have prepared a draft agreement in accordance with the July 13, 2000 transcript since the provisions in your earlier draft far exceeded the terms agreed to." (J.A. at 1063.) RE/MAX objected to this draft, arguing that it narrowed the meaning of key terms. Ironically, Realty One's proposed agreement, while purporting to be limited to the terms of the July 13th transcript as RE/MAX's agreement had allegedly failed to do, was actually longer **[**14]** than RE/MAX's draft.

On September 5, 2000, RE/MAX filed a motion to enforce the settlement agreement. Realty One opposed this motion on the basis that the district court lacked jurisdiction. Realty One also alleged that it had already satisfied the terms of the July 13th agreement. Neither party requested an evidentiary hearing. Judge Gwin entered an order enforcing the motion on September 14, 2000.

DISCUSSION

I. JURISDICTION TO ENFORCE SETTLEMENT AGREEMENT

This court reviews a district court's decision regarding subject matter jurisdiction **de novo**. ***Long v. Bando Mfg. [*641] of Am., Inc.***, *201 F.3d 754, 759 (6th Cir. 2000)*. The party seeking to invoke the subject matter jurisdiction of the district court bears the burden of showing that the matter is properly before that court. ***Serras v. First Tenn. Bank Nat'l Ass'n***, *875 F.2d 1212, 1214 (6th Cir. 1989)* (citing ***McNutt v. Gen. Motors Acceptance Corp***., *298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)*). **[***12]**

Realty One contends on appeal that the district court lacked subject matter jurisdiction to enforce the settlement agreement because the language **[**15]** of its order of dismissal was unconditional We disagree. The order of dismissal in the case at bar read, in full:

> Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000 - July 13, 2000. During said conferences, settlement talks took place. After a diligent effort on all sides, the parties have settled this[.] Therefore,
>
> IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice".
>
> FURTHER, Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

(Order of Dismissal, J.A. at 693.)

In ***Kokkonen v. Guardian Life Ins. Co. of Am.***, *511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994)*, the Supreme Court considered a district court's attempt to enforce a settlement agreement between parties in a diversity action. The parties had settled and filed a stipulation of dismissal with prejudice pursuant to *Fed. R. Civ. Pro. 41(a)(1)(ii)*, which the district court judge then signed. [4] Writing for a unanimous Court, Justice Scalia **[***13]** explained that as courts of limited jurisdiction, federal **[**16]** district courts do not possess the inherent power to vindicate their own authority where parties enter into a voluntary agreement resolving their federal lawsuit. *511 U.S. at 376-77*. Instead, "enforcement of the settlement agreement, whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." *511 U.S. at 378*. However, a district court does have the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement. ***Futernick v. Sumpter Township***, *207 F.3d 305, 310 (6th Cir. 2000)*. The **Kokkonen** Court noted that such ancillary jurisdiction would have existed if the parties had provided for the court's enforcement of a dismissal-producing settlement agreement through either one of two methods:

> The only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement **[**17]** agreement had been made part of the order of dismissal- either by separate provision **[*642]** (**such as a provision "retaining jurisdiction**" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a breach of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

Kokkonen, *511 U.S. at 381* (emphasis added).

[18]** **[***14]** We first considered the requirements for satisfying the second **Kokkonen** exception in ***Caudill v. N. Am. Media Corp***., *200 F.3d 914 (6th Cir. 2000)*. [5] **[**19]** Following the decisions of the Third and Eighth Circuits on this issue in ***In re Phar-Mor, Inc. Securities Litigation***, *172 F.3d 270 (3d Cir. 1999)*, and ***Miener v. Missouri Department***

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[4] That rule provides:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Fed. R. Civ. P. 41(a)(1)(ii).

[5] In **Caudill**, we were presented with a dismissal order which stated:

> In the presence of and with the assistance of counsel, the parties placed a settlement agreement on the record before the Hon. Bernard Friedman on October 1, 1991. Pursuant to the terms of the parties' October 1, 1991 settlement agreement, the Court hereby DISMISSES this case.
>
> IT IS SO ORDERED.

Caudill v. N. Am. Media Corp., *200 F.3d 914, 915 n.1 (6th Cir. 2000)*.

of Mental Health, *62 F.3d 1126 (8th Cir. 1995)*, we held that "the phrase 'pursuant to the terms of the settlement' fails to incorporate the terms of the settlement agreement into the order because '[a] dismissal order's mere reference to the fact of settlement does not incorporate the settlement agreement in the dismissal order.'" ***Caudill***, *200 F.3d at 917* (citations omitted). In ***McAlpin v. Lexington 76 Auto Truck Stop, Inc.***, *229 F.3d 491 (6th Cir. 2000)*, we similarly held that the mere reference in a dismissal order to a settlement agreement does not incorporate the settlement agreement into the order. [6]

[*15]** Inasmuch as the district court's order of dismissal in the instant case merely made reference to "settlement **[**20]** talks" and failed to incorporate the terms of the settlement agreement, it is clear that the second **Kokkonen** exception has not been satisfied. However, in considering RE/MAX's motion to enforce, the district court found that through the language of its order, it had retained jurisdiction to enforce matters concerning the settlement agreement in satisfaction of the first **Kokkonen** exception.

Realty One argues that under this Court's opinion in **McAlpin,** the district court's language was not sufficiently explicit. Realty One points to this Court's statement in **McAlpin** that under **Kokkonen** "a federal district court lacks jurisdiction to enforce a settlement agreement terminating litigation unless the court '**expressly retained jurisdiction** to enforce the settlement agreement' or 'incorporated the terms of the settlement into the dismissal order.'" ***McAlpin***, *229 F.3d at 501* (emphasis added). In **McAlpin**, we noted **[*643]** that this Court has "joined other circuits in strictly applying **Kokkonen's** relatively narrow interpretation of a district court's ancillary jurisdiction to enforce settlement agreements terminating litigation." ***Id.*** *at 502*. **[**21]** However, we did not have occasion to construe the first **Kokkonen** exception in that case. Instead, the holding in **McAlpin** was limited to holding that "the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement." **Id.** Insofar **[***16]** as the first **Kokkonen** exception was not the basis for our decision in **McAlpin**, the language to which Realty One points is dicta and therefore not binding on this Court. [7]

[22]** Moreover, we do not believe that **Kokkonen** requires the interpretation mentioned in **McAlpin**. While **McAlpin** purports to quote the words of Justice Scalia, the phrase "expressly retained jurisdiction" does not appear in the Supreme Court's decision in **Kokkonen**. Instead, **Kokkonen** only requires a reasonable indication that the court has retained jurisdiction, "**such as** a provision 'retaining jurisdiction' over the settlement agreement." ***Kokkonen***, *511 U.S. at 381* (emphasis added). In this way, the Court intended to avoid subjective interpretations of what a district court intended to accomplish through its order of dismissal - a practice employed by appellate courts in cases such as ***McCall-Bey v. Franzen***, *777 F.2d 1178 (7th Cir. 1985)*. [8]

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[6] In **McAlpin**, the stipulation of dismissal provided,

> The parties being in agreement and the Court being otherwise sufficiently advised that the parties hereto have settled their disputes, ... the Court hereby orders:
>
> 1. That the Complaint filed herein is DISMISSED AS SETTLED WITH PREJUDICE AS TO ALL CLAIMS asserted therein and this action is Ordered stricken from the docket of this Court in its entirety.
>
> 2. That this Court's Order of August 29, 1997, is hereby amended to provide that Count II of the Complaint is Dismissed with Prejudice.
>
> 3. That the Court appointed Receiver, Morris Gahafer, is hereby ordered to turn over to the Defendants any and all copies of the Receiver's First Interim Report as well as any drafts thereof or any other documents which he may have obtained or generated as a result of the performance of his duties as Receiver herein.

McAlpin v. Lexington 76 Auto Truck Stop, Inc., *229 F.3d 491, 497 (6th Cir. 2000)*.

[7] The same may be said of our decision in **Caudill,** which was decided a few months earlier. **See** ***Caudill***, *200 F.3d at 915*; **see also** ***In re Phar-Mor, Inc. Secs. Litig.***, *172 F.3d 270, 273 (3d Cir. 1999)* (holding that no jurisdiction existed after an order dismissed the case with prejudice "**pursuant to the terms of the Settlement** . . ."). The dismissal orders in those cases contained no language which could be construed as retaining jurisdiction.

[8] In **McCall**, the court reasoned:

> The judge would not have been likely to grant such a petition in a case over which he had no jurisdiction because he had dismissed the case outright months earlier. His response is therefore some evidence that he had indeed intended to make his dismissal, though outright in form, conditional in substance; that in referring to the as yet unfiled stipulation in his order of dismissal, the judge, perhaps fully aware of the tenor and progress of the settlement negotiations and the provision in the settlement agreement for petitioning the court to enforce it, intended to honor that provision, and to this end decided to retain jurisdiction of the litigation for the very purpose of responding to the type of petition that the plaintiff filed. It would of course have been much better if the judge had made all this clearer, but we conclude that the plaintiff has shown--if barely--that the judge did retain jurisdiction of the case.

McCall-Bey v. Franzen, *777 F.2d 1178, 1188-89 (7th Cir. 1985)*.

[*17]** However, while the circular logic used in **McCall-Bey** may not survive **Kokkonen**, the tradition of not requiring the use of specific terminology remains. **See** *id. at 1188* (rejecting the notion that "there is any magic form of words that the judge must intone in order to make the retention of jurisdiction effective.").

[23]** In post-**Kokkonen** decisions, appellate courts have adhered to this view. For example, in ***Bell v. Schexnayder**, 36 F.3d 447, 448 (5th Cir. 1994)*, the Fifth Circuit held that the district court had properly retained jurisdiction by including language in its dismissal order that gave the parties the right to reopen the judgment if a settlement was not consummated within sixty days. [9] **[**24]** Also, in ***Ford v. Neese**, 119 F.3d 560, 561-62 **[*644]** (7th Cir. 1997)* [10], the Seventh Circuit borrowed the surviving logic of **McCall-Bey** in holding that it was apparent that the district court intended to retain jurisdiction. [11] The Seventh **[***18]** Circuit recently employed this logic again in ***In re Bond**, 254 F.3d 669 (7th Cir. 2001)*.

Realty One cites post-**Kokkonen** cases from other circuits that require express language of retention. **See, e.g.**, ***Scelsa v. City Univ. of N.Y.**, 76 F.3d 37, 41 (2d Cir. 1996)* (holding that under **Kokkonen**, the district court has jurisdiction only if the dismissal **[**25]** order expressly reserved authority to enforce the agreement, or incorporated the agreement into the order); ***Hagestad v. Tragesser**, 49 F.3d 1430 (9th Cir. 1995)* (holding that although the court clearly intended to retain jurisdiction, an order dismissing the case with prejudice "with leave for good cause shown within ninety (90) days, to have the dismissal set aside and the action reinstated if the settlement is not consummated" failed to meet the **Kokkonen** standard). Needless to say, these decisions are not binding on our Circuit. In addition, we believe these cases are distinguishable. As was true in **Kokkonen**, **McAlpin** and **Caudill**, many of these cases involved stipulations of dismissal prepared by the parties and ratified by the court pursuant to *Fed. R. Civ. P. 41(a)(1)(ii)*. **See, e.g.,** ***Scelsa**, 76 F.3d at 39* (finding no jurisdiction where the district court dismissed the action with prejudice after approving an order drafted by the parties pursuant to *Rule 41(a)(1)(ii)*, marking it "SO ORDERED."). Conversely, in the case at bar, the district court dismissed the action with prejudice in a *Rule 41(a)(2)* order. [12] **[**27]** This distinction **[**26]** is further evidence that **[***19]** **McAlpin** and **Caudill** did not settle the issue we now decide. **See** ***Hinsdale v. Farmers Nat'l Bank & Trust**, 823 F.2d 993, 996 (6th Cir. 1987)* (finding no jurisdiction where the order of dismissal with prejudice was unconditional, but recognizing the authority of a district court to retain jurisdiction under *Fed. R. Civ. P. 41(a)(2)*). Furthermore, the language of the orders in many of those cases made only vague references to the settlement agreement, thereby not even implicating the first **Kokkonen** exception that we discuss today. [13]

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[9] The **Bell** court explained,

> The order states that the court, "having been advised by counsel for the parties that the above action has been settled," was dismissing the case "without prejudice to the right, upon good cause shown within sixty (60) days, to reopen it if settlement is not consummated and seek summary judgment and enforcing the compromise."

***Bell v. Schexnayder**, 36 F.3d 447, 448 (5th Cir. 1994)*.

[10] The order in **Ford** dismissed the suit "without prejudice to reinstatement in the event that the . . . payments are not made by the defendant . . . ." ***Ford v. Neese**, 119 F.3d 560, 561-62 (7th Cir. 1997)*.

[11] It cannot be said that all of the Seventh Circuit's reasoning in **McCall-Bey** is meaningless in the wake of **Kokkonen**. Indeed, the court recognized in **McCall-Bey** that "there must be a deliberate retention of jurisdiction, as by issuing an injunction or stating that jurisdiction is retained for a particular purpose. An unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by *Rule 60(b)*." **See** ***McCall-Bey**, 777 F.2d at 1190*.

[12] *Rule 41(a)(2)* provides:

> Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(a)(2).

[13] Similar to the dismissal orders in **McAlpin** and **Caudill**, recounted earlier in this opinion, the language of the dismissal order in **Scelsa** could in no way be construed as expressing an intent to retain jurisdiction. The **Scelsa** dismissal order provided:

> It is Hereby Stipulated and Agreed, by and between the undersigned attorneys for the parties, that the above-captioned action is dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement among the parties dated January 7, 1994.

[*645] We also note that this Court has not historically adopted such a narrow construction of a district court's jurisdiction. **See, e.g.,** ***Aro Corp. v. Allied Witan Co.***, *531 F.2d 1368, 1371 (6th Cir. 1976)* (holding that federal courts have inherent powers to enforce agreements executed in settlement). The fact that we have previously found jurisdiction in light of express statements is not indicative of a change in course. **See, e.g. [**28] ,** ***Futernick***, *207 F.3d at 309* (finding jurisdiction **[***20]** where a district court amended its judgment "to provide for the court's retention of jurisdiction until completion of the parties' obligations under the settlement agreement"); ***Waste Mgmt. of Ohio, Inc. v. City of Dayton***, *132 F.3d 1142, 1145 (6th Cir. 1997)* (holding that a district court had subject matter jurisdiction to address the state law issues because the consent decree specifically conferred jurisdiction). Simply because a mandate is exceeded is no reason to raise the bar to the same level in every circumstance. [14]

Turning to the language of Judge Gwin's order, **[**29]** we believe that it satisfied the second exception recognized in **Kokkonen**. The order stated that any "subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order." (J.A. at 693.) Of course, the court may only enter subsequent orders involving the settlement agreement if it has retained jurisdiction. Thus, the "continued role for the court that was contemplated after dismissal" is included in the language of the order itself. ***In re Bond***, *254 F.3d at 676-77*. We therefore find that this was a "separate provision" retaining jurisdiction in compliance with **Kokkonen** and hold that the district court properly asserted subject matter jurisdiction.

II. TERMS OF SUMMARY ENFORCEMENT

We now address Realty One's claim that the district court erred by enforcing terms to which Realty One had not agreed. This Court reviews for clear error the district court's factual determination that the parties had agreed to settlement terms; however, we review the district court's decision to grant a motion to enforce the settlement based on its preliminary **[***21]** factual finding **[**30]** for an abuse of discretion. ***Therma-Scan, Inc. v. Thermoscan, Inc.***, *217 F.3d 414, 418 (6th Cir. 2000)*. We will only find an abuse of discretion only when left with the "definite and firm conviction that the court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors" or where it "improperly applies the law or uses an erroneous legal standard." ***Huey v. Stine***, *230 F.3d 226, 228 (6th Cir. 2000)* (citations and internal quotation marks omitted).

A. Validity of Settlement Agreement

Before enforcing a settlement, a district court must conclude that agreement **[*646]** has been reached on all material terms. ***Brock v. Scheuner Corp.***, *841 F.2d 151, 154 (6th Cir. 1988)*. Ordinarily, an evidentiary hearing is required where facts material to an agreement are disputed. ***Kukla v. Nat'l Distillers Prods. Co.***, *483 F.2d 619, 622 (6th Cir. 1973)*; ***Aro Corp.***, *531 F.2d at 1372*. However, no evidentiary hearing is required where an agreement is clear and unambiguous and no issue of fact is present. ***Aro Corp.***, *531 F.2d at 1372*. Thus, summary **[**31]** enforcement of a settlement agreement has been deemed appropriate where no substantial dispute exists regarding the entry into and terms of an agreement. ***Kukla***, *483 F.2d at 621*; **cf.** ***Therma-Scan***, *217 F.3d at 419* (recognizing that summary proceedings may result in inequities when a dispute exists as to a material term). No evidentiary hearing was held in the instant case because neither party requested one. Indeed, none was required because the record shows that all the essential terms had been agreed upon in open court and all that remained was to sort out the non-material details and put the agreement in writing. Realty One acknowledges that there was a clear and unambiguous agreement, constituting a meeting of the minds on key terms. In addition, Realty One admits that the fact that certain terms, such as "adverse split" and "RE/MAX business model," were left undefined at the July 13, 2000 court session does not undermine the crux of the agreement.

[*22]** The existence of a valid agreement is not diminished by the fact that the parties have yet to memorialize the agreement. When parties have agreed on the essential terms of a settlement, **[**32]** and all that remains is to memorialize the agreement in writing, the parties are bound by the terms of the oral agreement. ***Brock***, *841 F.2d at 154*; ***Kukla***, *483 F.2d at 621* (observing that the power of a trial court to enforce a settlement agreement has been upheld even where the agreement has not been arrived at in the presence of the court nor reduced to writing). Furthermore, the objective acts of the parties reflect that an agreement had been reached. In the first few days after the settlement was reached, Realty One communicated its belief that an agreement had been reached in a newsletter to its employees. In addition, at

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Scelsa v. City Univ. of N.Y., *76 F.3d 37, 39-40 (2d Cir. 1996)*.

[14] We are likewise undeterred by the fact that Judge Gwin's subsequent order of enforcement contained the sentence "This Court shall retain continuing jurisdiction to enforce the provisions of this judgment." (J.A. at 213.) After Realty One attacked the court's jurisdiction initially, it could only be expected to take every precaution in the future.

various points in the post-settlement talks, RE/MAX attempted to consummate the settlement by preparing a written document. Realty One also began performance of its obligations under the agreement by tendering a payment of over three million dollars and withdrawing its adverse split letters. Under Ohio law, these expressions of assent are generally sufficient to show a meeting of the minds. **See** ***Nilavar v. Osborn***, *127 Ohio App. 3d 1, 711 N.E.2d 726, 733 (Ohio Ct. App. 1998)*.

B. Breach By Realty One

[33]** The district court noted in its order that Realty One had breached the agreement by failing to negotiate in good faith and agree to final terms. According to the plain language of the dialogue from July 13, 2000, Realty One adopted Smythe, Cramer's obligation to prepare a memorialized written expression of the settlement terms as well as to "handle the details" of the agreement within forty-five days. [15] **[*647]** Yet, **[***23]** Realty One argued that it never agreed to prepare any written document aside from papers withdrawing its special notice letters informing RE/MAX franchisees of its intent to engage in adverse splits. The record shows that Realty One stubbornly refused to cooperate.

[34]** Realty One now claims that it complied with the terms of the settlement agreement by tendering a payment for over three million dollars and by withdrawing its special notice letters. However, it did not even make these overtures until August 28, 2000, which was the deadline for memorializing the agreed upon terms--not the deadline for payments or releases from the respective parties. Although both parties were jointly responsible for memorializing the terms within the prescribed time period, Realty One was more culpable because its acts that have frustrated the negotiation process, thereby necessitating judicial intervention. Thus, the district court correctly determined that Realty One breached the settlement agreement.

C. Language of the Enforcement Order

The district court determined that Realty One agreed to a settlement on the same terms as to future conduct that RE/MAX had agreed upon with Smythe, Cramer, except that **[***24]** Realty One agreed to pay much more than the amount agreed upon by Smythe, Cramer. As we have already discussed, this factual determination was not clearly erroneous. Realty One's attorney stated, and the district court judge verified, that Realty **[**35]** One was agreeing to the same deal that had been dictated into the record during the several minutes prior to Realty One's surprise settlement agreement. The district court's enforcement order prohibits Realty One from issuing "special notice letters" to RE/MAX brokers in the Northern District of Ohio based upon their affiliation with RE/MAX or their use of the RE/MAX business model. Realty One now claims that the terms in the district court's order are different than those to which it assented on July 13, 2000. Specifically, Realty One complains that certain terms are too broad and are the product of subsequent negotiations and deals struck between RE/MAX and Smythe, Cramer. However, Realty One has failed to articulate any material differences between the July 13th agreement and the subsequent order of enforcement. We believe that the parties received the same basic deal to which they had already agreed.

"Special Notice Letter"

Realty One objects to the use of the term "special notice letter" in the district court's order, contending that it never agreed to use this term as a substitute for "adverse split." Realty One claims that use of the term "special notice letter" would **[**36]** significantly alter its obligations and would insulate RE/MAX from fair market competition. Although the settlement agreement as stated provides that Realty One will withdraw all adverse splits and issue them under limited circumstances in the future, the term was left undefined. However, Realty One has not demonstrated how inclusion of the term "special notice," as defined by the district court, yields a materially different agreement. Realty One informed RE/MAX **[*648]** of the adverse splits via special notice letters. The trade usage of the term "adverse split" comports with the **[***25]** district court's definition of "special notice letter." [16] Moreover, the record of post-settlement

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[15] As RE/MAX and Smythe, Cramer had nearly completed recording the terms of their agreement, the RE/MAX's Chairman, Mr. Liniger, stated, "This becomes effective today **and we would just handle the details?**" (J.A. at 1756.) Shortly thereafter, Smythe, Cramer's Chairman, Lucius McKelvey, confirmed that documentation would be prepared to memorialize the parties agreement and RE/MAX's counsel, Terrence Quinn, agreed:

> MR. McKELVEY: Your Honor, is it implicit that the attorneys are thus mandated **to complete the written agreement within the 45 day time frame, right?**
>
> THE COURT: Yes.
>
> MR. McKELVEY: That's a given.
>
> MR. QUINN: Sure, that's fine.

(J.A. at 1757-58.)

[16] The district court's order defines "special notice letter" as

> a written notification by defendants to a broker in which a

correspondence between the parties shows that Realty One itself used these terms interchangeably. For example, the letters Realty One submitted to RE/MAX franchisees on August 28, 2000, allegedly in fulfillment of the requirement that it withdraw adverse splits against RE/MAX franchisees, announced that Realty One was "canceling any and all special notices sent . . . regarding the commission payable to your brokerage on the sale by your brokerage of a Realty One listing." (J.A. at 1819.) Realty One's challenge **[**37]** is therefore without merit.

"RE/MAX Business Model"

Realty One also contends that the district court's definition of the "RE/MAX business model" is too broad and expansive. [17] Realty One claims that the definition of this term should be limited to mean the RE/MAX 100% concept, a policy by which RE/MAX agents typically retained larger **[***26]** commissions than Realty One agents. However, Realty One provides no support for this restriction. At the July settlement conference, Smythe, Cramer **[**38]** agreed that in addition to withdrawing all adverse splits then in effect, it would also covenant not to "impose any adverse splits **based upon the business model used by plaintiff RE/MAX or its agents**, and would do so only for reasons consistent with the imposition of adverse splits among other real estate agencies in the [North Eastern Ohio] area." (J.A. at 1756 (emphasis added).) When Realty One agreed to the same terms as Smythe, Cramer, it agreed to this provision as well. In addition, the parties' stipulations from early in the litigation imply a broader definition that Realty One now advocates. [18] We therefore find no error in the district court's definition of this term.

[39] "North Eastern Ohio", "MLS" & "RE/MAX Brokers"**

Realty One disputes the geographic area in which the agreement will be effective. Specifically, it claims that "Northeastern Ohio", or "Northeast Ohio", should be limited to the thirteen counties represented by the local real estate industry's "multiple listing services" ("MLS") - namely, the Northern Ohio Regional Multiple Listing Service ("NORMLS") and the Akron Area Multiple Listing Service ("AAMLS") - as opposed to the Northern District of Ohio, which includes some twenty counties. The record reveals that, on **[*649]** July 13th, 2000, Smythe, Cramer agreed that the restrictions would apply to "North Eastern Ohio"; the parties **[***27]** did not restrict this area by reference to any particular MLS. As we have explained, Realty One is also bound by this agreement. It is therefore plausible for the district court to have included the entire Northern District of Ohio, which is the area in which Realty One was allegedly engaged in anti-competitive business practices that inhibited RE/MAX's operations. The full remedy negotiated by the parties contemplated including this entire area.

In addition, Realty One's challenge to the **[**40]** inclusion of three listing service areas, NORMLS, AAMLS, and the Centralized Real Estate Information Service ("CIRS"), is immaterial. As RE/MAX notes, AAMLS no longer exists, and has since been replaced by CIRS. Realty One does not even begin to explain the materiality of this difference. Realty One also challenges the application of the agreement to future RE/MAX brokers, but again fails to articulate why this was in error. [19] The district court's definition comports with the

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> defendant (i) offers to compensate the addressee broker on the sale of a defendant listing by the addressee broker or any of its agents (either as buyer's agent or as subagent) at a level lower than that offered generally by the defendant to other brokers through the listing of the property with an MLS or (ii) declines to co-broke on defendant listings.

(J.A. at 206-07.)

[17] The district court order defined "RE/MAX business model" as follows:

> RE/MAX business model" shall mean the methods of operating and developing a residential real estate brokerage office, as taught and/or promoted by RE/MAX International to new and existing franchisees.

(J.A. at 207.)

[18] The first stipulation provides:

> The distinguishing characteristics of the RE/MAX system include, among other things, distinctive sales and promotional materials, centralized advertising, promotional and referral services, proprietary procedures and a 100 commission concept.

(J.A. at 316.)

[19] The district it court's order defines "RE/MAX Brokers" in the following manner:

> "RE/MAX Broker" shall mean any residential real estate brokerage firm (i) operating, at present or in the future, under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International (ii) in the Northeast Ohio area. Without limiting this definition, the Franchisee Plaintiffs are included within the scope of the term "RE/MAX Broker" for the periods during which they operated or operate under their respective franchise agreements. The term "RE/MAX Broker," as used herein, shall not include any Franchisee Plaintiff or other residential real estate brokerage firm that has a court action (other than the Actions and court actions relating to property-specific or transaction-specific matters involving a buyer or seller client) now pending against

notion that Realty One adopted Smythe, Cramer's agreement to terminate its allegedly illegal business practices as to "all RE/MAX principals and agents." (J.A. at 1755.) The record contains **[***28]** no restriction applying only to current RE/MAX agents. Furthermore, the settlement talks focused in large part upon prospective business arrangements. Limiting the order only to current agents would defeat the clear intent of the parties in agreeing to settle by rendering the agreement impotent.

[41] Dispute Resolution Procedure**

Finally, Realty One attacks the detailed "Dispute Resolution Procedures" incorporated into the settlement order. However, it fails to object to any of the specific provisions in that dispute procedure. Instead, Realty One merely makes the blanket statement that it only agreed that an arbitrator would resolve factual disputes concerning the issuance of an adverse split by Realty One to RE/MAX. Yet, the record reveals a more detailed arbitration agreement. The district court noted on the record that

> the party and agency, RE/MAX agency, as against whom the adverse split was being imposed would have a right to contest that before a disinterested arbitrator to be chosen by the parties. And the parties would both mutually agree to bear the cost of that arbitration, and both would commit to facilitating that arbitration.
>
> . . .
>
> It's further the agreement of the parties that this right to arbitrate would continue for five years, or for such period of time at which RE/MAX International and its agents reached . . . 20 percent **[*650]** [of the market share] in the . . . North Eastern Ohio area, whichever came first.

(J.A. at 1755-56.). Realty **[**42]** One has not indicated how this agreement is materially different from the mandates of the district court's order and its challenge to the dispute resolution procedures is not well-taken.

Once concluded, a settlement agreement is as binding, conclusive, and final as if it had been incorporated into **[***29]** a judgment. ***Clinton St. Greater Bethlehem Church v. City of Detroit***, *484 F.2d 185, 189 (6th Cir. 1973)*. Summary enforcement of a settlement agreement for which there is no dispute as to the terms of the agreement is the only appropriate judicial response, absent proof of fraud or duress. **See, e.g.,** ***Aro Corp.***, *531 F.2d at 1372*; ***Kukla,*** *483 F.2d at 621*; **cf.** ***Dillow v. Ashland***, *1999 U.S. App. LEXIS 20354*, No. 97-6108 at **1-**2 (6th Cir. Aug. 24, 1999) (unpublished) (holding that the district court did not abuse its discretion in enforcing a settlement agreement where the plaintiff agreed on the record to the same material terms enforced by the district court). As our discussion reflects, the material terms are the same as those agreed to on July 13, 2000. Realty One has failed to point to any material differences that **[**43]** would warrant a finding to the contrary. We therefore hold that the district court's enforcement order was not an abuse of its discretion.

CONCLUSION

For the foregoing reasons, the district court properly retained and exercised jurisdiction over the settlement agreement, and did not abuse its discretion in enforcing the agreement. The district court's judgment is therefore **AFFIRMED.**

Dissent by: J. Clifford Wallace

Dissent

[*30]** WALLACE, Circuit Judge, dissenting. Because I conclude that the district court did not retain jurisdiction to enforce the settlement agreement, I dissent. The appeal should be dismissed.

To retain jurisdiction to enforce a settlement agreement, a district court must either include a "separate provision [in the order of dismissal] (such as a provision 'retaining jurisdiction' over the settlement agreement) or . . . incorporate the terms of the settlement agreement in the [dismissal] order." ***Kokkonen v. Guardian Life Ins. Co. of Am.***, *511 U.S. 375, 381, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994)*. In this case, the majority argues that the district court had jurisdiction to enforce the settlement agreement because it included a **[**44]** provision in its order of dismissal "'retaining jurisdiction' over the settlement agreement." **Id.**

The order of dismissal states:

> IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice."
>
> FURTHER, any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

By its plain meaning, the order gives the court the authority to **alter** the terms of the settlement agreement not the authority to **enforce** it. If the court wanted to retain jurisdiction to **enforce** the agreement, it could easily have so stated in the

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Defendant Realty One.

(J.A. at 206.)

order. This appears clear on the face of the order.

But to the majority, a court may exercise ancillary jurisdiction over a settlement agreement if its order of **[***31]** dismissal contains "some sort of indication that the court has retained jurisdiction." Thus, the majority appears to argue that a partial reservation of jurisdiction by the district court in its **[*651]** dismissal order really operates as a total reservation of jurisdiction. For example, apparently the majority would hold that a district court's reservation **[**45]** of jurisdiction in a dismissal order over a settlement agreement for ninety days is actually a reservation of jurisdiction for an indefinite period of time or that a district court's reservation of jurisdiction in a dismissal order over one provision in a settlement agreement is really a reservation of jurisdiction over the whole agreement. In other words, the district court's dismissal order in this case does not mean what it clearly says but, instead, means what this court thinks it should have said.

I cannot accept this approach, nor is it consistent with Supreme Court precedent. The Court, reminding us that federal courts are courts of limited jurisdiction, held in **Kokkonen** that there is a presumption against a determination of federal jurisdiction and that federal court jurisdiction should "not be expanded by judicial decree." *511 U.S. at 377*. It further held that, while a district court may reserve jurisdiction to enforce a settlement agreement, it must do so in its dismissal order. *511 U.S. at 381*. The majority opinion is contrary to the Supreme Court's ruling in **Kokkonen** because it disregards the presumption against federal jurisdiction **[**46]** and expands the district court's jurisdiction to enforce the settlement agreement beyond the plain meaning of the dismissal order.

The majority's approach is also inconsistent with our own precedent. In ***McAlpin v. Lexington Auto Truck Stop, Inc.***, *229 F.3d 491, 502 (6th Cir. 2000)*, we held, citing our earlier decision in ***Caudill v. North American Media Corp.***, *200 F.3d 914 (6th Cir. 2000)*, that we had "joined other circuits in strictly applying the holding in **Kokkonen**." The majority argues that our previous rulings in **McAlpin** and **Caudill** are not binding because they address the scope of **Kokkonen's** second basis for a court's ancillary jurisdiction to enforce a **[***32]** settlement agreement-incorporation of the settlement agreement's terms in the dismissal order-and not the first basis: the inclusion of a "provision 'retaining jurisdiction' over the settlement agreement" in the dismissal order. *511 U.S. at 381*.

I do not see, and the majority does not explain, why this distinction is meaningful. We have construed ancillary jurisdiction under **Kokkonen** narrowly because, as I stated, federal courts are courts **[**47]** of limited jurisdiction. ***McAlpin*** *229 F.3d at 501* (quoting ***Kokkonen***, *511 U.S. at 378*). This reasoning applies with equal force regardless of whether the district court incorporates the settlement agreement in the order of dismissal or includes a provision in the dismissal order reserving jurisdiction. If the majority opinion has not created a conflict among holdings in this circuit, it has created a conflict in the reasoning of its opinions.

Moreover, the holding in one of our earlier decisions is especially relevant to this case. In **McAlpin**, we outlined the contours of the second basis for a district court's ancillary jurisdiction to enforce a settlement agreement. We held that a "district court's incorporation in its dismissal order of only **one term** of the Settlement Agreement . . . is insufficient to confer jurisdiction over the **entire** agreement." *229 F.3d at 502* (emphasis added). It is true that in this case we are addressing the first basis for ancillary jurisdiction under **Kokkonen** and not the second. Yet we are really deciding the same issue: whether a partial reservation of jurisdiction over the enforcement **[**48]** of a settlement agreement really acts as a complete reservation. In its reliance upon a narrow distinction, the majority has eclipsed our ruling in **McAlpin** **[*652]** and created an unnecessary conflict in our rulings.

The majority relies upon cases from the Fifth and Seventh Circuits when it argues that a district judge need not employ formulaic language in a dismissal order to retain jurisdiction to enforce a settlement agreement. I agree. But the majority goes well beyond this. It seeks to divine the district court's **[***33]** intent different from the plain language of the order when there is no evidence of that intent contemporaneous to the dismissal order. It may be (although I have considerable doubt) that a look beyond the language of the dismissal order to the assumed district judge's intent would be appropriate if the dismissal order were ambiguous and if there was strong circumstantial evidence at the time of the order that a district judge did, indeed, have a certain intent. But such is not the case here. The dismissal order's language is unambiguous and there is no such circumstantial evidence. To the extent the cases of our sister circuits cited by the majority are inconsistent **[**49]** with this view, I would disregard them.

Federal jurisdiction is a precise doctrine. It does not exist here. I would rely upon the reasoning in **Kokkonen** and our own case law and hold that the district court did not have jurisdiction to enforce the settlement agreement. RE/MAX should have brought a separate claim in state court.

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