

**Nos. 15-10006-FF, 15-10450**

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**GAYLORD CHEMICAL COMPANY, LLC**

**Respondent/Cross-Petitioner**

**and**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND  
SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO**

**Intervenor**

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**ON APPLICATION FOR ENFORCEMENT AND  
CROSS-PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**ELIZABETH HEANEY**  
*Supervisory Attorney*

**NICOLE LANCIA**  
*Attorney*

*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-1743  
(202) 273-2987

**RICHARD F. GRIFFIN, JR.**  
*General Counsel*

**JENNIFER ABRUZZO**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*  
*National Labor Relations Board*

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WORKERS INTERNATIONAL UNION, )  
AFL-CIO )  
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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. R. 26 and Local Rule 26.1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Abruzzo, Jennifer, Board Deputy General Counsel
2. Connor, Glen M., Charging Party's Counsel
3. Dreeben, Linda, Board Deputy Associate General Counsel
4. Ferguson, John H., Board Associate General Counsel
5. Gaylord Chemical Company, LLC, Respondent

6. Griffin, Jr., Richard F., Board General Counsel
7. Harrell, Jr., Claude T., Board Regional Director
8. Heaney, Elizabeth A., Board Counsel
9. Hirozawa, Kent Y., Board Member
10. Jackson Lewis P.C., Respondent's Counsel
11. Johnson III, Harry I., Board Member
12. Lancia, Nicole, Board Counsel
13. Meyers, Kerstin, Board Field Attorney
14. National Labor Relations Board, Petitioner
15. Pearce, Mark Gaston, Board Member
16. Rouco, Richard Paul, Charging Party's Counsel
17. Sandron, Ira, Administrative Law Judge
18. Schwartz, Jeffrey A., Respondent's Counsel
19. United Steelworkers International Union and its Local 887, Charging Party

s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street N.W.  
Washington, D.C. 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 27th day of May 2015

## **STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that this case involves the application of well-settled legal principles to largely undisputed facts and, therefore, that oral argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

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## STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Order issued against Gaylord Chemical Company, LLC (“Gaylord”). The Board’s Decision and Order issued on October 28, 2014, and is reported at 361 NLRB No. 67. (2014 D&O 1-3.)<sup>1</sup> The Board’s Order is final with respect to all parties.

The Board had subject-matter jurisdiction over the unfair-labor-practice proceeding pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over the Board’s application for enforcement and Gaylord’s cross-petition for review pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in Tuscaloosa, Alabama.

The Board filed its application for enforcement on January 2, 2015, and Gaylord filed its cross-petition for review on January 14. Both filings were timely, as the Act places no time limitation on such filings. The United Steel, Paper and

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<sup>1</sup> Record references in this brief are to the Board’s October 28, 2014 Decision and Order (“2014 D&O”); the Board’s June 25, 2012 Decision and Order (“D&O”); the transcript from the hearing before the administrative law judge (“Tr.”); the General Counsel’s exhibits (“GCX”); and Joint Exhibits (“JX”). “Br.” references are to Gaylord’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (“the USW International” or “the Union”) has intervened on the Board’s behalf.

### **STATEMENT OF ISSUES**

I. Whether substantial evidence supports the Board’s findings that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union, refusing to provide the Union with information it requested, and unilaterally creating a new unit job position without first giving the Union notice and an opportunity to bargain.

II. Whether substantial evidence supports the Board’s finding that Gaylord violated Section 8(a)(1) of the Act by coercively interrogating employee Mitchell about his union views.

### **STATEMENT OF THE CASE**

This case concerns Gaylord’s refusal to recognize and bargain with the Union following Gaylord’s relocation of its plant operations from Bogalusa, Louisiana to Tuscaloosa, Alabama. After investigating charges filed by the Union (GCX 1(a), (c), (e)), the Board’s Acting General Counsel issued a complaint against Gaylord, alleging that it violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union, refusing to provide requested information to the Union, and unilaterally creating a new unit position. The

complaint also alleged that Gaylord violated Section 8(a)(1) of the Act by interrogating its employees about their union sympathies. (GCX 1(h).)

Following a hearing, an administrative law judge issued a decision and recommended order finding that Gaylord committed the alleged violations. (D&O 1 & n.1, 3-5.) On June 25, 2012, after considering the exceptions and supporting brief, the Board (Chairman Pearce and Members Hayes and Griffin) adopted the judge's rulings, findings, and conclusions, with slight modification. (D&O 1-6.)

On October 22, 2012, the Board applied to this Court for enforcement of its 2012 Decision and Order, and Gaylord cross-petitioned for review on November 5. (Case Nos. 12-15404, 12-15690.) The Union intervened on the Board's behalf. On December 4, after the Board filed the record, the Court placed that case in abeyance pending the Supreme Court's review of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which raised questions concerning the validity of certain recess appointments to the Board.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointment of Member Griffin. On August 13, this Court, granting the Board's motion, vacated the 2012 Decision and Order and remanded the case to the Board for further proceedings.

On October 28, 2014, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and Johnson) issued the Decision and Order now before the Court, which incorporates by reference the 2012 Decision and Order. (2014 D&O 1-3.)

## **I. THE BOARD'S FINDINGS OF FACT**

The salient facts in this case are undisputed due to the parties' extensive stipulations of fact at the hearing before the administrative law judge. (D&O 2.) The following facts are based primarily on those stipulations.

### **A. Background; the Union's Structure and Gaylord's Operations**

Under the USW International's structure, there are two types of locals: a full-fledged independent local and an amalgamated local, which is a smaller member organization that is part of a "mother local" that handles the amalgamated local's finances. Locals report to districts, which in turn report directly to the USW International. Overall, there are 13 districts nationwide. Alabama is in District 9, and Louisiana is in District 13. (D&O 2; Tr. 79-84, GCX 13 pp. 5-6.) The designated local for employees at the Bogalusa facility is Local 189, also known as Local 13-189; Local 887 is the designated local for the Tuscaloosa facility employees.

Gaylord operates a chemical plant in Tuscaloosa, Alabama, where it manufactures dimethyl sulfoxide (DMSO). (D&O 2; JX 1(a).) Before opening

that facility, Gaylord operated a facility in Bogalusa, approximately 238 miles away. For decades, employees at the Bogalusa facility enjoyed continuous union representation.<sup>2</sup> (Tr. 107, 113, JX 1(a).) After purchasing the Bogalusa chemical plant from its predecessor in 2007, Gaylord recognized the Union as the collective-bargaining representative of the production and maintenance employees at Bogalusa. (JX 1(a).) During that time, Gaylord and the Union entered into successive collective-bargaining agreements and multiple memoranda of agreement. (JX 1(a), 1(b), 2-3.)

Around February 2009, Gaylord informed employees that it was closing the Bogalusa facility and opening a new facility in Tuscaloosa. It offered jobs to all Bogalusa unit employees who were willing to relocate to Tuscaloosa. (D&O 2; Tr. 135-41.) Subsequently, Gaylord and the Union bargained over the effects of the closing. The Union also sought bargaining over whether the existing collective-bargaining agreement would apply to the Tuscaloosa facility, but Gaylord declined to address that during bargaining. (D&O 2; Tr. 152-53, 156-57, 161-62, GCX 22, 26, JX 1(a).)

On March 27, the parties entered into a memorandum of agreement providing, in part, that employees would enjoy continued employment through the period of time necessary to relocate. (D&O 2; Tr. 141-44, JX 1(a), 3.) On March

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<sup>2</sup> The employees' collective-bargaining representative has changed over the years due to union mergers. (D&O 2; Tr. 111-15.)

29, incorporating the terms of that memorandum, the parties executed a new labor agreement, effective through the closing of the Bogalusa facility. (D&O 2; JX 2.) USW International Staff Representative Michael Tourné and representatives of Local 189 signed the memorandum. The union representatives who signed the collective-bargaining agreement were: Representative Tourné, the International's president, secretary-treasurer, and vice presidents of administration and human affairs; District 13's director; and Local 189 representatives. (JX 2.) As the Union's chief spokesperson, Tourné participated in all negotiations for the parties' agreements, administered the contracts, and participated in grievances and arbitrations on behalf of the Bogalusa unit. Gaylord never challenged the Union's representational status before it began the relocation process. (D&O 2; Tr. 120-21, 126-27, 130-31.)

**B. The Union Requests Bargaining and Information on Unit Employees, but Gaylord Refuses; Gaylord Relocates Its Operations to Tuscaloosa, and Creates a New Unit Position, Without Giving the Union Notice and an Opportunity To Bargain**

On August 31, 2010, at Representative Tourné's request, District 9 Director Daniel Flippo sent a letter to Gaylord, requesting bargaining as well as information necessary for bargaining, such as the names, job classifications, seniority dates, rates of pay, and benefits for unit employees. Gaylord did not respond. (D&O 3; Tr. 91-92, GCX 14, JX 4.) On September 23, Flippo sent a similar letter requesting bargaining and the same information. On September 30, Gaylord

finally responded, but only to ask for an explanation of District 9's involvement in the representation of the employees. (D&O 3; JX 5-6.)

On October 19, Flippo replied that the USW International was the employees' certified bargaining representative, and again requested bargaining and the same information as before. (JX 7.) Further, Flippo requested additional unit-related information, including the criteria used to transfer employees, compensation packages for relocated employees, wage rates and classifications at both facilities, wages paid to each employee, job descriptions and duties, Gaylord's compliance with health and safety standards and other reporting requirements, plant rules and regulations, and workers' compensation programs. (D&O 3; Tr. 97-98, JX 7.) On October 25, Gaylord again refused to provide the information, claiming that "neither the International nor District 9 is the certified bargaining representative" for employees at the Tuscaloosa facility. (JX 8.)

By October 30, a majority of unit employees from the Bogalusa facility—12 out of 18—had permanently relocated to the Tuscaloosa facility, where they performed job functions substantially similar to those they performed in Bogalusa. On December 16, the Tuscaloosa facility began producing DMSO, the sole product manufactured at the plant, and operated in form basically unchanged from Bogalusa. In January 2011, Gaylord closed the Bogalusa facility. (D&O 2-3; JX 1(a).) About that same time, Gaylord also created a new unit position of "lead

shipper,” without first notifying the Union or affording it an opportunity to bargain. (D&O 3-4; GCX 1(h), (k).)

**C. Vice President Smith Questions Employee Mitchell About His Union Views**

In September 2010, shortly after Bogalusa employees began relocating to Tuscaloosa, Vice President of Manufacturing Marc Smith summoned employee Doug Mitchell, who had transferred from Bogalusa, to his office for a one-on-one meeting. Smith asked Mitchell “why [he] thought [employees] needed a union,” to which Mitchell responded, “why not?” Smith then described his “team leadership philosophy,” and stated that there would be more flexibility and fewer expenses without a union. Mitchell asked Smith what expenses he meant. Smith stated that employees would have to pay union dues and Gaylord would have to hire attorneys to negotiate and review labor agreements. (D&O 3-4; Tr. 176-80.)

**II. THE BOARD’S CONCLUSIONS AND ORDER**

The Board (Chairman Pearce and Members Hirozawa and Johnson) found, agreeing with the administrative law judge, that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union and its designated local, failing and refusing to provide the information requested by the Union, and unilaterally creating the lead shipper position without giving the Union notice and an opportunity to bargain. It also found that Gaylord violated Section

8(a)(1) by interrogating employee Mitchell about his union views.<sup>3</sup> (2014 D&O 1.)

The Board's Order requires Gaylord to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, it requires Gaylord, upon request, to recognize and bargain with the Union and to furnish the Union with the information it had requested. The Order also requires Gaylord, upon request, to rescind or bargain with the Union over the lead shipper position, to make unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral creation of that position, and to post a remedial notice. Additionally, Gaylord must compensate employees for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the award to the appropriate calendar quarters for each employee. (2014 D&O 1-2.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union following Gaylord's relocation to Tuscaloosa. As the Board reasonably

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<sup>3</sup> The Board did not pass on the judge's additional finding that Gaylord unlawfully interrogated employee Ronald Talley because that finding would be cumulative and not affect the remedy. (2014 D&O 1 n.1.)

found, the undisputed, stipulated facts solidly demonstrate the continuity of the bargaining unit and the Union's status as unit employees' representative at the Tuscaloosa plant. A majority (12 of 18) of the Bogalusa employees relocated to Tuscaloosa where they performed substantially similar work, and Gaylord operated the Tuscaloosa facility in basically unchanged form. Moreover, the record evidence confirms that Gaylord's collective-bargaining relationship was with the USW International, not separately with its locals, because USW International Representative Tourné signed, negotiated, and administered all agreements between the parties.

In its defense, Gaylord repeats several meritless challenges that the Board properly rejected, and the Court should likewise reject for the same reasons. For the first time, Gaylord also contends that there is a question concerning the Union's status as the employees' bargaining representative, claiming there is no evidence that the Union retained majority support after the relocation. However, Gaylord's failure to raise this challenge before the Board waives review of that argument. Nevertheless, that argument lacks merit. The undisputed facts show a continuity of both unit composition and employer operations following Gaylord's relocation; therefore, the Union did not have to establish that it retained majority status. Given Gaylord's duty to bargain with the Union, the Court must affirm the

Board's remaining, and otherwise uncontested, violations that Gaylord refused to provide requested information and unilaterally created a new lead shipper position.

Additionally, in its brief to the Court, Gaylord offers only a vague denial of the Board's finding that Vice President Smith coercively interrogated employee Mitchell in violation of Section 8(a)(1) of the Act. It is settled that merely referring to an issue in an opening brief, as Gaylord has done here, is insufficient to preserve that issue for appellate review. Thus, Gaylord waived its challenge to the interrogation, and the Board is entitled to summary affirmance of that uncontested finding. In any event, substantial evidence supports the Board's finding, as Vice President Smith—a high ranking official—summoned Mitchell to his office, inquired about his views on union representation, and sought to persuade him to abandon his union support. Accordingly, Gaylord has presented no basis for disturbing the Board's findings.

### **STANDARD OF REVIEW**

The Court affords “considerable deference” to the Board's findings and will sustain the Board's factual findings if they are supported by “substantial evidence on the record considered as a whole.” *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997) (quoting 29 U.S.C. § 160(e)); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951). And “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of

fact . . . is not supported by substantial evidence.” *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).<sup>4</sup> The Board’s determination that an employer must recognize its employees’ collective-bargaining representative following relocation is reviewed under the substantial evidence standard. *Westwood Import Co. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982).

Moreover, “Congress [] made a conscious decision” in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board “the primary responsibility of marking out the scope . . . of the statutory duty to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). Accordingly, given the Board’s “competence in this area” of assessing an employer’s duty to bargain after a relocation, the Board’s determination is entitled to deference. *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 743 (8th Cir. 2001).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT GAYLORD VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN WITH THE UNION, REFUSING TO PROVIDE THE UNION WITH REQUESTED INFORMATION, AND UNILATERALLY CREATING THE LEAD SHIPPER POSITION**

As the Board reasonably found (D&O 1, 3-4), the stipulated facts fully establish that the Union was the bargaining representative of the unit employees at

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<sup>4</sup> Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

the Bogalusa facility, that a majority of those employees transferred to Tuscaloosa, and that Gaylord operated the Tuscaloosa facility in basically unchanged form. (JX 1(a), GCX 1(h) pp.3-5, 1(k) p.2.) Indeed, Gaylord does not dispute (Br. 2) the facts underlying those findings, or the information request and unilateral change violations. Rather, Gaylord challenges the Board's Section 8(a)(5) findings only by asserting (Br. 4-7, 9, 15) that it had no duty to continue recognizing and bargaining with the Union after relocating its plant operations. Its contentions, however, are either unsupported by law or contrary to the undisputed, stipulated facts of this case.

**A. Following Relocation, An Employer's Duty To Continue To Bargain with the Union Depends on the Continuity of the Bargaining Unit**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). It has long been recognized that an employer violates that provision if it fails to bargain with the established bargaining representative after relocating its operations,<sup>5</sup> unless the relocation fundamentally changes the

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<sup>5</sup> An employer's duty to bargain with its employees' bargaining representative continues "where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health and Welfare Trust Fund v. Adv. Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)).

employer's operations.<sup>6</sup> *Leach Corp. v. NLRB*, 54 F.3d 802, 810 (D.C. Cir. 1995); *NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370 (2d Cir. 1995); *Westwood Import Co. Inc. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982); *NLRB v. Marine Optical, Inc.*, 671 F.2d 11, 16 (1st Cir. 1982). Absent such a fundamental change, the interests of industrial stability and the protections afforded employees under the Act prohibit employers from diminishing employees' rights to union representation through a relocation that leaves the "job situations [of employees] essentially unaltered." *Leach Corp.*, 54 F.3d at 810. Otherwise, an employer could push "the Union . . . out the door" whenever the employer opts to relocate its operations. *Molded Acoustical Prods., Inc. v. NLRB*, 815 F.2d 934, 940 (3d Cir. 1987).

Specifically, in determining whether an employer must continue to bargain with the union after relocating its operations, the Board assesses the continuity of the bargaining unit and the employer's operations by considering a number of factors. Those include whether the operations at the new facility are substantially the same as those at the old facility, whether transferees from the old plant constitute a substantial percentage (about 40 percent) of the employee complement at the new location, and the distance of the move. *Harte & Co.*, 278 NLRB 947,

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<sup>6</sup> A violation of Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights (29 U.S.C. § 157).

948 (1986) (citing cases); *see Rock Bottom Stores, Inc.*, 312 NLRB 400, 402 (1993), *enforced*, 51 F.3d 366 (2d Cir. 1995); *Westwood Import Co.*, 681 F.2d at 666.

**B. The USW International Is the Employees' Collective-Bargaining Representative, Not Any Particular Local**

Here, the Board properly assessed the continuity of the bargaining unit and Gaylord's operations in determining that Gaylord had a duty to bargain with the Union. (D&O 3.) Before the Board, Gaylord stipulated that it "continued to operate Tuscaloosa facility in basically unchanged form and that a majority of its Tuscaloosa employees were previously employed at the Bogalusa facility." (JX 1(a).) Indeed, at the Tuscaloosa facility, Gaylord continued manufacturing DMSO, the sole product manufactured at Bogalusa, in the same manner. Moreover, 12 of the 18 unit employees at the Bogalusa facility permanently transferred to Tuscaloosa, where they "perform[ed] job functions substantially similar to those they performed at Bogalusa." (D&O 2; JX 1(a), 11.) Given those explicit stipulated facts, the Board's finding of a duty to bargain is beyond doubt.

Moreover, based on the undisputed facts of this case, the Board reasonably found that Gaylord's "collective-bargaining relationship has been with the USW International, not separately with its subordinate components, whose bargaining authority and representational authority derived entirely from their affiliation with the USW International." (D&O 4.) As shown (pp. 6-7), USW International Staff

Representative Tourné informed District 9 Director Flippo of the relocation and instructed him to seek bargaining with Gaylord, given that a majority of employees at Bogalusa would be transferring to Tuscaloosa. Despite Flippo's multiple bargaining requests, Gaylord indisputably refused to bargain with the Union based on its bare assertion that neither the International nor District 9 was the bargaining representative of the Tuscaloosa employees.

Gaylord continues to maintain that claim (Br. 8-9, 14-15), but it is belied by settled law and the facts of this case. Illustrative of the relevant settled law is *UAW v. NLRB*, 394 F.2d 757 (D.C. Cir. 1967). There, where the labor agreements were between the employer "and the International and its Local 940," the court held that, though "the International and Local 'as an integral part' of the joint bargaining agent negotiated and signed the contracts," the local was never "an independent bargaining entity; at most it was a de facto agent." *Id.* at 761 (internal quotation marks omitted). Likewise, here, the agreements were between Gaylord and "[the USW International] and its Local No. 13-189," and the USW International was a signatory to all contracts. Indeed, it is undisputed that International Representative Tourné was the "chief spokesman" for the Union in bargaining and arbitrated grievances on behalf of the Union, and that the Union's structure requires locals to report to districts, which ultimately report to the International. Moreover, the employer in that case did not refuse to bargain with the International, but only

refused to negotiate with a local union newly seeking to establish its bargaining authority. *Id.* By contrast, Gaylord utterly repudiated its established duty to bargain with the USW International, as well as with District 9, an established agent that reports to the International and to which Local 887 reports.

Thus, the Board reasonably concluded that Local 189 was not an independent bargaining entity, as Gaylord insists, but rather, its representational authority “derived entirely from [its] affiliation with the USW International.”

(D&O 4.)

### **C. Gaylord’s Contentions Are Without Merit**

In its opening brief, Gaylord defends its refusal to recognize or bargain with the Union by repeating (Br. 6-9, 14-15) arguments that the Board reasonably rejected (D&O 3-4), and offering (Br. 10-14) new arguments that it never raised to the Board. First, as before the Board, Gaylord places undue emphasis on the language of its labor agreement with the Union, the distance of the move, the absence of animus behind its decision to relocate, and a nonexistent Union “internal requirement” that employees continue to express a desire for unionization. Second, Gaylord now, for the first time, seeks to justify its conduct (Br. 8, 10-15) based on an asserted absence of evidence that a majority of unit employees support the Union, but its claim is untimely and meritless. As shown below, each argument fails either under settled law or the facts of this case.

### 1. The Board properly rejected Gaylord's arguments

For instance, Gaylord relies heavily (Br. 7-9) on the “conjunctive phrasing” of the parties to the CBA—“[the International] and its Local No. 13-189”—in asserting that it need not recognize the Union or its local in Tuscaloosa. But, as explained above, the Board reasonably found that “[Gaylord’s] collective-bargaining relationship has been with the USW International, not separately with its subordinate components, whose bargaining [and] representational authority derived entirely from their affiliation with the [International].” (D&O 4.) Gaylord ignores the fact that the International and *its designated local* have been the exclusive bargaining representative of the Bogalusa employees, since the “local union’s number designation and the ownership of the facility have changed through the years.” (D&O 2.) Accordingly, the International and Local 887, the designated Tuscaloosa local, represent the employees who transferred from Bogalusa. Thus, contrary to Gaylord’s claim (Br. 8), the Board did not “manufacture a new certified bargaining representative.”

Gaylord also mistakenly insists (Br. 9) that the distance of the move—238 miles—justifies its refusal to bargain. In doing so, it exaggerates the importance of distance in the Board’s analysis, as it wrongly assumes that distance outweighs whether a substantial percentage of employees transferred to the new facility and whether the employer’s operations are substantially unchanged. The Board has

long held that the distance of a relocation is not singly determinative of whether the duty to bargain exists. *See Hydro-Air Equip.*, 277 NLRB 85, 89-90 (1985) (finding employer had duty to bargain despite “substantial change in geographic location,” where 23 of 47 unit employees relocated to new plant and production “methods, tools, and techniques” remained the same). As the Board explained here, if the distance of the move, in and of itself, were sufficient to strip the Union of its representational status, that “would allow an employer to evade its collective-bargaining obligations simply by moving further away.” (D&O 4.) Indeed, the fact that over 60 percent of employees transferred to Tuscaloosa demonstrates that the distance of the move was not so significant as to eradicate majority support for the Union, and consequently, that Gaylord’s obligation to recognize and bargain with the Union continued. (D&O 4.)

Despite Gaylord’s eagerness to highlight an “absence of evidence of bias” on its part (Br. 9), the Board’s finding that Gaylord unlawfully refused to bargain with the Union after the relocation does not depend on the presence or absence of union animus. Rather, the General Counsel never alleged nor contended that Gaylord’s decision to relocate was motivated by union animus, so that consideration is irrelevant. *See J.R. Simplot Co.*, 311 NLRB 572, 579 (1993). As such, here, “whether or not the relocation was motivated by antiunion or other

unlawful reasons is not determinative of the Union's right to continued representational status." *Id.*

Additionally, Gaylord maintains (Br. 8-10, 13-14) that the Union failed to satisfy a nonexistent "internal requirement" that employees express their desire for unionization and that it should have filed a petition for a representation election at the Tuscaloosa facility. But Gaylord cites no evidence that the Union had any such internal requirement, and the Union was not required to establish its majority support because it was already the employees' certified bargaining representative. (D&O 4.) Moreover, despite Gaylord's claims to the contrary (Br. 8-9), the Board properly found (D&O 4) that the Union's decision to seek new authorization cards after the relocation "in no way serves as an admission against interest or supports [Gaylord's] suggestion that the Union was required to file a representation petition to establish post-relocation majority status."

In short, the Board correctly dismissed Gaylord's claims that it justifiably refused to recognize the Union based on the language of the collective-bargaining agreement, the distance of the move, the absence of animus behind its relocation, and a nonexistent Union internal requirement that employees express a desire for unionization. And the Court should likewise reject those assertions.

**2. Gaylord’s belated challenge to the Union’s majority status is not properly before the Court and, in any event, lacks merit**

Gaylord further attempts to justify its refusal to recognize and bargain with the Union by contending that the Union failed to show that it retained majority support. Gaylord contends (Br. 10) that, absent such a showing, a question concerning representation exists and that the Union’s failure to resolve that question justifies Gaylord’s refusal to bargain. As shown below, Gaylord has waived judicial review of this claim and misunderstands the applicable law.

**a. Gaylord did not argue before the Board that the Union lacked majority status**

As the Board explained, Gaylord did not argue an alleged post-relocation loss of majority support “as a basis for nonrecognition of the Union.” (D&O 3.) Now, for the first time, Gaylord seeks to challenge the Union’s majority status before this Court. (Br. 10-15.) However, the Court may not consider that argument because Gaylord failed to raise it to the Board. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); 29 C.F.R. § 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (holding that Section 10(e)

bars a court from considering arguments which the party has raised for the first time on appeal); *accord Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1431 (11th Cir. 1985). Accordingly, because Gaylord never took issue with the Union's majority status before the Board, its failure to do so precludes the Court from considering it.

**b. Gaylord's argument is contrary to applicable law**

In any event, Gaylord's belated argument fails because the relocation had no effect on the Union's representational status. Contrary to Gaylord's contention (Br. 10), the Board did not improperly sanction a transfer of representation to District 9 absent any evidence of majority support. As the Board found (D&O 4), the post-relocation geographic change from Bogalusa to Tuscaloosa did not "strip[] the Union of its representational status." Because Gaylord's operations remained substantially the same at the new location, and a substantial percentage of employees transferred to the new location, the Union remained the designated representative. And, as the Board found (D&O 4), the Union, not its affiliated locals, is the employees' representative. Thus, Gaylord's contention (Br. 10) that a "question concerning representation" existed after the relocation is based on the erroneous belief that the Union lost representational status following relocation, which it did not.

Gaylord also incorrectly insists (Br. 14) that, following the relocation, the Union was required to prove its majority status to continue representing the employees. However, Board law does not require a Union to prove its employees' desire for representation following a geographic location, thereby rendering immaterial Gaylord's complaint that "no authorization cards were ever submitted" to it. The Union was entitled to continued recognition because of the continuity of both the bargaining unit and Gaylord's operations following the relocation. Indeed, it is settled that an employer, such as Gaylord, that is seeking to withdraw recognition from an incumbent union, such as the Union, must show, as a defense, that the union actually lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001). Thus, if Gaylord suspected a loss of majority support, it was required to come forward with supporting evidence.<sup>7</sup> And, as the Board

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<sup>7</sup> Gaylord's argument also erroneously presumes that the Union's presumption of majority support was rebuttable and subject to challenge. *See Auciello Iron Works v. NLRB*, 517 U.S. 781, 786-87 (1996) (after the expiration of a bargaining agreement, a union's presumption of majority status continues, but becomes rebuttable and subject to challenge). Because Gaylord never offered evidence regarding loss of majority support, the Board did not need to pass on whether the parties' collective-bargaining agreement terminated after the relocation, or whether the Union's presumption of majority status was subject to challenge. (D&O 3.)

found, Gaylord “provided no evidence that the Union has ever lost the support of a majority of unit employees.”<sup>8</sup> (D&O 3.)

Furthermore, the authorities that Gaylord cites (Br. 10-14) to support its contention that a question concerning the Union’s representational status exists are inapplicable to this case because they do not involve an incumbent union’s continued recognition following an employer’s relocation of operations. Rather, they concern a variety of representational questions not present here, such as a transfer of representational rights from one local to another, two locals’ competing claims of interest in representing employees, or a merger of two locals. *See, e.g., Hermet, Inc.*, 222 NLRB 29, 30-31, 34-35 (1976) (transfer of representational rights from certified local to sister local and two union locals’ competing claims to represent employees); *Gas Service Co.*, 213 NLRB 932, 933 & n.3 (1974) (transfer of representational rights from one local to another local); *Carriage Oldsmobile Cadillac, Inc.*, 210 NLRB 620, 620-21 (1974) (transfer of representational rights to

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<sup>8</sup> In fact, the record evidence demonstrates the Union has majority support. In August 2010, following relocation negotiations with Gaylord, the Union polled its membership and determined it had majority support. (Tr. 165-66.) And, at the hearing, the judge’s in-camera inspection of eight authorization cards “revealed that the Union continued to enjoy [majority] status after the move to Tuscaloosa.” (D&O 3; Tr. 249.)

sister local); *U.S. Gypsum Co.*, 164 NLRB 931, 931 (1967) (merger of two locals); *Yale Mfg. Co.*, 157 NLRB 597, 597-98 (1966) (transfer of representational rights).<sup>9</sup>

Additionally, Gaylord mischaracterizes (Br. 15) the Union's continued representation of employees as "a disguised request to amend the certification." However, this case does not involve an amendment to a union's certification, but an employer's duty to recognize and bargain with an incumbent union after relocating its operations. *See Westwood Import*, 681 F.2d at 665-67. The Board properly found (D&O 4) that the Union continued to represent Gaylord's employees following the relocation. Therefore, as the incumbent bargaining representative, the Union was not required to seek an amendment to its certification. *See generally* NLRB Casehandling Manual, Part Two, Representation Proceedings, § 11490.2 (2014) (stating that an amendment of certification petition "is usually used to confirm a change in the name of the employer or labor organization involved or to reflect a change in the affiliation of the labor organization.")

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<sup>9</sup> Gaylord's reliance on *Crescent Bay Convalescent Hosp.*, 31-CA-25999 (Div. of Advice Feb. 26, 2003), and *Centra, Inc.*, 8-CA-27654 (Div. of Advice Jan. 22, 1996), memoranda issued by the General Counsel's Division of Advice, is particularly misplaced. Those cases involve a union's transfer of bargaining rights from one local to another and are therefore factually distinguishable from the present case. Moreover, "memoranda issued by the General Counsel do not constitute precedential authority and are not binding on the Board." *Atelier Condo. & Cooper Square Realty*, 361 NLRB No. 111, 2014 WL 6722499, at \*8 (2014).

Lastly, Gaylord hypothesizes (Br. 14) that, “had [it] recognized District 9, [it] would arguably have violated” multiple provisions of the Act, presumably for recognizing a minority union. Again, because the Union continued to represent unit employees following the relocation, Gaylord’s recognition of the Union runs no such risk.

Therefore, substantial evidence supports the Board’s finding that Gaylord violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union. Accordingly, the Court should affirm that finding and reject Gaylord’s attempt to challenge it.

**D. Given Gaylord’s Duty To Bargain, the Remaining Factually-Uncontested Bargaining Violations Must Be Upheld**

Since substantial evidence supports the Board’s finding that Gaylord was obligated to bargain with the Union, and Gaylord has not otherwise disputed the remaining bargaining violations, the Court must uphold those Board findings.

For example, Gaylord indisputably refused to provide the Union with requested unit employee information that was necessary and relevant to the Union’s representational duties. It is settled that, under Section 8(a)(5) and (1) of the Act, an employer has a duty “to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1570 (11th Cir. 1989) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967)). Information pertaining to unit employees is

presumptively relevant and must be furnished. *Id.* As discussed (pp. 6-7), the Union submitted multiple requests for presumptively relevant information on unit employees' terms and conditions of employment, but Gaylord refused to furnish it, based on its erroneous belief that the Union was not employees' collective-bargaining representative. (D&O 3; JX 6, 8.)

As to the unilateral change, Gaylord similarly has explicitly stipulated that, after the relocation, it created the "lead shipper" position in the unit without giving the Union notice and an opportunity to bargain. (D&O 3-4; GCX 1(h) pp.4-5, 1(k) p.2, JX 4-8.) It is well established that an employer violates Section 8(a)(5) and (1) of the Act where, as here, it creates a new bargaining unit position without first giving the Union notice and an opportunity to bargain over them. *Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 879 (7th Cir. 2011); *see NLRB v. Katz*, 369 U.S. 736, 743 (1962); *City Cab Co. of Orlando, Inc. v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986) (citing *A.H. Belo Corp. v. NLRB*, 411 F.2d 959, 970 (5th Cir. 1969)). In failing to do so, Gaylord violated the Act.

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT GAYLORD VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING EMPLOYEE MITCHELL ABOUT HIS UNION VIEWS**

The Board properly found (D&O 1, 4-5) that Vice President Marc Smith unlawfully interrogated employee Doug Mitchell when Smith—a high ranking official—called Mitchell into his office and asked Mitchell why he desired union

representation. (*See above* p. 9.) Because Gaylord fails to adequately challenge the Board's interrogation finding in its opening brief, it has waived judicial review of that issue, and the Board is entitled to summary enforcement of that uncontested violation. In any event, substantial evidence demonstrates that Smith's interrogation of Mitchell violated Section 8(a)(1) of the Act.

Before this Court, Gaylord "denies that it unlawfully interrogated employees" (Br. 5), but offers no argument or authorities to support its empty claim. Consistent with the Federal Rules of Appellate Procedure, this Court has made clear that when a party fails to sufficiently raise an issue in its opening brief, that issue is waived. *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306-07 (11th Cir. 2012); *see* Fed. R. App. P. 28(a)(9)(A) (argument must contain party's contentions with citation to authorities and record); *see also Herring v. Sec'y, Dept. of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (arguments "raised for the first time in a reply brief are not properly before a reviewing court"). Here, by presenting nothing more than a vague, conclusory assertion with no citation to applicable legal authorities, Gaylord has waived appellate review of the Board's interrogation finding. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (where a party merely "refers" to an issue in its initial brief and "elaborates no arguments on the merits," the issue "is deemed waived") providing specific argument waives that issue); *U.S. v. Jernigan*, 341 F.3d 1273,

1283 n. 8 (11th Cir. 2003) (party must make more than “passing references” to issues to preserve them for review); *Bd. of Regents of the Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (merely referring to argument in opening brief is insufficient to preserve it). Thus, the Board is entitled to summary enforcement of that uncontested violation. *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 n.2 (11th Cir. 1999); *Purolator Armored, Inc.*, 764 F.2d at 1427-28.

In any event, substantial evidence supports the Board’s finding (D&O 1, 4-5) that Vice President Marc Smith coercively interrogated employee Doug Mitchell about his union views. Section 7 of the Act guarantees employees the right to “self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain or coerce employees in the exercise of” those rights. 29 U.S.C. § 158(a)(1); *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987). An employer violates Section 8(a)(1) when its conduct tends to be coercive of an employee’s exercise of his Section 7 rights; a showing of actual coercion is not necessary. *Id.*; accord *NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 921 (11th Cir. 1982).

Interrogations about employees' union views or activities "present an ever present danger of coercing employees in violation of their Section 7 rights." *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 416 (5th Cir. 1981). In determining whether an interrogation is coercive, the Board considers a number of factors, such as the nature of the information sought, the rank of the questioning official, the place and manner of the conversation, and whether the employer assures the employees that no reprisals will be taken if they support the union. *Id.* at 416. However, "[t]his list is not exhaustive . . . and coercion may occur even if all of these factors operate in favor of the employer." *Id.*; accord *Sturgis Newport Bus. Forms, Inc. v. NLRB*, 563 F.2d 1252, 1256 (5th Cir. 1977).

Here, the Board reasonably found that Vice President of Manufacturing Smith coercively interrogated employee Mitchell. (D&O 3-5.) As shown, shortly after the relocation, Smith, a high-ranking official, called Mitchell into his office and asked him why he wanted a union. It is settled that where such conversations are conducted in a director's office, a place of authority or with "unnatural formality," that factor weighs in favor of finding coercion. *TRW-United Greenfield Div.*, 637 F.2d at 417 (quoting *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir. 1965)). Though Smith summoned Mitchell to his office under the guise of developing employee leadership, the Board reasonably found (D&O 4) that the interrogation centered on persuading Mitchell that employees would not benefit

from unionization. Furthermore, in response to Smith's question of why Mitchell wanted union representation, Mitchell replied "why not," which is suggestive of an employee's fear of reprisal for admitting his union support and is further evidence of coercion. *See Sturgis Newport Bus. Forms, Inc.*, 563 F.2d at 1257. Thus, the circumstances establish that Smith's interrogation reasonably tended to coerce Mitchell in exercising his Section 7 rights, and Gaylord's unsupported assertion that it did not interrogate Mitchell falls far short of proving otherwise.

In sum, substantial evidence supports the Board's findings that Gaylord failed and refused to recognize and bargain with the Union, failed to furnish requested information to the Union, unilaterally created the "lead shipper" position without giving the Union notice and an opportunity to bargain, and coercively interrogated employee Mitchell regarding his union views. Accordingly, the Court should uphold each of those violations.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full and deny Gaylord's cross-petition for review.

/s/ Elizabeth Heaney  
ELIZABETH A. HEANEY  
*Supervisory Attorney*

/s/ Nicole Lancia  
NICOLE LANCIA  
*Attorney*  
*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-1743  
(202) 273-2987

RICHARD F. GRIFFIN, JR.

*General Counsel*

JENNIFER ABRUZZO

*Deputy General Counsel*

JOHN H. FERGUSON

*Associate General Counsel*

LINDA DREEBEN

*Deputy Associate General Counsel*

NATIONAL LABOR RELATIONS BOARD

May 2015

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner/Cross-Respondent	* Nos. 15-10006-FF
	* 15-10450
v.	*
	* Board Case No.
GAYLORD CHEMICAL COMPANY, LLC	* 10-CA-038782
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENGERY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	* * * * *
Intervenor	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,220 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 27th day of May, 2015

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-10006-FF
	*	15-10450
v.	*	
	*	Board Case No.
GAYLORD CHEMICAL COMPANY, LLC	*	10-CA-038782
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENGERY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	*	
	*	
Intervenor	*	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

Jeffrey A. Schwartz  
Jackson Lewis, PC  
1155 Peachtree Street NE Ste. 1000  
Atlanta, GA 30309

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 27th day of May, 2015