EHXIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

----------x

GALAXY TOWERS CONDOMINIUM ASSOCIATION

Respondent

and

Case 22-CA-030064

LOCAL 124, RECYCLING, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES

Charging Party

----------x

DECLARATION OF STEVEN H. KERN

1. I am associated with Barnes, Iaccarino & Shepherd LLP, and as such am counsel to charging party Local 124, Recycling, Airport, Industrial & Service Employees ("Local 124" or "the Union"). I make this declaration in support of General Counsel's Reply and Motion to Strike with respect to the Motion for Judicial Notice and Judicial Estoppel of respondent Galaxy Towers Condominium Association ("Galaxy"; the "Galaxy Motion"). I am fully familiar with the facts and circumstances set forth herein.

2. The Galaxy Motion contends that Local 124 (and of course the GC) should be estopped from maintaining before the Board the position that the Memorandum of Agreement executed by the parties in 2007 ("2007 MOA") left tentative agreements regarding non-economic terms ("T/A's"), including particularly the subcontracting clause, dependent on further bargaining and future agreement on a complete CBA. [Galaxy Motion, page 1, point 1]

3. The Galaxy Motion posits as the reason for such estoppel that Local 124 (not the GC) took a supposedly inconsistent position in a case concerning Galaxy's unsuccessful

attempt to vacate an arbitration award against it in favor of Local 124: *Galaxy Towers Condominium Association v. Local 124 I.U.J.A.T.*, U.S. District Court, District of New Jersey, Civil Action No. 2:11-cv-04726 ("Arbitration Litigation"). Galaxy alleges that the Union "argued" that the parties were bound by certain grievance and arbitration language providing for "arbitration before Elliott Schriftman, Eugene Coughlin or Robert Herzog on a rotating basis." [Galaxy Motion at 2-3, point 4] The Galaxy Motion asserts that the Union "argued" and Judge Martini "found – that a non-economic term, the arbitration language was a part of the bargaining parties' CBA." [*Id.* at point 6]

4. The Union did not argue this point, and the district court did not make any finding *per se* regarding this point. Please refer to the "Certification of Stephen Ploscowe, Esq. In Support Of Order To Show Cause" included in the Galaxy's initiatory papers in state court seeking to vacate the arbitration award and the first exhibit referenced therein, the Arbitration Article; true copies annexed hereto as Exhibit 1. The action was removed by the Union to federal court. Note, Ploscowe Certification ¶¶ 2, 3. Please compare to the Affidavit of James Bernardone filed by Local 124 in the district court in opposition to vacatur of the arbitration award. [RX 29 ¶¶ 2 and 6]. By the Ploscowe Certification, Galaxy asserts in perfunctory fashion that the parties have agreed to arbitrate disputes before the three named arbitrators on a rotating basis, etc., etc. Ploscowe made no reference to the MOA. Ploscowe refers to his March 13, 2007 proposal as a "draft", and that proposal was never signed or implemented. Galaxy's proposal on management rights with the right to subcontract was never implemented as part of a full and final contract (which was never reached). By the <u>subsequently</u> written and filed Bernardone Affidavit, the Union made the same assertion as Ploscowe regarding the grievance/arbitration language in the same

perfunctory fashion.[1] Thus, though the district court cited to the Bernardone Affidavit, it could just as well have cited to the Ploscowe Certification.

5. The grievance/arbitration language was specifically implemented on an interim basis by an Interim Agreement that the parties signed at the start of negotiations on August 8, 2006. [GCX 4][2] However, the particular arbitrators were initially left blank. [GCX 3, 4]. Those arbitrators were subsequently agreed upon and used as a matter of practice by the parties. The identity of the arbitrators was not in dispute and never has been. [GCX 4, 3] The MOA did not implement the grievance/arbitration language or any part thereof. The MOA did not implement any other provision that was not specifically identified therein (i.e., wages, medical benefits, and paid-time off). This has consistently been the Union's position; the Union has never made any argument or assertion to the contrary.

6. A fair reading of the district court's opinion (true copy annexed as Exhibit 3) and of the papers which resulted in it reflect that the issue which was contested vis-à-vis the collective bargaining agreement was whether the arbitration agreement had been <u>amended</u> to <u>exclude</u> Arbitrator Coughlin. As to that issue, the district court decided against Galaxy: "...there was no meeting of the minds on the issue of removing Mr. Coughlin: Galaxy raised the idea of removing Mr. Coughlin, the Union side-stepped the issue, and Galaxy failed to raise the issue again in later negotiations." [District Court Opinion, Exhibit 3 at 3]

7. Regarding the timing of the instant Galaxy Motion, there is no earthly reason why Galaxy was not fully aware of the "position" taken by the Union in the Arbitration

[1] The perfunctory fashion of the assertions is due to the fact that the arbitration provisions have never been disputed. I myself represented the Union in at least two arbitrations before Arbitrator Herzog and two before Arbitrator Shriftman. The practice of the parties in these matters, as well as others filed for arbitration but settled without a hearing that I personally handled, amply reflects the parties' agreement.

[2] References to General Counsel and Respondent exhibits in the underlying unfair labor practice trial are cited herein as [GCX] and [RX] respectively.

Litigation long before trial of this case to the ALJ in January, March and April of 2012. The Arbitration Litigation was fully briefed and submitted to the district court in September 2011. See, docket report of Arbitration Litigation; true copy annexed as Exhibit 4.[3] Galaxy did not need to await the District Court Opinion to know what issues the parties had themselves argued, and what arguments they had made.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on January 4, 2013.

Steven H. Kern

[3] Galaxy applied to the court for leave to file further material in May 2012; however, the Court denied the application on June 12, 2012.

EXHIBIT 1

DIKTAS SCHANDLER GILLEN, PC
596 Anderson Avenue, Suite 301
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Cliffside Park, New Jersey 07010
(201) 943-8020
Attorneys for Plaintiff

FILED

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:
HUDSON COUNTY
Docket No.

GALAXY TOWERS CONDOMINIUM ASSOCIATION,

Plaintiff,

v.

LOCAL 124, I.U.J.A.T.,

Defendant.

CIVIL ACTION

CERTIFICATION OF STEPHEN PLOSCOWE, ESQ. IN SUPPORT OF ORDER TO SHOW CAUSE

STEPHEN PLOSCOWE, ESQ., being of full age, upon his oath deposes and says:

1. I am an attorney-at-law of the State of New Jersey and a member of the law firm Fox Rothschild, LLP which served as labor counsel to the Galaxy Towers Condominium Association during the period referenced herein.

2. After numerous bargaining sessions, on March 13, 2007 I forwarded a draft of the Collective Bargaining Agreement between the Galaxy Towers Condominium Association and Local 124 to the Union's representative Jamie Bernadone. Article 15 of that document set forth the parties' grievance procedure and arbitration agreement. Section 4 of the Article listed Elliot Shriftman, Eugene Coughlin and Robert Herzog as arbitrators to be assigned on a rotating basis. Annexed hereto as Exhibit A is the cover page and Article 15 of that Agreement.

3. Shortly thereafter, the parties invoked the contractual arbitration procedures in connection with the discharge of an employee. Eugene Coughlin was assigned and the arbitration

hearing was conducted on April 4, 2007. I served as counsel for the GTCA at that hearing.

4. After the morning session, the parties recessed for lunch. Former GTCA General Manager Susan Fitzpatrick, who was attending the proceeding, observed Eugene Coughlin having lunch with the Union representative and the grievant. As a result, when the hearing reconvened I immediately moved the arbitrator to disqualify himself for lack of impartiality. My application was granted.

5. On April 10, 2007, I corresponded with Mr. Bernadone to inform him that GTCA sought to amend Article 15 of the Collective Bargaining Agreement to delete Mr. Coughlin's name due to the events of April 4, 2007. My letter is annexed hereto as Exhibit B.

6. I then suggested that J.J. Pierson be substituted as arbitrator and thereafter, on May 8, 2007, I transmitted an email to Stephen Goldblatt, Esq., who was acting as the Union's attorney, in which I mention that GTCA sought to designate the contract arbitrators as Robert Herzog, Elliott Shriftman and J.J. Pierson. A copy of my email is annexed hereto as Exhibit C.

7. On May 17, 2007, I spoke to Mr. Goldblatt by telephone regarding the terms of the grievance procedure which remained under discussion. Although he requested a change to the proposed terms for the time to submit grievances, he expressed no objection to the arbitrators identified by my May 8, 2007 letter thereby resolving that issue. Later correspondence, annexed hereto as Exhibit D, was therefore limited to the issues that remained under negotiation.

8. Shortly thereafter, I was contacted by Wendell Shepherd, Esq. of the firm Barnes, Iaccarino, Virginia, Ambinder and Shepherd informing me that Ms. Shepherd was assuming representation of the Union. On July 3, 2007, I forwarded to Ms. Shepherd a chronology of

the contract negotiations with supporting documentation that included the April 10, May 8 and May 24, 2007 correspondence annexed hereto. A copy of my July 3, 2007 letter is annexed hereto as Exhibit E.

9. Consistent with the parties' agreement, the arbitration from which Mr. Coughlin was disqualified was later conducted by J.J. Pierson.

10. On or about June 15, 2011, in connection with another matter, I provided to the office of GTCA's current General Counsel certain documents related to GTCA's collective bargaining agreement and negotiations, including the documents annexed hereto as Exhibits B and E. Thereafter, in response to counsel's further inquiry, on or about June 27, 2011, I provided counsel with the documents annexed hereto as Exhibits C and D.

I hereby certify that the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Stephen A. Ploscowe

STEPHEN A. PLOSCOWE, ESQ.

DATED: July 18, 2011

DIKTAS SCHANDLER GILLEN, PC
596 Anderson Avenue, Suite 301
P.O. Box 2199
Cliffside Park, New Jersey 07010
(201) 943-8020
Attorneys for Plaintiff

GALAXY TOWERS CONDOMINIUM ASSOCIATION, Plaintiff, v. LOCAL 124, I.U.J.A.T., Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: HUDSON COUNTY Docket No. CIVIL ACTION **CERTIFICATION OF FACSIMILE SIGNATURE**

CHRISTINE GILLEN, ESQ., being of full age, upon her oath deposes and says:

1. I am an attorney-at-law of the State of New Jersey and a member of the law firm of Diktas Schandler Gillen, PC, attorneys for plaintiff in this matter. I hereby certify, pursuant to R.1:4-4(c), that the affiant, Stephen Ploscowe, Esq., acknowledged to me the genuineness of his signature on the annexed Verification of Complaint and I further certify that the document containing the original signature, will be filed upon request.

2. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

CHRISTINE GILLEN, ESQ.

DATED: July 18, 2011

Exhibit A

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

GALAXY TOWERS CONDOMINIUM ASSOCIATION

AND

LOCAL 124 I.U.J.A.T.

EFFECTIVE

JUNE 1, 2006 THROUGH MAY 31, 2009

* * * *

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number of jobs, change materials or equipment, subcontract any work, change any method of operations, shall be vested solely and exclusively in the Employer. Subject to the provisions of this Agreement, the Employer shall have the exclusive right to schedule and assign work to be performed and the right to hire or rehire employees, promote, recall employees who are laid off, demote, suspend, discipline or discharge for just cause, transfer or lay off employees because of lack of work or other legitimate reasons, it being understood, however, that the Employer shall not discipline or discharge an employee except for proper cause or otherwise improperly discriminate against an employee.

Section 2b. The Employer shall have the right to establish, maintain, amend and enforce reasonable rules and regulations to assure orderly operation of the Employer's business. The Union has the right to grieve the reasonableness of any rule or regulation hereunder. The Employer maintains Work Rules, and an Employee Handbook, copies of each are provided to each employee upon commencement of employment and thereafter, one per year, at the beginning of each calendar year.

ARTICLE 14 - DISCHARGES

No regular full-time basis employee shall be discharged, except for cause. The Union has the right to challenge the discharge and, if so, may proceed as grievance, in accordance with the provisions of this Agreement, including arbitration as hereinafter set forth.

ARTICLE 15 - GRIEVANCE PROCEDURE AND ARBITRATION

From time to time there may be instances where a difference between the Employer and an employee may arise. The grievance procedure is to be followed when these differences arise.

The proper and permitted channels of communication are between Management and the Union.

Section 1. Should any dispute arise between the Employer and an employee, or the Employer and the Union concerning the application or interpretation of any provision of this Agreement, the aggrieved employee and his/her supervisor shall attempt to adjust the grievance in two (2) working days after the occurrence of the event being grieved, or the grievance shall be forever barred.

Section 2. If the grievance is not settled as a result of the forgoing, the aggrieved employee will be required to file with the Union a grievance concerning the dispute, within five (5) working days after it occurs.

Section 3. If the Union decides to pursue the matter, the Union shall, within five (5) working days from the receipt of the grievance, file the grievance with the General Manager of the Employer. The parties shall attempt to arrive at a mutually satisfactory resolution of the grievance.

Section 4. If the grievance is not settled as a result of the foregoing, the Union or the Employer may request that the matter be submitted to arbitration before Elliott Schriftman, Eugene Coughlin or Robert Herzog on a rotating basis. Any request for arbitration must be made within ten (10) working days from the final decisions of the General Manager. The decision of the arbitrator shall be final and binding on all parties. No strike or lockout shall be permitted while a grievance is being negotiated for settlement or until the arbitration proceedings have been concluded. The cost of such arbitration shall be borne equally between the parties.

Section 5. It is the intention of the parties that all unsettled grievances, disputes, arising out of this Agreement are to be submitted to final and binding arbitration as provided herein.

Section 6. All cases involving discharge shall be first taken up as a grievance, after the

discharge, between the Union and the Employer involved, and if no settlement is reached within five (5) days of the discharge, then same shall, at the option of either party, be submitted for decision to arbitration under the procedure outlined in paragraph 4 above. The discharged employee shall have the right to be present at the proceedings.

Section 7. The decision of the arbitrator shall in no way alter, amend or depart from the terms of this agreement.

ARTICLE 16 – MILITARY SERVICE

Any employee entering military service in any branch of the United States Government must be rehired by the Employer and shall resume seniority when honorably discharged from such service, provided such employee requests his job back within the time allowed under the applicable laws of the United States.

ARTICLE 17 – WELFARE PLAN

Section 1a. Effective February 1, 2007, for each employee who successfully completes the probationary period of 90 days, the Employer agrees to contribute to Local 124 Welfare Plan the sum of $550.00 monthly for each employee in the bargaining unit without dependents; $625.00 per month for each employee in the bargaining unit with one dependent; and $700.00 monthly for each employee in the bargaining unit with more than one dependent. Such payments are to be made for any employee covered by the terms of this Agreement, and who has been employed any part of this month who have completed the probationary period. Such Fund is to be administered in accordance with the current Trust Agreement by an equal number of Employer and Employee Trustees. The Employer agrees that the Trustees have the power to

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GALAXY TOWERS CONDOMINIUM ASSOCIATION, **Plaintiff,** **v.** **LOCAL 124 I.U.J.A.T.,** **Defendant.**	Civ. No. 2:11-cv-04726 (WJM) **OPINION**

WILLIAM J. MARTINI, U.S.D.J.:

Plaintiff Galaxy Towers Condominium Association ("Galaxy") filed this action against Defendant Local 124 I.U.J.A.T.[1] (the "Union") seeking *vacatur* of an arbitration award; the Union requests that the Court confirm the arbitration award. There was no oral argument. Fed. R. Civ. P. 78(b). For the reasons set forth below, Galaxy's application to vacate the arbitration award is **DENIED**, and the award is **CONFIRMED**.

I. BACKGROUND

Galaxy is a condominium association operating a luxury condominium in Guttenberg, New Jersey. The Union acts as the representative to all full-time and part-time Galaxy employees. Galaxy and the Union were parties to a collective bargaining agreement (the "CBA"). Article 15, Section 4 of the CBA provided that, if a grievance arose between Galaxy and an employee, "the Union or the Employer may request that the matter be submitted to arbitration before Elliott Schriftman, Eugene Coughlin or Robert Herzog on a rotating basis." Bernadone Aff. Ex. A, ECF No. 5-1.

Eugene Coughlin was assigned to be the arbitrator at a hearing conducted on April 4, 2007 between the Union and Galaxy in connection with the discharge of an employee. Galaxy's attorney at the hearing, Stephen Ploscowe, observed Mr. Coughlin eating lunch with the Union's Secretary, James Bernadone, and requested that Mr. Coughlin be replaced as the arbitrator for that matter. In response, Mr. Coughlin voluntarily recused himself from that arbitration.

[1] Defendant has since changed its name to Local 124 R.A.I.S.E.

On April 10, 2007, Galaxy's attorney Mr. Ploscowe sent Mr. Bernadone a letter stating that Galaxy wanted to amend Article 15 of the CBA to delete Mr. Coughlin's name. On May 7, 2007, Stephen Goldblatt, the Union's attorney, sent an email to Mr. Ploscowe, in which Mr. Goldblatt mentioned that he would like to address certain issues for negotiation with regard to the CBA. Mr. Goldblatt's email did not address the replacement of Mr. Coughlin as an arbitrator. On May 8, 2008, Mr. Ploscowe responded to Mr. Goldblatt's email, stating, among other things, that Galaxy sought to designate J.J. Pierson as an arbitrator instead of Mr. Coughlin. On May 24, 2007, Mr. Goldblatt sent an email responding to Mr. Ploscowe, but again did not address the replacement of Mr. Coughlin.

On December 4, 2010, an incident occurred that caused Galaxy to terminate three employees for just cause. All three employees were members of the Union. The Union sought to arbitrate the matter of just cause and contacted Mr. Coughlin to request that he serve as arbitrator. Galaxy did not oppose this request. Arbitration hearings were conducted on February 22, 2011 and on April 4, 2011. Thereafter, Mr. Coughlin issued an opinion and award directing the reinstatement of the employees subject to a two-week suspension. Galaxy then filed the current action seeking to vacate the arbitration award.

Galaxy asserts that, due to the fact that there was an interim change in counsel for Galaxy, Galaxy's new lawyers learned of Mr. Coughlin's recusal from the 2007 arbitration only after Mr. Coughlin had issued his opinion in the current arbitration. Galaxy argues that the Union's failure to mention the 2007 recusal to Galaxy's new lawyers was fraudulent, and the award should therefore be vacated. Galaxy also argues that Mr. Coughlin rendered an award that lacked support in the record.

II. LEGAL STANDARD

A petitioner bears the burden of showing that an arbitration award should be vacated. *Handley v. Chase Bank*, 387 Fed. Appx. 166, 168 (3d Cir. 2010). Arbitration awards are entitled to extreme deference and may only be overturned in "exceedingly narrow circumstances." *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003) (internal quotations omitted). Pursuant to Section 10(a) of the Federal Arbitration Act ("FAA"), a court may only vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrator;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a); *Hall Street Associates, LLC v. Matel*, 552 U.S. 576, 584 (2008) ("*Hall Street*") (holding that the FAA's enumerated grounds for *vacatur* are exclusive).

III. DISCUSSION

In this case, Galaxy argues that the arbitration award should be vacated for two reasons: (1) the award was procured by corruption, fraud, or undue means; and (2) the arbitrator so imperfectly executed his powers that a mutual, final, and definite award cannot be said to have been made. The Court does not find either argument persuasive.

First, the award was not procured by corruption, fraud, or undue means. The correspondence between Galaxy and the Union shows that there was no meeting of the minds on the issue of removing Mr. Coughlin: Galaxy raised the idea of removing Mr. Coughlin, the Union side-stepped the issue, and Galaxy failed to raise the issue again in later negotiations. At no time did the Union's representatives, Mr. Bernadone and Mr. Goldblatt, agree to remove Mr. Coughlin as a designated arbitrator. Moreover, the Union can hardly be blamed for the failure of Galaxy's former counsel to properly transition the representation to Galaxy's current counsel. Neither the failure of the parties to come to an agreement nor Galaxy's lack of knowledge of past events constitutes corruption, fraud, or undue means. Thus, the award cannot be vacated on those grounds.

Second, the arbitrator did not execute his powers so imperfectly that a mutual, final, and definite award upon the subject matter submitted was not made. Galaxy requested that the Court review all the evidence from the arbitration, including the transcripts of the proceedings and all the exhibits, to find that there was a "deficient performance" by the arbitrator. Reply Br. at 20. The Court declines to do so, as conducting a searching review of the record before the arbitrator would wildly exceed the scope of the Court's reviewing authority. *See Stroehmann Bakeries, Inc. v. Local 776, Int'l Broth. of Teamsters*, 969 F.2d 1436, 1441 (3d Cir. 1992) ("Full-blown judicial review of labor arbitrators' decisions" would "render the arbitrator's decision practically meaningless"). The Court has reviewed the arbitrator's opinion and finds that the arbitrator's just cause determination was grounded in the record evidence and the CBA. *See id.* ("[A]s long as the arbitrator's award is drawn from the essence of the collective bargaining agreement, a court may not vacate it even if the court finds the basis for it to be ambiguous or disagrees with its conclusions under the law"); Arbitration Opinion, Bernadone Aff. Ex. B at 11-12 (discussing witness credibility, photographic evidence, and the "just cause" standard). The award should therefore be confirmed.

IV. CONCLUSION

For the reasons stated above, the motion to vacate the arbitration award is **DENIED**, and the arbitration award is **CONFIRMED**. An appropriate order follows.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Date: November 28, 2012

EXHIBIT 3

CLOSED

U.S. District Court
District of New Jersey [LIVE] (Newark)
CIVIL DOCKET FOR CASE #: 2:11−cv−04726−WJM−MF

GALAXY TOWERS CONDOMINIUM ASSOCIATION v. LOCAl 124 I.U.J.A.T.
Assigned to: Judge William J. Martini
Referred to: Magistrate Judge Mark Falk
Case in other court: SUPERIOR COURT OF HUDSON COUNTY, C−000102−11
Cause: 29:185 Labor/Mgt. Relations (Contracts)

Date Filed: 08/16/2011
Date Terminated: 11/28/2012
Jury Demand: None
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

Plaintiff

GALAXY TOWERS CONDOMINIUM ASSOCIATION represented by **CHRISTINE GILLEN**
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ATTORNEY TO BE NOTICED

V.

Defendant

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Counter Claimant

LOCAl 124 I.U.J.A.T. represented by **SAMER ELIAS KHALAF**
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

GALAXY TOWERS CONDOMINIUM ASSOCIATION represented by **CHRISTINE GILLEN**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/16/2011	1	NOTICE OF REMOVAL by LOCAl 124 I.U.J.A.T. from SUPERIOR COURT OF HUDSON COUNTY, case number C−000102−11. (Filing fee $ 350 RECEIPT # 3883747) (Attachments: # 1 Verification of complt in support of OSC, # 2 Brief, # 3 Certification)(dr,) No state Court complaint submitted Modified on 8/25/2011 (mn). (Entered: 08/17/2011)
08/17/2011	2	Letter to Attorney, Russell Jermyn, Counsel to Galaxy Towers Condominium Association re: Not a Member of the Federal Bar of New Jersey re 1 Notice of Removal. (dr,)Disregard Entry. Modified on 8/22/2011 (mn). (Entered:

		08/17/2011)
08/18/2011	3	ORDER adjusting the deadlines set forth in the July 18, 2011 Order; Defendants to submit opposing papers by August 29, 2011; reply, if any, shall be submitted by September 6, 2011, etc.. Signed by Judge William J. Martini on 8/18/11. (gh,) (Entered: 08/18/2011)
08/23/2011	4	*Defendant's* ANSWER to Complaint *AND*, COUNTERCLAIM against GALAXY TOWERS CONDOMINIUM ASSOCIATION by LOCAl 124 I.U.J.A.T..(KHALAF, SAMER) (Entered: 08/23/2011)
08/26/2011		CLERK'S QUALITY CONTROL MESSAGE − Please be advised, pursuant to Fed. R. Civ. Pro. 7.1, a disclosure statement is required to be filed by a nongovernmental corporate party. Please refer to the Court's website at www.njd.uscourts.gov for a form and filing instructions. (mn,) (Entered: 08/26/2011)
08/26/2011	5	RESPONSE TO ORDER TO SHOW CAUSE by LOCAl 124 I.U.J.A.T.. (Attachments: #1 Affidavit)(KHALAF, SAMER) (Entered: 08/26/2011)
08/29/2011	6	NOTICE of Appearance by CHRISTINE GILLEN on behalf of GALAXY TOWERS CONDOMINIUM ASSOCIATION (GILLEN, CHRISTINE) (Entered: 08/29/2011)
08/29/2011	7	Corporate Disclosure Statement by GALAXY TOWERS CONDOMINIUM ASSOCIATION. (GILLEN, CHRISTINE) (Entered: 08/29/2011)
08/31/2011	8	Corporate Disclosure Statement by LOCAl 124 I.U.J.A.T.. (KHALAF, SAMER) (Entered: 08/31/2011)
09/06/2011	9	BRIEF *in reply to opposition to Order to Show Cause* filed by GALAXY TOWERS CONDOMINIUM ASSOCIATION. (Attachments: #1 Certification of Michael L. Kingman supporting Order to Show Cause, #2 Exhibit Exh A to Certification, #3 Exhibit Exh B to Certification, #4 Exhibit Exh C to Certification, #5 Exhibit Exh D to Certification, #6 Exhibit Exh E to Certification, #7 Statement Acknowledgment of Service of Order to Show Cause, #8 Certificate of Service, #9 Text of Proposed Order)(GILLEN, CHRISTINE) (Entered: 09/06/2011)
09/06/2011	10	Letter from C Gillen, Esq. to Hon. William J.Martini, U.S.D.J. re: plaintiff's reply papers and initial state court filings re 9 Brief,,. (GILLEN, CHRISTINE) (Entered: 09/06/2011)
09/06/2011	11	*Plaintiff's* ANSWER to Counterclaim *of defendant* by GALAXY TOWERS CONDOMINIUM ASSOCIATION.(GILLEN, CHRISTINE) (Entered: 09/06/2011)
09/08/2011	12	Letter from C Gillen, Esq. to Hon. William J. Martini, U.S.D.J. re delivery of video evidence re 9 Brief,,. (GILLEN, CHRISTINE) (Entered: 09/08/2011)
09/23/2011	13	Letter from Local 124 I.U.J.A.T.. (KHALAF, SAMER) (Entered: 09/23/2011)
05/11/2012	14	Letter from Ptf's attorney to Judge William Martini. (GILLEN, CHRISTINE) (Entered: 05/11/2012)
05/16/2012	15	Letter from plaintiff's attorney to Judge William Martini re: proposed scheduling order. (Attachments: #1 Text of Proposed Order)(GILLEN, CHRISTINE) (Entered: 05/16/2012)
05/16/2012	16	Letter from Local 124, I.U.J.A.T. re 14 Letter. (KHALAF, SAMER) (Entered: 05/16/2012)
06/12/2012	17	ORDER denying Plaintiff's request for further briefing. Signed by Judge William J. Martini on 6/12/12. (gh,) (Entered: 06/13/2012)
11/28/2012	18	OPINION. Signed by Judge William J. Martini on 11/28/12. (gh,) (Entered: 11/28/2012)

11/28/2012	19	ORDER denying Plaintiff's application to vacte the arbitration award; granting Defendant's request to confirm; the award issued by Eugene Coughlin is confirmed. Signed by Judge William J. Martini on 11/28/12. (gh,) (Entered: 11/28/2012)
11/28/2012		***Civil Case Terminated. (gh,) (Entered: 11/28/2012)

EHXIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

GALAXY TOWERS CONDOMINIUM ASSOCIATION

Respondent

and **Case 22-CA-030064**

LOCAL 124, RECYCLING, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Benjamin W. Green, Counsel for the General Counsel, submits this post-hearing brief to the Honorable Steven Davis, Administrative Law Judge ("ALJ"), in the above-captioned case.[1] Local 124, Recycling, Airport, Industrial & Service Employees Union (the "Union") filed the charge against Galaxy Towers Condominium Association ("Respondent") on July 6, 2011. [GCX 1(a)] On October 31, 2011, the Regional Director for Region 22 issued a Complaint and Notice of Hearing (the "Complaint"). [GCX 1(c)] The case was tried at the Regional office of Region 22 in Newark, New Jersey on January 12, 2012 and at the office of the Division of Judges in New York, New York on March 26, 27, 29, 30, April 4, 5, 10, 19, 20, 24 and 27, 2012.

II. SUMMARY OF THE CASE

The Complaint alleges that Respondent engaged in three interrelated violations of Section 8(a)(1) and (5) the National Labor Relations Act (the "Act"). Respondent unilaterally laid off 67 (of 77) bargaining unit employees and subcontracted their work. [GCX 1(c) ¶¶ 14-17] Respondent failed to furnish relevant information that was requested by the Union. [GCX 1(c) ¶¶ 10-12, 16-17] Respondent suspended contract negotiations for employees whose work was not being outsourced. [GCX 1(c) ¶¶13, 17].

The subcontracting allegation has a long factual background, but involves well settled legal principles that are applicable to (for the most part) uncontested events. Respondent appears to rely on the following defenses which are easily dismissed: (1)

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[1] In this brief, references to the official transcript will be designated as [Tr.]. References to the General Counsel's exhibits and the Respondent's exhibits will be referred to as [GCX], [RX], respectively.

The January 2, 2007 Memorandum of Agreement ("MOA") included a waiver of the Union's right to bargain over subcontracting decisions; (2) the Union somehow adopted Respondent's March 13, 2007 unsigned proposal which contained the same waiver; (3) Respondent implemented its subcontracting decision upon impasse in negotiations over that decision; (4) Respondent implemented a bargaining waiver on subcontracting in a final offer upon contractual impasse. As addressed herein, each of these defenses is fatally flawed.

III. SUMMARY OF THE ARGUMENT ON SUBCTRATING AND LAYOFF

The parties' current collective bargaining agreement, a partial contract consisting primarily of the MOA, does not contain a waiver of the Union's right to bargain over subcontracting decisions. Bargaining waivers are disfavored and must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The MOA does not contain a management rights provision or any other reference to subcontracting. Rather, the MOA contains a reference to tentative agreements that were not to be implemented until the parties reached, ratified, and signed a full and final contract. In fact, both parties sought to renegotiate such tentative agreements in 2007 and 2008. In September 2008, the parties signed an NLRB settlement agreement which expressly and conclusively established that any previous agreement on management's right to subcontract was a tentative agreement that the MOA did not implement two years earlier.

After the parties abandoned negotiations for a complete agreement, and began negotiating a successor to the MOA in 2009, the Union did not adopt an unsigned offer that Respondent had proposed on March 13, 2007. In asserting the contrary, Respondent

attempts to mischaracterize the position that the Union took in a representation hearing and lawsuit to vacate an arbitration award regarding the documents that constitute the parties' contract. However, unlike Respondent, the Union has always taken a clear and consistent position on this issue and never adopted Respondent's unsigned proposal.

In 2011, Respondent did not bargain to a good faith impasse over its decision to subcontract unit work. Among other deficiencies of this defense, Respondent precluded impasse by failing to provide backup materials that the Union requested to substantiate Respondent's economic claims, evaluate Respondent's proposal, and prepare a response. *See E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557-58 (2006) (no impasse where employer claimed that subcontracting would save $1 million, but refused to provide vendor bids among other information to verify that claim). In fact, Respondent did not attempt to bargain over the subcontracting decision at all. Rather, Respondent's inexperienced corporate counsel believed he only had an obligation to bargain over the effects of subcontracting and repeatedly pressed the Union to bypass negotiations over the decision.

In 2011, Respondent also failed to bargain to contractual impasse before attempting to implement an offer that included a provision on management rights with the right to subcontract. Respondent precluded contractual impasse by including in this offer permissive demands that the Union's welfare fund withdraw a lawsuit to collect contributions and that the Union withdraw an arbitration. See *NLRB v. Borg-Warner-Corp.*, 356 U.S. 342, 349-350 (1958); *WWOR-TV, Inc.*, 330 NLRB 1265, 1266 (2000); *Caribe Staple, Inc.*, 313 NLRB 877, 890 (1994); *International Metal Specialties, Inc.*,

312 NLRB 1164, 1164-65 (1993); *Plattdeutsche Park Restaurant*, 296 NLRB 133, 137 (1989). Further, Respondent did not reach overall contractual impasse on the collective bargaining agreement as whole since it unlawfully suspended negotiations for a final contract that would cover employees who work was not to be outsourced. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81-82 (1995); *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 n.1, 802 (1992); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991; *Trumball Memorial Hospital*, 288 NLRB 1429, 1448-49 (1992). Additionally, traditional factors of the Board's impasse analysis reflect the absence of a mutual understanding that the parties were deadlocked.

Respondent would not have been entitled to implement its proposal on management rights even if the parties had bargained to contractual impasse. Although an employer is normally entitled to implement its last contractual offer upon impasse, that rule does not apply to bargaining waivers. Statutory bargaining rights belong to the Union and the Union retains exclusive discretion to waive such a right, even upon impasse. *Colorado-Ute Electric Association, Inc.*, 295 NLRB 607, 609 (1989); *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1390-91 (1996); *Rotorex Co., Inc.* 1998 WL 34058110 (N.L.R.B.G.C., April 9, 1998).

IV. STATEMENT OF THE FACTS

A. Early Negotiations in the Summer of 2006

Respondent is the condominium association responsible for the management of a three-tower complex in Guttenberg, New Jersey, which consists of 1076 residential apartment units and 32 commercial units. [Tr. 1375] Respondent retains Cooper Square

Realty to manage its day-to-day operations. Respondent has maintained a collective bargaining relationship with the Union since June 5, 2006. [Tr. 33] The Union replaced Local 734, L.I.U. of N.A., AFL-CIO ("Local 734") [GCX 2] as the representative of a service employee bargaining unit, which included concierge, housekeeping, garage, and maintenance employees (the "Unit").[2] [Tr. 15, 91] [GCX 1(c) ¶ 6] [GCX 1(g) ¶6]

On about July 6, 2006, Respondent and the Union began negotiations for an initial contract. [Tr. 33] The Union bargaining committee consisted of former Union attorney Christopher G. Sabatella, labor consultant Louis DeAngelis, Secretary Treasurer James Bernadone, former President Kevin Watts, and a complement of Unit employees. Respondent was represented by former Respondent attorney Stephen A. Ploscowe and former General Manager Susan Fitzpatrick. [Tr. 33-35] [RX 7]

At the start of negotiations, the parties confirmed that the terms of the prior contract between Respondent and Local 734 would remain in effect until they reached a new agreement to replace it.[3] [Tr. 215, 272, 1073] [RX 32] The parties did not agree that individual provisions would be implemented as agreements were reached. [Tr. 1102-4]

The Union made a proposal that was similar but not identical to Respondent's contract with Local 734. [Tr. 35] [GCX 3] The Union's proposal on management rights (Article 12) was the same as the corresponding provision in the Local 734 agreement.

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[2] Maintenance employees are also referred to as "in-unit services." [Tr. 367]

[3] The Act requires that Respondent maintain existing wages, hours, and other terms and conditions of employment while the parties negotiate a new contract. *University Moving & Storage Co.*, 350 NLRB 6, 7 (2007).

[GCX 2-3] This management rights provision did not contain a waiver of the Union's right to bargain over decisions to subcontract Unit work. [GCX 3]

On August 8, 2006, the parties signed a handwritten interim agreement (the "2006 Interim Agreement") which adopted certain provisions from the Union's first proposal. [Tr. 36-37] [GCX 4] The 2006 Interim Agreement did not contain a provision on management rights or subcontracting. [GCX 3-4]

Although Respondent's first two proposals were dated August 8, 2006, Ploscowe did not give them the one with revised management rights language at that time. [Tr. 1074-76] [GCX 5 p. 3-5] Rather, Ploscowe likely e-mailed the proposal to Sabatella sometime thereafter.[4] [Tr. 1076] Ploscowe's management rights proposal included a waiver of the Union's right to bargain over subcontracting decisions. [GCX 5] Management rights was not discussed on August 8, 2006 or at any other bargaining session in 2006. [Tr. 41, 1083]

By e-mail on August 16, 2006, Ploscowe sent Sabatella a full-length red-lined contract proposal reflecting the Union's initial proposal as Respondent sought to modify it. [GCX 7] Respondent modified some language but accepted significant language as

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[4] Ploscowe testified that he might have given the proposals to the Union at a bargaining session on August 15, 2006. No bargaining session was held on that date. The Union had no bargaining notes dated August 15, 2006 and neither did Ploscowe. Ploscowe made reference to an undated list of provisions and speculated that those could be his notes from August 15, 2006. [GCX 6 p. 6] However, that page is clearly the type of confirmation list (which Ploscowe prepared throughout negotiations) of items that were discussed on August 8, 2006. [Tr. 1023-24, 1080, 1082] [GCX 62 p. 6] [RX 7] The undated list is grouped with his notes for August 8, 2006 and refers to items that were discussed on August 8 (with many quotes taken directly from the notes). [GCX 62 p. 1-3, 6] The undated list contains no reference to Respondent's proposal [GCX 5 p. 3-5], which was not discussed by the parties until the next bargaining session (following August 8) on August 29, 2006. [GCX 62 p. 11]

drafted by the Union. [Tr. 1082, 1103] [GCX 3, 7] By e-mail dated August 25, 2006, Sabatella accepted certain provisions, including Respondent's provision on management rights. [GCX 38] [R38] Sabatella stated in his proposal that "[t]he Union reserves the right to add to, delete from or otherwise amend and modify these proposals." [GCX 38] DeAngelis and Bernadone were not aware of this correspondence between counsel. [Tr. 38-41, 227, 438-39, 943-44]

Generally, as here, bargaining parties do not implement provisions as they are agreed upon.[5] [Tr. 1102-4] Rather, provisions are agreed to on a tentative basis and only implemented upon the completion of a full and final contract. Tentative agreements may also, as here, be conditioned upon ratification by unit employees. [Tr. 1654, 1656, 1718] In addition, tentative agreements may be withdrawn before they take effect if the party retracting the agreement has a good reason and is not attempting to frustrate negotiations.[6] [Tr. 48, 248, 891, 1104, 1610-11, 1653-55]

As discussed at greater length below, in September 2008, the parties entered into a settlement agreement that resolved an unfair labor practice case. [GCX 19] That settlement expressly described any agreement by the Union to include subcontracting in the management rights clause as a "tentative agreement," which could not be "unlawfully withdrawn." This necessarily means that any agreement on subcontracting could be "lawfully" withdrawn and was still conditioned upon reaching, ratifying, and signing a

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[5] See *Holmes Typoghraphy, Inc.*, 218 NLRB 518, 524 (1975) (despite "desirability of securing firm agreement on specific issues at each stage of negotiations, such fragmentation of the bargaining process is not necessarily conducive to consummating a complete agreement").

[6] See *Holmes Typoghraphy, Inc.*, 218 NLRB at 524-525 (party that reserved right to delete proposals and advanced cogent reasons for doing so did not violate the Act).

full and final contract. [Tr. 60-61, 891, 1652-56] Since the MOA was executed on January 2, 2007, it could not have implemented and put into effect a provision that was still "tentative" in September 2008.

B. Negotiations Through the Fall of 2006

The parties held nine more bargaining sessions from August to November, 2006. In about October, 2006, Sabatella was replaced as lead negotiator by DeAngelis. [Tr. 34, 223, 254] DeAngelis and Bernadone were not aware of additional contract proposals that had been exchanged between counsel. [Tr. 221, 237-38, 301-2, 307, 883-84, 892-99, 943-44] [GCX 7-9] From August through October, 2006, the parties discussed economic and non-economic subjects. However, employees were pressuring the Union to negotiate a wage increase and the Union was anxious to obtain medical coverage for employees through the Union welfare fund. [Tr. 42-43, 48, 242, 901] Accordingly, in about November 2006, with other matters still outstanding and open, the parties turned their attention to an agreement that would implement certain core economic items.[7] [Tr. 42-44, 47-48, 222-23, 235, 246, 300, 433, 901-10, 1090-91] [GCX 62]

In November, 2006, negotiations were limited to core economic subjects of wages, paid time off, a 401(k) plan, and hours of work.[8] [Tr. 42, 47-48, 222-23, 235, 300, 433, 901-8, 1090-91] [GCX 62] [RX 7] At a November 15, 2006 bargaining session, Respondent made a final offer with regard to wages, PTO, and a 401(k) plan. [GCX 62]

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[7] The notes of Ploscowe and DeAngelis for bargaining sessions held on November 15 and 21, 2006 reflect that the parties narrowed the discussion to specific economic items. [GCX 62] [RX 7] Ploscowe admits that other non-economic items were still open. [Tr. 1097]

[8] Respondent's contributions to the Union's welfare fund for medical coverage of employees had already been resolved. [GCX 9 p. 17]

The Union conditioned acceptance upon ratification and Ploscowe confirmed that wage increases would not go into effect until the final offer was ratified. [Tr. 1722] [GCX 62]

C. Respondent's Final Offer on Certain Economic Terms

By e-mail n December 4, 2006, Respondent sent the Union its formal final offer for the immediate implementation of certain economic items. [GCX 10] The final economic offer contained paragraphs addressing wage increases, medical coverage, and paid time off. These paragraphs were not identical to and did not reflect an intent to implement entire articles on wages (Article 11), medical coverage (Article 16), vacation (Article 4), and sick leave/PTO days (Article 17 § 6(a) and (b)).[9] [Tr. 46-47] [GCX 7-10] [RX 28]

The final economic offer contained the following concluding paragraph [GCX 10]:

> Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items.

This paragraph reflects the parties' understanding that provisions (i.e., those tentatively "agreed upon to date" and "to be resolved" in the future) not expressly listed in the final economic offer would be included in final "Contract Language" and implemented at that time. [Tr. 48, 244-45, 247-48, 436-37, 915-6, 1097] This paragraph is an obvious reference to *final* contract language that would be implemented in the *future* since items "to be resolved" could not possibly be implemented *before they exist.*

Ploscowe's e-mail attaching the final economic offer reflected his understanding that the offer would be submitted to unit employees for ratification. [GCX 10] [Tr. 240,

[9] For example, the paragraph on "PTO Days" states, "Final language to be worked out by the parties." [GCX 10]

242] On December 6, 2006, the economic items in the final offer were presented to Unit employees and ratified. [Tr. 243] Respondent did not provide the Union with a list of provisions that had been "agreed upon to date" and the parties did not attempt to identify those provisions for employees prior to ratification. [Tr. 1090, 1638, 1647] This is understandable since such tentative agreements (like future agreements "to be resolved") were not being submitted for ratification and would not be implemented until final "Contract Language" was reached, ratified, and signed. [Tr. 42-43, 223, 300, 307, 436-438, 915-918]

D. The Memorandum of Agreement

After ratification, Respondent notified the Union that the vacation schedule which Respondent had been proposing since August 2006 and included in its final economic offer was an error. [Tr. 45, 1092-93] [GCX 7-9 Art. 4.1(a)] Accordingly, Ploscowe drafted an MOA with a revised vacation schedule. Although the MOA was ultimately executed, the Union was placed in the embarrassing position of going back to the employees with reduced vacation. [Tr. 44-45]

The concluding paragraph in the MOA on "Contract Language" was revised by Ploscowe to read as follows:

> Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items. It is specifically agreed as follows as to these open items:
>
> 1. Article 4 (Vacations), Section 3 shall read as follows:
> Unearned vacation time may not be used. The Employer may use part-time or temporary employees to fill in for vacation time off. Vacation time off is paid at the employees base rate of pay at the time of vacation. It does not

include overtime or any special forms of compensation such as incentives, commissions, bonuses, or shift differentials.

2. Article 17 (miscellaneous), Section 6b shall read:
Unearned PTO days may not be used as sick days without the express approval of the Employer's General Manager for a verifiable illness. Upon termination of employment, Employer shall deduct payment given for unearned sick days from employee final check.

As reflected in Ploscowe's e-mail attaching the final economic offer, these additional sections were agreed to by the parties shortly before the offer was sent to the Union. [Tr. 1100] [GCX 10] Nevertheless, the MOA refers to these sections as "open items." DeAngelis properly testified that tentative agreements could be considered "open" because they were still tentative and not to be implemented at the time.[10] [Tr. 471-72]

Ploscowe admits that the MOA was a partial contract that did not constitute a complete collective bargaining agreement. [Tr. 1099] [GCX 63 ¶ 5] Tentative agreements were still conditioned upon agreement and ratification of all final "Contract Language." [Tr. 48, 60-61, 248, 879, 891, 1104, 1610-11, 1653-55] At this point, the parties had only agreed to implement specific items that were described in the 2006 Interim Agreement and the MOA, while other terms were covered by the Local 734 agreement. [Tr. 271, 300, 1102] [GCX 2, 4, 11] None of these documents contained a management rights clause with a waiver of the Union's right to bargain over subcontracting decisions.

[10] The parties did not discuss, prepare, or attach a list of provisions that were "agreed upon to date." DeAngelis was the Union's lead negotiator when the MOA was signed. At the time, he and Bernadone were unaware of any tentative agreement between Ploscowe and Sabetella on management rights. [Tr. 438-39, 943-44]

E. Respondent's Proposal on March 13, 2007

As indicated above, from August to October, 2006, the parties reached certain tentative agreements that were not discussed in November 2006 or implemented by the MOA. Those provisions were still open for negotiation. Respondent's November 13, 2006 contract proposal consisted of the Union's proposal as Respondent sought to modify it (with Ploscowe's handwritten notes in the margin). [GCX 9] The proposal and notes reflect Ploscowe's understanding of the parties' tentative agreements (i.e., Union proposals that Respondent did not contest and language the Union agreed to change).

After the MOA was executed, Ploscowe was expected to prepare a full-length contract proposal. [Tr. 1035] However, he did not transmit such a proposal to the Union until March 13, 2007. [Tr. 1154] [GCX 12]

In his March 13, 2007 proposal, Ploscowe modified many of the agreements that the parties reached in 2006, further confirming that those agreements were tentative and not implemented by the MOA. [Tr. 300, 443-48, 1110-34] [GCX 9, 12] The March 13, 2007 proposal included modifications of the following tentative agreements:[11]

GCX 9 – Art. Agreed	GCX 12 – New Art.	Description of Change to Tentative Agreement
Art. 1 § 4(e) Ok – 9/28/06	Art. 1 § 4(e)	Added last sentence - temporary employee hired as regular employee must work full probation period. [Tr. 1112-13]
Art. 3 § 5 Ok – 9/28/06	Art. 3 § 5	Added last sentence – confusing new language regarding work on an unscheduled working day. [Tr. 1116-17]

[11] The far left column contains Ploscowe's handwritten notations of "OK" from GCX 9 (indicating his belief that the provisions were agreed upon) or "not contested" (indicating that Respondent did not contest the Union's language).

Art. 6 § 2 Not contested	Art. 7 § 2	Changed layoff notice from 24 hours to 12 hours. [Tr. 1120-21]
Art. 7 § 4(E) Ok – 9/28/06	Art. 8 § 4(E)	Removed phrase - seniority lost after 3-day absence unless "unable to give notice." [Tr. 1121-22]
Art. 9 § 4 Not contested	Art. 10 § 4	Added last sentence – employee responsibility for employer equipment. [Tr. 1122-23]
Art. 9 Not contested	Art. 10 § 6	Added entire § 6 – employee responsibility for radios. [Tr. 1130-33]
Art. 10 § 1 Ok – 10/6/06	Art. 11 § 1	Added last sentence – forfeit of Union visitation rights. [Tr. 1133-34]

About a month after Ploscowe submitted this proposal to the Union, he had an informal discussion with DeAngelis at an arbitration hearing regarding the status of negotiations.[12] [Tr. 49-51, 269-70, 273-75] DeAngelis advised Ploscowe that the subcontracting language in management rights was likely to prevent the parties from reaching a contract. Ploscowe did not claim that Respondent already had a right to subcontract Unit work under the MOA. [Tr. 51-52]

F. Events in 2007 and 2008

By April 19, 2007, Respondent was already contemplating the "outsourcing [of] security and custodial services." [GCX 83(a) p. R 0454] However, Respondent did not advise the Union of its intention to do so. [Tr. 340] Rather, two years later, Respondent was still telling the Union that outsourcing was just a "philosophical issue" that would not actually happen.[13] [Tr. 67, 965-66] [GCX 21 p. 9]

In about March 2007, the Union briefly retained Stephen Goldblatt as labor counsel. [Tr. 49, 255] In May 2007, Goldblatt corresponded with Ploscowe and

[12] DeAngelis credibly testified to the details of this discussion which occurred on the second day of hearing conducted in the lobby of the Sheraton in Weehawken. [Tr. 49-50, 269-70]

[13] In fact, Planned had been soliciting business from Respondent for some time before April 2007. [Tr. 1057-58, 1071]

mistakenly identified four contractual items as open. [Tr. 256-59] Many more items still required negotiation. Accordingly, the Union replaced Goldbatt with Wendell "Wendy" Shephard, Esq. [Tr. 256-59, 279-80, 289-90, 938-41] Before the next bargaining session, Ploscowe asked Shephard to identify open items. He did not claim that open items were limited to the four identified by Goldblatt. [Tr. 1045, 1154-55] [GCX 13-14]

By e-mail to Ploscowe dated August 1, 2007, Shephard identified items that would require further negotiation, including subcontracting, overtime, and agreements that were modified by Ploscowe in his March 13, 2007 proposal. [Tr. 1110-24, 1128-36] [GCX 15]

Beginning August 3, 2007, the parties resumed negotiations over the items that Shephard identified. [Tr. 57-61, 1639] Ploscowe claimed that the Union was reneging on certain agreements even though he had already proposed the modification of several tentative agreements himself. On August 17, 2007, Respondent filed a charge (Case 22-CB-10448) which alleged that the Union had engaged in regressive bargaining by reneging on *tentative* agreements.[14] [Tr. 1104] [GCX 19] [RX 14-15] Nevertheless, the parties continued to negotiate for a complete agreement. [Tr. 448-449, 1641-60] Ploscowe's notes reflect that he considered management rights, including the right to subcontract, to be "open." [Tr. 1138] [GCX 68 ¶ 19; GCX 75 ¶ 19; GCX 76 ¶ 19]

In 2007 and 2008, the parties reached more tentative agreements. [Tr. 1661] [GCX 16, 18, 66] [RX 56-59] Other items remained outstanding and management's right

[14] The case was submitted to the NLRB's Division of Advice. The Advice memorandum, which was introduced by Respondent, states in part as follows: "This case was submitted for advice as to whether [the Union] violated Section 8(b)(3) of the Act when its newly hired attorney withdrew from *tentative* agreements on bargaining proposals..." [RX 15 p. 1] [Emphasis added]

to subcontract was particularly contentious. [Tr. 1146, 1642-44, 1551, 1651, 1659, 1725] [GCX 69] Respondent desperately wanted the final contract to include subcontracting, but did not claim it had the right to subcontract work in advance of a complete agreement. [Tr. 51, 1087, 1146, 1639] In an e-mail dated October 10, 2007, Respondent Board Member Steven Braitman stated his understanding of negotiations as follows [GCX 67, 69]:

> Is it time to fire Plascowe and get someone who will bring the union contract to closure? [¶] I remind you of the reason for EXTREME sense of urgency - the proposed new union contact gives GTCA unprecedented wide latitude in out-sourcing. Out-sourcing will be the fastest method available to us to achieve serious reduction in operating costs, especially in housekeeping, security, spa and garage.[15]

The Union advised Respondent and the NLRB (in 22-CB-10488) that management rights was never discussed or agreed to at the bargaining table, and was not ratified prior to the MOA. [Tr. 1645-47, 1677, 1682, 1689, 1701, 1746] [GCX 74] The Union also explained that such a clause could result in the layoff of the entire Unit and effectively negate the contract. [Tr. 58, 452, 1644, 1688]

On July 9, 2008, Respondent offered to grant the Union's request for overtime after eight hours if Unit employees ratified a contract that would waive the Union's right to bargain over subcontracting decisions. Respondent made clear that overtime after eight hours would not be retroactive. The Union rejected Respondent's offer. [Tr. 1650-52, 1718-19] [RX 62]

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[15] Clearly, Respondent believed that a conclusion of the "proposed" union contract was required before Respondent could subcontract work unilaterally.

As discussed above, in September 2008, the parties signed a settlement agreement resolving case 22-CB-10448 (the "Settlement Agreement"). [GCX 19] The notice posting of the Settlement Agreement indicates that the Union would not "*unlawfully withdraw* from *tentative agreements* reached during negotiations for a collective bargaining agreement, including *tentative agreements* reached with Galaxy concerning subcontracting." (Emphasis added) [GCX 19] Since any agreement on subcontracting was still "tentative" in 2008, the MOA did not implement such an agreement in 2007.[16]

On December 5, 2008, at the final bargaining session, the parties discussed but did not reach agreement on background checks, the locations where employees could smoke, and work that could be performed by temporary employees. [Tr. 1528-30, 1657-60, 1724-25] The Union advised Respondent that the bargaining unit was "up in arms" and would not ratify a proposal with subcontracting in the management's rights provision. [Tr. 1718] Respondent reiterated its offer to give employees overtime after eight hours per day as an incentive for the Unit to ratify a proposal that provided for subcontracting. [Tr. 1718-19] [RX 72 p. 2] [GCX 84 – 12/4/08] Ploscowe advised the Union that his overtime proposal was not retroactive and would only be effective upon ratification. [Tr. 1723-24] The Union rejected Respondent's offer and expressly conditioned any agreement upon ratification. [Tr. 60-61, 1723-24, 1736] It is uncontested that a final contract was not reached or ratified in 2008. [Tr. 1548]

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[16] For the first time at trial, Respondent dismissed the Settlement Agreement as a valid basis for defining the parties' contract. Prior to trial, Respondent repeatedly referenced the Settlement Agreement for that very purpose. [GCX 24], [GCX 60 pp. 2-3 ¶¶ 2 & 5], [GCX 70 p. 2, 7]

On December 12, 2008, Ploscowe e-mailed Shephard a proposed contract that contained many items that had not been agreed upon by the Union, including several tentative agreements that were reached in 2006 and modified by Ploscowe on March 13, 2007.[17] [R-73] [Tr. 1556-76, 1650-52, 1655-61] In that regard, on December 12, 2008, Ploscowe was still proposing modifications of the following tentative agreements:

GCX 9 – Art. Agreed	**GCX 12 – New Art.**	**Description of Change to Tentative Agreement**
Art. 1 § 4(e) Ok – 9/28/06	Art. 1 § 4(e)	Added last sentence - temporary employee hired as regular employee must work full probation period. [Tr. 1112-13]
Art. 6 § 2 Not contested	Art. 7 § 2	Changed layoff notice from 24 hours to 12 hours [Tr. 1120-21]
Art. 7 § 4(E) Ok – 9/28/06	Art. 8 § 4(E)	Removed phrase – seniority lost after 3-day absence unless "unable to give notice" [Tr. 1121-22]
Art. 9 § 4 Not contested	Art. 10 § 4	Added last sentence – employee responsibility for employer equipment. [Tr. 1122-23]
Art. 10 § 1 Ok – 10/6/06	Art. 11 § 1	Added last sentence – forfeiture of Union visitation rights. [Tr. 1133-34]

In about February, 2009, Ploscowe was replaced by Michael Kingman, Esq. The MOA, a partial contract, was about to expire. Therefore, the parties stopped bargaining for a complete agreement (to be effective June 1, 2006 to May 31, 2009). When negotiations resumed, the parties started bargaining for a successor agreement. [Tr. 61-64, 453, 701-2, 772, 795, 1053] [GCX 22-24]

Respondent did not seek to expedite negotiations throughout 2007 and 2008, and the Union did not seek to delay negotiations so that the MOA would expire. [Tr. 1669,

[17] The Union did not agree to language in the following Articles that were proposed by Ploscowe on December 12, 2008: Articles 1 § 3, 1 § 4(a), 1 § 4(e), Art. 2 § 1, Art. 6, Art. 7 § 2, Art. 8 § 2, Art. 8 §4(e), Art. 9 § 6, Art. 10 § 4, Art. 10 § 6,Art. 11 § 1, Art. 13 §2, Art. 15 § 6, Art. 16, Art. 17, Art. 18 § 4, Art. 18 § 7, Art. 18 § 8, Art. 18 § 9, and Art. 18 § 10. [Tr. 1552-79] [GCX 15, 18, 66, 81]

1725] Respondent's contention to the contrary is preposterous since, as noted below, the Union agreed to extend the MOA multiple times and it is still in effect. [Tr. 1663-64, 1725-26] [GCX 20, 25]

G. Negotiations For a New Contract and Subcontracting Arbitration

The parties resumed negotiations for a new contract on May 18, 2009. Respondent was represented by Cooper Square Vice President Tal Eyal and Kingman. [Tr. 63] Kingman does not practice labor law and has little prior experience in such negotiations. [Tr. 700-3, 772-3, 1386] Initially, on June 4, 2009, Respondent proposed a one year extension of the MOA. [GCX 22] On June 15, 2009, the Union responded that it was flexible with regard to the terms of a new contract, but sought a three-year agreement that would stabilize the bargaining relationship. [GCX 23] The Union observed that the parties' reliance on a partial MOA and failure to finalize a full contract had caused confusion and mistrust. [GCX 23]

On June 19, 2009, Respondent countered with a regressive three-year contract proposal that demanded a three-year wage freeze, a three-year freeze in contributions for medical benefits, the elimination of overtime after 8 hours per day, the elimination of a holiday, limitation of arbitrations to discharges and suspensions of five days or more, and random drug testing. [GCX 24] Respondent's proposal also included the following: [GCX 24]:

> **OTHER MATTERS:** The terms and conditions of the Collective Bargaining Agreement as Modified by the Memorandum of Agreement and ratified by the stipulation of settlement entered into by the parties with the NLRB shall continue in full force and effect. The terms of the agreement

> as to temporary works, subcontracting, vacations, sick leave, and other provisions remain unchanged.[18]

The parties remained far apart on economics and also disagreed over non-economic items such as management's right to subcontract unit work. [Tr. 1251-53] [GCX 22-24] Respondent wanted the unilateral right to subcontract, but indicated that this was a "philosophical issue" which would never happen in practice. [Tr. 65-67, 965-66] At some point, Respondent began claiming that it already had the right to subcontract under the MOA. The Union denied that the MOA contained such a bargaining waiver and did not want the new contract to contain one either. Meanwhile, the parties agreed to extend the MOA three times. [Tr. 64-65] [GCX 20]

On August 13, 2009, Respondent proposed that the parties suspend negotiations for a new contract and submit to arbitration the issue whether Respondent had a right to unilaterally subcontract work under the MOA. [Tr. 1253, 1383-82] Kingman prepared an Interim Agreement (the "2009 Interim Agreement") which would suspend negotiations pending the arbitration of the following issues [GCX 25]:

> (1) Does the current Agreement between the parties permit sub-contracting by the [Respondent], and if so;
>
> (2) What is the nature and extent of such permitted sub-contracting?

The Union agreed and the arbitration hearing was scheduled for May 6, 2010. [Tr. 71] [RX 47] However, that hearing date was rescheduled at Respondent's request to September 21, 2010 over the Union's objection. [Tr. 71] Respondent only agreed to

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[18] The only collective bargaining agreement that preceded and could have been "modified" by the MOA was the Local 734 contract. [GCX 2] The paragraph makes no reference to Ploscowe's unsigned March 13, 2007 proposal, which was prepared after the MOA. [Tr. 710-12]

proceed on September 21, 2010 if the hearing was limited to opening statements and the marking of exhibits. [Tr. 1666, 1269, 1728] Respondent then requested an indefinite postponement, which was granted over the Union's objection. [Tr. 353]

H. Discharge Arbitrations

As indicated above, the 2006 Interim Agreement adopted the grievance/arbitration provision in the Union's initial proposal. [GCX 3-4] However, the Union's initial proposal left blank and did not provide for the arbitrators that the parties would use. [GCX 3 p. 13-14 Art. 14 § 4] Respondent's March 13, 2007 proposal filled in those blanks with arbitrators Elliott Schrifman, Eugene Coughlin, and Robert Herzog. [GCX 12 p. 18 Art. 15 § 4]

In about 2007 and 2008, the parties held a number of discharge arbitrations. In each instance, the parties stipulated that the issue to be arbitrated was whether Respondent had just cause to discharge employee(s). Arbitrators Schrifman, Coughlin, and Herzog were used on a rotating basis, as proposed by Ploscowe on March 13, 2007. [Tr. 547-48, 1150-52, 1615-16]

Coughlin recused himself from an arbitration that was conducted in April, 2007. [RX 29 p. 2 ¶ 7] Based upon that recusal, Respondent later initiated an action in United States District Court to vacate an award that Coughlin issued in a different arbitration proceeding involving the discharge of three other employees. [Tr. 1614] [RX 29 - Exhibit B] The Union submitted a response which included an April 23, 2011 affidavit from Bernadone. Bernadone referenced Article 15 of Ploscowe's March 13, 2007 proposal since that article was the only writing that reflected the parties' practice and

agreement with regard to the use of specific arbitrators. [GCX 3-4, 12] [RX 29 - Exhibit A] The Union did not attach the remainder of Ploscowe's March 13, 2007 proposal because it was never executed and did not reflect the parties' agreement. [TR. 936-37, 1616-17]

I. Other Grievances

In January, 2010, the Union filed for arbitration on grievances regarding vacation and temporary employees, relying on the 2006 Interim Agreement, the MOA, and Local 734 agreement, as necessary. [Tr. 73-77] [GCX 26-31] By letters dated February 3, 2010, Kingman advised the arbitrators that Respondent would not proceed to arbitration because "the Union has taken the position that [the] contract is not legal and binding." [GCX 30-31] By this time, Kingman - who did not attend negotiations from 2006 to 2008 – was apparently asserting that Ploscowe's unsigned March 13, 2007 proposal was the parties' collective bargaining agreement.[19] [Tr. 708] The Union explained that binding agreements did exist (though Ploscowe's unsigned proposal was not a part of the contract). [Tr. 333] Nevertheless, Respondent refused to arbitrate. [Tr. 77-78, 331-33]

J. Additional Events in 2010

In about the spring of 2010, the Union's welfare fund conducted an audit of Respondent and filed an ERISA lawsuit for the collection of delinquent contributions. [Tr. 78]

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[19] This position was contradicted by the description of the current contract in Respondent's own proposal. [GCX 24]

On about August 3, 2010, Kingman met with Bernadone and DeAngelis to discuss outstanding grievances. [Tr. 337, 1363-69] The meeting was not attended by the parties' broader bargaining committees and neither party took notes. [Tr. 828] Kingman told the Union that a subcontracting company called Planned Building Services might be retained to perform Unit work.[20] [Tr. 333, 337-38, 829] Kingman drafted a revised management rights proposal with new subcontracting language and asked the Union to contact Planned.[21] [Tr. 339-40, 829] The Union consulted with IUJAT before doing so.[22] [Tr. 338, 1369-70] After consulting with IUJAT, the Union did not meet with Planned and did not accept Respondent's revised subcontracting proposal. [Tr. 336-38, 345-46, 363, 457, 829, 953-55, 957-58, 1270, 1369-70, 1666-67, 1728-29]

On August 17, 2010, Teamsters Local 966 ("Local 966") filed a petition with the Board to represent Unit employees. An election was conducted on September 24, 2010, and the Union won. Local 966 filed objections to the election. [Tr. 79-81]

Meanwhile, Respondent hired a company called PM Solutions to evaluate its (Respondent's) operation and prepare a report on possible cost savings. [Tr. 1258-59] The report contained various suggestions, including but not limited to potential savings

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[20] Respondent ultimately subcontracted work to three companies: Planned Building Services, Planned Security Services, and Planned Lifestyle Services. These companies are referred to collectively herein and on the record as "Planned." [Tr. 1238-39] Former Respondent attorney Ploscowe is counsel for Planned. [Tr. 1070-71] Ploscowe testified to his understanding that a restoration remedy would result in the termination of his client's contract with Respondent. [Tr. 1071]

[21] On August 23, 2010, Kingman sent an e-mail to then Union Vice-President Michael Pagan attaching a proposed Memorandum of Agreement with his new subcontracting language. Bernadone and DeAngelis were out on leave and did not see the document. [Tr. 345-6, 954-55, 983] The Union did not accept Respondent's proposed Memorandum of Agreement.

[22] IUJAT is the international with which the Union was then affiliated. [Tr. 31]

from subcontracting. [Tr. 1251, 1259, 1379, 1415-1419] Respondent did not advise the Union of this study or its findings, and did not provide the Union with a copy of the report. [Tr. 1379, 1419, 1726]

In October 2010, the Union sought to resume bargaining for a new contract. At the time, employees were anxious for a pay increase and Respondent was attempting to indefinitely postpone the subcontracting arbitration. [Tr. 351-52, 355-56] [GCX 32] Such a postponement would, under the 2009 Interim Agreement, indefinitely suspend negotiations for a new collective bargaining agreement. [Tr. 72-73, 82-83, 352, 355-56] Respondent refused to negotiate with the Union on the grounds that objections to the election were still pending and the identity of the Unit's bargaining representative was in doubt. [Tr. 84] [GCX 34] The Union filed a charge (case 22-CA-29681) with the NLRB in order to compel Respondent to resume negotiations. [Tr. 84] [GCX 53]

On November 8, 2010, a hearing was conducted on the objections that were filed by Local 966. [GCX 79] At this hearing, the unsigned proposal that Ploscowe sent to the Union on March 13, 2007 was entered into evidence. [GCX 79 – Exhibit P2] Welfare fund Administrator and then Union Vice President Michael Pagan testified that he did not participate in negotiations with Respondent and did not know to what extent the March 13 proposal reflected the parties' agreement.[23] [GCX 79 - p. 65] [Tr. 345] Union

[23] Respondent flagrantly attempted to falsify what actually happened at the hearing by introducing into evidence a portion of the R-case transcript that excluded Pagan's testimony in this regard. [Tr. 1244-45] [RX 45 p. 64] [GCX 79] Respondent also attempted to exclude Kern's statement of position on behalf of the Union. [Tr. 1359] Kingman was present at the representational hearing and knew better, but chose to participate in the presentation of evidence that he knew to be inaccurate.

attorney Steven H. Kern explained that the unsigned March 13 proposal was not the contract, which consisted of interim agreements and the MOA. [GCX 79 p. 26, 109-10]

On November 11, 2010, Respondent agreed to settle case 22-CA-29681 and return to the bargaining table.[24] [Tr. 84] [GCX 53]

On November 19, 2010, Respondent issued a "Request For Proposal" ("RFP") to prospective subcontractors to perform Unit work. [RX 47] The RFP called for bids to be submitted by December 22, 2010. [RX 47 p. 5] Respondent received five bids in response. [Tr. 725, 1380] Respondent did not notify the Union of the RFP or bids, even though Respondent would ask the Union to submit a competitive proposal six months later. [Tr. 719, 725, 1380]

K. Resumption of Negotiations in December 2010

When negotiations resumed, Kingman represented Respondent as lead negotiator with a bargaining committee of residents Ruth Olsen and Eugene Blum. DeAngelis attended all bargaining sessions on behalf of the Union and, beginning May 9, 2011, was accompanied by attorney Steven Kern. [Tr. 87-88] A bargaining committee of Unit employees also attended on behalf of the Union. The parties held bargaining sessions on December 8, 2010, March 16, May 9, May 23, June 7, June 20, June 30 and July 27, 2011. [GCX 41, 54, 59]

[24] In that case, Respondent claimed it was excused from bargaining because objections were pending in case 22-RC-13150. Respondent did not assert that it was excused from bargaining by the 2009 Interim Agreement or because the parties allegedly reached agreement in August 2010. [Tr. 1372-73]

At the first bargaining session on December 8, 2010, Respondent rejected (without counter) a proposal by the Union to implement an interim wage increase. [Tr. 88-90]

On March 16, 2011, Respondent presented a last, best, and final contract offer ("LBFO") for a two year contract effective June 1, 2010 to May 31, 2011. [Tr. 91-93] [GCX 41] Respondent merely asked the Union to accept it or reject it. [Tr. 774, 1196] The LBFO contained the subcontracting language in a management rights provision that Kingman drafted at the informal grievance meeting that was held on about August 3, 2010. [GCX 41] The LBFO also included the following demand in a paragraph on "BENEFITS" [GCX 41]:

> [T]he Welfare Plan shall dismiss the lawsuit filed in the Federal District Court against the GTCA for additional benefit payments through 2009 with prejudice in return for payment of the sum of two thousand dollars ($2,000.00).

Bernadone took particular exception to the offer of $2,000 to settle a lawsuit that was based on a $100,000 liability to the welfare fund. In fact, he crumpled up the LBFO, threw it on the table, and walked out of the meeting. [Tr. 958-59]

Likewise, under "OTHER ISSUES," the LBFO required the dismissal of the subcontracting arbitration. The Union advised Respondent that it was unlawful to include a demand for the settlement of fund litigation in a last, best, and final offer. [Tr. 103, 534-35, 566, 1280]

Nevertheless, Respondent refused to retract any portion of its LBFO. [Tr. 103, 534-35, 1387, 1606-7] In fact, Respondent stated in negotiations that the Union could not bargain over the LBFO on a "piecemeal basis" and insisted that the Union "sign off on all litigation." [Tr. 113, 535-536, 775-776, 1196-1197] Kingman, testified that he was

(and is) unaware that it is unlawful to declare impasse on such a permissive subject of bargaining. [Tr. 1386]

By e-mail dated April 12, 2011, Kingman advised the Union that Respondent was "contemplating alternative employment scenarios whereby the GTCA would no longer be the direct employer in connection with certain departments at the Galaxy, including but not limited to housekeeping, concierge and security." [GCX 43] Kingman stated that Respondent would like to present its rationale at the next bargaining session. Kingman further stated that Respondent would "make a final decision at a Board meeting in June so that if a change in operations is made it would be effective July 1, 2011." [GCX 43] Kingman did not notify the Union that Respondent had already received bids in response to an RFP that issued several months ago. [RX 47]

On May 9, 2011, for the first time, Respondent announced that it had issued an RFP which solicited bids from subcontractors to perform the work of all Unit employees except ten maintenance employees. [Tr. 93-97, 476-86] Respondent said it received five bids and explained that its decision to subcontract Unit work was purely economic. Using a power point presentation, Respondent represented that it could save over $1 million per year on the cost of labor by subcontracting. [Tr. 94-95, 717-19] [GCX 45] The Union requested a copy of the power point slides, but Respondent refused to provide them. [Tr. 457, 480] [GCX 54 p. 1] Respondent asked the Union to make a competitive

proposal to match its representation of savings.[25] [Tr. 484, 719] Respondent also stated that its time frame for subcontracting was July 1, 2011. [Tr. 732] [GCX 43]

The Union requested backup material, including the RFP and bids in order to substantiate and evaluate Respondent's presentation on alleged savings and prepare a response.[26] [Tr. 95-7, 382, 385, 392, 431, 481-8, 500, 571-72, 598-99, 613, 617, 729-30 972, 974, 985-86, 1189] [GCX 41 p. 4] [GCX 59 – 5/9/11 p. 2] [GCX 54 p. 2] The Union also asked Respondent when the RFP had issued and when the bids had been received. [Tr. 481] [GCX 41 p. 4] [GCX 54 p. 2] Kingman claimed he did not know. [Tr. 481]

The Union reiterated its request for information in writing and at every bargaining session, but Respondent refused to provide it. [Tr. 100, 371, 726, 757-58] [GCX 44] Respondent never claimed that the bids were confidential. [Tr. 1601-2, 1726, 1753] Despite Kingman's incredible testimony to the contrary, he was not corroborated by his own committee members and no such claim is reflected in his or any other bargaining notes, his affidavit, correspondence, and/or Respondent's position statement. [GCX 41, 45, 50, 54, 59-60, 1163-1224]] [RX 44, 59, 60] Kern also testified that he has a practice

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[25] Despite this request, Respondent would not actually entertain a competitive contract proposal since the LBFO – its "final" contract offer - was a take it or leave it proposition. [Tr. 774 – 76] Respondent would not even discuss a three-year contract for maintenance employees. [Tr. 787] This effectively presumed that the Union could not make a competitive proposal for savings on current employees (including maintenance) that might avoid subcontracting altogether. [Tr. 780-88]

[26] At one point in his testimony, Kingman refused to admit that the Union requested "backup material" even though his notes say, "Union Request: Backup Material." [Tr. 798] [GCX 59 – 5/9/11 p. 1] Kingman's testimony was remarkably evasive throughout this proceeding.

of exploring redaction and a confidentiality agreement whenever claims of confidentiality are raised, and no such discussion occurred here.[27] [Tr. 1601-2]

Kingman admits that he did not believe Respondent had an obligation to bargain over the decision to subcontract unit work. He only thought Respondent had to bargain over the effects of that decision.[28] [Tr. 788, 1193, 1332] Further, Kingman did not believe that the requested information was relevant to effects bargaining. [Tr. 796] Accordingly, Kingman reluctantly *admitted* that Respondent never provided the Union with the RFP or bids to substantiate its claims of labor savings.[29] [Tr. 98, 431, 532, 796-97, 800, 1295] Rather, right after the Union requested information on May 9, 2011, Kingman asked the Union to *assume* that Respondent would move to an alternative employer and make a proposal on effects. [Tr. 483] [GCX 59 – 5/9/11 p. 2]

In response, the Union requested that Respondent engage in negotiations over the decision before anything was "assumed." [Tr. 483] The Union never said it could not match the savings that Respondent was *claiming* it could realize and never agreed to Respondent's subcontracting decision. [Tr. 150-51, 484-485, 531-34, 622, 683, 743-744,

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[27] Likewise, Respondent never claimed that the original bids were replaced by new bids. If they had, the Union would certainly have asked for the new bids as well. [Tr. 1601, 1726]

[28] An employer must bargain over the decision to subcontract unit work and the effects of that decision. *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702. Effects bargaining generally follows decision bargaining since there is not point discussing effects if it has not been determined that subcontracting will occur. See *Dan Dee West Virginia Corp.*, 180 NLRB 534, 539 (1970) (bargaining over effects was "premature until the matter of the change… was resolved or an impasse reached on it").

[29] Kingman's evasive and unreliable testimony was on particular display when he talked about the production of materials that the Union requested in order to substantiate Respondent's claim of savings. Kingman repeatedly testified that Respondent provided the requested information (meaning Respondent's self-serving representation of savings) when he was obviously being asked about the actual RFP and bids. [Tr. 726, 738, 797-99, 800-1, 833]

990] [GCX 48] Indeed, the Union had no idea what Respondent's savings would actually be and could not engage in meaningful negotiations without the materials it had requested.[30] [Tr. 95-96, 382, 482]

By letter dated May 11, 2011, Kern confirmed the Union's information request. [GCX 44] Kingman responded on May 19, 2011, but did not provide the RFP or bids. [GCX 45] [Tr. 100-1, 431, 485] Respondent only provided an altered version of materials shown to the Union during the unsubstantiated power point presentation that it prepared and presented on March 16, 2011. [Tr. 800-1]

On May 23, 2011, the Union made a counterproposal to the LBFO and advised that the outsourcing provision could not be negotiated without the requested information.[31] Therefore, the answer to subcontracting was still "no." [Tr. 101-2, 491-92, 586, 736-8] [GCX 41 p. 6-8, 10] [GCX 59 -5/23/1 p. 2] [GCX 60 p. 11 lines 17-20] In addition to the outstanding information that was previously requested, Bernadone asked whether Respondent had considered any savings other than savings in the cost of labor. [Tr. 973, 1750] [GCX 41 p. 9] Respondent disregarded and did not address the Union's information requests.[32] Rather, Kingman again asked the Union to assume an alternative

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[30] Kingman's repeated testimony that the Union was simultaneously admitting it could not match the savings while at the same time requesting materials to verify those savings makes no sense. This is an example of the wishful thinking that so characterized Kingman's approach to negotiations and his role as a "fact" witness in this case.

[31] Kingman initially denied that this was the Union's response [Tr. 736] even though it is reflected in his bargaining notes and affidavit. [GCX 59 -5/23/1 p. 2] [GCX 60 p. 11 lines 17-20]

[32] Kingman testified that the PM Solutions report (which would have been responsive) was public and could be found on the internet. [Tr. 1418-19] Since the report was public, it is unclear why Respondent refused to notify the Union of its existence and provide them with a copy (or tell them where to find it). [Tr. 1611-12, 1726]

employer would be used and discuss the effects. [Tr. 100-1, 491-92, 739-41, 1611-12, 1626] [GCX 60 p. 11] Respondent also reminded the Union of its self-imposed deadline for finalizing a subcontracting arrangement. [Tr. 739-40] [GCX 60 p. 11]

In addressing the LBFO, the Union specifically rejected any withdrawal of its subcontracting arbitration or the fund's ERISA lawsuit. The Union also requested a third year that would extend the contract to May 31, 2012, as opposed to a two-year agreement effective through May 31, 2011 (which was just a week away). [Tr. 102-4, 493-98, 534-35, 566] [GCX 41 p. 7-8] [GCX 42] The request for a third year confused Kingman because he thought most Unit work was going to be outsourced. [Tr. 497-98, 735-36] [GCX 60 p. 11] Kingman indicated that he would not rule out a three year agreement for maintenance employees whose were remaining, but insisted that the parties first reach an agreement for severance to be received by departing employees. [Tr. 736] [GCX 60 p. 11 line 13-17] The Union viewed Kingman's confusion as a clear signal that Respondent had already made the decision to subcontract Unit work and was not there to bargain in good faith. [Tr. 497-98, 741-42]

On June 7, 2011, DeAngelis stated that Respondent would probably implement its subcontracting decision and the Union would file a charge. [Tr. 685-86, 744-45] The Union again indicated that it could not evaluate Respondent's proposal or develop counter proposals without the outstanding information.[33] [Tr. 106-7] [GCX 41 p. 11, 13]

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[33] Kingman's testimony that, on June 7, 2011, the Union abandoned its request for information is absurd. [Tr. 746-47] His own notes and affidavit confirm Kern's statement at the end of the bargaining session that the Union still needed the RFP and bids. [GCX 59 – 6/7/11 p. 2] [GCX 60 ¶26 lines 6-7]

[GCX 54 p. 6-8] [GCX 59 – 6/7/11 p. 1] In addition, the Union requested actual payroll figures from 2010, as opposed to the 2011 budget figures that Respondent relied upon in its power point presentation. [Tr. 107] [GCX 41 p. 12] [GCX 54 p. 7]

Respondent refused to provide the Union with any information and, as before, insisted that the Union discuss effects. [Tr. 106-8, 500-6, 509-10] [GCX 54 p. 8] The Union did discuss such matters, but subsequently reiterated its request for information and its opposition to subcontracting. [Tr. 505-6, 509-510, 533, 750-52] [GCX 41 p. 13] [GCX 54 p. 8] [GCX 59 – 6/7/11 p. 2] Kingman lost patience and told the Union it was a fantasy to act as though outsourcing was not going to happen.[34] [Tr. 510-12, 629-30, 1331, 1400-2] [GCX 60 p. 14 ¶ 26]

On June 20, 2011, despite Respondent's failure to provide information and bargain in good faith, the Union suggested a "concept" for labor savings. [Tr. 109-10, 682-83, 689-93, 1325] The Union proposed that all Unit employees be offered voluntary severance and indicated that about a third might take it. The Union noted that replacement employees would receive a lower rate of pay ($3 less per hour) under the 2006 Interim Agreement [GCX 4], and offered to negotiate less expensive "Tier 2" terms (such as medical coverage) for newly hired employees. [Tr. 109-10, 116, 382, 404, 512-14, 533, 638, 682, 689-90, 986-88, 1177-78] [GCX 54 p. 9]

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[34] After his outburst, Kingman asked the Union if it wanted Respondent to postpone a June 9 vote of the Board of the Directors which would authorize him to begin negotiating a contract with Planned. [Tr. 677-78, 755, 1322] However, Respondent was refusing to produce information and Kingman was indicating that further negotiations would be futile. [Tr. 512, 631-32] The vote was also irrelevant because it was not a vote to accept a contract with Planned (but merely to start negotiations). [Tr. 408, 755, 1322] DeAngelis advised Kingman he could not tell Respondent what to do, but that the Union was available to negotiate and reach agreement. [Tr. 408, 512, 632]

The Union hoped that these savings would convince Respondent not to subcontract Unit work. [Tr. 108-111, 143-44, 402, 512-514, 533, 646, 651, 659] [GCX 48, 57] However, if Respondent would not discuss or reconsider its decision to subcontract, the Union did not rule out an agreement for Planned to hire Unit employees with acceptable wages, benefits, and terms. [Tr. 143-44, 402-3, 639-640, 646, 684, 689-90, 971, 985-86, 1191-92, 1368, 1731] The Union was attempting to protect the jobs of current employees and was flexible as to how this could be accomplished.[35] [Tr. 187, 402, 639041, 644-46, 682-85, 689-90, 694, 745, 763-64, 1175, 1179, 1394, 1731] For the Union, any agreement to subcontract was a last resort that might avoid litigation. [Tr. 745, 971, 1731]

By June 20, 2011, Respondent had not yet signed a contract with Planned, but was assuming that outsourcing would occur. [Tr. 806] Respondent understood that the Union opposed subcontracting and wanted Respondent to remain the employer. [Tr. 1199-1200, 1220] Nevertheless, Respondent chose to treat the Union's cost saving proposal as one for involuntary severance upon the layoff of all Unit employees other than maintenance (even though this was not the Union's intent). [Tr. 689-90, 761, 656, 671-72, 692, 808, 1175] Respondent refused to discuss acceptable terms for retaining employees to work at

[35] The Union attempted to schedule a three-way meeting with Planned and Galaxy, but such a meeting never occurred. [Tr. 402-3, 689-90, 811] The Union met separately with Francis on two occasions. In May 2011, DeAngelis and Bernadone met with Francis regarding a different building in Brooklyn, New York and nothing of substance was discussed regarding Galaxy Towers. [Tr. 137, 401, 676, 836, 982-83] [GCX 61] In mid to late-July 2011, DeAngelis and Bernadone met with Frances to explore some sort of subcontracting arrangement that might result in a contract between the Union and Planned. [Tr. 142-44, 402] However, no such agreement was reached. [Tr. 143-44, 813]

Galaxy Towers (be it for Respondent or for Planned). [Tr. 143-44, 689-90, 692, 810-14, 818, 1175, 1180, 1219, 1334] [GCX 50]

On June 20, 2011, Kingman insisted that any agreement be finalized before he left for vacation on July 2, 2011. Kingman also insisted that the Union "sign off on all litigation." [Tr. 515, 806, 816-18, 1194] [Tr. 54 p. 11] [GCX 59 - 6/20/11 p. 3] The parties never reached an agreement. [Tr. 683]

On June 23, 2011, Kingman made a written request that the subcontracting arbitration be held in abeyance pending the conclusion of effects bargaining on the subcontracting of Unit work. [GCX 47] This implied that the Union had agreed to the subcontracting decision and negotiations were limited to effects.

By letter dated June 28, 2011, Kern advised Kingman that the Union had not agreed to subcontracting, had not received the information it needed to negotiate over that decision, and had not waived its right to bargain over the decision.[36] [GCX 48] Kern's letter reads in full as follows:

> This is to confirm Local 124's position regarding certain issues that have arisen in bargaining. Discussion of matters incidental to the potential subcontracting of most bargaining unit work, and to Galaxy's expressed intention to subcontract, should in no way be construed as agreement by Local 124 that it should be done, or agreement that it may lawfully be done, in view of both the contract we are negotiating off of as well as the status of negotiations. Additionally, while the Union will continue to do its best to work from the limited economic information given to us regarding subcontracting, this does not mean we agree that Galaxy has provided all information requested and needed in order for the Union to properly assess Galaxy's proposals and formulate its own proposals. I am sure you understand that courtesy at the bargaining table does not equate to any waiver of any party's rights.

[36] Shephard also advised the arbitrator that the Union opposed any postponement of the subcontracting arbitration. [GCX 49]

Kingman admits that the Union never, as Kern confirmed, expressly stated that it agreed to or waived its right to bargain over the subcontracting decision. [Tr. 743-44] Nevertheless, Kingman testified that the Union, somehow, waived its right to bargain.[37] [Tr. 819-822]

On June 30, 2011, the Union reiterated its desire to negotiate a full contract with Respondent and asked whether the contractual LBFO was still on the table. [Tr. 112-13, 518-19, 653, 784-86] [GCX 41 p. 14; GCX 54 p. 11] DeAngelis advised Respondent that the parties were going to wind up in litigation before the NLRB or with a contract. [Tr. 113] [GCX 41 p. 14] DeAngelis again brought up the concept of labor savings through voluntary severance. The Union reduced its severance demand and offered to discuss additional reductions of Tier 2 benefits for lesser paid new hires.[38] [Tr. 116-17, 521] [GCX 41 p. 15] The Union was flexible and suggested that new hires might only receive medical benefits after one year, reduced paid time off, and overtime after 40 hours per week instead of eight hours per day. [Tr. 116-117] [GCX 41 p. 15]

Unfortunately, Respondent refused to engage in such negotiations. Respondent stated that the parties reached impasse on the LBFO, which could not now be negotiated piecemeal. [Tr. 115, 520, 654, 775-76, 783-87] [GCX 41 p. 16] Respondent even refused to discuss a prospective contract for maintenance employees whose work was not being outsourced. [Tr. 112-18, 518-22, 654-55, 686-87, 782, 785-7, 824-27] Respondent

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[37] Once again, this testimony exemplifies the wishful thinking that characterized Kingman's approach to negotiations and his role as a "fact" witness in this case.

[38] The Union reduced its severance demand from one week of pay per one year of severance to one week of pay per two years of service. The Union also reduced its request for post-employment medical benefits from 6 months to 3 months. [GCX 41 p. 16]

insisted that the subcontracting issue be dealt with in advance of and separately from an agreement for maintenance employees going forward. [Tr. 778-80, 785] [GCX 50]

Respondent did not declare impasse on the subcontracting decision. [Tr. 825-26] Nevertheless, on June 30, 2011, Kingman continued to insist that the parties bargain over effects and offered involuntary severance of $1,000 per employee. [Tr. 521, 825-26] The Union advised Respondent that subcontracting would result in litigation if the parties did not reach an agreement. [Tr. 534, 827, 1348-49] [GCX 59 – 6/30/11]

On July 6, 2011, Respondent entered into a subcontracting agreement with Planned. [Tr. 1349] The Union filed a ULP charge the same day. [GCX 1(a)]

On July 27, 2011, at the final bargaining session, the Union again requested outstanding information and Respondent refused to provide it. [Tr. 144, 525, 529, 532, 670] [GCX 41 p. 18] [GCX 54 p. 14-15] The Union reiterated its opposition to subcontracting and its desire to negotiate a contract. [Tr. 144, 149, 528-29] Accordingly, the Union continued to modify its cost saving offer based on voluntary severance.[39] [Tr. 1339] Nevertheless, Respondent refused to discuss terms for retaining employees. [Tr. 147-148, 522-25, 528-29, 533, 666, 670] Respondent merely revised its involuntary severance offers to be paid upon the layoff of all employees except maintenance. [Tr. 522-32, 669] Respondent also, again, refused to discuss a final contract for maintenance employees until its subcontracting arrangement was finalized. [Tr. 144-150, 522-32, 1211, 1218-9] [GCX 50]

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[39] The Union twice reduced its severance demand to one based on the seniority of departing employees. [GCX 41 p. 17] [GCX 54 p. 13-15]

Effective August 1, 2011, Respondent laid off 67 Unit employees and subcontracted their work. [Tr. 1238-39, 1403] Planned hired four of those employees, leaving 63 without employment. [Tr. 1735]

L. Respondent's Financial Condition

Respondent's decision to subcontract was based on choice not necessity. Any cash shortage that Respondent has experienced was the result of its own decisions to accelerate a large loan payment and spend millions of dollars on a lobby renovation. [Tr. 1246, 1414] Moreover, the record contains no evidence that the special assessment of unit owners could not make up for any shortfall. Even when the economic "perfect storm" allegedly occurred in 2009, Respondent continued to meet payroll which remained essentially flat.[40] As explained in the minutes of a Board of Directors meeting that was held on August 20, 2009, Respondent was not significantly over budget.[41] [GCX 83(b) p. R 0219] Since then, Respondent's finances have improved. In minutes of another Board of Directors meeting held on August 4, 2011 – before any saving could be realized from subcontracting – the Controller reported that accounts receivables were up by $200,000 from June 2011. [GCX 83(b) p. R 0336] The Controller also reported favorably on Respondent's finances as follows [GCX 83(b) p. R 0336]:

> In our overall financials, the Net Income, excluding energy, for six months entered as of June 30th there was $153,773 to the positive. We are controlling spending and revenue is coming in as planned so we are looking better than we have in the

[40] Employees did not receive a wage increase after June 2008 and Respondent's contributions toward employee medical coverage did not increase after February 2009. [GCX 11]

[41] The minutes expressly reflect that payroll was not the cause of a modest $75,007 shortfall. In fact, the minutes describe "staff" expenses as "under budget by $75,000." [GCX 83(b) p. R 0219]

last couple of years. The Net Income, including energy pass through after six months is $252,000.

M. Credibility and *Bannon Mills* Sanctions[42]

This case will not turn on credibility as the significant facts are largely uncontested. However, Respondent's witnesses clearly sought to modify certain facts to conform to Respondent's position. Further, Respondent's approach toward this proceeding reflected a general disregard for the creation of an accurate record. Indeed, Respondent sought to withhold documents [RX 49-74] that were responsive to the General Counsel's subpoena *duces tecum* until such time as Respondent decided to introduce those documents into evidence in its own case. [RX 85] Under *Bannon Mills, Inc.*, 146 NLRB 611, 633-34 (1964), Respondent should not be to allowed to rely on those records or any testimony regarding them.

The bias and unreliability of Respondent's witnesses can be discerned from prior admissions that contradicted their current testimony. Kingman repeatedly contradicted his affidavit and notes, and made matters worse by attempting to disown his affidavit on the grounds that it was prepared by a Board agent.[43] [Tr. 730-39, 727, 746, 761, 772-73, 774-76, 1390-92] [Tr.727] Kingman spent 11 hours preparing the affidavit over two days and was then given an additional opportunity to make further edits at his leisure and discretion. [Tr. 727-28, 739-] Kingman's credibility is clearly undermined by his

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[42] Credibility is only addressed in this section to the extent it has not already been discussed with regard to specific evidentiary issues that are described above.

[43] In addition to contradicting his testimony, Kingman was repeatedly evasive and reluctant to provide responsive answers to straightforward questioning. Kingman was clearly inclined to obstruct the creation of an accurate record by obfuscating and evading truthful responses.

repeated attempts to "correct" and disclaim an affidavit that did not result in a dismissal of the case during the investigation.

Similarly, Ploscowe sought to rewrite the Settlement Agreement in a manner that was futile and undermines his credibility. During his testimony (within a matter of seconds), Ploscowe went from relying on the settlement (which references an "agreement" between the parties) [Tr. 1535] to disclaiming the same settlement (because that reference is actually to a "tentative" agreement) [Tr. 1536]. Remarkably, in this regard, Ploscowe sought to emphasize the word "agreement" but reject the word "tentative" because the latter (but not the former) was somehow the "word the NLRB used…" [Tr. 1535-36] Ploscowe's testimony in this regard is inherently absurd and reflects his lack of credibility. As Planned's attorney, Ploscowe had an obvious interest in avoiding a restoration remedy that would terminate his client's contract with Respondent. [Tr. 1070-71]

Indeed, Respondent's reversal of position regarding the Settlement Agreement reflects its cavalier approach toward the creation of an accurate record. Prior to trial, in describing the parties' contractual relationship, Respondent referenced and relied upon the Settlement Agreement in its proposal to the Union [GCX 24], Kingman's affidavit [GCX 60 p. 2-3 ¶¶ 2 & 5], and Respondent's position statement [GCX 70 p. 2, 7]. At trial, upon realizing that the Settlement Agreement was detrimental to its case, Respondent sought to marginalize the Settlement Agreement on the ridiculous grounds that it was drafted by the Board and is of little "probative value." [Tr. 231]

The belated production of subpoenaed documents by Kingman and Ploscowe is also telling of their casual approach to this proceeding and lack of credibility. The General Counsel issued subpoenas *decus tecum* to Respondent and Ploscowe for bargaining notes and correspondence related to negotiations.[44] [GCX 78, 85] From the first day of trial (January 12, 2012) to April 18, 2012, the General Counsel did not receive such records for the second half of 2007 and 2008.[45] [Tr. 1429] [RX 49-74] [GCX 75-76] In hindsight, the reason is clear. Ploscowe's bargaining notes indicate that the management rights clause with subcontracting language was still "open" in 2007 and 2008 (and not previously implemented by the MOA). [GCX 75-76] The reason for the subsequent production of responsive documents is also clear. It became apparent from other evidence that management rights was "open" in 2007 and 2008 (so there was no harm in producing additional evidence), and Respondent decided to use documents from that time period in support of a different position.[46] When Respondent believed that the documents could be useful, they were easily "found."[47]

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[44] Kingman was the custodian of records responsible for the timely production of documents in response to Respondent's subpoena. [Tr. 1756].

[45] Although the documents were in Ploscowe's position, they were under Respondent's control. Ploscowe maintained the documents as an attorney and agent of Respondent, and had an obligation to provide them upon request.

[46] On the 11th day of hearing, April 24, 2012, Respondent sought to introduce "newly discovered" records in support of a new argument with regard to impasse. [Tr. 1509-10] [RX 49-74]

[47] Ploscowe's explanation that he found the records in a drawer that he had not looked in before is no better than a "dog eat my homework" excuse. Ploscowe testified that he had "searched, and searched, and searched" for these missing records. [Tr. 1580] However, when Respondent wanted to introduce the documents into evidence, those documents were located. The self-serving explanation is implausible and unworthy of belief.

Under these circumstances, Kingman and Ploscowe should be broadly discredited. Further, under *Bannon Mills, Inc.*, 146 NLRB 611, 633-34 (1964), Respondent should not be allowed to rely on subpoenaed documents [RX 49-74] that they failed to produce to the General Counsel or on testimony regarding those documents. See also *Southwest Janitorial and Maintenance Corporation*, 205 NLRB 1061, 1064-65 (1973) (Respondent is barred from using documentary evidence which it withheld from the General Counsel in response to a subpoena *duces tecum*).

In stark contrast, DeAngelis, Kern, Shephard, and Bernadone testified and approached this proceeding in a manner that was open and honest. Unlike Kingman, these witnesses endeavored to give complete and accurate answers in response to whomever was asking the questions.[48] They freely admitted when they were not sure of an answer and were willing to admit conduct that may have been embarrassing or inappropriate. They offered credible testimony that was consistent and reasonable, and should be fully credited with regard to any factual disputes.

[48] Indeed, on cross-examination, DeAngelis often answered questions notwithstanding an objection from the General Counsel.

V. ARGUMENT

A. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY FAILING TO PRODUCE REQUESTED INFORMATION

Respondent violated Section 8(a)(1) and (5) of the Act by refusing to produce the RFP and bids that were requested by the Union. The Board has long held that an employer must provide information that would enable a union to assess the validity of economic claims that are made during bargaining. *National Extrusion & Manufacturing Company*, 357 NLRB No. 8, 2011 WL 3860607, *2-3 (July 26, 2011); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1159-1160 (2006); *Curtiss-Wright Corp v. NLRB*, 347 F.2d 61, 68-69 (3d Cir. 1965); *I.T.T. Corp. v. NLRB*, 382 F.2d 366, 371 (3d Cir. 1967). More specifically, a union is entitled to a request for proposal, subcontractor bids, and other information to verify and formulate a counter proposal in response to an employer's stated reasons (e.g., cost savings) for subcontracting unit work. See *Sunoco, Inc.*, 349 NLRB 240, 242, 246-47 (2007); *National Grid USA Service Company, Inc.*, 348 NLRB 1235, 1245 (2006); *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557-58 (2006).

Respondent emphasized that its subcontracting decision was based on potential savings that it discerned from bids it received in response to the RFP. Respondent asked for a competitive proposal and made those alleged savings central to negotiations. The Union was entitled to request backup materials that would be used to substantiate and

evaluate Respondent's proposal, and prepare a response. *Id.* Respondent failed to produce those materials and thereby violated Section 8(a)(1) and (5) of the Act.[49]

B. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY UNILATERALLY LAYING OFF UNIT EMPLOYEES AND SUBCONTRACTING UNIT WORK

1. The MOA does not Contain a Waiver of the Union's Right to Bargain over Subcontracting, and Respondent could not Lawfully Rely on Such an Alleged Waiver in Advance of Arbitration

(a) *The MOA did not Contain a Waiver of the Union's Right to Bargain over Subcontracting Decisions*

The MOA did not contain a waiver of the Union's right to bargain over subcontracting decisions and no such waiver was in effect when Respondent unilaterally subcontracted the work of Unit employees.[50] National labor policy disfavors the waiver of statutory rights. Thus, the existence of a bargaining waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Ciba-Geigy Pharmaceuticals v. NLRB*, 722 F.2d 1120, 1127 (3d. Cir. 1983); *Clevenger Logging, Inc.*, 220 NLRB 768, 780 (1975).

Among the many evidentiary deficiencies in Respondent's proof of a clear and unmistakable bargaining waiver is the fact that the MOA does not contain a provision on management rights. Moreover, the parties *never discussed* management rights at the bargaining table or sought to identify non-economic items to be implemented by the

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[49] Nor did Respondent claim that the materials were confidential. [Supra p.27-28] Kingman's testimony on the subject was not corroborated by any other evidence and Kern testified that he goes through a specific process when confidentiality is claimed (which did not occur here).

[50] The subcontracting of unit work and layoff of unit employees are mandatory subjects of bargaining. *Torrington Industries*, 307 NLRB 809 (1992).

MOA (which only described certain economic terms). Ploscowe merely exchanged e-mails four months earlier with a former Union attorney who had not attended negotiations since October 2006. DeAngelis replaced Sabatella as lead negotiator and was unaware of any prior agreement between counsel on management rights. As Ploscowe knew, the Union used Respondent's final offer on certain economics items -- which contained *no reference* to management rights or subcontracting -- in presenting a *partial agreement* to Unit employees for ratification. Clearly, the Union did not intend to waive its right to bargain over subcontracting decisions by signing the MOA.

Absent a management rights provision in the MOA, Respondent unpersuasively attempts to rely on a single phrase in the paragraph entitled "Contract Language." *See Engelhard Corp. v. NLRB*, 437 F.3d 374, 381 (3rd Cir. 2006) (it is an established principle of contract construction to read all portions of an article or clause together "as a harmonious whole") citing *Ludwig Hon Mfg Co. v. Fletcher*, 405 F.2d 1123, 1130 n.31 (3rd Cir. 1969) (district court erred "in isolating one phrase of the ... clause to reach its conclusion that the contract language was clear and unambiguous"). Ploscowe's paragraph on *final* "Contract Language" groups together those provisions that were "agreed upon to date" and/or "to be resolved during *final drafting* as to any open items." [Emphasis added] Such "Contract Language" does not refer to items that the parties intended to implement upon the execution of the MOA because the MOA could not implement items that were "to be resolved" and *did not yet exist*. Rather, "Contract Language" necessarily refers to tentative and future agreements that would only be implemented *after* the parties reached, ratified, and signed a full and final contract.

The second sentence of the paragraph on "Contract Language" further confirms that items "agreed upon to date" were tentative agreements. The second sentence makes reference to items which were "specifically agreed" upon as "open items." As DeAngelis properly testified, those items could only be "open" if they were agreed to on a *tentative* basis and *not implemented* upon the signing of the MOA. Respondent's reading of the MOA is a tortured attempt to pluck the phrase "agreed upon to date" from surrounding language and ignore its context. *Id.*

The MOA clearly contemplated that the parties would continue negotiations for *final* "contract language" other than specific economic items, and that is exactly what happened. In his March 13, 2007 proposal, *Ploscowe modified several items* that were tentatively "agreed upon" in 2006. Likewise, the Union objected to certain provisions, including subcontracting language that was never discussed at the bargaining table and was not seen by Union representatives other than Sabetella. The Union reasonably explained that Respondent's proposal on management rights would effectively negate the contract if Respondent could unilaterally outsource all Unit work and lay off all Unit employees.[51] See *Holmes Typoghraphy, Inc.*, 218 NLRB 518, 524-25 (party that reserved the right to delete language and advanced cogent reasons for doing so did not violate the Act). Thereafter, *Ploscowe's own notes* referred to Respondent's management rights proposal with subcontracting as "open."

[51] The Settlement Agreement merely states that the Union would not "unlawfully withdraw from tentative agreements." However, this language clearly implies (and common sense dictates) that the Union could *lawfully withdraw* from such an agreement on subcontracting.

Respondent admits that the parties did not reach agreement when they returned to the table in 2007 and 2008. In December 2008, Respondent was still proposing a contract that contained numerous terms which had never been agreed to by the Union. The parties also discussed but did not reach agreement on background checks, the location where employees could smoke, and the work that could be performed by temporary employees. Further, Respondent was proposing to grant employees overtime after eight hours per day if the Unit ratified and the Union signed a contract that included a waiver of the Union's right to bargaining over subcontracting decisions. The Union refused this offer and conditioned any agreement on ratification. The parties did not reach or ratify any such agreement.

The fact that Ploscowe drafted the MOA weighs in favor of a finding that it was not meant to implement a new provision on management rights. *California Offset Printers, Inc.*, 349 NLRB 732, 735 (2007) citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (conflicts in contract interpretation resolved against the drafter). Ploscowe is an experienced labor lawyer who admittedly understood the elevated burden of proving the existence of a bargaining waiver and the principle that conflicts in contract interpretation are generally resolved against the drafter. Nevertheless, he did not include a management rights provision in the MOA and drafted a paragraph on final "Contract Language" that necessarily refers to terms that were not being implemented at that time. Respondent may not be heard to contest discrepancies in an MOA that was drafted by its own counsel. *Id.*

Respondent clearly understood that it did not have the right to subcontract under the MOA. In April 2007, at an arbitration hearing, DeAngelis objected to the inclusion of subcontracting in the management rights provision, and Ploscowe did not claim that the provision was already in effect. On October 10, 2007, Respondent Board Member Braitman commented on the extreme urgency of concluding a *proposed* contract that *would give* Respondent the unprecedented right to subcontract. He did not claim this was a right that Respondent already possessed. In September 2008, Respondent entered into a Settlement Agreement that expressly refers to "*tentative* agreements reached with Galaxy concerning subcontracting." [Emphasis added] The Settlement Agreement makes completely clear that any such agreement was not implemented by the MOA and was still tentative nearly two years later.

The Settlement Agreement is all the more compelling because it was executed by experienced labor counsel at a time when, as Ploscowe admits, management's right to subcontract was of central importance to negotiations. Ploscowe would need to be spectacularly incompetent to have Respondent enter into a Settlement Agreement that referred to a "tentative" agreement on subcontracting if he actually believed that such an agreement had already been finalized and was in effect. A far more rational conclusion, based on the plain language of the Settlement Agreement and other overwhelming evidence, is that items "agreed upon to date" were tentative and not implemented by the MOA.

(b) Respondent could not Rely on the Alleged Existence of a Bargaining Waiver in the MOA in Advance of Arbitration

Having submitted to arbitration the issue of its alleged right to subcontract work under the MOA, Respondent was not entitled to exercise this right in advance of arbitration. Arbitration is a form of dispute resolution that is used in lieu of negotiations. It is a fundamental premise of good faith negotiations that a party may not implement a proposal before it is negotiated. See *Mercy Hospital*, 311 NLRB 869, 873 (1993); *Michigan Ladder Co.*, 286 NLRB 21 (1987). The same principle applies to arbitration if that forum is elected as an alternative to bargaining. Here, Respondent agreed to resolve its right to subcontract under the MOA and cannot exercise that alleged right prior to a resolution in the parties' elected forum.

On this issue, Respondent should not be heard to complain about the time it has taken to arbitrate the subcontracting issue since Respondent sought the postponements which have caused the delay. Respondent requested a postponement of the original hearing date in May 2010 over the Union's objection. Respondent then sought to limit the submission of evidence on the first day of hearing (September 21, 2010) and indefinitely postpone the arbitration (over the Union's objection) thereafter.

Likewise, Respondent may not successfully argue that the Union violated and voided the 2009 Interim Agreement (which provided for the subcontracting arbitration) by requesting the resumption of negotiations in 2010. Respondent *agreed* to resume these negotiations. Thus, the Union did not unilaterally violate the 2009 Interim Agreement. Further, the parties did not resume bargaining over the issue that was being

arbitrated. The subcontracting arbitration concerned Respondent's alleged right to subcontract under the MOA, whereas the parties resumed negotiations for a successor agreement.

2. The Union did not Adopt Ploscowe's Unsigned Proposal

The Union did not somehow adopt Ploscowe's unsigned proposal of March 13, 2007, as Respondent appears to claim. In 2009, the parties resumed negotiations with a clear understanding that they never reached a complete agreement for the period June 1, 2006 to May 31, 2009. In a June 15, 2009 letter, Bernadone noted that the parties' "failure to finalize a Collective Bargaining Agreement" had caused mistrust. In a June 19, 2009 proposal, Respondent indicated that the parties' contract consisted of a "Collective Bargaining Agreement as Modified by the [MOA]" (which could not have been a Ploscowe proposal that was submitted *after* the MOA was executed). Clearly, the parties understood that Ploscowe's unsigned proposal was not a valid contract.[52]

Nevertheless, Respondent appears to contend that the Union signaled its adoption of Ploscowe's March 13, 2007 in the representational hearing of case 22-RC-13150. This is a flagrant misrepresentation of what actually occurred. In fact, Kern made perfectly clear that Ploscowe's March 13, 2007 proposal did not reflect the contract. Respondent's attempt to distort the record of that proceeding is transparent and unavailing.

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[52] This understanding was further confirmed when the Union attempted to file arbitrations in January 2010. Kingman opposed arbitration on the ground that the Union was taking the position that the parties did not have a final and binding contract. In fact, the Union merely noted (as per Bernadone's June 15, 2009 letter) that the parties never finalized a complete agreement. In any event, Kingman effectively accepted the Union's alleged position since he successfully opposed arbitration on that basis.

Likewise, the Union did not adopt Ploscowe's March 13, 2007 proposal by filing a single article of that proposal in connection with Respondent's lawsuit to vacate an arbitration award. The 2006 Interim Agreement adopted a grievance/arbitration provision that left blank the names of the arbitrators to be used. The Union submitted the grievance/arbitration provision from Ploscowe's proposal because it was the only writing that accurately identified the arbitrators that the parties had been using. The Union made a specific point of submitting *only* the grievance/arbitration provision and excluding the remainder of the document, which was never agreed to, ratified, and signed.

3. Respondent did not Bargain to Impasse on its Subcontracting Decision and may not Rely on its Financial Condition to Justify Such Action

(a) Respondent did not Bargain to Good Faith Impasse over its Decision to Subcontract Unit Work and Lay Off Unit Employees

It is well settled that a failure to produce information that is relevant to negotiations precludes a finding of good faith impasse in those negotiations. *Pertec Computer*, 284 NLRB 81, 811-812 (1987); *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557-58 (2006). The Union was clear at the bargaining table and in correspondence that it required the RFP and bids in order to verify, evaluate, and respond to Respondent's proposal on subcontracting. Respondent refused to provide materials which it made central to negotiations.[53] Respondent also ignored the Union's requests for actual payroll costs from 2010 (as opposed to budgeted costs that Respondent used in the power

[53] As noted above [*supra* § V(A)], Respondent raised alleged cost savings as the reason for subcontracting. Since such alleged savings were of critical importance, Respondent may not now claim that its failure to furnish backup materials was at most a "technical violation" that did not impede negotiations.

point presentation) and any cost saving options that Respondent explored in areas other than labor (e.g. the PM Solutions report). Respondent's failure to furnish relevant requested information precluded meaningful negotiation and the possibility of a good faith impasse on the decision to subcontract. *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557-58 (no impasse where employer claimed that subcontracting would save $1 million, but refused to provide bids among other information to verify that claim).

On its own, Respondent's failure to furnish the RFP and bids precludes a finding of good faith impasse. However, additional factors suggest the absence of an impasse as well. In this regard, Respondent sought to bypass, avoid, rush, and prematurely terminate negotiations in a manner that was antithetical to good faith impasse. Further, the Union was extremely flexible in its approach to negotiations and the parties did not evince a mutual understanding that further negotiations would be futile.

Kingman did not believe he had a legal obligation to bargain over Respondent's decision to subcontract and repeatedly sought to bypass such negotiations. During the first bargaining session in which the decision to subcontract was discussed (May 9, 2011), Respondent asked the Union to "assume" that Respondent would use an alterative employer and bargain over effects. Respondent repeated this request at the next two bargaining sessions (May 23 and June 7, 2011). On each occasion, Respondent ignored the Union's request for information and rushed negotiations by insisting that they be concluded in advance of an arbitrary time table. On June 7, 2011, Kingman scolded the Union that to act like subcontracting was not going to happen was just a "fantasy." Such a bargaining posture hardly qualifies as a valid basis for good faith impasse. *See, e.g.,*

Times Union, Capital Newspapers Division of the Hearst Corp., 356 NLRB No. 169, 2011 WL 2141744 *31 (May 31, 2011) (no impasse where employer prematurely ended negotiations and failed to explore agreement because of its determination that layoffs should occur by a date certain).

In fact, Respondent did not engage in *any* good faith negotiations over its decision to subcontract. The Union made cost saving proposals based upon voluntary severance in an attempt to convince Respondent not to subcontract. However, Respondent *chose* to treat the Union's offers as *effects* proposals *in the event of subcontracting* and refused to negotiate on any other basis.[54] Respondent may not refuse to bargain over its subcontracting decision and claim impasse upon the same subject.

Indeed, Respondent sought every opportunity to avoid negotiations on its decision to subcontract. In a letter dated June 28, 2011, Kern made crystal clear that the Union had not agreed to or waived its right to bargain over the subcontracting decision by discussing an agreement that might allow for the same. The Union was merely exploring options that may have mercifully avoided the instant litigation. Nevertheless, Kingman sought to capitalize on the Union's flexibility and good faith by interpreting Kern's letter as meaning the exact opposite of what it stated in the most unequivocal terms. Kingman precluded good faith impasse by attempting to dictate the Union's position and manufacture an agreement or waiver where there was none. See *Essex Valley Visiting*

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[54] In fact, Respondent precluded negotiations on its subcontracting decision by making a take it or leave it "last, best, and final" contract offer on March 16, 2011. Since Respondent would not entertain any other offer, the Union was denied the opportunity to make a contract proposal that might have convinced Respondent not to subcontract Unit work.

Nurses Association, 343 NLRB 817, 841 (2004) (no impasse where employer insisted that issue was "resolved" and sought to bypass negotiations despite Union's flexibility and attempts to negotiate).

In contrast, the Union was extremely flexible in attempting to reach a viable agreement and gave negotiations every opportunity to be fruitful. See *Castle Hill Health Care Center*, 355 NLRB No. 196, 2010 WL 3797696, *54 (Sept. 28, 2010) (overall course and conduct of the parties does not evidence a mutual understanding that further bargaining would not be fruitful); *Royal Motor Sales*, 329 NLRB 760, 772 (1999) (no impasse where union's proposals demonstrated flexibility and further negotiation might have produced additional concessions). As noted above, despite Respondent's refusal to produce information and bargain in good faith, the Union sought to explore a cost saving concept of replacing current Unit employees with less expensive new hires that might convince Respondent not to subcontract. See *Times Union, Capital Newspapers Division of the Hearst Corp.*, 356 NLRB No. 169, 2011 WL 2141744 *31 (May 31, 2011) (no impasse where Union made proposals even though it "correctly believed that [r]espondent had presented it with a fait accompli"). The Union was willing to consider reduced terms and conditions for new hires, including a delay in medical coverage, reduced paid time off, and reduced overtime pay. The Union also systematically reduced

its proposal for severance to be received by employees who agreed to leave. The Union's fluid approach to bargaining indicates that the parties did not reach a valid deadlock.[55]

Respondent's apparent reliance on the Union's failure to provide "specific" cost savings is a complete red herring. First, the Union went far beyond what was necessary by making proposals without the information it requested. Second, the Union could not determine how many employees would accept severance (and be replaced by less expensive new hires) because Respondent refused to discuss the terms of employees who opted to remain and the parties did not reach agreement on the severance to be paid to departing employees. Obviously, an employee would not be able to decide whether to stay or go until he/she knew the terms of continued employment and the severance to be paid upon departure. Respondent's failure and refusal to conclude such negotiations must negate any claim that the Union prevented meaningful negotiation by presenting offers that were insufficiently "specific."

(b) *Respondent's Financial Condition does not Justify Unilateral Implementation of the Subcontracting Decision*

The Board has held that a "dire financial emergency" may excuse a party from bargaining where "extraordinary events" are "unforeseen" and have a "major economic effect [requiring] the company to take immediate action." *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). Respondent's financial situation hardly qualifies. Respondent

[55] Respondent's conduct did not evince a mutual understanding that the parties were deadlocked either. Kingman did not believe he had an obligation to bargain over Respondent's subcontracting decision and chose not to explore whether the Union's concept of cost saving might reverse that decision. Accordingly, Respondent did not manifest a final good faith position on the decision to subcontract and did not declare impasse on that decision. See *Essex Valley Visiting Nurses Association*, 343 NLRB at 841 (no impasse where employer insisted that issue was "resolved" and failed to declare impasse).

had been contemplating cost savings through subcontracting since 2007 and been able to function without "immediate action" since the height of the economic downturn in 2009. Long term conditions not precipitated by a dramatic and unexpected event do not excuse unilateral action. See *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962-63 (2001); *Metrocare Home Services*, 332 NLRB 1570, 1575 (2000); *Haskins Lumber Company*, 316 NLRB 837, 838 (1995). Further, Respondent's alleged financial difficulties were based on its own decisions to incur large expenses. Nevertheless, Respondent's financial condition improved before the subcontracting decision was implemented. Accordingly, Respondent did not establish an exigency sufficient to excuse its bargaining obligation.

Presuming this to be the case, Respondent may nonetheless assert (without success) that its financial situation required expedited negotiations and "prompt action." Generally, "[d]uring negotiations for a collective bargaining agreement... an employer may not unilaterally change any term or condition of employment without having bargained to impasse for the agreement as a whole." *Lawrence Livermore National Security, LLC*, 357 NLRB No. 23, 2011 WL 3215515 *4 (July 28, 2011) (employer not entitled to implement layoffs in advance of overall contractual impasse). However, where a situation requires "prompt action" that is "compelled" by an "economic exigency," an employer may bargain separately to impasse or agreement over that individual change.[56] This exception only applies if the employer can "demonstrate that

[56] As demonstrated above, Respondent did not actually bargain to a good faith impasse over its subcontracting decision. Therefore, the instant argument is somewhat academic.

the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995)

Contrary to any defense that may be raised by Respondent, this line of cases actually suggests that Respondent was not entitled to negotiate and implement its subcontracting decision upon impasse (if it had been reached) for that specific action (as opposed to impasse on the contract as a whole). Respondent has not established an applicable exigency. As noted above, Respondent's financial condition had stabilized by August 2011 and its alleged difficulties were originally based on its own decisions. Those decisions were not unforeseeable external events beyond its control. Moreover, Respondent did not evince the need for "prompt action" since it has been anything but prompt. Respondent contemplated subcontracting for years and waited months before advising the Union that an RFP had issued and bids were received. Accordingly, Respondent did not establish that its subcontracting decision had to be implemented upon impasse in expedited negotiations that preceded impasse on a contract as a whole.[57]

4. Respondent was not Entitled to Implement the Management Rights Provision in the LBFO

(a) Respondent could not Lawfully Implement an offer that contained Permissive Demands

Respondent could not lawfully implement the LBFO because it contained permissive demands that the Union withdraw the subcontracting arbitration and obtain the withdrawal of an ERISA lawsuit which was filed by the Union's welfare fund. An

[57] It was particularly inappropriate here for Kingman to separate negotiations over the subcontracting decision from contract negotiations (as he did) because the Union's proposal to avoid subcontracting was necessarily based on a cost saving contract proposal.

employer may not bargain to good faith impasse upon a proposal that contains a permissive subject of bargaining. See *NLRB v. Borg-Warner-Corp*. 356 U.S. 342, 349-350 (1958). Moreover, "where an impasse has been created, even in part, by insistence on bargaining about a permissive subject… none of the terms of a final offer predicated on such an improper impasse can be lawfully implemented." *Retlaw Broadcasting Co.*, 324 NLRB 138, 143 (1997) citing *Boise Cascade Corp.*, 253 NLRB 462 (1987).

Demands to withdraw (or not file) litigation – including NLRB charges, arbitrations, and/or lawsuits to collect fund contributions – are such permissive subjects. *WWOR-TV, Inc.*, 330 NLRB 1265, 1265-66 (2000) (demand to withdraw grievance is permissive); *Caribe Staple, Inc.*, 313 NLRB 877, 890 (1994) (demands that union withdraw bad faith bargaining charges and "cease making threats" to file new ones are permissive subjects); *International Metal Specialties, Inc.*, 312 NLRB 1164, 1164-65 (1993) (demand that party abandon litigation to obtain fund contributions is permissive subject); *Plattdeutsche Park Restaurant*, 296 NLRB 133, 137 (1989) (demand that funds withdraw lawsuit to collect contributions is permissive subject).

Here, Respondent refused to retract its demand that the Union withdraw from litigation even though the Union expressly advised Respondent that it was unlawful to include such demands in a final offer. In fact, Respondent stated that the Union could not negotiate the LBFO on a "piecemeal basis" and insisted that the Union "sign off on all

litigation."[58] By including permissive demands in the LBFO, Respondent precluded impasse and lawful implementation on that basis. *Id.*

(b) *Respondent could not Implement a Management Rights Proposal before the Parties Reached Overall Impasse on a Contract as a Whole*

It is well settled that an employer many not implement a contractual provision until an overall impasse has been reached in bargaining for an agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (employer simply took action because it did not wish to wait for further bargaining toward agreement or impasse). Here, Respondent was proposing to outsource all Unit employees except maintenance and wanted to rely on the contractual outsourcing provision in the LBFO to do so. However, the Union opposed any outsourcing and was attempting to negotiate a viable prospective agreement for Respondent to retain all Unit employees. Respondent was not entitled to carve out for negotiation (and implementation) its right to subcontract in advance of negotiations for an overall contract (which would cover maintenance employees and could have potentially avoided subcontracting altogether). See *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 n.1, 802 (1992) (unlawful to fragment negotiations and expedite implementation on that basis).[59]

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[58] Kingman's assertion that he was asking the Union to sign off on or withdraw the instant charge *before it was filed* makes little sense. [Tr. 815] However, a demand that the Union "sign off" on an NLRB charge is no less permissive than a demand that the Union withdraw arbitration or get the welfare fund to withdraw a lawsuit.

[59] For the reasons described above [*supra* §§ V(B)(3)(b)], Respondent did not establish an economic exigency for such piecemeal negotiations.

(c) *Additional Factors Preclude a finding of Contractual Impasse*

The following factors, present here, have been relied upon in finding the absence of impasse: A limited number and long hiatus between bargaining sessions, negotiations that occurred in the context of an employer's unfair labor practices, union flexibility with regard to proposals, and the unwillingness of an employer to explore such proposals. *Taft Broadcasting*, 163 NLRB 475, 478 (1967); *Royal Motor Sales*, 329 NLRB 760, 761-2 (1999). Accordingly, in this case, the parties did not reach a good faith impasse.

The short duration and hiatus in negotiations suggest that the parties did not reach contractual impasse. The parties had one informal discussion on August 3, 2010 (during a meeting on grievances) in which Kingman handwrote some new language on management rights and the Union indicated a willingness to discuss the matter with IUJAT. Thereafter, the Union was forced to file a charge in order to bring Respondent back to the bargaining table after an extended hiatus. On March 16, 2010, Respondent presented the Union with the LBFO for acceptance or rejection. See *Cibao Meat Products, Inc.*, 349 NLRB 471, 475 (2007) (the parties did not reach impasse after two bargaining sessions). As indicated above, the LBFO did not even contain prospective terms for employees, such as maintenance, whose work was not being subcontracted. Under these circumstances, the parties had not exhausted contract negotiations or reached a valid impasse.

Respondent was refusing to deal with the Union in a straightforward manner and presented its LBFO in the context of unfair labor practices. *Royal Motor Sales*, 329 NLRB 760, 764-5 (1999) (no impasse reached where negotiations occurred in the context

of unfair labor practices); *Times Union, Capital Newspapers Division of the Hearst Corp.*, 356 NLRB No. 169, 2011 WL 2141744 *28 (May 31, 2011) (no impasse on layoff criteria where Respondent also acted unlawfully by placing employees on unpaid leave). See also *Intermountain Rural Elec. Ass'n*, 305 NLRB 783, 789 (1991). Here, Respondent was unlawfully refusing to provide information and bargain in good faith over its decision to subcontract Unit work. Indeed, for years, Respondent had been failing to notify the Union of its plans and preparations for subcontracting. Accordingly, Respondent's contractual demand for the unilateral right to outsource was not made in an environment of trust, free from other unfair labor practices, that was conducive to a quick and uncoerced conclusion to negotiations for a collective bargaining agreement. *Id.*

As described at length above [*supra* pp. 52-53], the Union's flexibility and Respondent's unwillingness to explore contractual alternatives further precludes any finding of impasse. The Union proposed a contractual concept of cost savings it hoped would convince Respondent to remain the employer of Unit employees. However, Respondent refused to consider a proposal other than the LBFO. Rather, Respondent repeatedly sought to bypass such negotiations and bargain exclusively over effects. The parties' respective bargaining postures did not evince a mutual good faith understanding that negotiations were deadlocked.

(d) *Respondent could not Lawfully Implement a Union Bargaining Waiver*

Respondent could not lawfully implement a bargaining waiver on subcontracting even if the parties had reached contractual impasse. The statutory right to bargain belongs to the Union and, even upon impasse, may only be waived by the Union. See

Colorado-Ute Electric Association, Inc., 295 NLRB 607, 609 (1989); *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1390-91 (1996); *Rotorex Co., Inc.* 1998 WL 34058110 (N.L.R.B.G.C., April 9, 1998).

C. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY SUSPENDING NEGOTIATIONS FOR EMPLOYEES WHOSE WORK WAS NOT BEING OUTSOURCED

Respondent violated Section 8(a)(1) and (5) of the Act by suspending contract negotiations over employees whose work was not being outsourced (e.g. maintenance employees) and conditioning the resumption of negotiations on the completion of an effects agreement for severance to be received by departing employees.[60] In this manner, Kingman turned Respondent's bargaining obligation on its head. As noted above [*supra* § V(B)(3)(b)], Respondent was not entitled to pursue negotiations on its subcontracting decision (much less the effects of that decision) to impasse and implementation in advance of overall impasse on a contract as a whole. This was particularly important in the instant case because the Union was endeavoring to present a contract proposal that would convince Respondent not to subcontract Unit work. By indefinitely suspending contract negotiations and conditioning resumption on a permissive effects agreement, Respondent violated Section 8(a)(1) and (5) of the Act.

[60] The condition that Kingman sought to impose on contract negotiations is properly defined as a permissive subject of bargaining. *See, e.g., Good GMC, Inc.*, 267 NLRB 583 (1983) (employer conditioned contract upon the settlement of a discharge grievance). The Union had no obligation to bargain over an effects agreement in advance of negotiations on the decision to subcontract and an overall contract (which were inherently intertwined in this particular case).

VI. CONCLUSION

For all of the foregoing reasons, Respondent should be found to have violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint. To remedy these unfair labor practices, Respondent should be ordered to cease and desist from its unlawful conduct and restore the status quo ante as it existed prior to the subcontracting of Unit work. Thus, Respondent should be ordered to stop subcontracting Unit work and reinstate laid off employees; make whole those laid off employees; commence negotiations with the Union for a new contract; and post an appropriate Notice to Employees. CGC further prays for such other relief as is just and proper under the circumstances

Dated at Newark, New Jersey, this 20th day of July, 2002.

Respectfully submitted,

Benjamin W. Green
Counsel for the General Counsel

EHXIBIT C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GALAXY TOWERS CONDOMINIUM ASSOCIATION
Respondent,
and Case No. 22-CA-030064

LOCAL 124, RECYCLING, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES UNION
Charging Party.

POST-HEARING BRIEF OF RESPONDENT
GALAXY TOWERS CONDOMINIUM ASSOCIATION

I. INTRODUCTION[1]

If this situation were not so serious, it would read like the plot summary of a bad crime satire: two former Teamsters officers are thrown out of that union for misconduct. These defrocked Teamsters conspire to form an independent union, where one becomes the "elected" leader and the other the "unpaid consultant." In the course of negotiating a first contract with a newly organized employer, two lawyers hired by the union make brief appearances and then are suddenly fired, never to be heard from again. A third union lawyer simply contradicts a written agreement made by the two fired lawyers on the ground that no self-respecting union would make that agreement – even though that lawyer admits that she neither spoke with, nor reviewed the files of, the former lawyers. For the next four years, the union and the employer battle over the validity of the agreement reached with the two former lawyers and disavowed by the still-

[1] Respondent Galaxy Towers Condominium Association ("GTCA"), through its undersigned counsel, files this Post-Hearing Brief in support of its contention that the Complaint in the above-referenced matter should be dismissed in its entirety, either because: (1) GTCA and Local 124, Recycling, Airport, Industrial & Service Employees Union ("Union") agreed in their Memorandum of Agreement ("MOA") that GTCA had the right to "subcontract any work" and, therefore, GTCA's decision to subcontract was the lawful exercise of a valid management right; or (2) GTCA and the Union bargained to impasse in 2011 over, or the Union acquiesced in, the decision to subcontract, a conclusion founded upon the Union's insistence (notwithstanding the language of the MOA) that it did not, would not and could not ever agree to subcontracting.

employed third lawyer. When the employer relies on the agreement in the face of economic necessity, the union's leaders attempt to avoid the consequences of their actions by asking an agency of the federal government to help them undo the employer's lawful decision. Rather than continuing to engage in this fiction, the administrative law judge ("ALJ") should apply traditional and well-established Board law, contract interpretation principles, and common sense to conclude that the agency's complaint should be dismissed in its entirety.

II. FACTUAL BACKGROUND

The relevant facts are divided among four analytically discrete time periods, each of which is discussed below.

A. The Parties' 2006 Negotiations Culminating in the MOA.

On or about June 5, 2006, a majority of GTCA's service, maintenance and garage attendant employees ("unit employees") selected the Union as their collective bargaining representative in an NLRB-supervised election. (GC Ex. 3; Tr. 33).[2] As a result, the Union replaced the employees' prior collective bargaining representative, Local 734 L.I.U. of N.A., AFL-CIO ("Local 734"). (*Id.*).

The Union and the GTCA met on July 6, 2006 to commence negotiations for a collective bargaining agreement ("CBA") to replace the CBA between GTCA and Local 734. (GC Ex. 2; Tr. 33). On July 21, 2006, the Union, through its principal officer, James Bernardone ("Bernardone"), sent a substantially complete draft CBA to GTCA. (GC Ex. 3; R Ex. 35). Among other proposed terms, that draft CBA included a management rights clause, Article 12 - Production Efficiency And Management Rights, generally describing GTCA's unilateral right to

[2] References to the record refer to the hearing of Board Case 22-CA-030064, unless otherwise designated, and are herein abbreviated as follows: Record citations to the transcript (Tr.), General Counsel exhibits (GC Ex.), and Respondent exhibits (R Ex.).

manage its operation, so long as GTCA did not exercise that right discriminatorily or in violation of the CBA.

As proposed by the Union, Section 2 of Article 12 provided:

> The management of, and the direction of, the working force of the Employer, including, but not limited to, the right to hire, suspend or discharge for just cause; to enlarge, combine, decrease, divide, transfer or rearrange departments and to make and enforce reasonable shop rules; establish rules and regulations for its operations, except and reserved to, the Employer, provided that the exercise of such rights will not be used for the purpose of discrimination against any member of the Union or to be contrary to any other specific provision of the Agreement, and provided that nothing herein would be construed to abrogate the provisions of the grievance-arbitration procedure contained in Article 14.

(GC Ex. 3). This proposal by the Union was identical to the language contained in the Local 734 CBA, except that the Union incorrectly copied the Local 734 CBA by omitting the phrase "to the extent specifically limited by the terms of this Agreement, are vested exclusively in[.]" (*Compare* GC Ex. 2 at Article 13, Section 2 *with* GC Ex. 3 at Article 13, Section 2).[3]

The parties held their first substantive bargaining session on August 8, 2006. (Tr. 36). At this meeting, attorney Stephen A. Ploscowe represented GTCA and attorney Christopher Sabatella represented the Union. (GC Ex. 62). Neither party indicated at that time – or at any other time during those negotiations -- that its counsel's authority was limited in any way. (Tr. 225, 227, 881).

At that meeting, the parties entered into a handwritten CBA, the "Interim Agreement," describing a limited number of terms of employment to be implemented immediately. (GC Ex. 4).[4] Specifically, the Interim Agreement implemented: (1) the Union's proposed checkoff, no strike/no lockout, visitation and grievance/arbitration language; (2) GTCA's new hire language,

[3] In fact, the Union's initial proposal for a CBA was substantially identical to the Local 734 CBA.
[4] Absent this Interim Agreement, GTCA acknowledges that the parties would have been bound by the terms of the Local 734 CBA.

as modified by the parties; and (3) the Union's proposal to continue the payment of a small bonus based on days worked in the preceding month. (*Id*.).[5]

Either at that meeting or before the parties' second meeting, Ploscowe presented GTCA's response to the Union's initial proposal. (GC Ex. 5).[6] GTCA rejected the Union's management rights proposal and made the following counter-proposal on management rights:

> **MANAGEMENT RIGHTS**
>
> Section l. ***Management of the Employer's operations and the direction of its working force, including the right to*** establish new jobs, change existing jobs, increase or decrease the number of jobs, change materials or equipment, ***subcontract any work***, change any method of operations, ***shall be vested solely and exclusively in the Employer***. Subject to the provisions of this Agreement, the Employer shall have the exclusive right to schedule and assign work to be performed and the right to hire or rehire employees, promote, recall employees who are laid off, demote, suspend, discipline or discharge for proper cause, transfer or lay off employees because of lack of work or other legitimate reasons, it being understood, however, that the Employer shall not discipline or discharge an employee except for proper cause or otherwise improperly discriminate against an employee.

(*Id*. (emphasis added)) GTCA's counter-proposal differed from the Union's initial proposal in a ***critical*** way – it reserved to GTCA the sole and exclusive right to "***subcontract any work***." (Tr. 686, 788).

Attorney Sabatella made a written response to GTCA's August 8, 2006 counter-proposal. In a document captioned "Response to Galaxy Towers' Counter Proposal," Sabatella described the Union's position on each element of GTCA's counter-proposal. (GC Ex. 6). Regarding GTCA's management rights proposal, Sabatella wrote that the proposal was "***[a]ccepted as drafted***." (*Id*. (emphasis added)).

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[5] The Local 734 CBA contained the bonus language at Article 11, Section 5. (GC Ex. 2). The Union's proposal on this issue appears at the same location in its draft CBA. (GC Ex. 3).

[6] Any uncertainty regarding the date on which GTCA actually conveyed its response is irrelevant, since there is no dispute that the GTCA conveyed, and the Union received, that response.

On August 16, 2006, Ploscowe sent Sabatella a "redlined" draft of the Union's original proposal showing the language changes agreed to by the Union as of that date. (GC Ex.7). Ploscowe incorporated Sabatella's agreement to the subcontracting language into the draft's management rights language:

> **ARTICLE 12 - PRODUCTION EFFICIENCY AND MANAGEMENT RIGHTS**
>
> . . .
>
> ~~Section 2. The management of, and the direction of, the working force of the Employer, including but not limited to, the right to hire, suspend or discharge for just cause; to enlarge, combine, decrease, divide, transfer or arrange departments and to make and enforce reasonable shop rules; establish rules and regulations for its operations, except and reserved to, the Employer, provided that the exercise of such rights will not be used for the purpose of discrimination against any member of the Union or to be contrary to any other specific provision of the Agreement, and provided that nothing herein would be construed to abrogate the provisions of the grievance arbitration procedure contained in Article 14.~~
>
> Section 2a. Management of the Employer's operations and the direction of its working force, including the right to establish new jobs, change existing jobs, increase or decrease the number of jobs, change materials or equipment, ***subcontract any work***, change any method of operations, shall be vested solely and exclusively in the Employer. Subject to the provisions of this Agreement, the Employer shall have the exclusive right to schedule and assign work to be performed and the right to hire or rehire employees, promote, recall employees who are laid off, demote, suspend, discipline or discharge for proper cause, transfer or lay off employees because of lack of work or other legitimate reasons, it being understood, however, that the Employer shall not discipline or discharge an employee except for proper cause or otherwise improperly discriminate against an employee.

(*Id*. (emphasis added)). From this point forward, this management rights language – incorporating GTCA's right to "subcontract any work" – ***appeared in every draft CBA exchanged by the parties in 2006, even those prepared by Sabatella***. (*See, e.g.,* GC Ex. 8, GC Ex. 9).

Sabatella's October 4, 2006 draft CBA removed the redlining notations contained in Ploscowe's original mark-up of the draft CBA, eliminating any doubt that GTCA's management rights language proposal had been accepted tentatively by the Union. (R Ex. 8).[7] Sabatella transmitted that draft CBA to Ploscowe under cover of an October 4, 2006 e-mail, which replied to Ploscowe's e-mail of September 19, 2006. (*Id*.).

The presence of the subcontracting language was no mistake – Sabatella reviewed and revised the draft CBA he had received from Ploscowe a little more than 2 weeks earlier. For example, the attachment to Sabatella's e-mail is titled "Redlined Galaxy CBA after 10_3_06 Negotiations.doc"; whereas, the title of the attachment to Ploscowe's earlier e-mail was "Draft Agreement dated 9/19/06-Galaxy Towers/Local 124". (*Compare* R Ex. 8 *with* GC Ex. 8). Sabatella also deleted the "9/19/2006" date stamp Ploscowe had added on the upper right-hand corner of his draft CBA; Sabatella's deletion is shown as a strikethrough in the same location. (*Id*.) Finally, Sabatella replaced the document control number appearing in the lower left-hand corner of Ploscowe's draft (559293_1.DOC~~557504_1.DOC~~) with an identifying mark of his own, "Redlined Galaxy CBA after 10_3_06 Negotiations.DOC". (*Id*.).

In or around mid-October, 2006, Sabatella literally "disappeared" without explanation from the Union's negotiating team. (Tr. 1136). His role as the Union's lead negotiator was assumed by Louis DeAngelis, purportedly a "consultant"[8] for the Union, and an experienced (if tainted) union representative. (Tr. 1136, R Ex. 4, R Ex. 5, R Ex. 6 (rejected exhibit)). Although he had attended the three meetings[9] prior to Sabatella's disappearance, DeAngelis neither

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[7] Ploscowe and Sabatella also corresponded regarding the parties' bargaining proposals. (R Ex. 36A-B, R Ex. 38). This correspondence clearly shows that the Union "accepted as drafted" GTCA's management rights language. (*Id*.)
[8] DeAngelis and Bernardone admitted that DeAngelis had not billed, nor been paid, for his "consulting" services from 2009 through the end of 2011 negotiations. (Tr. 192, 840-41). GTCA is unaware of any legitimate consultant that does not bill for his services.
[9] DeAngelis attended the August 15th, August 29th and September 29th bargaining sessions.

challenged that subcontracting language agreed to by Sabatella, nor did he ask Ploscowe how it came to be in the draft CBA. (GC Ex. 9; Tr. 41).

On December 5, 2006, GTCA made a final offer to the Union, which was to be submitted to the unit employees for ratification. (GC Ex. 10) That final offer, drafted by Ploscowe, included several proposed terms, including the term of the contract, elements of the Interim Agreement, various economic terms and a provision titled "Contract Language." That provision stated:

> ***As agreed upon to date*** and/or as to be resolved by the parties during final drafting as to any open items.

(*Id*. (emphasis added)) DeAngelis presented this final offer to the unit employees and they ratified it on December 6, 2006. (Tr. 243, 1106-07; GC Ex. 65).

Following the ratification of the final offer, Ploscowe drafted a Memorandum of Agreement ("MOA") to be executed by the parties. (GC Ex. 11). The MOA was identical to the final offer, except that it included two additional items that had been "open" as of the ratification but which subsequently had been agreed to. (*Id*., Tr. 46). The MOA's preamble stated that the parties "***agree to the following terms of a new agreement which was ratified by Local 124 members[.]***" (Id. (emphasis added)). One of those agreed-upon terms was the "Contract Language" provision contained in the final offer. The MOA was signed by GTCA and the Union on December 21, 2006 and January 2, 2007, respectively. As indicated by the document's preamble, the MOA is a CBA that the parties agree remains in effect today. (Tr. 230-31). The MOA, through its "***as agreed upon to date***" provision, incorporated all prior tentative agreements, including the tentative agreement on subcontracting. (Tr. 1033).

Notably, the Union did not attempt to withdraw from the mid-August 2006 tentative agreement on subcontracting prior to the execution of the MOA.

B. <u>The Union's Attempted Repudiation of the Agreement on Subcontracting.</u>

On March 13, 2007, Ploscowe mailed Bernardone a complete, execution-ready CBA. (GC Ex.12). Ploscowe advised Bernardone that "[i]f you believe that any changes are necessary, please let me know." (*Id*.). Bernardone did not respond. Instead, a new Union lawyer, Stephen Goldblatt, e-mailed Ploscowe on May 7, 2007, and stated: "My client [i.e., the Union] has advised me that they would like to address the following issues for negotiation with regard to the collective bargaining agreement. . . ." (R Ex. 10). Goldblatt then identified ***four items*** that the Union had advised him needed to be addressed – ***the subcontracting language was not among those issues***.

Ploscowe responded to Goldblatt the following day and provided his preliminary perspective on the four items that the Union had identified. (R Ex. 11). After discussing these four issues with GTCA, Ploscowe e-mailed Goldblatt on May 24, 2007, and provided a substantive response on each issue. (GC Ex.12). Goldblatt, however, did not respond to Ploscowe's e-mail. Instead, he "disappeared" as suddenly and inexplicably as Sabatella had.

On June 1, 2007, Ploscowe learned that the Union had retained yet another lawyer, Wendell Shepherd. (R Ex. 42). Ploscowe e-mailed Shepherd a copy of his May 24 e-mail to Goldblatt, relating to the four items which the Union had indicated "that they would like to address." (R Ex. 41). On July 3, 2007, Ploscowe sent Shepherd a comprehensive set of documents relating to the 2006 negotiations leading to the MOA and the subsequent correspondence between himself and Goldblatt. (R Ex. 13). Ploscowe advised Shepherd that Goldblatt had identified only four open, unresolved issues. Shepherd did not respond timely to Ploscowe's correspondence. In advance of a scheduled August 3, 2007 meeting with Shepherd,

Ploscowe made two further attempts to determine what issues, if any, Shepherd believed were unresolved. (GC Ex.13, GC Ex. 14).

Shepherd finally responded to Ploscowe by e-mail dated August 1, 2007. (GC Ex.14). Therein, Shepherd identified ***over twenty items*** the Union claimed were unresolved in the parties' bargaining. Regarding the subcontracting language – "accepted as drafted" by the Union in August 2006 – Shepherd simply claimed "***[t]he Union did not agree to the inclusion of subcontracting language***." (*Id.*)

Ploscowe was surprised and angered by the Union's assertion that a large number of issues remained unresolved and by its frivolous denial of the agreement on subcontracting. In an August 6, 2007 letter, Ploscowe wrote:

> I cannot tell you how upset both my client and I are with Local 124's attempt to renegotiate what was agreed upon during the negotiation process. While I can understand that there may have been some confusion on some issues on the Union side as a result of the Union's frequent change of negotiators, that is not an acceptable excuse for the Union's now regressive stand on a number of significant issues.
>
> I am reserving my client's right to file appropriate unfair labor practice charges with the hope that you will be able to get this situation back on track.
>
> When Stephen Goldblatt, Esq. became Local 124's counsel, he reviewed the agreement with the Union officials (or so he told me) and forwarded four (4) areas of concern. You were informed of those in my earlier emails to you which included my responses to Stephen.. [sic]
>
> Apparently, Local 124 has now told you that there are 28 items that are open or need to be addressed. Frankly, I believe we have good reason to challenge the "good faith" of Local 124 and some of those on its bargaining committee.

(GC Ex.16). With regard to the subcontracting issue, Ploscowe stated:

> We proposed the "subcontracting" language on August 8. See the attached August 8 proposals provided to the Union. The same language appeared in every draft of the agreement that followed including those drafted by [GTCA] and Local 124. It was never challenged by Local 124. Thus, it is clear that it was agreed upon. [GTCA] will not give up its agreement.

(*Id*.).

Shepherd responded to Ploscowe in a letter dated September 26, 2007. (GC Ex. 18). On subcontracting, Shepherd simply reiterated that "The Union never agreed to this language." (*Id*.). That deadlock – Ploscowe explaining that the subcontracting language was agreed to in August 2006 and Shepherd simply asserting that the Union did not – continued. To break the deadlock, Ploscowe filed an unfair labor practice ("ULP") charge against the Union on August 17, 2007, alleging that the Union had bargained in bad faith by "reneging on previously agreed upon items and language." (R Ex. 14). The NLRB took an extraordinary amount of time to investigate the ULP charge. Ultimately, the charge was referred to the NLRB's Office of Advice for analysis. (R Ex. 15).

On June 11, 2008, the Office of Advice issued an Advice Memorandum addressing the merits of GTCA's ULP charge. (*Id*.) The Office of Advice relied on the following facts:

> The parties' held their first face-to-face negotiations on July 6, 2006, and there have been one or two meetings per month, as well as email negotiations, since then. The parties are continuing to negotiate. Throughout negotiations the Employer has been represented by attorney Stephen Ploscowe. During that same period, the Union has changed representatives four times. The Union's current attorney, Wendell "Wendy" Shepherd, began representing the Union for contract negotiations in July 2007.
>
> Upon becoming the Union's legal representative, Shepherd asserted, in response to the Employer's emailing of a draft agreement, that the Union had never agreed to various items the Employer was asserting had been agreed upon. The Employer responded that the documentary evidence, which included Union counter proposals and a Memorandum of Agreement in which the

> Union explicitly agreed to various contract provisions and language, established that there had been agreement on those items.
>
> The Employer has now agreed to reopen all but two of the previously agreed-to contract items for further negotiation. The first item that the Employer will not agree to reopen is Article 13, Sec. 2a - which allows management the right to subcontract unit work. The Employer provided documentary evidence establishing that Chris Sabatella, the Union's original bargaining representative, unequivocally agreed to the subcontracting language in August 2006. The Employer's evidence further establishes that despite many opportunities, the Union never disputed the inclusion of the subcontracting language in the contract until Shepherd disputed it in August 2007. ***When questioned during the investigation as to why she would contend there was no agreement when prior Union counsel had unequivocally agreed to the management rights article containing the subcontracting language, Shepherd stated that no self respecting union would agree to this. The Union has provided no other reason for its current disavowal of Sabatella's agreement to the subcontracting language and has provided no evidence to rebut the Employer's claim that the Union agreed to the subcontracting language.***

(*Id*. (emphasis added)).

Based on those facts, the Division of Advice reached the following conclusion:

> It is a violation of the Act for a party negotiating a collective bargaining agreement to withdraw without good cause from tentatively agreed-to contract proposals. ***The Union has presented no rationale for withdrawing from the tentative agreements at issue here other than that "no self-respecting union would agree" to them. Indeed, the Union has not even acknowledged that it withdrew from the subcontracting agreement, but rather has maintained that it never agreed to that provision notwithstanding compelling evidence to the contrary.*** Applying well-established Board law to these facts, the Region has determined that the Union engaged in bad faith bargaining unless the Union's change of counsel privileged its withdrawal from these tentative agreements.
>
> We have found no cases suggesting that a change in bargaining representative can privilege otherwise unlawful regressive bargaining. Moreover, permitting such a defense would enable parties to avoid prior agreements merely by retaining new counsel,

> a result the law should not encourage. ***Indeed, although it is apparent that Shepherd reviewed her new client's prior agreements and made judgments about those agreements which resulted in the Union's withdrawals, the Union has not even articulated its "change of counsel" as a defense to the charge but has continued to maintain that it did not enter into the agreements at issue***.

Accordingly, the Region should issue a Section 8(b)(3) complaint, absent settlement. (*Id*. (emphasis added)).

A few months later, the Union settled the ULP charge. (GC Ex.19). The settlement agreement contained a notice posting obligation. (*Id*.). The notice to be posted in that case directed the Union to "rescind [its] withdrawal from tentative agreements reached, including sub-contracting, as described in the Production Efficiency and Management Rights clause, Article 13, Sections 2a and 2b." (*Id*.). Notwithstanding the conclusions reached by the Division of Advice, the Union's settlement of the ULP charge and the unambiguous language of the notice posting, the Union has continued to deny that it had agreed to the subcontracting language at issue or that that language was incorporated by reference into the MOA.

During the pendency of the ULP, the parties continued to meet in an effort to reach an overall CBA. (*See, e.g.*, GC Ex. 74, 80, 84; R Ex. 50-74). During that process, GTCA conceded on many of the issues the Union belatedly had identified as open. However, GTCA refused to concede on this issue of subcontracting. (R Ex. 72). Notwithstanding its refusal to concede on this issue, GTCA, acting under a reservation of rights, made a number of proposals either linking a Union agreement on subcontracting to some specific economic enhancement desired by the Union or proposing limitations or restrictions on the broad right to subcontract agreed to by the Union in August 2006. (*See* R Ex. 62 ("As to OT after 8 and subcontracting, I proposed a trade, one for the other, that is, Galaxy will agree to the OT after 8 on a go forward basis if the Union

agrees on subcontracting and we add "cross-training" to section 13.2a. The Union asked for more information on subcontracting, that is, is it limited to Security (as the Union has heard) and does that include the Garage employees? Also, will the Galaxy pay severance/buyouts to employees not hired by a subcontractor? Galaxy is concerned about older (long term?) employees losing their jobs and benefits. If the Union has a specific counter proposal, let me know.")). The Union refused to accept any of these conditional proposals and it refused to make ***any*** substantive counter-proposal on this issue. Instead, the Union repeatedly insisted that it would not under any circumstance agree to any form of subcontracting. (R Ex. 58A ("The right to subcontract. He [DeAngelis] said that the Union would never agree to a contract that contained the right to subcontract.")). At least in part due to the inability to bring the CBA to closure, Ploscowe was relieved of his role as labor counsel for GTCA in or around February 2009.

C. <u>The Sporadic 2009-10 Negotiations for a Successor CBA.</u>

The MOA expired by its terms on May 31, 2009. (GC Ex. 11). In advance of that termination date, the parties met on several occasions for the purpose of trying to negotiate a successor CBA. (*See* Kingman's notes at GC Ex. 21).[10] When the parties could not reach an agreement before the expiration date of the MOA, they entered into an "Extension Agreement" that extended the MOA through June 30, 2009. (GC Ex. 20).[11]

In June 2009, the parties exchanged proposals, which were more like statements of position than traditional bargaining proposals. (*See* GC Ex. 22, 23). GTCA's proposal, dated June 14, 2009, explained the extraordinary economic challenges facing the organization – the very same challenges Kingman described as motivating the disputed subcontracting decision

[10] Kingman became GTCA's chief spokesman at negotiations commencing with the parties' May 18, 2009 session. (GC. Ex. 21).

[11] This exhibit refers to a "Collective Bargaining Agreement" expiring in on May 31, 2009. The only CBA signed by the parties with an expiration date is the MOA.

nearly two years later. (GC Ex. 22). Based on these economic circumstances, GTCA proposed to extend the CBA and all current terms by one year. (*Id*.). The Union responded the following day. (GC Ex. 23). Therein, the Union rejected GTCA's proposed one-year extension and expressed its desire to bargain a "full three year agreement." (*Id*.).

The parties continued to meet and exchange proposals throughout Summer 2009. (*See* GC Ex. 21 (describing meetings occurring 6/24/09, 7/23/09, 7/27/09 and 8/13/09)). As had been the case over the last several years, the parties were unable to reach a complete agreement on a new CBA, at least in part because they could not agree on the disputed subcontracting language. (GC Ex. 24 ("The terms of the agreement as to . . . subcontracting . . . to remain unchanged."), GC Ex. 21 at p. 4 ("no subcontracting")). At their August 13, 2009 meeting, the parties discussed the prospect of submitting the subcontracting dispute to arbitration. (GC Ex. 21, at 9; Tr. 67, 324-25).

On August 31, 2009, the parties signed an "Interim Agreement," pursuant to which they agreed to indefinitely suspend bargaining for a successor CBA pending the receipt of an arbitration award on the following issues: "(1) Does the current Agreement between the parties permit sub-contracting by the GTCA, and, if so; (2) What is the nature and extent of such permitted sub-contracting?" (GC Ex. 25). The Interim Agreement also extended the parties' current CBA "until a date thirty (30) days after the delivery of the written decision of the arbitrator to the parties. . . ." (*Id*.). Thereafter, the parties did not meet for bargaining until Fall 2010.[12]

[12] Notwithstanding the Interim Agreement, the dispute over subcontracting was not resolved by an arbitrator. Only one hearing day was held and that was effectively a "show trial" for the Union's benefit. (Tr. 1268-69). Although both parties could have taken legal action to compel arbitration, neither side did so. GTCA contends that the Union breached the Interim Agreement by demanding bargaining in Fall 2010. (CG Ex. 35). The Union apparently believes that the arbitration is still pending. (GC Ex. 49).

In June 2010, Bernardone wrote to GTCA asking for bargaining.[13] (Tr. 1255). GTCA responded that the 2009 Interim Agreement relieved it of the obligation to bargain, but that GTCA would meet to discuss grievances. (*Id.*). This overture led to a series of meetings in which the Union stated that it was prepared to quickly agree on a new CBA, which the Union believed would serve as a contract bar to the raiding union. (Tr. 1256-67). On or about August 3, 2010, Kingman met in his office with Bernardone and DeAngelis. (Tr. 1257). According to Kingman:

> Mr. Bernardone said I [i.e. Bernardone] have the authority to enter into a contract. I don't have to submit it to the membership. I can sign it. And we discussed a two year contract, which this was in -- it was the beginning of August 2010. So it would have taken us through the end of May 2011. We discussed the terms of a two year contract, which would have included at that time I think the last final economic off of the Galaxy as to pay raises and so. And also included some new language concerning subcontracting.

(Tr. 1257-58).

Kingman told the Union representatives that GTCA would only accept a contract that included subcontracting. (Tr. 1258). Again according to Kingman:

> At which point the point was raised -- and I'm not sure whether it was Mr. DeAngelis or Mr. Bernardone, but one of them asked me about bumping rights and that if we outsourced, for example, the maintenance department or if we outsourced janitors, would those employees then be able to replace let's say concierges? We had a somewhat lengthy discussion about how bumping rights would work. And at their request we sat down and drew up some language which included bumping rights. This was what they asked for, and I sat there with them and I wrote it out on a legal sheet. We also wrote some language concerning -- or I wrote some language concerning subcontracting various departments, because at that point we had no idea.

(Tr. 1260).

[13] The Union sought to bargain even though it had agreed to the 2009 Interim Agreement because it was being raided by a competitor Teamster local union.

Kingman, Bernardone and DeAngelis then worked through draft subcontracting language. (Tr. 1262). After they had agreed on draft language, Kingman had his secretary type the draft language. Kingman then presented that agreed upon subcontracting language to Bernardone and DeAngelis. (*Id.*). That agreed upon language stated:

> In the event the employer shall subcontract a department or division, the employees of such department or division shall have the right to exercise bumping rights over less senior employees in job categories in other departments or divisions where such employees possess the requisite skill set and qualifications.
>
> The Employer (GTCA) shall have the right to cease its status as the employer of employees at the GTCA facilities and outsource, that is, retain a third party who shall become the employer at the facilities of the GTCA, provided that if a majority of the work force hired by the outsourcing company at the facilities of the GTCA shall be comprised of former GTCA employees, the outsourcing company, upon request of the union representing such employees, will recognize the union and negotiate the terms of a new collective bargaining agreement.

(R Ex. 16). At that same time, the parties reached an agreement on an overall CBA.

At about that time, Kingman communicated via e-mail with Ploscowe, in order to get his informal reaction the agreed upon subcontracting language and to determine if that language would present any issues for Planned, which was represented by Ploscowe. (Tr. 1263-64, 1053-56; R Ex. 43). Kingman's August 20, 2010 e-mail to Ploscowe stated:

> The GTCA has finalized terms of a new contract with the union, which includes the subcontracting/outsourcing language I sent you. The contract would be for two years retroactive to June 1, 2009. However, there is a new wrinkle. Yesterday I received a copy of a filing by the teamsters with the NLRB seeking certification as a representative of the employees. Apparently there is an issue as to whether the contract extension now in place is sufficient legally to defeat such a request. Two questions for you: (1) Can the GTCA sign a new contract with Local 124 while the teamsters request is pending with the NLRB? The notice I received asks us as employer to supply certain information, such as any contracts. Is there any liability to the GTCA if a new contract with Local 124 is

> signed next week? Please let me know your opinion ASAP. Thanks.

(R Ex. 43).

Based on his agreement with the Union, Kingman drafted a successor CBA (which he titled "Memorandum of Agreement") for the Union to sign and he transmitted it to them on August 23, 2010 for execution. (R Ex. 17). That MOA contained the following language addressing subcontracting:

> MANAGEMENT RIGHTS: Article 13, Section 2a. of the Agreement is amended to add the following language: "In the event the Employer shall subcontract a Department or Division, the employees of such Department or Division shall have "bumping rights" over less senior employees in job categories in other Departments or Divisions where such employees shall possess the requisite skill set and qualifications for such job category. The Employer shall have the right to discontinue and terminate its status as the Employer at the GTCA, and shall have the right to "outsource", that is, retain a third party who shall thereafter become for all legal and lawful purposes the employer of all employees at the GTCA facilities".

(*Id*.).

Despite agreeing on this subcontracting language and on other terms for a new CBA in Kingman's office, the Union reneged on its agreement to execute this MOA, apparently because it learned that contract would not act as a bar to the upcoming election with the raiding Teamsters local union. (Tr. 1266-67). Notably, despite receiving an e-mail from Kingman asking for the Union to sign an MOA that included subcontracting language, the Union didn't respond to this e-mail in any way.[14] Common sense would dictate that if one party sent another a contract that the first party contended had been agreed upon, the second party would respond in some fashion, especially if, as the Union has done here, the second party denies the existence of

[14] The Union's action here is consistent with its failure to respond to Ploscowe's March 17, 2007 letter, transmitting the CBA, and its failure to respond to Goldblatt's emails. Clearly there is a pattern here.

the agreement. Further, if Kingman simply invented this agreement out of whole cloth, or events occurred the way he recounted them. Why would he draft the subcontracting language, send it to Ploscowe for review, draft a full MOA and then send it to the Union for execution? The only rational conclusion here is that Kingman's version of events is correct and the Union – consistent with its history – simply reneged on another agreement.

Following that episode of Union perfidy, the Union sought to bargain even though pursuant to the 2009 Interim Agreement, it had agreed to suspend negotiations. GTCA initially was uncertain about its obligation to bargain with the Union during the pendency of the certification election and then election objections (which ultimately resulted in a rerun election). However, GTCA eventually agree to resume bargaining. Perhaps unsurprisingly, the parties negotiations in late 2010 were not fruitful, culminating in the bizarre meeting attended by Union lawyer Roy Barnes. (Tr. 1272-76). Barnes was apparently uninformed about the parties' bargaining and he suggested that GTCA simply agree to a substantial wage increase and deal with non-economic issues later. (Tr. 1275-76). GTCA declined that offer. (Tr. 1276).

D. **<u>The 2011 Negotiations.</u>**

1. **The March 16, 2011 meeting and subsequent communications regarding subcontracting.**

On March 16, 2011, the GTCA and Union bargaining committees met for the first time since December 2010. (Tr. 1276). At this meeting, GTCA through its lead negotiator Kingman presented the Union with a "last, best, and final offer" ("LBFO") for a successor CBA. (Tr. 1278; GC Ex. 42). Kingman explained that this LBFO was based on the substantive terms of the CBA that the Union had agreed to and then reneged on in August 2010, except that it included a proposal to settle a then-pending lawsuit concerning the Union's health and welfare plan. (Tr. 1278-9, R Ex. 17). After the Union objected to this litigation provision, GTCA withdrew that

demand and never raised it again thereafter. (Tr. 1279).[15] Bernardone effectively ended the March 16 meeting by launching a tirade at GTCA. He took the LBFO, crumpled it up, threw it across the table, and stormed out of the room. (Tr. 92, 1166, 1208, 1280).

As of the March 16 meeting, GTCA had not made and did not at that time make a specific proposal regarding the subcontracting of bargaining unit work. (Tr. 1165-66, 1284). Nonetheless, on the very next day, Bernardone sent a letter to Galaxy Towers homeowners stating a vehement and blanket objection to any subcontracting of unit work. He emphasized that that any attempt to subcontract would be unqualifiedly opposed through litigation. (Tr. 1282-83; R Ex. 31). The Union's preemptive warning on subcontracting – reinforcing its consistent and unequivocal refusal to even entertain the idea of subcontracting – echoed the Union's unwaivering position on this issue since the appearance of Union counsel Shepherd. (Tr. 133-34).

On April 12, 2011, Kingman sent an e-mail to the Union's legal counsel, in which he: (1) advised the Union ***for the first time*** that GTCA was considering a specific proposal to subcontract certain unit work including housekeeping, concierge, and security services, and would provide further details at the parties' next meeting; (2) proposed dates for further negotiations; (3) described an anticipated 60-day timetable for the negotiation and final decision-making process concerning subcontracting; and (4) invited the Union to discuss and respond to the subcontracting proposal. (Tr. 1284; R Ex. 45).

[15] Kingman explained at the Hearing that GTCA had included the health fund litigation provision because it had been raised by Barnes, counsel for the Union, at the December 2010 bargaining meeting and identified by the Union itself as an issue that they wanted to resolve as part of an overall settlement. (Tr. 1279). As Kingman further explained, after GTCA withdrew this specific proposal any subsequent references to settling "litigation" after March 16 referred solely to the Union's occasional threats to file a ULP charge and to litigate the subcontracting issues before the NLRB. (Tr. 1281-82).

2. **The May 9, 2012 meeting and subsequent communications regarding subcontracting issues and information requests.**

Nearly two months passed before the parties met again on May 9, 2012. GTCA made a detailed presentation to the Union bargaining representatives regarding GTCA's subcontracting proposal and the compelling financial basis for that proposed decision. (Tr. 717, 1167, 1286). GTCA controller Joseph Manzi made the PowerPoint presentation consisting of detailed data contained on five slides; the presentation lasted approximately 30-60 minutes. (Tr. 1287-88; R Ex. 46).[16] The primary focus of the presentation was on the substantial cost savings that GTCA could realize through subcontracting the work at issue,[17] savings estimated at over $1,000,000 on an annualized basis. (Tr. 1293; R Ex. 46, at 4). The Union had the opportunity to ask questions about the presentation and Manzi scrolled back and forth repeatedly through the slides at the Union's request. (Tr. 1288-1290). The Union made no counter-proposal on subcontracting at this meeting. (Tr. 1172-73).

After the presentation, the Union also made several requests for information, which it memorialized in a May 11th letter from Union counsel Steven Kern to Kingman. (Tr. 1292; GC Ex. 44). The Union, through Kern, requested the following items:

> l. Please provide the Request For Proposal (or Requests, if more than one) said to have been sent out by Galaxy concerning outsourcing of bargaining unit work and supervisory/management work related to such bargaining unit work that may be outsourced along with it.
>
> 2. Please provide the bids or offers or proposals said to have been received from five entities for performance of such work on an outsourced basis.
>
> 3. Please identify the union or unions with which the three bidders said to be "union" have bargaining relationships.

[16] Contrary to the scattershot testimony of the Union's witnesses, the presentation lasted considerably longer than "five minutes," (Tr. 1289), was not "twenty or fifty pages long," (Tr. 1287), and did not contain any "pizza charts," "pie charts," or "cartoons." (Tr. 1287, R Ex. 46).

[17] GTCA contemplated subcontracting all the bargaining unit work except that performed by the In Unit Services ("IUS") employees. (GC Ex. 43; R Ex. 46).

4. Provide copies of current collective bargaining agreements of these bidders covering work of the same nature as bargaining unit work at Galaxy Towers.

5. Provide hard copy of the power point presentation shown on May 9 including numbers and charts regarding comparative costs of bargaining unit work performed by Galaxy employees and such work performed on an outsourced basis.

By e-mail dated May 19, 2011, Kingman replied to Kern's letter, enclosing materials in response to the Union's information requests and again requesting that the Union provide a substantive response to GTCA's subcontracting proposal. (Tr. 1292-93; GC Ex. 45). Kingman provided a four page document containing ***all of the information*** in the May 9 PowerPoint presentation, as well as a comprehensive list of all the services under consideration for subcontracting. (Tr. 1298-99, 1293; GC Ex. 45).[18] The Union never challenged the accuracy or scope of the materials sent by GTCA on May 19. (GC Ex. 45; Tr. 1300).

Taking into account the information provided orally at the May 9 meeting and as confirmed in the e-mail and attachment from Kingman on May 19, the Union had received all the responsive and available information it had requested. (Tr. 1295, 1301; GC Ex. 44). With respect to Request #1 – responsive information was provided in Kingman's e-mail and related attachment on May 19, which attachment contains all the information requested. (Tr. 1301). Moreover, the Union itself had direct access to the information regarding employee classifications by virtue of their representational status. (Tr. 1293-94, 1301); Request #2 – GTCA representatives had previously explained to the Union that GTCA had received five bids in response to the RFP, but that two of those bids were from non-union contractors and immediately disqualified on that basis; therefore, those bids were completely irrelevant to the

[18] As explained by Kingman at the Hearing, certain of the additional information contained in the attachment to his e-mail was comprised of the substantive portions of the underlying Request for Proposal ("RFP") issued by GTCA to potential bidders, including in particular pp. 9-14 of that RFP. (Tr. 1295; R Ex. 47).

subcontracting discussion. (Tr. 757, 1301-1302). Moreover, at future meetings Kingman explained that the only vendor being considered as a potential contractor was Planned Building Services and its affiliates ("Planned"), and that their bid and the actual terms being offered would be the subject of further negotiations; therefore, the original bid was obsolete and irrelevant. (Tr. 1301-1302). Finally, even to the extent that the bids could have been relevant, GTCA explained that the bids were subject to confidentiality agreements with the respective vendors, a position which was not contested or responded to by the Union. (Tr. 757); Request #3 – GTCA advised the Union that it had no responsive information. (Tr. 1303); Request #4 GTCA advised the Union that it had no responsive information. (Tr. 1303); Request #5 – GTCA provided the Union with the PowerPoint materials and therefore satisfied this request. (Tr. 1303). After receiving these materials, the Union stopped asking for bids or financial related information until several meetings later. (Tr. 738).

a. The May 23 meeting and subsequent communications.

On May 23, the parties held their next collective bargaining session. (Tr. 742, 1304). Despite the passage of two weeks since the previous meeting and the Union's receipt of the requested subcontracting information, the Union did not make a specific, substantive counter-proposal with respect to GTCA's contemplated decision to subcontract unit work. (Tr. 1174, 1209-10, 1304-1305). Rather, the Union admitted (as they would repeatedly throughout the bargaining process) that they could not possibly match the savings which GTCA would realize through subcontracting. (Tr. 742, 744). Kingman again requested a substantive counter-proposal and advised the Union that the GTCA Board of Directors intended to consider and vote in early June on whether to move forward with negotiations with Planned. (Tr. 1305).[19] Rather

[19] As noted by Kingman at the Hearing, GTCA never gave the Union a hard deadline or an ultimatum; rather, at all times, GTCA was flexible on the timing of negotiations and implementation of the decision under consideration and

than make a proposal on the decision to subcontract, the Union initiated discussions about how the subcontracting and subsequent hiring process would take place with the new employer. (Tr. 1175). For example, the Union asked whether all employees could be interviewed and offered jobs by the new employer. (Tr. 742, 1175). Further, the Union and GTCA discussed confidentiality concerns regarding the transfer of personnel files to Planned. (Tr. 596). Kingman explained that GTCA could not dictate hiring decisions for the new employer, but he agreed to seek assurances that all current employees could interview if they so chose to. (Tr. 1175). The next bargaining session was set for June 7, 2011.

Prior to the next face-to-face meeting, DeAngelis called Kingman on June 6 and advised him that he was going to make a substantive proposal on behalf of the Union at the next meeting concerning ***the effects*** of GTCA's decision to subcontract the unit work at issue. (Tr. 1307-08; R Ex. 48).[20] DeAngelis also stated that negotiations over a new comprehensive CBA were now "academic" and irrelevant, given GTCA's subcontracting proposal. (Tr. 1307, 1312). During that call, DeAngelis outlined the structure of an effects bargaining proposal under which approximately one third of the current Galaxy employees would accept a severance payment and not seek reemployment with Planned, one third would be hired by Planned at their current rate, and one third would be hired by Planned at a reduced rate. (Tr. 1309-1310; R Ex. 48). DeAngelis emphasized that that one of the Union's main concerns was to preserve as many jobs as possible with the new employer. (Tr. 1310). Kingman and DeAngelis then talked about how they might involve Planned in related discussions, to the extent the Union was seeking specific

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provided the Union with regular and ongoing updates and multiple opportunities to delay the process, as necessary. (Tr. 731, 1171, 1305, 1319; R Ex. 43).

[20] Kingman kept notes of this meeting, which were consistent with his testimony. (R Ex. 48). DeAngelis, of course, had no written record of this call.

hiring and wage-related objectives. (Tr. 1311). DeAngelis also indicated that he either would or might already have met with Planned to discuss these issues independently. (Tr. 1311).[21]

b. The June 7 meeting.

The day after Kingman and DeAngelis spoke on the telephone, GTCA and the Union met for a full bargaining session on June 7. (Tr. 746, 1314). Before the employee committee members arrived, DeAngelis stated that the Union understood GTCA would likely implement the decision to outsource and that, while the Union could file a ULP charge, they preferred to reach an agreement over the effects of the subcontracting decision and to preserve as many jobs as possible with Planned. (Tr. 764, 803-04, 1314). DeAngelis indicated that he also knew that a number of current employees wanted to leave the Galaxy anyway and so might be interested in a severance package. (Tr. 1314). During this exchange, the employee members of the committee arrived. They were very upset and vocal that the Union had engaged in effects bargaining over what would happen after outsourcing took place. (Tr. 1316). This outburst was quickly followed by a caucus. (Tr. 1316).

After the break, the Union raised for the first time in nearly a month the issue of information allegedly needed to understand GTCA's subcontracting proposal. (Tr. 1317). Specifically, the Union asked for breakdown of the number of the anticipated hours employees would be working at the new employer within the outsourced classifications. (Tr. 1317). Although the Union could have easily derived this data from information it already possessed, GTCA provided the requested information at the meeting. (Tr. 1317). The Union again made no specific proposal concerning subcontracting, while conceding that the only way the Union could match the savings at issue would be if the employees took a 30% pay cut. (Tr. 1318). Finally,

[21] GTCA subsequently learned that DeAngelis and Bernardone had met with Robert Francis of Planned. (Tr. 105-06, 402, 802).

Kingman reminded the Union that the GTCA Board was intending to vote on June 7 on whether to move forward in final negotiations with Planned. Kingman asked the Union if they would like him to have the GTCA Board delay the vote. (Tr. 1319). The Union declined his offer and told him the Board should move forward. (Tr. 1319). On June 9, the Board voted to authorize Kingman to enter into negotiations with Planned concerning the terms of a potential subcontracting agreement. (Tr. 1322).

c. The June 16 Meeting.

On June 16, 2012, Kingman and DeAngelis met alone at Kingman's office. (Tr. 1320-21).[22] At this meeting, Kingman and DeAngelis continued the discussion they had had on previous occasions regarding effects bargaining, whereby some portion of the current employees would take a severance package and the remaining employees would accept employment with Planned under a two-tiered wage rate structure. (Tr. 1320-21). DeAngelis expressed his hope that Planned would hire all the current employees that did not accept severance. He also stated that he was particularly concerned about the jobs of the employees with high seniority, especially those working in the front desk/concierge classification (including bargaining committee members Rosado and Morales). (Tr. 1320). DeAngelis said the Union would make a comprehensive effects bargaining proposal at the next full negotiating session, which would include a specific severance proposal linked to seniority. (Tr. 1321; GC Ex. 59). Throughout these discussions, DeAngelis never indicated that he or the Union intended that any of the employees subject to the subcontracting proposal would continue to be employed by GTCA. (Tr. 1322).

[22] Once again, Kingman had notes of this meeting. (*See* GC Ex. 59). DeAngelis, of course, had none.

d. The June 20 Meeting

GTCA and the Union next met on June 20, 2011 at the Galaxy Towers. (Tr. 805, 1324).[23] DeAngelis explained that the Union had two routes it could take – litigation or effects bargaining – and that it chose to engage in effects bargaining. (Tr. 1182, 1324). The Union then made a specific effects bargaining proposal which included offering a severance package to all employees under which employees would be eligible for one week of pay for each year of service. (Tr. 805, 1176-78, 1324). The Union stated that its proposal was based on the assumption that approximately one third of the employees would accept the severance offer and separate their employment permanently; one third would be offered jobs with Planned at their current contract rate and one third would be offered jobs with Planned at a rate $3.00/hour lower than the contract rate. (Tr. 805, 1210-11, 1324, 1326).[24] GTCA quickly analyzed the severance component of this proposal and determined that it would cost the organization over $1.65 million in 2011 if every employee took the severance, a preposterous proposal knowing that GTCA was desperate to cut costs immediately. (Tr. 810, 1212, 1325). While GTCA was willing to negotiate over this comprehensive proposal, Kingman also made it clear to the Union that in order for it to reasonably assess any severance proposal, GTCA would need to know how many employees would actually accept, or be required to take, a severance package. (Tr. 818, 1214, 1330).[25]

At this June 20 meeting, the discussion solely concerned the circumstances under which the current employees would either take severance or leave and become employees of the "new

[23] Kingman had notes of this critical meeting; DeAngelis "lost" his. (Tr. 108-09, 175; see GC Ex. 59).
[24] This public proposal was consistent with the proposals DeAngelis had discussed in his private discussions with Kingman on June 6, 2011 and June 16, 2011.
[25] Absent a hard number of employees that would be severed, GCTA's severance cost was an unknown variable. If a very high number of employees took severance, then GTCA's cost of severance in 2011 would significantly eroded the saving it was trying to achieve.

employer." (Tr. 1178, 1180, 1210-1211).[26] The parties ***never*** discussed a scenario whereby these employees would remain employed by GTCA. (Tr. 1326-27). Relatedly, the Union did not make any proposal describing ***specific cost savings*** to GTCA as an alternative to outsourcing. (Tr. 1326-27).[27] Moreover, despite its awareness that the GTCA Board was seriously contemplating the subcontracting of unit work, the Union neither asked any questions about the economics of that decision nor requested that GTCA delay the process in order to allow for further consideration by the Union. (Tr. 1177-78, 1327-28). In sum, as at previous meetings it was clear that the Union had acquiesced in the decision to subcontract and focused solely on bargaining over the "effects" of that decision, including on the transitional process and on the terms for employees who either accepted severance or were hired by Planned. (Tr. 1181-82, 1330).

e. <u>The June 30 Meeting.</u>

The parties met again on June 30. (Tr. 1331). Oddly, at this meeting the Union avoided entirely the subcontracting issue and only asked about the status of GTCA's March 16 LBFO – an issue it had not raised since that March meeting. (Tr. 1331). When Kingman asked the Union for a counter-proposal on subcontracting, the Union obliquely responded only that they hoped GTCA would "come to its senses." (Tr. 1331). Kingman believed that the Union never intended to make a substantive proposal on subcontracting. (Tr. 1332-33). Returning to the issue of the

[26] At this meeting DeAngelis also emphasized that the Union was most concerned about protecting the jobs of the concierge (front desk) employees in connection with the new employer. (Tr. 1179, 1211).

[27] DeAngelis attempted to claim after the fact that the Union's proposal at this and other meetings only ever contemplated "voluntary" departures from Galaxy. (Tr. 110). As noted elsewhere, DeAngelis' notes for this important session conveniently disappeared. Moreover, this claim was directly at odds with the specific, consistent and credible testimony of Michael Kingman, Ruth Olsen and Eugene Blum that the discussion on June 20 and other dates always and solely concerned an arrangement whereby all employees at issue would involuntarily separate employment from GTCA, with some accepting severance and the others seeking employment with the new employer. Further, the bargaining notes from Union counsel Kern also contradicted DeAngelis and reflected that the Union proposal on June 20 was structured in part to protect the jobs of employees above a "certain seniority level." (GC Ex. 54, at 9). This proposal, of course, would be unnecessary if the arrangement was entirely "voluntary."

effects of the decision, Kingman offered a severance proposal in an amount equal to $1,000 per employee, which would have capped total liability at under $70,000 if all employees took it. (R Ex. 44, at 25).

In early July 2011, Kingman concluded negotiations with Planned for a subcontracting agreement. Planned then began the process of interviewing and making offers to employees prior to the anticipated start date of August 1, 2011. (Tr. 1058). Planned circulated an offer sheet and arranged a specific date to conduct interviews on site at the Galaxy Towers. (Tr. 393; GC Ex. 52). Shockingly, only a few employees showed up to interview; all were offered positions. The Union then failed to show up for the next scheduled bargaining session on July 22, 2012. (Tr. 1335).

f. The July 27 Meeting.

The parties next met on July 27, 2011. (Tr. 1183-84, 1215, 1336). Bernardone opened the meeting by insisting that the parties had never engaged in effects bargaining. After Kingman corrected him by pointing out that he had not been present at certain previous meetings, Bernardone exploded and launched into an abusive tirade, causing all present to fear for the worst. (Tr. 1183-84, 1215, 1336). After Bernardone stormed out, DeAngelis proposed a new severance package that would have been capped at $500,000 if all employees accepted it. Kingman countered with a proposal with a cap of $120,000. (Tr. 1338-39). DeAngelis said he would call with a further response in a few days, but never did. (Tr. 1340).

III. ARGUMENT

A. Credibility Issues.

1. The ALJ Should Draw An Adverse Inference Against the CGC and/or the Union for the Failure to Call Sabatella or Goldblatt as Witnesses and for Spoliation.

"[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Int'l Automated Machines*, 285 N.L.R.B. 1122 (1987), *enfd.* 861 F.2d 720 (6th Cir.1988). The ALJ is entitled to apply this inference, regardless of whether a witness is equally available to both the parties, where the witness is presumed to be "favorably disposed" to a particular party. *Id.*

Such adverse inference is particularly appropriate where, as here, the CGC seeks to avoid the consequences of powerful admissions by the Union's agents regarding the content of the parties' CBA – and, particularly, whether that CBA included the disputed subcontracting language. Here, the CGC and the Union failed to call either Sabatella and Goldblatt at trial.[28] As described above, Sabatella was the Union lawyer who repeatedly communicated the Union's agreement to GTCA's subcontracting language – an agreement that the Union attempted for years to disavow even though it lacked any factual or legal basis for doing so. The CGC and the Union also failed to present Sabatella's bargaining notes or his written communications with either Bernardone or DeAngelis. Given Sabatella's role as Union counsel and lead negotiator, one would have anticipated the he would have supported the Union's strident and prolonged

[28] The fact that Sabatella and Goldblatt are attorneys is irrelevant. Courts have routinely drawn adverse inferences against a party that fails to call a former lawyer. *See Pacifico v. Pacifico*, No. FM-12-330-96, 2009 WL 436465, at * 10 (N.J. Super. Ct. App. Div. Feb. 24, 2009) (reversing and remanding where, *inter alia*, the lower court failed to draw an adverse inference from party-wife's failure to produce any testimony from former attorney representing her during negotiation of disputed property settlement agreement); *Pelarinos v. Henderson*, 643 A.2d 894,898 (Conn. App. Ct. 1994), certification denied, 231 Conn. 909 (1994) (drawing adverse inference from defendant's failure to call former attorney who allegedly could corroborate defendant's claims regarding commercial property contract negotiations).

claim that it never agreed to the subcontracting language. Since he inexplicably was not called to testify or produce documents, the ALJ should conclude that his testimony would not have supported the Union on this critical point.

Goldblatt's unexplained absence is even more compelling. Goldblatt was Union counsel after the MOA was signed and after Bernardone received Ploscowe's March 17, 2007 complete CBA draft. As explained above, Goldblatt wrote to Ploscowe on May 7, 2007 and stated: "My client [i.e., the Union] has advised me that they would like to address the following issues for negotiation with regard to the [CBA]. . . ." (R Ex. 10). Goldblatt then identified four issues to be addressed.[29] ***The subcontracting language was not one of the four items***. (*Id*.). Goldblatt's statements regarding the four open issues – and the omission of the subcontracting language as an open item – are admissions admissible against the Union. In this e-mail, Goldblatt related statements made to him by the Union ("My client has advised me. . . .") regarding the open CBA issues. Notably, these statements were made more than five months after the MOA was signed and more than six weeks after Ploscowe sent Bernardone a complete CBA draft. New Union counsel Shepherd's and DeAngelis' responses (or should we say, non-responses) to Goldblatt's admissions are equally probative on this point. As noted above, Ploscowe sent Shepherd and DeAngelis a copy of Goldblatt's e-mail on June 1, 2007 and June 2, 2007, respectively. (R Ex. 41, 42). Neither Shepherd nor DeAngelis ever disputed Goldblatt's authority to send the May 7th e-mail, nor did they ever attempt to explain why he would have made such a statement. Rather, the Union waited for sixty days to simply say "The Union did not agree to the inclusion of subcontracting language." (GC Ex. 15).

In reviewing Goldblatt's admissions, only three situations are possible: (1) Goldblatt never conferred with the Union and simply fabricated the content of his e-mail; (2) Goldblatt

[29] Goldblatt's statements on this issue are not hearsay. *See* Fed.R.Evid. 801(b)(2)(C), (D).

misunderstood what the Union told him; or (3) Goldblatt accurately reported what DeAngelis and Bernardone told him. Situation #1 is not remotely likely since the Union has not alleged that Goldblatt acted in a rogue or unauthorized fashion. Situation #2 also is not likely because neither Shepherd nor DeAngelis ever contemporaneously took the position that Goldblatt misunderstood what his "client" had told him. On this point, common sense dictates that if an agent makes a grievous error on the principal's behalf, then the principal would act promptly to attempt to clarify the situation. Here, neither Shepherd nor DeAngelis reacted at all to Goldblatt's e-mail. Only Situation #3 is the only reasonable conclusion; that is the conclusion that the ALJ should reach – Goldblatt accurately reported what his "client" – the Union – told him.

The ALJ should also draw an adverse inference from the Union's inadequate – and in some cases nonexistent – document production.[30] Simply put, the document production efforts of the CGC's witnesses stretches credulity. GTCA, for example, issued subpoenas to Union "consultant" DeAngelis and his business, ERBA Consulting Group. DeAngelis, who admittedly never objected to or petitioned to revoke the subpoenas, testified that ERBA Consulting "has no files whatsoever." (Tr. 161). This claim is preposterous in light of tax and other mandated recordkeeping requirements. DeAngelis also stated that he limited his response to what he deemed responsive to the Court's March 1, 2012 Order. (Tr. 165). He did so despite the fact this Order related only to subpoenas addressed to the Union (subpoena B-612362) and its law

[30] In contrast, GTCA's production and review was voluminous and the result of collecting documents from multiple sources. Further, when GTCA witnesses Kingman and Ploscowe discovered additional documents pursuant to ongoing and active document collection efforts, they promptly and immediately produced those additional documents. GTCA's diligent document production efforts stand in stark contrast to that of the Union, its law firm, and consultant. Based on GTCA's good-faith efforts, sanctions pursuant to *Bannon Mills* are clearly unwarranted here.

firm (B-612361). *See* Order Denying in Part the Petitions to Revoke [Respondent's] Subpoenas, Case No. 22-CA-030064 (N.L.R.B. Div. of Judges Mar. 1, 2012)("March 1 Order").

Moreover, GTCA was improperly denied access to materials in the possession of the Union and its law firm.[31] DeAngelis testified regarding the critical June 20, 2011 bargaining session and he admitted he made notes of that meeting. Those notes, however, were never produced and DeAngelis meekly claimed to have lost them. (Tr. 174-75). With respect to the conduct of this meeting, an adverse inference should be drawn against the CGC that the notes would not have supported the Union's version of events. Rather, the ALJ should infer that these notes would have supported GTCA' contention that the Union agreed to engage in effects bargaining and had agreed to, or acquiesced in, GTCA decision to subcontract.

Continuing to make it up as he went along, DeAngelis later testified about documents that he claimed existed but could not produce. Specifically, DeAngelis testified, "I remember having a document and I don't see it here and I couldn't find it in the file.…I specifically remember circling the word 'subcontract,' my hyphen, my epiphany." (Tr. 256). DeAngelis' sharp memory of this document, especially his "epiphany" of more than a year earlier, should simply be disregarded. Moreover, other witnesses testifying in support of the CGC's case continued to refer to unproduced, subpoenaed documents. Kern, for example, testified regarding a withheld document relating to GC Ex. 52 that was never produced. (Tr. 394-96; 464-65).

Accordingly, significant spoliation issues exists. GTCA clearly has been prejudiced and deprived of its right to access evidence and documents supporting its defense. The ALJ should draw a spoliation-based adverse inference in its favor. *See Teamsters Local 776 (Pennsy*

[31] GTCA repeatedly challenged both the language of the ALJ's March 1 Order as it limited the production of the Union and its law firm to only those documents that GTCA did not have (rather than to produce the documents in their possession), and the nature of those entities' responses. The ALJ refused to modify the scope of its Order or to compel the Union and its law firm to properly produce documents.

Supply), 313 N.L.R.B. 1148, 1154 (1994) (adverse inference drawn where party refused to disclose information pursuant to subpoena duces tecum); *Extreme Building Services Corp.*, 349 N.L.R.B. 914, 931 (2007) (same).

The Union and its law firm also produced two privilege logs identifying a sum total of six documents. (Tr. 128-32, 551-52).[32] Four of the six documents were completely irrelevant sign-in sheets of employee meetings – leaving only two arguably responsive privileged documents. (Tr. 128). It is simply impossible that a dispute spanning more than five years could result in the creation of only two arguably privileged documents, particularly in light of Kern's assertion he had to review "entire boxes and boxes of files that the law office has [before] going back to the union office." (Tr. 27).[33] Moreover, the Union and its counsel admitted they made no effort to obtain or review the documents from Sabatella or Goldblatt. (Tr. 549, 846-48, 1678-79).[34] Even arguably privileged documents in the possession of those attorneys should have been produced since the Union and its counsel broadly waived the privilege during the hearing by repeatedly testifying about attorney/client communications. (*See, e.g.*, Tr. 256-59, 943-45, 1273-74).

GTCA's subpoenas required the production of documents not only in the possession of the Union, but also "any other person or entity acting on the Charging Party Union's behalf[.]" (R Ex. 26). Documents in the possession of a party's attorney or former attorney are clearly covered by the production obligation. Fed.R.Civ.P. 34(a) requires a party to produce documents in its "possession, custody, or control." Numerous cases hold that such control extends to documents in the custody of a party's attorney or former attorney. *See Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 501 (D. Md. 2000) (concluding that "'documents in the

[32] In comparison, GTCA's privilege log contained hundreds of entries. (Tr. 461).
[33] Of course, this begs the questions of what was in those boxes and files and why wasn't that material produced?
[34] DeAngelis admitted that Sabatella made bargaining notes. (Tr. 210).

possession, custody or control of a party's attorney or former attorney are within the party's 'control' for the purposes of Rule 34."); *Devon Robotics v. DeViedma*, No. 09–cv–3552, 2010 WL 3985877, at *2-3(E.D. Pa. Oct. 8, 2010) ("There are thus two circumstances under which a defendant can be required to turn over documents owned by a third party: when the defendant has actual (physical) possession of the documents, and when the defendant has "control" over documents in the physical possession of another"); *Steele Software Systems, Corp. v. Data Quick Information Systems, Inc.*, 237 F.R.D.561 (D. Md. 2006) (granting motion to compel where corporate judgment debtor was found to have "control" over documents possessed by nonparty corporate relatives).

Finally, Bernardone provided an affidavit to the CGC prior to the hearing and, in accordance with Board procedure, Bernardone and/or his counsel was provided a copy of that affidavit. *See* NLRB Case Handling Manual, ¶ 10060.9 (regarding copies of affidavits). That statement was clearly covered by GTCA's subpoenas to Bernardone, the Union and its law firm, yet the statement was not produced. (R Ex. 26). Despite GTCA's request at the hearing, the CGC refused to produce it, claiming that production was not required under the Board's Jencks statement law. (Tr. 964).[35] The failure to produce that affidavit was particularly critical because Bernardone recalled next to nothing. (Tr. 845, 859, 861, 865, 871, 884).

2. **Union-affiliated witnesses Bernardone, and DeAngelis were not credible.**

a) <u>Bernardone.</u>

Bernardone's testimony (if that term can even be applied to his time on the witness stand) was incredible, snide, contradictory and false in every respect. Alone among the witnesses, he was crude, profane and disrespectful. He refused to provide direct answers to simple questions. He claimed that he was unable to remember dates, ostensibly on account of a "seizure disorder"

[35] GTCA called Bernardone as a witness of cross-examination.

that no other witness seemed to be aware of. He was willing even to lie about whether he had signed an affidavit filed in unrelated federal court litigation, claiming that he had signed that affidavit when the signature on that document bore no similarity to the many examples in the record of his actual signature. (*Compare* R Ex. 29 *with* GC Ex. 4, 11).

Bernardone also was the subject of disciplinary proceedings conducted by the Teamster's Independent Review Board ("IRB") related to his misconduct during his tenure as secretary-treasurer of Teamsters Local 531. (R Ex. 27).[36] As a result of those disciplinary proceedings, Bernardone was determined to have, *inter alia*, "testif[ied] falsely during sworn examination about the use of Local 531 vehicles during the period in which he did not have a valid driver's license, and . . . violat[ing] his oath of membership by negotiating bargaining agreements intentionally designed to permit employers to maintain sham memberships for the purpose of receiving union health benefits." (*Id*.). When Bernardone did answer questions, his answers were often illogical or internally contradictory. For example, when asked whether he was the Union's chief spokesman in negotiations, he stated: "No, I kind of take a back seat sometimes. Well, yeah, yeah. No, I would have spoke a lot, yeah. I like to take a back seat, but yes, I would have spoke. I like to listen." (Tr. 866). Further, he allegedly poor memory did not stop him from literally making things up, like when claimed that GTCA's PowerPoint presentation contained "pizza charts," "pie charts," or "cartoons." (Tr. 964-65, 970, 972, 990). His testimony was farcical. Not only should it not be credited, but the ALJ also should credit the testimony of any GTCA witness over that of Bernardone.

[36] *See U.S. v. International Brotherhood of Teamsters*, 247 F.3d 370, 379 (2nd Cir. 2001) (describing creation of, and procedures applicable to, the IRB and holding that IRB findings are "entitled to great deference from a reviewing court.") (internal quotation marks omitted).

b) DeAngelis.

In many respects, DeAngelis is the perfect foil for Bernardone – a classic good cop, bad cop relationship. DeAngelis' calm demeanor belies his utter incredibility. As noted, DeAngelis was barred for life from the Teamsters. (R Ex. 4 (rejected exhibit)). In fact, DeAngelis chose not to contest the charges brought against him by the Investigations Officer, including charges that: (a) aiding in the embezzlement of union monies and breach of fiduciary duty; and (b) knowingly associating with members of the Mafia. (R Ex. 4, 6 (rejected exhibits)). DeAngelis overall credibility is additionally undercut by his willingness to make factual statements that are contrary to indisputable documentary evidence. Specifically, the parties' bargaining notes show – and the CGC and current Union counsel now admit – that the Union tentatively agreed to GTCA subcontracting proposal in mid-August 2006. Yet, DeAngelis has always continued to maintain that the Union never made such an agreement or even discussed subcontracting in 2006. (Tr. 41, 64).

Further, DeAngelis testified contrary to Goldblatt's admission, via e-mail to Ploscowe, that the subcontracting issue was not open. Despite being made aware of that communication shortly after it was sent, DeAngelis never contemporaneously disputed, or sought to explain, it in any way. Instead, DeAngelis simply acts as if these factual incongruities simply do not exist. Again, GTCA contends that if an agent makes a critical error on behalf of a principal, then the principal is obligated to promptly correct that error upon becoming aware of it. DeAngelis' repeated failure to act here is probative of his willingness to cling to the "story" even where the facts – set forth in contemporaneous documents – are directly to the contrary. Finally, DeAngelis' biggest and most transparent fabrication is his claim that the final offer and MOA

related only to economic issues. As explained above, this claim is contrary to the facts, the law of contract interpretation and, most importantly, common sense.

B. <u>The MOA Included the Disputed Subcontracting Language.</u>

This case is about whether GCTA had the right to subcontract. If, as GTCA asserts, it did have that right, then its decision to subcontract to Planned and to lay off its employees was a lawful exercise of a management right. GTCA contends that the parties' MOA incorporated by reference the Union's tentative agreement to "accept[ ] as drafted" GTCA's management rights proposal. That proposal expressly provided that "***[m]anagement of the Employer's operations and the direction of its working force, including the right to ... subcontract any work ... shall be vested solely and exclusively in the Employer***." (GC Ex. 5 (emphasis added)).[37]

GTCA's argument is straightforward:

- GTCA made a specific management rights proposal to the Union that included "the right to … subcontract any work. . . ." (GC Ex. 5)
- The Union tentatively accepted that proposal in its entirety by advising GTCA in writing that the proposal was "accepted as drafted." (GC Ex. 6)
- Thereafter, each draft version of the CBA, whether drafted by the Union or GTCA, contained this exact subcontracting language. (GC Ex. 7, GC Ex. 8, GC Ex. 9)
- GTCA made a final offer to the Union in early December 2006, which offer was expressly subject to ratification by the Union-represented employees. (GC Ex. 10)
- The final offer contained the following proposed term: "<u>Contract Language</u>: ***As agreed upon to date*** and/or as to be resolved by the parties during final drafting as to any open items." (*Id.* (emphasis added))
- The final offer was accepted and ratified by the Union and its members. (Tr. 245)

[37] It is well-settled under NLRB law that language of this type constitutes a clear and unmistakable waiver of a union's right to bargain over subcontracting. *See, e.g., Allison Corp.*, 330 N.L.R.B. 1363, 1364-65 (2000).

- GTCA and the Union signed the MOA containing the terms of the ratified final offer. (GC Ex. 11)

- The MOA specifically included the "Contract Language" provision ratified by the Union as part of the final offer. (*Id.*)

- The Union did not purport to rescind its agreement on subcontracting until then-new Union counsel Shepherd wrote to Ploscowe on August 1, 2007. (GC Ex. 15)

- The NLRB's Office of Advice found that Shepherd's purported withdrawal from the tentative agreement on subcontracting was unexplained and unlawful. (R Ex. 15)

- As a result of the NLRB settlement, the Union agreed to rescind its "withdrawal from tentative agreements reached, including sub-contracting, as described in the Production Efficiency and Management Rights clause, Article 13, Sections 2a and 2b." (GC Ex. 19)

The MOA's "Contract Language" provision – specifically, the "***agreed upon to date***" clause – cannot fairly be read to exclude the Union's tentative agreement on subcontracting made more than four months earlier. As shown below, the MOA indisputably incorporated the parties' subcontracting agreement.

1. Contract interpretation issues.

When interpreting a CBA, "traditional rules of contract construction apply when not inconsistent with federal labor law." *Int'l Union, United Auto., Aero. & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999). The MOA must be read "to give effect to all of its provisions and to render the provisions consistent with each other." *Local 205, Cmty. & Soc. Agency Emps.' Union, Dist. Council 1707 AFSCME v. Day Care Council of N.Y., Inc.*, 992 F. Supp. 388, 392 (S.D.N.Y. 1998) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)); *see also Engelhard Corp. v. NLRB*, 437 F.3d 374, 381 (3d Cir. 2006) (discussing the need to interpret "all provisions of a contract together as a harmonious whole").

2. The MOA specifically and unambiguously incorporated the subcontracting agreement.

The MOA cannot rationally be interpreted to exclude GTCA's right to subcontract. The "Contract Language" provision of the MOA is unambiguous and can be interpreted in only one way – to incorporate tentative agreements reached prior to its execution, including the agreement on subcontracting. The phrase, "[a]s agreed upon to date" can only mean that tentative agreements reached before the parties executed the MOA became part of that contract.

The MOA's "Contract Language" provision states in full:

> As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items. It is specifically agreed as follows as to these open items:
>
> 1. Article 4 (Vacations), Section 3 shall read as follows:
>
> Unearned vacation time may not be used. The Employer may use part-time or temporary employees to fill in for vacation time off. Vacation time off is paid at the employee's base rate of pay at the time of vacation. It does not include overtime or any special forms of compensation such a incentives, commissions, bonuses, or shift differentials.
>
> 2. Article 17 (Miscellaneous), Section 6b shall read:
>
> Unearned PTO days may not be used as sick days without the express approval of the Employer's General Manager for a verifiable illness. Upon termination of employment, Employer shall deduct payment given for unearned sick days from employee final check.

(GC Ex.11).[38] Established canons on contract interpretation compel the conclusion that the first sentence of this provision – "***As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items***." – incorporates the tentative agreement on subcontracting into the MOA.

[38] Items #1 and #2 are in the MOA but not the final offer. These issues were "open" terms agreed upon subsequent to the drafting of the final offer. (Tr. 46).

First, this sentence can be read logically in only one way. The sentence has two clauses joined by the conjunction "and/or." The first clause, "[a]s agreed upon to date," can only refer to contract language tentatively agreed to before the execution of the MOA. The only purpose this phrase can have is to incorporate those precedent tentative agreements. The second clause, "as to be resolved by the parties during final drafting as to any open items," reflects the understanding that not all bargainable issues had been tentatively agreed to as of the date the MOA was signed. As a matter of law, both of the clauses comprising the first sentence ***must*** be given effect.[39]

The CGC's argument that the final offer and the MOA related only to economic issues is simply wrong. First, there is nothing in the substantial written record in this case supporting the claim that the final offer and the MOA did not also relate to non-economic issues. Common sense dictates that such a significant issue would have been memorialized somewhere, especially where the parties had spent a significant portion of the last four months bargaining over non-economic issues. The absence of such a writing strongly supports GTCA's contention that there was no such agreement.

Second, the CGC's position makes no sense from a collective bargaining perspective. Typically, non-economic issues are bargained first, or they are bargained in conjunction with economic issues. *See S. Shore Hosp. v. NLRB*, 630 F.2d 40, 43 n.2 (1st Cir. 1980), *cert. denied*, 101 S.Ct. 1481 (1981) (quoting hornbook advice that employers should not "talk wages or money benefits until desired changes have been worked out on other aspects of the agreement…. That agreement should be combed from top to bottom before there is a concession on money matters.") (internal citations omitted). Here, the parties commenced substantive bargaining on

[39] Ploscowe's testimony directly supported GTCA on this point. (Tr. 1033). And, Ploscowe drafted both the final offer and the MOA. (Tr. 1031-32).

August 8, 2006. The parties did not substantively discuss wages (Article 11 in the Union's full CBA proposal) until the September 28, 2006 bargaining session (GC Ex. 62), and the Union did not make a full-blown written proposal on wages until Sabatella e-mailed Ploscowe on October 4, 2006. (R Ex. 8). Thereafter, the parties' bargaining notes show that they continued to discuss economic and non-economic issues together. (GC 62, R Ex. 7).

The CGC's suggestion that the MOA related only to economic terms is nonsensical and cannot be credited. Several reasons, both logical and factual, compel this conclusion:

- If an employer agrees to an economic package with a union before reaching agreement on significant non-economic issues, then the employer has lost all leverage over the union to pressure it to accept its important operational language;
- If an MOA relates only to economic issues, then a union could withdraw from any non-economic tentative agreement, with the employer unable to respond with economic pressure since the economic terms had been made "final" by the MOA;
- If the MOA related only to economic issues, then there was no reason to include the "Contract Language" term in both the final offer and the MOA. In other words, that term is meaningless and surplusage if it does not related to non-economic issues;
- Union attorney Shepherd did not advance the argument now championed by the CGC in responding the GTCA's ULP charge. She never made the argument that non-economic issues were not included in the MOA – she argued only that the Union never made the underlying tentative agreement on subcontracting. Obviously, if she thought then that the MOA was limited as the CGC now

contends, she would have raised that "winning" argument during the Board's investigation.

- Finally and most compellingly, crediting the CGC's argument requires the ALJ to do two things: (a) he must credit the testimony of DeAngelis and Bernardone over that of Ploscowe; and (b) he must fail to give the term "as agreed upon to date" its unambiguous common sense meaning.

Clearly, the CGC's argument that the MOA does not include the tentative agreement on subcontracting is simply wrong and, frankly, borders on the frivolous. In the related 10(j) case, the CGC has previously set out his reasons why the MOA does not include non-economic terms, including the disputed subcontracting language. *See* Petitioner's Memorandum of Points and Authorities in Support of Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act, filed in *NLRB v. Galaxy Towers Condominium Association*, No. 12-cv-03061 (D. N.J. May 22, 2012), ECF No. 1 (herein "CGC's Memorandum"). On this issue, the CGC first contends in the 10(j) case that: "At this point, the parties' partial contract consisted of the 2006 Interim Agreement and the MOA. Other terms were still covered by the Local 734 agreement until a full and final contract was signed. . . . None of those documents contained a management rights clause with a waiver of the Union's right to bargaining over subcontracting decisions." (CGC's Memorandum, 13). This contention is entirely consistent with GTCA's position – the MOA is a contract between the parties; the Local 734 CBA continues to determine terms not contained in the Interim Agreement or MOA; and while the MOA does not expressly contain "a waiver of the Union's right to bargain over subcontracting decisions[,]" that agreed-upon language was incorporated explicitly by reference.

The CGC next argues that the MOA implemented only specific economic terms, relegating all non-economic "Contract Language" to some uncertain future effective date. (CGC's Memorandum, 30). The CGC then speciously claims that the Union had "good cause" to withdraw from the tentative agreement on subcontracting – a contention foreclosed by the Division of Advice's analysis. (*Id.*; R Ex. 15). The CGC concludes this argument by speciously claiming the subcontracting agreement was not included in the MOA, since the NLRB notice posting characterized the subcontracting agreement as "tentative." (*Id.*; GC Ex. 19).

The CGC's argument has several glaring flaws, in addition to those identified above. Most obviously, the CGC reads the first sentence of the MOA's "Contract Language" provision as though it contained only one operative clause. If that sentence provided only that "Contract Language" would "be resolved by the parties during final drafting as to any open items," then the CGC's argument might have some superficial appeal. (GC Ex. 11).[40] However, that sentence also references contract terms "as agreed upon to date." These two phrases are temporal opposites: "as agreed upon to date" necessarily refers to agreements reached in the past; and "to be resolved by the parties during final drafting as to any open items" necessarily refers to agreements to be reached in the future. CGC's argument improperly reads the first, backward-looking clause literally out of existence.

Further, nothing in the MOA indicates that preexisting tentative agreements were not incorporated. In fact, the converse is true. The MOA's preamble provides that the parties "hereby agree to the following terms of a new contract which was ratified by the Local 124 members. . . ." Clearly, "Contract Language" was a term of the parties' "new contract." If, as the CGC suggested, that term did no more than "reserv[e] other [']contract language['] … for

[40] Even in that case, CGC's suggested construction must be rejected. That is, if the parties intended to defer all non-economic tentative agreements to a future, complete and ratified CBA, then there would be no reason to limit the future negotiations to only "any open items."

implementation by a future final contract[,]" then it is rendered completely meaningless. (CGC's Memorandum, 30). To accept the CGC's position, the ALJ must both ignore language that is in the MOA and read language into it that does not appear. Such interpretive hoop jumping is contrary to the law, the facts, and logic.

If, as GTCA contends, the subcontracting language is incorporated in the MOA, then the rest of this case is easy. Under *Allison Corp.*, 330 N.L.R.B. 1363, 1364-65 (2000), the operative language of the GTCA/Union management rights clause – "***Management of the Employer's operations and the direction of its working force, including the right to ... subcontract any work ... shall be vested solely and exclusively in the Employer.***" – indisputably constitutes a "clear and unmistakable waiver of the Union's right to bargain over GTCA's decision to subcontract.[41]

In *Allison Corp*, the management-rights clause in the parties' CBA provided:

> SECTION 13. MANAGEMENT RIGHTS
>
> A. The Company has, retains, and shall possess and exercise all management rights, functions, powers, privileges and authority inherent in the Company as owner and operator of the business, excepting only such rights that are specifically and expressly relinquished or restricted by a specific Article or Section of this Agreement.
>
> B. ***The Company shall have the exclusive right*** to manage the business and operation of its facilities; to schedule and require the performance of overtime work; to discipline or discharge employees for just cause; to adopt, modify or rescind reasonable work rules, quality and production standards and to discipline or discharge employees for violation of such rules and standards; to determine, implement, modify or eliminate techniques, methods, processes, means of production; ***to subcontract***; to transfer work or materials from one Company operation to another, as now may exist or as may hereafter be established; to utilize labor saving devices; to determine the location of the business, including the establishment of new facilities and the relocation, closing, selling, merging or liquidating of any facility, department, division or subdivision thereof either

[41] Although it is not currently Board law, GTCA reserves the right to argue that under the so-called "contract coverage" theory, it did not have an obligation to bargain with the Union regarding subcontracting. *See, e.g., Provena St. Joseph's Medical Center*, 350 N.L.R.B. 808 (2007).

> permanently or temporarily; and generally to control and direct the Company in all of its operations and affairs.

330 N.L.R.B. at 1364-65 (emphasis added).

Based on this language, the Board held:

> Here, on the other hand, the management-rights clause specifically, precisely, and plainly grants the Respondent the right "to subcontract" without restriction. We therefore find a "clear and unmistakable waiver" by the Union of its statutory right to bargain regarding the Respondent's decision to subcontract. We therefore conclude that the Respondent did not violate Section 8(a)(5) by unilaterally subcontracting unit work.

Id. at 1365 (internal footnotes omitted). Clearly, *Allison Corp*. controls here and the ALJ should find a "clear and unmistakable waiver" by the Union of its right to bargain over GTCA's decision to subcontract bargaining unit work to Planned.

C. GTCA Lawfully Implemented Its Subcontracting Proposal Only After Acquiescence to that Proposal by the Union or After Bargaining to Legal Impasse

Even if, *arguendo*, the ALJ were to conclude that the current CBA between the parties does not contain a contractual waiver over the subject of subcontracting, the record facts demonstrate that GTCA nonetheless also independently satisfied any duty to bargain it had concerning this issue. Under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the "Act"), an employer has a duty to bargain over mandatory subjects, either to agreement or impasse. In response to GTCA's subcontracting proposal the Union took a series of unclear and seemingly contradictory positions, which varied depending on who was speaking for the Union at any particular time. Nonetheless, despite the elusiveness of its "strategy," when the Union's statements and conduct are viewed in their entirety, the ALJ must conclude that the Union either acquiesced to GTCA's subcontracting proposal or that the parties reached legal impasse on the

proposal. In either event, GTCA was privileged thereafter to implement the subcontracting proposal.

1. The Union acquiesced to the subcontracting proposal.

GTCA made a discrete proposal to the Union on April 12, 2011 to subcontract the work performed by several employee classifications in the Galaxy Towers complex. GTCA then repeatedly attempted to engage the Union in efforts to bargain over this proposal and related issues over the next three and a half months. The Union refused to bargain over the substantive issue of subcontracting, stating repeatedly through its representatives that it simply could not and would not be able or willing to approach the savings contemplated under GTCA's proposal. Instead, the Union acquiesced in the decision to subcontract and focused on the effects of that decision and its expected relationship with the new employer, Planned. Over the course of several meetings the parties discussed various aspects of the transition to a new employer and its effects on the employees, including primarily: (1) the interview process and hiring opportunities with Planned, (2) the disposition of employee personnel files, (3) severance payment opportunities for departing employees, and (4) wage rates and seniority rights for employees with the new employer. The record facts clearly show that the Union chose not to oppose subcontracting; rather, their stated focus was in managing the transition and striking the best deal they could for departing employees. The Union's explicit acquiescence in the proposal to subcontract privileged GTCA to implement that proposal.

2. GTCA and the Union were at impasse over the proposed decision to subcontract unit work.

Even if the Union's conduct did not constitute acquiescence to the subcontracting proposal, the record facts clearly show that the parties were at legal impasse over the issue of subcontracting and that GTCA was therefore privileged to implement its proposal on August 1,

2011. As noted above, following notice to the Union of its subcontracting proposal, GTCA repeatedly sought to bargain over the proposal and to solicit a response. Despite these efforts, the Union refused to make any substantive counter-proposal in the course of bargaining. Rather, it took and maintained an unqualified position against subcontracting while at the same time repeatedly acknowledging that it was impossible for it to match or approximate the savings that GTCA could realize through its subcontracting proposal. In recognition of this, the Union abandoned any meaningful attempt at decisional bargaining and engaged GTCA in effects bargaining discussions, which itself may have been illusory and which, in any event, the Union also eventually abandoned. For all these reasons, the parties were at a legal impasse over the proposed decision to subcontract unit work and GTCA was, therefore, privileged to implement that decision upon impasse.

An impasse occurs when an employer and a union have engaged in good faith negotiations over a particular matter which is subject to collective bargaining and, despite their best efforts to reach agreement, neither party is willing to move from its respective position. *See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co*., 484 U.S. 539, 543 n.5 (1988) (impasse is the "point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless"). The Board also has defined impasse as "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile." *A.M.F. Bowling Co.,* 314 N.L.R.B. 969, 978 (1994), *enf. denied on other grounds*, 63 F.3d 1293 (4th Cir. 1995); *see also NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) (duty to bargain in good faith does not require parties "to engage in fruitless marathon discussions"). Under the framework of the Act, particularly as embodied in Section 8(d), the Board will not permit a union to prevent an employer from

engaging in legitimate business decisions, simply by engaging in outright refusals to agree to the employer's proposals and by failing to make substantive counter-proposals. In this regard, an employer is not required to engage in never-ending "negotiations" with a union after it is apparent the parties are at impasse over the subject at issue. *See Cmty. Gen. Hosp.*, 303 N.L.R.B. 383, 385 (1991) (holding that while bargaining must be conducted in good faith, it need not continue in perpetuity). For various reasons outlined above, GTCA and the Union were clearly at impasse on the subcontracting issue.

First, while the Union's haphazard and mercurial course of bargaining makes it difficult to discern what exactly the Union hoped to accomplish, if anything, the evidence at least establishes that the Union publicly maintained an explicit and categorical opposition to subcontracting in any form and under any circumstances. Notably, Bernardone published the Union's intransigent position even before GTCA had made an actual proposal on the subject. (Tr. 1282-83). For example, in his letter dated March 17, Bernardone asserted that the Union would never agree to subcontracting and that any attempt to do so would result in litigation. (R Ex. 31). As summarized by Kingman at the Hearing, thereafter the Union's only concrete response to the subcontracting proposal was "don't do it." (Tr. 1304). The Union's subsequent actions must be viewed in light of this stated opposition to subcontracting and demonstrate that the Union was simply unwilling to bargain in good faith at any level. Ultimately, all the meetings, phone calls, conversations, and information request thereafter were simply part of a sham designed to delay and short circuit the bargaining process and then attempt to set up specious allegations of unfair labor practices.

Consistent with this view is the Union's complete failure to make any substantive proposal on subcontracting over the three and a half month period between mid-April and

August 1. (Tr. 1185, 1209-10, 1304). In the face of a compelling rationale for GTCA to subcontract unit work and realize substantial savings of over $1,000,000, the Union did not once make any proposal that would have provided specific cost savings to GTCA, whether on an annual basis or otherwise. At select moments, the Union made very limited proposals on a future comprehensive CBA, but these proposals involved ***increased*** costs over the term of the proposed contract and therefore were obviously not responsive to the subcontracting proposal. (Tr. 1203, 1304-05). The wholesale failure of the Union to engage in decisional bargaining at any level rendered negotiation of an agreement impossible and left the parties at an intractable impasse. *See Michigan Transp. Co, Inc.*, 273 N.L.R.B. 1418, 1420 (1985) (dismissing Section 8(a)(5) allegations where employer outsourced unit work after impossibility of reaching concessionary deal because union had no counterproposal).[42]

In its perhaps more candid moments, the Union also repeatedly expressed the view that it was futile to bargain over the decision to subcontract, because it would be impossible for the Union to come close to the savings at issue, absent a massive, 30% wage cut that would be politically unfeasible. (Tr. 406, 742, 763, 1318, 1330). With this in mind, the Union simply abandoned the decisional issue and shifted the focus of negotiations to effects-related issues, including the logistical process for the transition to a new employer, the financial terms of severance for departing employees, and new hire rates for those employees who received job offers from the new employer. However, as at every other point along the way, these effects bargaining discussions were stymied by the "Jekyll and Hyde" bargaining approach that GTCA now recognizes as a hallmark of the Union. It all may have been a fiction designed to delay and obstruct, but it was a fiction maintained until the last minute (and beyond, to the present), with

[42] GTCA's witnesses uniformly testified that if the Union had made any reasonable proposal, it would have been given serious consideration by the GTCA Board. (Tr. 1185, 1217-18, 1322).

DeAngelis promising that he would call Kingman within a few days after the July 27, 2011 meeting. Not surprisingly, that call never came.

Ultimately, whether the Union's tactics over this several month period are viewed as a well-intentioned, but incompetent, attempt to salvage the best deal it could for its members or a ham-handed ruse designed simply to frustrate and derail the bargaining process, is irrelevant. The credible facts of record show that the Union simply never engaged, nor intended to engage, in meaningful bargaining over the issue of subcontracting, despite more than ample time and opportunity to do so. As such, GTCA was left with no alternatives and the parties were at impasse. The decision to subcontract unit work following that impasse was lawful.[43]

D. GTCA Fully Satisfied Any Obligations It Had With Respect to Any Legitimate Requests For Information.

GTCA provided all relevant information in its possession in response to any legitimate requests for information made by the Union in the course of bargaining. Moreover, as discussed above, the Union had no actual intention to engage in legitimate, good-faith negotiations. Its information requests were simply part of the contrived, sham bargaining process that it concocted. For these reasons, the allegations relating to information requests should be dismissed.

[43] The Complaint alleges a generalized refusal to bargain. Although GTCA is unsure whether that allegation is limited to its decision to subcontract, out of an abundance of caution will address that issue as though it relates to the remaining, residual unit of IUS employees. With regard to that group of Union-represented employees, GTCA acknowledged its obligation to bargain on their behalf. (Tr. 1198). GTCA, however, wanted to defer the bargaining for the IUS employees until after the subcontracting issue was resolved. (Tr. 1339). DeAngelis admitted that GTCA was willing to discuss the IUS employees after the larger issue was addressed: "I remember him using an expression that we don't know what the economic pie is and -- and simply that they weren't prepared to negotiate a full contract for maintenance ***at that time***". (Tr. 146 (emphasis added)). After August 1, 2011, the effective date of the subcontracting decision, the Union never sought to bargain about the IUS employees -- a fact proved by the CGC's failure to introduce any post-subcontracting evidence on this issue. The fact of the matter is that after the majority of the employees were laid off, the IUS employees were an afterthought. The Union made no effort to bargain on their behalf and GTCA did not refuse to bargain. This allegation should be dismissed.

1. GTCA provided all relevant information in its possession in response to any legitimate requests for information made by the Union.

Following GTCA's notice to the Union on April 12, 2011 of its proposal to subcontract unit work and the related presentation to the Union on May 9, the Union made a formal request for information by letter dated May 11, 2011. (GC Ex. 44). Each of these requests was responded to and satisfied, as follows:

Request# 1: The first request sought the request for proposal ("RFP") issued by GTCA to prospective vendors. Although not relevant to the economic basis for the subcontracting decision, GTCA nonetheless provided the substantive portions of the RFP (pp. 9-14) to the Union on May 19, via an e-mail and attachment from Kingman. (GC Ex. 45; *see* R Ex. 47, 9-14). Moreover, GTCA had already advised the Union as to the scope of services subject to subcontracting in Kingman's initial e-mail of April 12, 2011, (GC Ex. 43), and at the meeting on May 9 where the details of the subcontracting proposal discussed in connection with the PowerPoint presentation. (R Ex. 46). Otherwise, all the substantive information in the RFP relating to scope of services at issue concerned employees ***represented by the Union itself*** and, therefore, was information already directly within the knowledge and possession of the Union. For all these reasons, this request was satisfied, if otherwise proper.

Request #2: This request sought the five vendor bids received in response to the RFP. Even if otherwise relevant, GTCA asserted that these bids were provided under confidentiality agreements, an assertion that was not challenged or further explored by the Union in terms of alternatives or a compromise. As such, the Union abandoned this request. Further, GTCA immediately disqualified two of the five original bids because they were submitted by non-union companies. Further, in May 2011 GTCA advised the Union that it was only considering entering into an agreement with one of the five vendors that had submitted a bid, further rendering

irrelevant the other four bids. Finally, as to that targeted vendor, Planned Building Services, GTCA advised the Union that the original bid was obsolete as the terms were subject to further negotiation; the Union never thereafter made a request for any information relating to a contract with Planned. For all these reasons, the vendor bids were no longer relevant at the time they were requested or shortly thereafter and therefore there was no obligation to produce them to the Union. *See Glazers Wholesale Drug Co., Inc.,* 211 N.L.R.B. 1063, 1066 (1974), *enfd.* 523 F.2d 1053 (5th Cir. 1975) (stating that information that has become "moot" need not be provided to a union representative).

Request #3: This request sought the identity of the unions that the vendors had relationships with. GTCA did not have this information and therefore could not respond, even if it was otherwise relevant.

Request #4: This request sought the collective bargaining agreements that the bidders had with their respective unions. GTCA did not have this information and therefore could not respond, even if it was otherwise relevant.

Request #5: This request sought the information contained in the PowerPoint presentation and this information was provided to the Union on May 19, 2011. (GC Ex. 45).

The only other piece of information requested by the Union was the employee hours breakdown discussed at the meeting on June 7 and immediately provided by GTCA. (Tr. 1317). In sum, all the information sought by the Union was either not relevant, not available to GTCA, and/or was provided to or in the possession of the Union. For these reasons, the allegations related to information requests should be dismissed.

2. The Union's information requests were invalid because they were presented solely in connection with a scheme to delay and frustrate the bargaining process.

Aside from the substantive issues concerning the Union's requests for information and GTCA's responses to those requests, the Union's requests were invalid and presumptively irrelevant because the Union never had any intention in bargaining over the decision to subcontract and the requests were made solely as part of a deliberate scheme to frustrate, delay, and impede the bargaining process concerning GTCA's proposal.

As described at length above, the record evidence demonstrates that the Union was both immovably set against any form of subcontracting from the outset and unwilling under any circumstances to engage in legitimate negotiations with GTCA in response to its subcontracting proposal. Information requests need not be fulfilled if the union's motivation is not to use the information to engage in good faith bargaining, but rather to delay implementation of an employer's decision. *ACF Indus., LLC*, 347 N.L.R.B. 1040, 1043 (2006) ("We agree with the judge that the Union's information request was purely tactical and was submitted solely for purposes of delay."); *see NLRB v. Wachter Constr., Inc.*, 23 F.3d 1378 (8th Cir. 1994) (stating that information demands made in "bad faith" by the union need not be fulfilled). For these reasons, the allegations related to information requests should be dismissed.

IV. CONCLUSION

For all of the reasons set forth above, the CGC cannot support any violation under Sections 8(a)(1) or 8(a)(5) of the NLRA, and GTCA respectfully requests the Complaint be dismissed, with prejudice, in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2012, a copy of the foregoing Post-Hearing Brief of Respondent Galaxy Towers Condominium Association, which was filed today via the Board's E-Filing System, was served on the following by electronic mail:

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