**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| In the Matter of:<br><br>LEIFERMAN ENTERPRISES, LLC d/b/a HARMON AUTO GLASS,<br><br>Respondent,<br><br>And<br><br>INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES – DISTRICT COUNCIL 82<br><br>And<br><br>LIGHTHOUSE MANAGEMENT GROUP, INC., RECEIVER,<br><br>Party in Interest. | **Case No.** 18-CA-18134<br><br>**EXCEPTIONS OF LIGHTHOUSE MANAGEMENT GROUP, INC., PARTY IN INTEREST, TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** |

Pursuant to Section 102. 46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "the Board"), Party in Interest Lighthouse Management Group ("Lighthouse"), both for itself and on behalf of Respondent Leiferman Enterprises, LLC ("Leiferman" or "Respondent") as its Receiver, takes exception to the following recommended findings of fact, conclusions of law, and Decision as set forth in the July 20, 2007 recommended Decision of Administrative Law Judge ("ALJ") Jane Vandeventer in the above-captioned matter.

## I. Lighthouse's Exceptions to the ALJ's Findings that Respondent Unlawfully Failed to Provide the Union with Information:

1. That the Respondent unlawfully refused to provide the Union with cost information regarding Respondent's healthcare proposal. (Dec. 6, lns 26-29).[1] The ALJ's

[1] References to the ALJ Decision are referred to herein as "Dec. ___."

conclusion is contrary to fact and law.

2. That Respondent unlawfully refused to provide the Union with information about the standards or goals applicable to the Respondent's merit pay proposal. (Dec. 6, lns. 42-46; Dec. 7, lns 13-25). The ALJ's conclusion is contrary to fact and law.

3. The ALJ's determination that Respondent was obligated to either provide the Union with information about the standards or goals on which its "merit pay" proposal was based, or to "bargain them" into existence, and that Respondent violated Section 8(a)(5) by refusing to "bargain them." (Dec. 7, lns 13-26). This conclusion is contrary to law and to fact.

4. The ALJ concluded there was "no evidence of any bad faith on the party of the Union in making its information requests." (Dec. 6, lns 32-33). This finding is contrary to the record.

5. The ALJ concluded that Respondent violated Section 8(a)(5) of the Act by refusing to provide financial information to the Union. (Dec. 7, 28-50). This conclusion is contrary to fact and law.

## II. Lighthouse's Exceptions to the ALJ's Findings that Respondent Unlawfully Implemented Changes to Terms and Conditions of Employment in the Absence of a Lawful Bargaining Impasse:

6. That Respondent and the Union had not reached a bargaining impasse because Respondent had unlawfully failed to provide the Union with requested information. (Dec. 8, lns 11-23). This is contrary to fact and law.

7. That the conduct of the parties showed they had not reached a bargaining impasse. (Dec. 8, lns 27-52; Dec. 9, lns 1-7). This is contrary to fact and law.

8. That Respondent violated Section 8(a)(5) of the Act by unilaterally implementing changed terms and conditions of employment of the bargaining unit employees. (Dec. 9). This is

contrary to law.

### III. Respondent's Exceptions to the ALJ's Findings that Party-In-Interest Lighthouse is Obligated to Remedy the Unfair Labor Practices Allegedly Committed by Respondent, and to Carry Out the Terms of the Board's Remedial Order:

9. That Lighthouse is an agent of Respondent. (Dec. 10, lns 23-45). This conclusion is contrary to fact and law.

10. That knowledge of the alleged unfair labor practice can be imputed to Lighthouse through Jeff Barr. (Dec. 10, lns 12-20). This conclusion is contrary to fact and law.

11. That Jeff Barr was present at the unfair labor practice trial as the designated representative of Lighthouse. (Dec. 3, lns 11-12; Dec. 10, lns 12-14). This conclusion is contrary to fact.

12. That knowledge of the alleged unfair labor practices can be attributed to Lighthouse through Douglas Seaton. (Dec. 10, lns 7-20). This conclusion is contrary to law and fact.

13. That Lighthouse, as a state court receiver, is obligated to remedy the alleged unfair labor practices of Respondent. (Dec. 10, lns 39-45). This finding is contrary to law.

**WHEREFORE**, for the reasons stated herein and more fully discussed in Lighthouse's Brief in support of these Exceptions, Lighthouse respectfully submits that the ALJ's recommended Decision should be reversed and the Complaint be dismissed in its entirety.

Dated: August 17, 2007

**SEATON, BECK & PETERS, P.A.**

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**ATTORNEYS FOR LIGHTHOUSE MANAGEMENT GROUP, INC., PARTY IN INTEREST**

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

LEIFERMAN ENTERPRISES, LLC d/b/a
HARMON AUTO GLASS,

Respondent,

And

INTERNATIONAL UNION OF PAINTERS
AND
ALLIED TRADES – DISTRICT COUNCIL 82

And

LIGHTHOUSE MANAGEMENT GROUP,
INC., RECEIVER

Party in Interest.

**Case No.** 18-CA-18134

**PARTY IN INTEREST LIGHTHOUSE MANAGEMENT GROUP'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Party in Interest, Lighthouse Management Group, Inc. ("Lighthouse" or "the Receiver"), for itself, and as Receiver on behalf of Respondent Leiferman Enterprises, LLC ("Leiferman" or "the Company"), submits the following Brief in Support of Its Exceptions to the Decision of Administrative Law Judge ("ALJ") Jane Vandeventer in the above-captioned matter.

## INTRODUCTION

This is a case in which Respondent, Leiferman, was in severe financial distress, and in urgent need of relief from the financial burdens of its Collective Bargaining Agreement with the Union, which was to expire on June 30, 2006. The Union, with knowledge of the Company's financial distress, sought to slow the negotiations, in order to maintain the old contract's terms for as long as possible. As a result, despite implementing its Final Offer on August 13, 2006, Leiferman, nonetheless, defaulted on a loan and was placed in Receivership. The Receiver, Lighthouse, was not involved in any of the alleged unfair labor practice, and, in fact, offered to continue negotiations with the Union, and to produce previously requested financial information – which the Union declined to pursue. Now, despite having no involvement in any unfair labor practice, the ALJ, by her Decision, seeks to impose upon Lighthouse the obligation to remedy the unfair labor practice allegedly committed by Leiferman.

## STATEMENT OF CASE

This case now arises out of an Unfair Labor Practice Charge filed with Region 18 of the National Labor Relations Board on August 10, 2006 by District Council 82 of the International Union of Painters and Allied Trades ("the Union"), and the amendments to that Charge filed on August 11, 2006 and October 10, 2006. The original Charge alleged "Employer refused to provide pertinent information to the union for purposes of Collective Bargaining." (G.C. Ex. 1 (a) ).[1]

The Amendment filed on August 11, 2006 additionally alleged "[O]n or about August 10, 2006, the Employer prematurely declared impasse and announced that they would implement part of the Employer's last proposal." (G.C. Ex. 1 (c) ).

The Second Amended Charge thereafter alleged:

> On about July 24, 2006, the Employer failed and refused to provide the Union with information needed to represent unit employees during contract negotiations, including the criteria or standards to be applied when granting merit increases.
>
> On about August 10, 2006 the Employer failed and refused to provide the Union with requested financial information the Union was entitled to in order to evaluation (sic) the Employer's contract proposals.

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[1] References throughout are to the Transcript of Proceedings (Tr.__); General Counsel Exhibits (G.C. Ex.__); Respondent Exhibits (R. Ex. ____.); and ALJ's Decision (ALJ Dec. ____).

> Since on about August 18, 2006, the Employer has refused to provide the Union with requested information concerning its health insurance proposal which was necessary for the Union to bargain with the Employer about health insurance benefits.
>
> On about August 10, 2006, the Employer declared impasse and on August 13, 2006, it unilaterally implemented new terms and conditions of employment for employees in the unit represented by the Union at a time when the parties had not reached impasse at the bargaining table and/or at a time when there were outstanding unremedied unfair labor practices which precluded the parties from reaching an impasse.
>
> By the above and other acts, the above named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

(G.C. Ex. 1 (e)).

On November 1, 2006, the Regional Director issued a Complaint and Notice of Hearing based on the Charge and Amended Charges. (G.C. Ex. 1(c).) On November 15, 2006 the Respondent and the Receiver timely filed an Answer denying the allegations in the Complaint. (G.C. Ex. 1 (i)). The trial was held on January 25 and 26, 2007 in Minneapolis, Minnesota before Administrative Law Judge Jane Vandeventer.

The evidence at trial showed that Respondent and the Union engaged in negotiations for a new collective bargaining agreement during June and July 2006. During this time Respondent was in a financial crisis which was rapidly deepening. As a result Respondent was in urgent need of, and bargained for, concessions from the Union to relieve its financial crisis. From the very beginning of the negotiations, Respondent informed the Union that its financial crisis was critical, and that time was of the essence. During negotiations, the Union made certain information requests to which Respondent either supplied the information, or responded that the information either did not exist or was not available. Late during the final session the Union for the first time made an ambiguous request for financial information, and subsequently made similarly vague requests in writing.

At the end of the July 24, 2006 session, the Company made its best and final contract offer. At this point in time the Company was at the end of its bargaining rope, and the Union showed no indication that it would make the necessary concessions to reach agreement. The union did not accept the final offer, but did submit the proposal to its membership for a vote. The employees voted to reject the offer. As a result, and due to its urgent need to address its financial crisis, the Company informed the Union it would implement the terms of the final offer effective August 13, 2007, which it did. The Union thereafter continued to request information and to request additional negotiations.

However the implementation of the terms of the final offer was too late for the Company's survival. The Company defaulted on a promissory note to a secured creditor, and was consequently placed into receivership. Lighthouse Management Group, Inc. was appointed Receiver on September 20, 2006, for the purpose of securing the Company's assets in order to repay the loan of the secured creditor. At the time of the hearing on this matter, the Receiver was attempting to sell Leiferman's assets.[2] Lighthouse had no involvement in any of the alleged unfair labor practices, and there is no allegation that Lighthouse itself has in any way violated the Act. In fact, the Union declined to negotiate with Lighthouse, preferring to wait until a purchaser had taken possession of Leiferman.

[2] The Board may wish to take notice that subsequent to the ULP trial, Lighthouse successfully completed the sale of Leiferman's assets, and disbursed all the proceeds to the secured creditor, and unsecured creditors (including collective bargaining counsel) received nothing. As of the time of this writing, Leiferman Enterprises, LLC has no assets and no operations.

On March 8, 2002, the ALJ issued her recommended decision. Based on the above facts, the ALJ erroneously concluded that Leiferman and the Union were not at impasse at the time the Company implemented its final offer, such that said implementation as a violation of Sections 8(a)(1) and (5) of the Act. The ALJ also incorrectly determined that Leiferman unlawfully refused to provide the Union with requested information, which was both a violation of its duty to bargain, and which further prevented establishment of an impasse. Finally, the ALJ incorrectly determined that Lighthouse Management, as Receiver, was an agent of Leiferman, and therefore is required to implement the ALJ's proposed remedial order.

## QUESTIONS PRESENTED

1. Whether the ALJ erred in ordering Lighthouse Management to remedy the unfair labor practices allegedly committed by Respondent. Exceptions 9, 10, 11, 12, and 13.

2. Whether the General Counsel proved Respondent unlawfully refused to provide information to the Union. Exceptions 1, 2, 3, 4, and 5.

3. Whether the General Counsel proved Respondent unlawfully made unilateral changes to terms and conditions of employment in the absence of a bargaining impasse. Exceptions 6, 7, and 8.

## STATEMENT OF FACTS

Respondent, Leiferman Enterprises, LLC, doing business as Harmon AutoGlass, was in the business of auto glass repair and replacement. In approximately April, 2004, Leiferman purchased the assets known as Harmon AutoGlass from the prior owner, the Dwyer Group. (Tr. 27). The Charging Party, The International Union of Painters and Allied Trades, District Council No. 82, represented the employees of Harmon Auto Glass, and was a party to the Collective Bargaining Agreement with the Dwyer Group. When Leiferman purchased Harmon AutoGlass, the Company recognized the Union and adopted the terms of that Bargaining Agreement. (Tr.

27).

The Collective Bargaining Agreement at issue expired on June 30, 2006. (GC Ex. 2, Art. 24). Prior to expiration, the Company, by a letter dated April 4, 2006 provided notice to the Union that it intended to terminate the Agreement as of June 30, 2006, and offered to meet and confer regarding a new labor agreement. (Tr. 187, R. Ex. 8). Chief negotiator for the Company, Douglas Seaton, shortly thereafter contacted Union representative Russell Pavlak, in an effort to schedule negotiations as soon as possible. (Tr. 188). Despite efforts to begin negotiations earlier, Seaton was unable to schedule a meeting with the Union until June 16, 2006, after passage of more than 60 days. (Id.).

Attending that June 16 meeting were Pavlak, the Union's chief spokesman, Michael Gavanda, Seaton and Jeff Barr, Vice President of Leiferman. (Tr. 32). At the meeting, the Union presented a short written proposal to the Employer. (Tr. 33). According to Union witness Gavanda, Seaton then explained that the Company was having financial problems, and that it was the Company's intent to address those problems through a number of approaches, including the establishment of a merit pay system. (Tr. 33-34). Gavanda testified that Seaton stated the current contract was "a detriment to the company's financial stability," and that the contract was not allowing the Company to be profitable. (Id.).

Gavanda also testified that he explained to the Company there was much overlap work between the Agreement under which Leiferman was operating, and the Glassworker Agreement, which was also covered much of the industry. Gavanda testified he told Seaton that he (Gavanda) would have difficulty "deviating too far from the terms of the Glassworker Agreement, simply because that would give them an unfair advantage over my Glassworker contractors." (Tr. 35).

With respect to this meeting, Seaton testified that the Company had asked the Union to provide, in advance, a complete copy of their proposals. (Tr. 189). The Union did not do so, but instead first presented those proposals to the Company at the meeting. (Id.). Included in the Union's proposals was a proposal to replace the Company's 401(k) retirement plan with the Union's pension plan. This proposal concerned the Company representatives because it would not be helpful to the Company's efforts to correct its financial problems. (Tr. 189-190, GC Ex. 6). Gavanda explained that this proposal was partly motivated by the Company's failure to make timely payments to the 401(k) Plan. In response, Seaton explained that the reason for the Company's failure to make those payments was "the financial situation of the company." (Tr. 191). Thereafter, the Union and Company representatives discussed the situation of the auto glass industry, and the sources of the financial problems the Company was facing. (Id.). These included problems with auto insurers cutting back on the amount of reimbursement they would provide to customers seeking auto glass replacement or repair. The parties also discussed that the Company's sales were down.

At the end of the meeting, Seaton explained to the Union that "it's going to be difficult for you to see our proposal (at the next meeting). It's going to be we need economic relief." (Tr. 192). Seaton also informed them that "you are going to regard it as a concessionary proposal." (Id.). According to Seaton, he wanted to make sure "they were put on notice that this would be a proposal they were going to be gulping hard at receiving because it was not a good situation for them or the Company and we wanted them to be aware of that so they were in a position to grapple with it." (Id.). Gavanda affirmed that he was not surprised to receive a concessionary proposal from the Employer at the next meeting. (Tr. 82).

At that meeting, on June 28, the Company provided the Union with its first bargaining proposals. (Tr. 36, GC Ex. 7). The major items of the Company's proposals included that:

1. "New employees" receive wages and benefits at a lesser scale than existing employees (i.e., a "two-tier" system)(GC Ex. 7 at p. 3);

2. The amount of the Company's contributions to the 401(k) Plan be discretionary to the Company (Id. at p. 15);

3. Employees' share of health insurance premiums be raised to 50% of the premium cost, and that new employees pay 2/3 of that cost (Id. at p. 14); and

4. In addition to the minimum wage scales in the Agreement, the Company would have "discretion" to pay "additional merit or production based compensation," (Id. at 2).

After the Company explained its proposals, the Union caucused, and then provided its general reactions and comments. (Tr. 195-196). At that time Gavanda stated that the Company's proposal could represent a net decrease in compensation to the bargaining unit employees. (Tr. 196). Seaton agreed, conceding it was a concessionary proposal, and asserting it was necessary due to the Company's economic predicament. (Id.). Gavanda responded that he appreciated the comprehensive nature of the proposal, and that it was a difficult proposal, but that he understood "it could have been worse." (Id.).

The parties then scheduled a bargaining session for July 12. 2006, which later needed to be postponed until July 18, due to the funeral of a former union official. (Tr. 197). Gavanda testified that the Union presented its response to the Company's previous proposal at the July 18 meeting. (Tr. 43). With respect to the employees' Health and Welfare contributions, the Union proposed a 30% contribution, in response to the Company's proposal for a 50% contribution. (Tr. 45). With respect to the Company's proposal on merit pay, Gavanda testified the Union asked for goals and objectives by which employees would be evaluated. (Tr. 46). He also testified that the Company responded that there were no definitive goals and objectives, but that it was discretionary. (Tr. 46-47). In this regard Seaton explained to the Union that the Company was seeking authority to prepare the programs. (Tr. 204). According to Seaton, the Company wanted to "have the ability to implement a supplementary pay system that won't reduce the base pay and it won't be discriminatorily applied and it would—that would reward behavior we think we have to try to incentivize." (Id.). As to the medical insurance proposal, Gavanda stated that the Company's proposal was a "big change." (Tr. 205). In this regard Seaton stated at the meeting that the Company needed "the very serious economic changes that this proposal embodied," and was "going to have to save a great deal of money to permit the Company to operate." (Tr. 206).

The Union's economically significant movements at this meeting were limited to the small increase in the employee share of health insurance premiums, and a retreat from their proposal to replace the Company's 401(k) Plan with the Union's defined benefit pension plan. (Tr. 209). The parties scheduled a subsequent negotiation session for July 24, 2006. At the end of the meeting Seaton stated that the following meeting might require more than just a day, because the Company believed "the parties could and should get to their final positions at the next meeting." (Tr. 211). In response, Gavanda either said "yes," or nodded in agreement. (Tr. 211).

When the parties met again on July 24, Seaton distributed a copy of the Company's next comprehensive proposal. (Tr. 211, GC Ex. 9). Seaton again told the Union that the Company hoped to get an agreement that day, and that they would "stay the day and the night if necessary to do what we needed to do to try to get—get the agreement resolved, but that we would be making a final offer at the point we have the union's responses to this proposal..." (Tr. 212). As in the prior meetings, Seaton alluded to the economic circumstances of the Company, and said it was "urgent" that an agreement be reached. (Tr. 213). After the Company distributed and explained its next set of negotiation proposals, the Union spent approximately three hours reviewing those proposals. According to the Union, the primary issues in dispute remained the merit pay proposal, the proposal for a 50% employee contribution to medical insurance, and for a reduction of the Company's contributions to the 401(k) Plan, and the proposal of a two-tier pay system. With respect to the two-tier pay system, Gavanda insisted on retaining the existing contract language. (Tr. 21). With respect to the Company's 401(k) proposal, the Union stated it opposed the proposal because it was "discretionary." (Tr. 218). The Union similarly opposed the Company's proposal regarding medical insurance contributions, because it also provided the Company with discretion to adjust the amount of employee contributions. (Tr. 219).

With respect to both the 401(k) and the insurance premium proposals, the Union inquired as to the specific dollar amounts at issue. In response the Company explained that both were ultimately matters of the Company's discretion. (Id.). With respect to the medical insurance contributions, the Company specifically explained that it had no specific numbers to produce, but that the Company was working pursuant to a formula that was subject to discretionary change. (Tr. 219). The Union also inquired about the standards for the merit pay, to which the Company replied that the specifics of the program had not been established, and that the Company was simply seeking to clarify that it could supplement the pay of employees pursuant to whatever program it developed, so long as the program was not discriminatory in nature. (Tr. 220).

Thereafter, the parties caucused, and the Company prepared a final proposal. Prior to breaking, the Company specifically inquired as to whether it had the Union's complete response, and informed the Union that it would prepare its "best and final offer." (Id.).

In this final proposal, the Company maintained its merit pay proposal as it had been previously written. (Tr. 222-223). The Company modified its health insurance proposals to require that its union and non-union employees be treated the same with respect to the proportion of their contribution to the premium cost, which Jeff Barr explained was 50% for the non-bargaining unit employees. (Id.). With respect to the retirement plan proposal, the Company maintained that it must have discretion to determine the amount of the Company contribution to the plan. (GC Ex. 10).

When the parties resumed their meeting, Seaton, on behalf of the Company, informed the Union that, "We are not going to be able to manage and continue the business unless we make these changes." (Tr. 225). Thereafter the Union requested information about the 401(k) plan, and about the health benefit plan for the non-bargaining unit employees. (Tr. 226). The Company responded by obtaining by fax an information sheet from the Company offices, and Jeff Barr explained how the benefits were administered for non-bargaining unit employees. (Id.) (See R. Ex. 1). At no point did the Union say this information was insufficient. (Tr. 227).

Then, near the end of the meeting Seaton asked when the Union would submit the Company's offer to the employees. The Union responded that a ratification vote had not yet been scheduled, but that they would not recommend the employees ratify the offer. Gavanda added that they felt they still needed more information. (Tr. 229). Seaton responded that the Company expected to have final positions today, and that the Union shouldn't "play the information game with us." (Id.). Following the meeting, the Company provided the Union with a formal copy of its final offer. (GC Ex. 11).

Thereafter, by letter dated July 31, 2006, the Union requested a summary plan description relating to the 401(k) Plan, and ambiguously requested "the financial back-up needed to clarify your position in your final offer." (Tr. 231, GC Ex. 12). In response, the Company provided the 401(k) Plan information, but refused to provide information regarding the Company finances, because the request was ambiguous and irrelevant. (GC Ex. 13).

On August 9, 2006, bargaining unit employees voted to reject the Company's contract offer. The Company then informed the Union by letter that it intended to implement the economic terms of the final offer. (GC Ex. 14). Thereafter, the Company and the Union exchanged a series of letters by which the Union demanded further bargaining and requested information, and the Company set forth its position that the parties were at an impasse. (R. Exs. 10, 11, 12 & 13). Among the Union's requests for information were "a complete list of your customers so we can check with them...to see if it is prices, service, management arrogance, etc. [as the cause of the Company's financial problems]." (R. Ex. 13). The Union also requested a list of all customers who had been lost in the last five years, a price list for Leiferman's goods and services, a list of new equipment purchased in the last five years, and a list of all actions the Company had taken to be more competitive. (*Id.*). Significantly, the Union made no request for information, such as balance sheets, profit and loss statements, or other accounting documents.

On September 20, 2006, the District Court for the State of Minnesota, County of Hennepin, placed Leiferman Enterprises, LLC in receivership and appointed the Lighthouse Management Group as Receiver. (R. Ex. 6). Lighthouse had no prior involvement with Leiferman, and had no involvement in any of the events related to the unfair labor practice allegations. The court authorized Lighthouse to operate the business in a manner designed to preserve and maximize the value of the business and its assets, and also authorized Lighthouse to pursue the sale of Leiferman Enterprises, or its assets. (Id. at p. 5). The court granted Lighthouse the power to pay obligations previously "incurred by Leiferman Enterprises, LLC only if deemed necessary by the Receiver for the preservation of HAIP [Harmon AutoGlass Intellectual Property] collateral." (Id. at p. 6). The court further ordered that "the Receiver shall not be liable for the debts and obligations of Leiferman Enterprises, LLC." (Id. at p.7).

After establishment of the receivership, Union representatives, Gavanda and Pavlak, met with the Receiver and Attorney Seaton. (Tr. 242-243). At the meeting, Seaton, on behalf of the Receiver, conveyed that the Receiver was prepared to discuss a new agreement with the Union. (Id.). The Union declined, stating they preferred to wait until the purchaser had taken over the Company. (Id.). At the meeting, the Receiver also offered to make available "any financial information you want." (Tr. 245). The Union also did not take up this offer.

## ARGUMENT

### I. THE ALJ ERRONEOUSLY CONCLUDED THAT THE RECEIVER, LIGHTHOUSE MANAGEMENT, WAS AN AGENT OF RESPONDENT AND THEREFORE OBLIGATED TO CARRY OUT THE TERMS OF THE PROPOSED ORDER.

Despite the fact that Lighthouse had no involvement in any of the alleged unfair labor practices, the ALJ's Decision obligated Lighthouse to carry out the terms of any Order issued by the Board, and thereby to remedy the unfair labor practices allegedly committed by Leiferman, is based on multiple factual and legal errors. (ALJ Dec. at 10, lns. 39-45). First, the ALJ's order is overly broad because it does not limit the liability of the Receiver to the assets in the receivership. Second, the ALJ's determination that Lighthouse, a state court receiver, was an agent of Leiferman, (ALJ Dec. at 11, lns. 31-34), is in direct conflict with Board case law. .Finally, the ALJ erroneously concluded that Attorney Douglas Seaton and Leiferman Vice Present Jeff Barr were representatives of Lighthouse at the time it was appointed receiver, and therefore Lighthouse had notice of the unfair labor practices allegedly committed by Leiferman. (ALJ Dec. at 10, lns. 9-16).

### A. The ALJ's Order Is Overly Broad.

The ALJ determined that Lighthouse was an agent of Leiferman, and in broad terms ordered that "Lighthouse is obligated to carry out the terms of any Order issued by the Board." (ALJ Dec. 10, lns. 39-45). This Order, on its face, would require Lighthouse to remedy the alleged unfair labor practices even if Lighthouse is required to expend funds out of its own pocket, which, since Leiferman's assets are exhausted, it would apparently be required to do. In this regard it is significant that no unfair labor practices are alleged to have been committed by Lighthouse. Indeed, all events related to the unfair labor practice allegations occurred prior to Lighthouse's appointment as Receiver on September 20, 2006. Thus the ALJ's determination that Lighthouse is obligated to remedy Leiferman's alleged unfair labor practices is based solely on Lighthouse's status as Receiver. In this regard the Order itself is overbroad, and should, in express terms, be modified to limit Lighthouse's liability to the assets in the receivership. Indeed, the Board has in other cases, placed such a limitation on the liability of parties in positions similar to receivers, such as bankruptcy trustees. See *Yorke v. NLRB*, 709 F.2d 1138, 1145 ($7^{th}$ Cir.1983)(wherein the Board argued that the liability of a bankruptcy trustee for a backpay remedy consumed the entire assets of the bankrupt estate, but the Board did not contend that the liability extended beyond the estate).

### B. The ALJ's Holding That Lighthouse Was An Agent Of Leiferman, And Therefore Obligated To Remedy Leiferman's Alleged Unfair Labor Practices, Is Contrary To Established Board Precedent.

The ALJ's holding that Lighthouse is obligated to remedy the alleged unfair labor practices of Leiferman is grounded in her faulty determination that Lighthouse is an agent of

Leiferman. In determining that Lighthouse was an agent of Leiferman, the ALJ superficially relied upon the Board's language in *Holiday Inn Coliseum*, 300 NLRB 631 (1990), and *Karsh's Bakery*, 273 NLRB 1131 (1984), and took the Board's holdings in those cases entirely out of context. (ALJ Dec. 10, lns. 29-37). In both cases the Board's analysis focused on jurisdictional issues, not questions of liability. In *Karsh's Bakery*, the respondent, a debtor in possession under Chapter 11 of the federal Bankruptcy Code, argued that the Board should not consider its pre-petition (bankruptcy) revenue when determining jurisdiction. 273 NLRB at 1131, fn.1. The Board held that such a debtor in possession was the same entity as the pre-petition bankrupt employer, and therefore its pre-petition revenue should be considered in determining if jurisdictional requirements were met. *Id.*

In *Holiday Inn Coliseum*, the receiver of the respondent employer also argued that the Board lacked jurisdiction. In that case the receiver contended that, as a court appointed receiver, he was a political subdivision of the state, and therefore exempt from the Act. 300 NLRB at 631, fn. 4. The Board rejected this contention, and, **for jurisdictional purposes**, analogized receivers to bankruptcy trustees over whom jurisdiction is asserted. *Id.*

In contrast, in the immediate case Lighthouse does not challenge the Board's jurisdiction. Rather, the issue is the ALJ's error in determining that Lighthouse was an agent of Leiferman **for liability purposes**. In this regard the ALJ's decision is in direct conflict with Board precedent. In *Cone-Heiden Corporation*, 305 NLRB 1045 (1991), the Board found that neither a state court appointed receiver, nor the entity contracted by that receiver to operate the company which was in receivership, were agents of that company. In that case the respondent employer, Cone-Heiden, had been placed in receivership by a Washington state court, and the receiver was charged with liquidation of the company. *Id.* The receiver contracted with another company, Press Products, to continue the operations of Cone-Heiden, pending the liquidation. Both Press and Cone-Heiden were charged with unfair labor practices, and General Counsel sought to hold Press liable as Cone-Heiden's agent. *Id.* at 1052.

The Board found that Press had operated the business as an agent of the receiver, not of Cone-Heiden. *Id* at 1045. The Board further found that the receiver also was not an agent of Cone-Heiden. *Id.* The Board then reasoned that because "the Receiver was not the agent of Cone-Heiden, it would appear to follow that Press, the agent of the Receiver, was not an agent of Cone-Heiden." *Id.* With respect to its finding that the receiver was not an agent of Cone-Heiden, the Board stated that a state court appointed receiver is a "fiduciary under state law." *Id.* As such, the Board observed:

> [T]his case does not rest on Federal bankruptcy principles. Indeed, the General Counsel bases his case solely on agency principles: It is clear that a fiduciary is not an agent. A fiduciary owes its loyalty to the beneficiaries or, in the context of the instant case, to the creditors. By contrast an agent owes its loyalty to its principal.

*Id.* Absent a finding of a linkage by agency between Cone-Heiden and Press, the Board affirmed the ALJ's dismissal of the complaint.

In the instant case it is similarly undisputed that Lighthouse is the state court appointed receiver of Leiferman Enterprises, LLC. (R. Ex. 6). Consistent with the observations of the Board in *Cone-Heiden Corporation*, under Minnesota law such a receiver is a representative of the court, and property in his/her possession is also in the possession and custody of the court. *In re Telesports Prods Inc.'s Receivership & Dissolution*, 476 N.W.2d 798 (Minn.App.1991). Moreover, it is also clear that a Minnesota receiver is a fiduciary, and represents the rights of creditors. See *Moon v. Allen*, 84 N.W. 654 (Minn.1900), *Magnusson v. American Allied Ins. Co.*, 189 N.W.2d 28 (Minn.1971). However he/she is **not** an agent of the parties. *See Duparquet*

*Huot & Moneuse Co. v. Evans*, 297 U.S. 216 (1935), *Peterson v. Darelius*, 210 N.W. 38 (Minn.1926). As an agent of the Court, the Receiver is entitled to personal immunity for his actions as receiver. *Drexler v. Walters*, 290 F. Supp. 150 (D. Minn. 1968). Effectively, an Order against the Receiver is an Order against a Minnesota Court. In fact, consistent with this caselaw, the Minnesota District Court which appointed Lighthouse as receiver explicitly immunized Lighthouse from liability for Leiferman's debts, providing in the receivership order that "The Receiver shall not be liable for the debts and obligations of Leiferman Enterprises, LLC." (R. Ex. 6). Moreover, as reflected in the Court's Order, the appointment of the Receiver was on the Motion of the Secured Creditor (Harmon AutoGlass Intellectual Property, LLC, a separate and distinct entity from "Harmon AutoGlass," which was the d/b/a name used by Leiferman). (R. Ex. 6, p. 1). Having been appointed at the request of the secured creditor, a part opponent of Leiferman, for the purpose of securing Leiferman's assets for the benefit of that secured creditor, it is impossible for Lighthouse to be considered an agent of Leiferman.

Given the Board's holding in *Cone-Heiden*, and the clarity of Minnesota law to the effect that receivers are fiduciaries, not agents, of the parties, the ALJ's finding that Lighthouse was an agent of Leiferman is clearly erroneous. In the absence of such agency, there is no basis for the ALJ's holding that Lighthouse is obligated to carry out the terms of the recommended Order.

### C. The ALJ's Conclusion That Lighthouse Had Notice Of Unfair Labor Practices Allegedly Committed By Leiferman Is Unsupported By The Record.

In the course of her faulty analysis of whether Lighthouse is obligated to remedy the alleged unfair labor practices of Leiferman, the ALJ found that Lighthouse had notice of those allegations. This conclusion was based on her finding that it was "undisputed" that Leiferman Vice President Jeff Barr and Attorney Douglas Seaton were representatives of Lighthouse. (ALJ

Dec. 10, lns. 8-19). While the relevancy of these findings is unclear, they were apparently a factor in her determination that liability for Leiferman's alleged unfair labor practices could be imputed to Lighthouse. However, these findings are not only erroneous, but with respect to Barr, they are a complete fiction invented entirely out of thin air by the ALJ.

With respect to Barr, the ALJ correctly found that he was Vice President of Leiferman during the 2006 bargaining, but then erroneously found he was the designated representative of Lighthouse at the trial. (ALJ Dec. 6, lns. 8-10, Dec. 10, lns. 12-14). Nowhere in the record is there any support for the finding that Barr was ever a representative of Lighthouse, whether at the trial or otherwise.[3] Rather, the record clearly reflects that the only representatives of Lighthouse at the trial were attorneys "Douglas Seaton and Jon Olson." (Tr. 6, ln. 21)[4]. The ALJ's conclusion that Barr was Lighthouse's designated representative at the hearing, or at any other time, was entirely an invention of the ALJ, has no basis in the record, an is erroneous in its entirety.

Similarly, the ALJ also erroneously concludes that knowledge of the alleged unfair labor practices can be imputed to Lighthouse because attorney Seaton represented both Lighthouse and Leiferman. However the relevant point in time for considering whether the Receiver had received information about the unfair labor practice issues from Seaton is the time of the actual appointment. While it is true that Seaton represented both Lighthouse and Leiferman for a period of time, the ALJ improperly, and incorrectly assumes this dual representation existed at the time the receivership was established. In this regard nothing in the record supports a finding

[3] In reality the representative of Lighthouse Management Group is James Bartholomew. Jeff Barr is not, and has never been a representative of the Lighthouse Management Group in any capacity.

[4] Though the fact is not affirmatively captured in the record, for obvious reasons, Jeff Barr was not present in the hearing room for any part of the trial. The Board may wish to take notice that the record of a hearing does not normally reflect the identities of those not present.

that Seaton represented Lighthouse prior to, or at the time of, its appointment as receiver. [5]

Absent such representation prior its appointment as receiver, there is no basis for imputing Seaton's knowledge to Lighthouse at the time it was considering whether to accept the receivership. Absent some forewarning of the unfair labor practice allegations prior to being appointed as receiver, the ALJ improperly imputes liability to Lighthouse based on information it received after it was too late to take any action to protect or indemnify itself from such liability.

In short, the ALJ's finding that Seaton represented Lighthouse prior to its appointment as receiver is erroneous, and thus was an improper consideration in her imputation of liability to Lighthouse.

## II. THE ALJ ERRED IN DETERMINING LEIFERMAN ENTERPRISES UNLAWFULLY REFUSED TO PROVIDE INFORMATION TO THE UNION.

The ALJ held that Leiferman violated Section 8(a)(5) of the Act by failing to provide the Union with information regarding (1) the Company's financial condition; (2) the cost to employees of the Company's health insurance proposal; and (3) the goals and standards to be applied to employees under the Company's merit pay proposal. (ALJ Dec. 6, lns 24-24; Dec. 6-7; Dec. 7, lns 28-50). It is well established that, included within an employer's duty to bargain in good faith with duly authorized union representatives, is the duty, on request, to furnish relevant information to those representatives during contract negotiations. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). However, the duty only exists where the information requested is relevant to the bargaining issues, *Southern Cal. Gas Co.*, 342 NLRB No. 56 (2004), the request has been made by the union in good faith, *NLRB v. Wachter Constr.*, 23 F.3d 1378 ($8^{th}$ Cir.1994), and the information exists and is available to the employer, *King Soopers, Inc.*, 344 NLRB No.

[5] In reality Seaton did not represent the Receiver, and had no knowledge of the Receiver's identity, or any communications with the Receiver, until after the court ordered establishment of the receivership.

104 (2005). The ALJ erred in her findings because Leiferman Enterprises either provided the Union with the information requested, did not possess the requested information, or, with respect to the requested financial information, was not obligated to provide it because the Union's request was made in bad faith in an attempt to delay resolution of the contract, and to postpone impasse.

### A. Leiferman Provided The Union With Health Insurance Information, And Subsequent Requests Were Not Made In Good Faith.

The ALJ erroneously found that Leiferman unlawfully failed to provide the Union with information concerning amounts to be paid by employees under the Company's Health Insurance proposal. (ALJ Dec. 6, lns. 24-36). The record does not support these findings. Rather, it is clear that when the Union requested information about how the health insurance plan was managed for non-bargaining unit employees, Company representative Jeff Barr provided a detailed explanation at the meeting. Specifically, he explained the non-bargaining unit employee premium contributions were based on a percentage (at that time it was 50%) of the actual cost of the premium for each individual. (Tr. 219). Barr also explained that the premium varied depending on the circumstances of the individual, such as number of dependents, medical conditions, etc. (Id.). Furthermore, he explained the percentage was also subject to discretionary change by the Company. (Id.). Thus, there was no specific number that could be provided in response to the Union's request for the cost information because it would vary from employee to employee. The only information the company could provide (and did) was an explanation of how the formula would be applied.

At no time during the remainder of the meeting did the Union inform the Company that this explanation was an inadequate response to their inquiry. (Tr. 227). Instead, by letters dated

August 18, 2006 and September 8, 2006, the Union made similar requests for information on the health insurance premium costs of non-bargaining unit employees. (See GC Exs. 16, 17). This, however, occurred after impasse, and after the Company's final offer had been implemented, rendering the request moot for bargaining purposes.

More significantly, these requests simply ignored the Company's explanation given at the final bargaining session, and were a continuation of the Union's overall pattern of using information requests to harass the Company, and to manufacture a basis for challenging the legality of the impasse. When viewed in the context of this pattern, which includes the above discussed bad faith requests for financial information, it is clear that the request for health insurance cost information was simply a continuation of the Union's efforts to delay contract resolution. (G.C. Exs. 16 & 17). Buttressing this conclusion is the fact that while the letters include the requests for health insurance information, the bulk of their substance is devoted to challenging the status of the impasse, and demanding continued bargaining. (Id.). Essentially, the information requests were added as an after-thought.

In this context, the Union's later requests for health insurance information, made after impasse, should be seen for what it is; a bad faith delaying tactic intended to forestall resolution of the contract, rather than to aid the Union in its role as employee representative. The ALJ's decision is therefore erroneous and unsupported by the record.

### B. Leiferman Did Not Possess The Merit Pay Information Requested By The Union.

The ALJ also erroneously found that Leiferman unlawfully failed to provide the Union with information about the standards to be used in administering the Company's "merit pay" proposal. (ALJ Dec. 6-7). In so finding, the ALJ profoundly mischaracterizes the nature of the

Company's proposal, and imposes a burden on the Company far beyond that required by law.

As even the Union's witnesses admitted, the Company repeatedly explained at negotiations that the proposal was intended to provide the Company with **discretion** to establish a supplemental pay plan. (Tr. 46-47). The proposal, therefore, did not outline any specifics of such a plan, and, as the Company representatives explained, the requested standards did not exist. (Tr. 204). In short, the information did not exist because the Company's proposal was not for a standards based system, but for the Company to be able to issue rewards or incentives to employees at its discretion. Since no such standards had been formulated, the Company honestly responded to this information request by informing the Union that the existing standards did not exist.

Since the Company obviously cannot be required to produce information which does not exist, the ALJ invented another rationale for finding the Company in violation of the Act: that the company refused to engage in bargaining over the standards and goals, and proffered "the merit pay proposal as a take-it-or-leave-it choice." (ALJ Dec. 7, lns. 21-26). More specifically, the ALJ found that an employer is obligated to include standards and goals within so-called merit pay proposals (and to provide that information to the union upon request), or, if no such standards are included, then the Company is obligated "to bargain them with the Union." *Id.* Thus the ALJ required the Company to either include standards in its proposal, or to bargain over the substance of such standards with the Union.

The ALJ's holding in this regard is flawed on multiple levels. First, the Complaint issued by General Counsel alleged only that Leiferman failed to provide the requested information as to the standards – there is no allegation that the Company refused to bargain over the substance of the standards. (G.C. Ex. 1(g), ¶¶ 9(a), 9(g)). As such the ALJ invented a new allegation – one of which Leiferman had no notice – and found the Company to have violated the Act based on that new allegation.

Second, the ALJ's finding that Leiferman "refused" to bargain over the merit pay standards is simply not supported by the record. It is self evident that, for an employer be guilty of refusing to bargain over an issue, there must be some attempt or offer by the union to bargain over that issue. In this regard the record reflects that while the Union requested information about merit pay goals and standards, there is no evidence that the Union made any proposal or counter proposal with respect to the substance of such standards, or even any overture that it intended to. As such, the record simply does not support the ALJ's finding that Leiferman proffered "the merit pay proposal as a take-it-or-leave it choice." *Id.* Rather, the Company made its proposal, and the Union, while requesting information (which did not exist), made no response or counter proposal. This is not a situation where the Company refused to bargain over the substance of the proposal – but rather one in which the Union itself did not substantively respond.

Finally, the dichotomy invented by the ALJ – that an employer must either include standards in its proposal, or must substantively "bargain them," is not supported by Board case law. In simple terms, Leiferman's "merit pay" proposal was intended to give the Company authority to make discretionary payments, in addition to contract wage rates, to employees of rewards and incentives, without binding itself to specific standards. The ALJ's finding of violation implies that Leiferman was obligated under the Act to bargain against itself on this proposal. Because the Union made no substantive counter-proposals of its own with respect to the merit pay standards, but merely voiced its dissatisfaction with the Company's proposal, the only way to satisfy the bargaining obligation imposed by the ALJ to "bargain them" (the standards)(ALJ Dec. 7, ln. 23), would be for Leiferman to unilaterally modify its own proposal to incorporate such standards. In other words, since the Union made no counterproposal as to such standards, the ALJ's decision requires the Company to formulate a counterproposal on the Union's behalf.

Thus the ALJ effectively decided she did not like the Company's proposal, referring to it as a "pig-in-a-poke," and ordered the Company to change it. (ALJ Dec. 7, ln. 17). This, however, is beyond her authority under Board law. The Board has made clear that an employer does not violate Section 8(a)(5) of the Act by submitting a proposal which the union finds undesirable. *Reichhold Chemicals*, 288 NLRB 69 (1988). Nor does an adamant insistence on a package of multiple hard line proposals, including a broad management rights clause, at-will employment, merit based wage increases, and an arbitration free contract, establish that an employer has breached his obligation to bargain in good faith. *Coastal Electric Cooperative*, 311 NLRB 1126 (1993). Thus the Board does not dictate the terms of an employer's proposals. By requiring Leiferman to either include substantive standards for merit pay within its proposal (such that it would have information to provide the Union in response to its information request), or to bargain those standards such that they are ultimately included, the ALJ has done exactly that. Therefore the ALJ's finding that Leiferman violated Section 8(a)(5) of the Act with respect to its merit pay proposal must be reversed.

### C. The Union's Requests For Financial Information Were Made In Bad Faith.

The ALJ also held that Leiferman violated the Act by refusing to provide the Union with financial information. (ALJ Dec. 7, lns 28-52). The ALJ found that the Company claimed it "could not afford to offer anything more than what was in its final offer," and reasoned that such a claim obligated the Company to provide the financial information requested. (ALJ Dec. 7, lns.

46-49). The ALJ also cavalierly dismissed the Company's contention that the Union's information requests, including those for financial information, were made in bad faith. The ALJ simply stated "the record revealed no evidence of any bad faith on the part of the Union . . ." (ALJ Dec. 6, lns. 32-33 ). In this regard the ALJ's conclusions were clearly erroneous, as the circumstances of those requests reveal that they were made for purposes of delaying the resolution of the contract, rather than to obtain information for purposes conducive to bargaining.

It is well settled that an employer has a duty, on request, to furnish relevant information upon a good faith request by union representatives during contract negotiations. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). This duty is incurred with respect to a company's financial information when it makes a claim of financial inability to meet union demands for raises or increases in benefits. *Id.* The rationale for this obligation is to "permit independent verification" by the union of such financial inability. *Id.* at 153. However where the purpose of a union's information request is not to verify such financial representations, but rather to delay the progress of negotiations, such a request is not made in good faith, and the employer does not violate the act by refusing to provide the information. *H & H Pretzel Company*, 277 NLRB 1327 (1985).

In *H & H Pretzel Company*, (discussed in further detail below) the Board found the employer did not violate its duty to bargain in good faith by ignoring a union's information requests. In that case the employer had claimed it was financially unable to meet the union's wage demands, and the parties had been unable to reach agreement after three (3) bargaining sessions. *Id.* The union, without recommending it, agreed to submit the employer's final proposal to the membership, who voted to reject the offer. Id. The union then almost immediately requested further bargaining, and requested an examination of the company's books.

*Id.* at 1334. The company ignored the union's requests, and implemented its proposal to convert the drivers into independent contractors. *Id.* at 1333. The Board, in its decision, adopted the Administrative Law Judge's finding that an impasse had been reached. The ALJ found that the employer's refusal to provide the requested information did not violate the Act because the union's failure to make an earlier request for the company's financial information showed the request was merely a delaying tactic. *Id.* at 1334.

The circumstances of the immediate case are similar to those in *H & H Pretzel*. As in *H & H*, the Union's request for Leiferman's financial information was not made until late in the final negotiation session between the parties, after the Company had already presented its final offer to the Union (a fact admitted by Union witness Gavanda). (Tr. 68). Furthermore Gavanda admitted that approximately five weeks earlier, at the very beginning of negotiations, the Company had discussed with the Union that it was in financial distress and would be seeking economic concessions. (Tr. 33). Thus, though aware of the Company's claim, the Union expressed no interest in reviewing the Company's financial information through the first five weeks of negotiation. Instead it waited to request the financial information until after the Company had reached the end of its bargaining rope, and had already presented the Union with its last, best offer. As in *H & H Pretzel*, the timing of this information request strongly supports a finding that the Union's purpose in making the request was not to facilitate negotiations, but rather to delay a resolution of those negotiations. Indeed, if the Union had any real doubt about the veracity of the Company's representations of financial distress, one would logically have expected the Union to request access to the financial records long before it did.

Further supporting the conclusion that the Union was not truly interested in verifying the Company's financial condition are admissions by Union witness Gavanda. Specifically, Gavanda admitted he was aware of the Company's financial predicament even before negotiations began, because he had learned of it from members of the bargaining unit. (Tr. 82). Based on this knowledge of the Company's financial problems, Gavanda also admitted that he was not surprised to receive a financially concessionary proposal from the Company. (Id.). Thus Gavanda admitted he knew the Company was in financial distress. The admission of such knowledge establishes that the Union's request for financial information was not for the purpose of checking the veracity of Leiferman's claim of distress, because the Union did not doubt the veracity of that claim. Rather, as Gavanda admitted, the Union knew the Company was in financial distress.

Further evidence that the Union's request for financial information was not in good faith is found in the Union's letter to Douglas Seaton, dated August 14, 2006, which requested massive amounts of information, including financial information. (See R. Ex. 13). However the request was nonspecific, vaguely requesting "financial information." Such vagary reflects that the Union had no specific concerns about the veracity of the Company's financial representations, but was merely tossing out the request in an effort to delay establishment of an impasse. Furthermore, the specific information that was requested by the Union was plainly not the type which could be used to verify the Company's financial status. The Union did not request balance sheets, profit and loss statements, or any other type of financial document which would reflect the Company's financial status. Instead, the Union requested customer lists so that it could check with customers to see if "management arrogance" was a problem; price lists; a list of competitors; a list of equipment purchased in the last five years; and a list of actions taken to become more competitive. (R. Ex. 13). While such information might be useful to the Union (i.e., by giving the Union leverage to pressure the Company into concessions through the threat to interfere with its customer relations), it does not verify the Company's financial status, and, therefore, is not relevant to the negotiations.

Thus, as in *H & H Pretzel*, the Union was utilizing information requests, and hollow expressions of flexibility, solely for posturing purposes, to delay the impasse, and to delay resolution of the bargaining. The Board in *H & H*, by affirming the ALJ's decision, held that when information requests are used for such purposes, an employer does not violate Section 8(a)(5) by refusing them. *H & H Pretzel*, 277 NLRB at 1334.

Thus, contrary to the ALJ's finding that there is "no evidence of any bad faith on the part of the Union in making its information requests," the record in fact reflects overwhelming evidence of just that. Thus the Union's requests for financial information were not made for the good faith purpose of verifying the Company's financial situation, but instead, as in *H & H*, were part of a campaign to delay establishment of an impasse. As such, the Company's refusal to provide the information is not a violation of the Act, and the ALJ's determination in this regard should be reversed.

## III. THE ALJ ERRED IN FINDING THAT LEIFERMAN ENTERPRISES UNLAWFULLY IMPLEMENTED THE TERMS OF ITS FINAL OFFER ON AUGUST 13, 2006 IN THE ABSENCE OF A BARGAINING IMPASSE.

### A. The Parties Had Reached Impasse; Therefore, Leiferman Was Entitled To Implement The Terms Of Its Final Offer.

The ALJ found that Leiferman also violated Section 8(a)(5) of the Act by unilaterally implementing the economic terms of its final contract offer in the absence of a bargaining impasse. The ALJ's conclusion is supported by neither the law nor the facts, and should be reversed.

In this regard, an impasse exists when "negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Washoe Medical Centre, Inc.*, 348 NLRB No. 22, p. 10 (2006), *citing Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539, 543 (1988). Among the factors in determining when an impasse exists are:

> The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of [the] negotiations . . .

*Id.*, *quoting Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

In *H & H Pretzel Company*, 277 NLRB 1327 (1985), discussed above, the Board found an impasse existed, and that the employer was entitled to implement its bargaining proposals, after the parties had met for just three negotiation sessions. In that case the employer, a snack food distributor, proposed converting its delivery drivers into independent contractors, because its labor costs threatened the company's survival. *Id.* at 1332-33. At the first meeting, the union proposed increased wages and benefits, and rejected the company's proposal. *Id.* at 1332. At the second meeting the union maintained its prior proposal, and again rejected the company's proposal. *Id.* at 1333. At the third meeting the company abandoned its independent contractor proposal, and instead presented a final contract offer reflecting economic concessions it needed for survival. *Id.* The union agreed to submit the proposal to the membership, who voted to reject the offer. The union then almost immediately requested further bargaining, and requested an examination of the company's books. *Id.* at 1334. The company ignored the union's requests, and implemented its proposal to convert the drivers into independent contractors. *Id.* at 1333.

The Board, in its decision, adopted the Administrative Law Judge's finding that an impasse had been reached, which was not negated by the union's expressed desire to continue bargaining, or by its request to examine the company's books. The ALJ found that the company "felt a need to reduce the cost of labor that the existing contract imposed on it. It could not continue to pay the money – whether in the way of wages or fringe benefits." *Id.* Thus, the ALJ found the union's failure to make an earlier request for the company's financial information demonstrated that it was not really interested in the company's financial position. The ALJ further reasoned that to hold that the Act requires an employer "to just keep on meeting with the Union and going on with useless talking, would simply mean that the Union continues to enjoy the old contract benefits, which makes it happy, and the Employer continues suffering what it considers impossible economic conditions." *Id.* at 1334. The ALJ found this was not a reasonable interpretation of the Act, and therefore concluded the union was merely engaged in delay tactics, which could not prevent establishment of an impasse.

The facts of *H & H Pretzel* are substantially similar to those in the immediate case. Leiferman engaged in four (4) bargaining sessions with the Union, while in *H & H* the employer had three (3) such sessions. In both cases the employers informed the unions early in the negotiations that the companies were having financial difficulties, and were seeking economic concessions, and the unions showed very little movement on the key economic issues throughout the bargaining. In the immediate case, Leiferman informed the Union, at the first bargaining session on June 16, 2006, that the Company was having financial problems, and that the collective bargaining agreement then in place was not allowing the Company to be profitable. (Tr. 33-34). In fact chief Company negotiator Seaton, explicitly informed the Union that the Company's upcoming proposal would be "a concessionary proposal." (Tr. 192). Union negotiator Gavanda nonetheless informed the Company that he would have a "problem" agreeing to concessions which deviated "too far" from the terms of the "glassworker" agreement (which was similar, but covered a different bargaining unit), because that would create an unfair advantage for Leiferman over the glassworker contractors. (Tr. 35). Thus, as in *H & H*, the Union here signaled little willingness to make concessions.

At the second bargaining session, on June 28, 2006, the Leiferman presented and explained its "concessionary" proposal to the Union, and specifically explained that concessions were needed due to the Company's economic predicament. (Tr. 196). According to Union witness Gavanda, the Company's main economic proposals were for a discretionary "merit pay" program (tr. 38), a new wage classification for new hires (tr. 38-39), discretionary contributions to the 401k Plan (tr. 40), and raising union employee health insurance premium contributions from 25% to 50% of the premium cost (tr. 40). The Union made no response to the proposals at this meeting (tr. 40), and also made no request for information, despite having received the concessionary proposals.

At the third meeting, on July 18, 2006 the Union responded to the Company's proposals. In response to the Company's proposal for a 50% employee contribution to health insurance premiums, the Union proposed a 30% (up from 25%) employee contribution. (Tr. 45). With respect to the retirement plan proposals, the Union agreed to retain the 401k Plan, but the parties made no progress with respect to the amount of the Company's contribution. (Tr. 209). With respect to the "merit pay" proposal, the Union requested the Company provide goals and objectives for the plan. (Tr. 46). Union witness Gavanda acknowledged, however, that Mr. Seaton told him there were no definitive goals or objectives, but that the proposal was for a discretionary plan. (Tr. 46-47). Gavanda testified the proposal was of "no value" to the Union without such goals and objective, but the record reflects no proposal by the Union to establish such standards. (Tr. 47). Gavanda also acknowledged that the parties were still divided on the new hire proposal as well. (Tr. 96). Thus, as of the third meeting, the only movement made by the Union with respect to the core economic issues of the bargaining was to concede an additional 5% for employee health insurance contributions, and to accept the concept of retaining the 401k Plan (though no progress was made as to the amount of the employer contribution).

At the final meeting, on July 24, 2006, the Company expressed a willingness to "stay the day and the night if necessary to . . . get the agreement resolved . . .," but that it expected to make a final offer that day. (Tr. 212). The Company presented its next proposals to the Union, and, again, little progress was made with respect to the four main economic issues. With respect to the merit pay proposal, the Union again requested that standards be identified, and the Company again explained that no such standards existed. (Tr. 220). As to the proposals regarding 401(k) and health insurance premium contributions, the Union simply opposed the discretionary nature of the employer contributions. (Tr. 219). Finally, the Union also simply opposed the new hire (i.e. "two-tier") wage classification as contrary to the Union's principles, and insisted on retaining the existing contract language. (Tr. 201).

After receiving the Union's response to the proposal, the Company representatives caucused to formulate their "best and final offer." (Tr. 220). In the final proposal, the Company conceded a return to the language of the old contract with respect to all disputed language, except for the four main economic issues. With respect to the merit pay proposal, the Company maintained its proposal as written: for the discretionary authority to implement a supplemental pay program. The same was true as to the 401(k) contribution proposal: that the Company would have discretion to determine the amount of the contribution. (GC Ex. 10). The Company also maintained its proposal regarding the establishment of a two-tier new hire wage classification. The Company modified its health insurance contribution proposal by equating the bargaining unit employee contribution level to that of non-bargaining unit employees, which was 50% of the premium. (Tr. 222-23). Company spokesman Seaton explained that the Company was "not going to be able to manage and continue the business unless we make these changes." (Tr. 225).

The Union then, for the first time, requested information about the benefits provided to non-bargaining unit employees. The Company obtained non-bargaining unit employee information by fax, provided it to the Union, and again explained both the discretionary nature of the proposals, and that health insurance costs varied from employee to employee. (Tr. 226, R. Ex. 1). The Union, also for the first time, requested financial information. (Tr. 228). Given the lateness of the negotiations, Mr. Seaton warned the Union not to play the "information game." The Union made no further movement on any of the Company's economic proposals, and Gavanda stated he would present it to the employees for a vote, but would not recommend ratification. (Tr. 229).

As such, Leiferman Enterprises bargained one session longer than the employer in *H & H Pretzel*. More importantly, as the Company expressed at the last session, it had no further room to make concessions on the core economic proposals, and the Union showed no sign of making significant movement toward the Company's position. In fact, the Union's opposition to the two-tier wage proposal, based on "principle," and its hard-line opposition to Company discretion in determining contributions to the 401(k) Plan and health insurance premiums, signaled little flexibility at all, and therefore mirrored the intransigence of the union in *H & H*.

The analogy to *H & H* is clear: the Company had reached the end of its bargaining rope, and the Union, despite voicing a hollow willingness to make concessions, showed no sign that those concessions would be of significance. Thus, there was no reasonable basis for viewing continued negotiations as anything beyond a waste of time.

In short, the record demonstrates that further negotiations would have been futile, and therefore that an impasse had been reached. As such the Company was entitled to implement the terms of its final offer, and the ALJ's findings are therefore clearly erroneous..

### B. Economic Exigencies Entitled Leiferman To Implement Its Final Offer Even If An Impasse Had Not Been Reached.

Assuming, for sake of argument only, that an impasse had not been reached in the negotiations, the economic exigencies faced by Leiferman nonetheless justified the unilateral implementation of the economic terms of the final offer. While the general rule is that an employer must refrain from unilateral changes until an impasse has been reached, the Board has recognized an exception to this general rule when "economic exigencies" compel prompt action. *Alpha Associates*, 344 NLRB No. 95, p. 4 (2005). Such economic exigencies arise when there is a "dire financial emergency," or when there is a "precipitate worsening of [the] situation" requiring immediate action. *Id., citing Hankins Lumber*, 316 NLRB 837, 838 (1995).

In this regard, Leiferman Enterprises had experienced large financial losses, and, in the words of chief spokesman Seaton, the Company was "hemorrhaging money." (Tr.67). The Company's financial documents confirm this assessment. By July 2006, total Company sales had declined by over 40%. (R. Ex. 3). Moreover, an examination of the Company's finances at the time it was placed in receivership reveal that its expenses outpaced its income by almost $848,000, for the period of January 1 to September 30, 2006. (See R. Ex. 2, p. 3). Finally, and definitive as to the severity of the Company's financial crisis, is the undisputed fact that the Company was placed in receivership on September 20, 2006. (See R. Ex. 6).

Unlike those cases in which the Board finds that the "economic exigency" exception is not met because the financial difficulties at issue are relatively commonplace, here Leiferman

Enterprises was truly teetering on the brink of financial ruin. In fact, as the establishment of the receivership demonstrates, at the time the contract terms were imposed on August 13, 2006, the Company had already slipped over that edge – though it was not yet aware of it. Rather, the Company believed it needed to quickly install the economic reforms contained in its bargaining proposals in order to avoid that financial ruin. In this regard it is significant that the Company attempted to begin contract negotiations earlier than the first session on June 16, 2006, in order to deal with the economic issues sooner, but were unable to schedule earlier bargaining dates with the Union. Union witness Gavanda admitted that the Company attempted to schedule the bargaining to begin earlier. (Tr. 80). The result was a delay in the bargaining as Company sales and finances continued to deteriorate. In fact, sales figures, already well behind the 2005 levels, plummeted during the period of May through July. (See R. Ex. 3). Though the May figures had been poor (25.5% below 2005 levels), by July, they were much worse (40.7% below 2005).

Thus, the Company was, in fact, faced with exactly the sort of "precipitate worsening" of its finances that justifies unilateral action, because, by the date of the final bargaining session, on July 24, 2006, the Company determined that if it did not obtain immediate relief from the economic burdens of the collective bargaining agreement, economic failure was imminent. In hindsight, the Company was wrong in this analysis only in that it had already crossed the point of no return. As evidenced by the appointment of a receiver to liquidate its assets, the implementation of the economic provisions of the Company's final offer came too late to save the business; the Company had actually bargained with the Union for too long.

The Company's situation thus is the epitome of a "precipitate worsening" of finances which justifies unilateral action even absent a bargaining impasse. In short, the Company implemented the economic terms of its final offer as a last-ditch effort to avoid economic ruin.

Its only mistake was in waiting too long to do so. The ALJ's Decision, by finding the Company violated Section 8(a)(5) of the Act when it implemented the terms of its final offer, effectively requires an employer to negotiate itself into bankruptcy in order to meet its bargaining obligation. The ALJ's Decision should also be reversed on this basis.

## CONCLUSION

For the reasons discussed herein, the Receiver, Lighthouse Management, Inc., for itself, and on behalf of the Respondent in its possession, requests that the Administrative Law Judge's Decision be reversed.

Dated: August 17, 2007


SEATON, BECK & PETERS, P.A.

By ______________________

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**ATTORNEYS FOR LIGHTHOUSE MANAGEMENT GROUP, INC., RECEIVER of LEIFERMAN ENTERPRISES, LLC, AND PARTY IN INTEREST**

**AFFIDAVIT OF SERVICE**

STATE OF MINNESOTA )
) ss.
COUNTY OF HENNEPIN )

Susan L. Nesheim of the City of Edina, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 17th day of August, 2007, she served by mail, a copy of:

1. The Exceptions of Lighthouse Management Group, Inc., Party-In-Interest, To the Administrative Law Judge's Decision in Case No. 18-CA-18134; and

2. Brief in Support of same.

directed to the following persons at their last known address:

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Susan L. Nesheim

Subscribed and Sworn to before me
this 17th day of August, 2007.

Linda L. Finn
Notary Public

LINDA L. FINN
Notary Public
Minnesota
My Commission Expires January 31, 2010