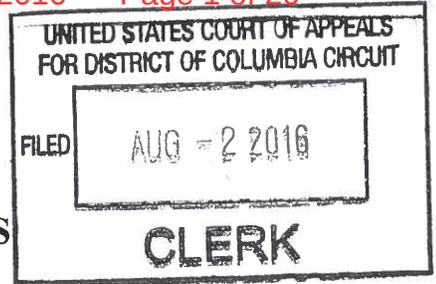


No. 16-1261



UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

COLORADO FIRE SPRINKLER, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ORIGINAL

Appeal of the Decision and Order Issued in
Colorado Fire Sprinkler Inc.

and

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO

Case Nos. 27-CA-115977 and 27-CA-120823

PETITION FOR REVIEW

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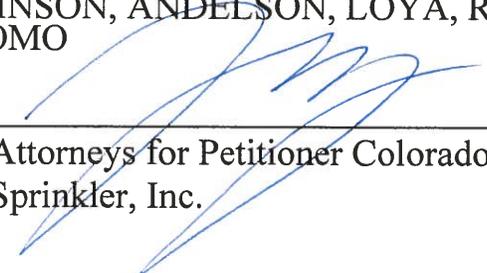
Attorneys for Petitioner Colorado Fire Sprinkler, Inc.

Petitioner Colorado Fire Sprinkler, Inc. ("CFS") hereby petitions the Court for review and setting aside adverse rulings against CFS in the Order of Respondent National Labor Relations Board entitled Colorado Fire Sprinkler, Inc. and Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, Case Nos. 27-CA-115977 and 27-CA-120823, Decision and Order, entered on July 22, 2016, and reported as 364 NLRB No. 55, a copy of which is attached as Exhibit "A."

Dated: August 1, 2016

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD
& ROMO

By: 

Attorneys for Petitioner Colorado Fire
Sprinkler, Inc.

CORPORATE DISCLOSURE STATEMENT

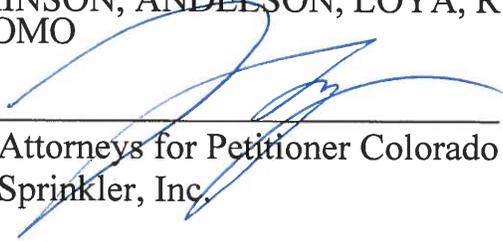
Petitioner Colorado Fire Sprinkler, Inc. submits its Disclosure Statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit.

Colorado Fire Sprinkler, Inc. is a Colorado corporation in the construction industry and is engaged in the business of installing fire sprinkler systems. Colorado Fire Sprinkler, Inc. has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public, nor has Colorado Fire Sprinkler, Inc. issued shares or debt securities to the public.

Respectfully submitted,

Dated: August 1, 2016

ATKINSON, ANDELSON, LOYA, RUUD
& ROMO

By: 

Attorneys for Petitioner Colorado Fire
Sprinkler, Inc.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Colorado Fire Sprinkler Inc. and Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO. Cases 27-CA-115977 and 27-CA-120823

July 22, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

On March 23, 2015, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a brief in support. The General Counsel and the Charging Party filed answering briefs and the Respondent filed a reply. The General Counsel filed exceptions and a brief in support. The Respondent filed an answering brief. The Charging Party filed cross-exceptions and a brief in support. The Respondent filed an answering brief and the Charging Party filed a reply. In addition, employee Robert Blackwell filed a Brief Amicus Curiae.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to adopt the judge's rulings, findings,¹ and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.²

We adopt the judge's findings that the parties' relationship was governed by Section 9(a) of the Act rather than, as the Respondent contends, by Section 8(f). In doing so, we follow our decision in *King's Fire Protection, Inc.*, 362 NLRB No. 129 (2015), which involved identical contract language. As we did in *King's Fire*, we decline to revisit our decision in *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717 (2001) (finding that clear and unequivocal contract language can establish a 9(a) relationship in the construction industry).³

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We amend the remedy, Order, and notice to conform to the Board's standard remedial language and to the violations found. We have substituted a new notice to conform to the Order as modified.

³ The dissent argues that Board law requires the Union to present additional extrinsic evidence of majority support to prove 9(a) status, even where clear and unequivocal contract language establishes a 9(a)

relationship. That assertion is incorrect for the reasons explained in *King's Fire*, supra, and for the additional reasons set forth below. Similarly, we find it unnecessary to address the applicability of *Casale Industries*, 311 NLRB 951 (1993), which extended to the construction industry the rule that claims that a union lacked majority status at the time of recognition are time barred after 6 months following recognition. Even if we were to put aside that 6-month bar, and consider the extrinsic evidence offered by the Respondent to contradict the contractual language on which our holding rests, the Respondent's evidence fails to show that the Union lacked majority support in the unit at the time the Respondent agreed to that contractual language.⁴

Despite finding that the parties' relationship was governed by Section 9(a), the judge dismissed the unilateral change allegations regarding the cessation of payments into the Union's benefit funds and the resulting cessation of the employees' Union-sponsored health insurance benefits, finding the allegations barred by Section 10(b). For the reasons stated below, we reverse this finding and conclude that the allegations were timely and that the unilateral cessation of payments violated Section 8(a)(5)

relationship. That assertion is incorrect for the reasons explained in *King's Fire*, supra, and for the additional reasons set forth below.

The dissent cites *Madison Industries*, 349 NLRB 1306, 1308 (2007), in support of its claim that the Board has found that an affirmative showing via extrinsic evidence is needed to establish a 9(a) relationship in the construction industry. In fact, *Madison Industries* stands for the converse proposition. The language quoted by the dissent is immediately followed by an acknowledgement that "the Board has held that voluntary recognition under Section 9 may be established solely by the terms of a collective-bargaining agreement that meets [the *Staunton Fuel*] requirements," and that a contract meeting those requirements is "independently sufficient both to establish [9(a)] status, and to overcome the presumption of 8(f) status." *Id.* (citing *Staunton Fuel*, supra, at 719-720) (emphasis added). Here, it is undisputed that the *Staunton Fuel* requirements are met.

The dissent also errs, along with the judge, in its reading of *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). In *Nova Plumbing*, there was clear evidence that the union "actually lacked majority support." *Id.* at 537. The judge's and the dissent's reading has been firmly rejected by the issuing court itself, which has emphasized that "*Nova Plumbing* rests on a simple principle: . . . 'Standing alone . . . contract language and intent cannot be dispositive at least where . . . the record contains strong indications that the parties had only a section 8(f) relationship.'" *Allied Mechanical Services v. NLRB*, 668 F.3d 758, 768-769 (D.C. Cir. 2012) (quoting *Nova Plumbing* at 537) (emphasis in *Allied Mechanical*); see also *King's Fire*, supra, slip op. at 1 fn. 2 (discussing the court's decisions).

⁴ The Respondent's showing consisted solely of the Respondent's owner answering "[n]ot to my knowledge" when asked at the hearing whether employees had "ever indicate[d] majority support" for the Union. This statement does not demonstrate that the Union *lacked* majority support. See *King's Fire Protection, Inc.*, 358 NLRB 1548 fn.1 (2012) (employer failed to show that union had lacked majority support when owner testified categorically that he had not been presented with evidence of the union's majority support), reaffirmed and incorporated by reference in 362 NLRB No. 129 (2015).

and (1) of the Act.⁵ We adopt the judge's finding that the implementation of a new insurance plan violated Section 8(a)(5) and (1) of the Act, but we amend the judge's remedy to provide the appropriate make-whole relief.⁶

To begin, it is undisputed that without giving the Union notice and an opportunity to bargain, the Respondent ceased making contributions to the Union's benefit funds, and as a result, the employees lost their health insurance coverage under the Union-sponsored plan. The Respondent then implemented a new insurance plan. It is further undisputed that the parties were not at impasse at the time of these unilateral changes, and the Respondent does not claim that the Union had lost majority support.

The charge underlying the cessation of benefit funds contributions was filed on October 29, 2013. Under Section 10(b), that charge is time barred if the Union had clear and unequivocal notice of the conduct said to constitute the unfair labor practice before April 29, 2013, 6 months before the filing of the charge. See, e.g., *United Kiser Services*, 355 NLRB 319, 320 (2010). In finding that the Union had such notice, the judge found that the operative event was the Respondent's failure to make a payment for the January 2013 period, during the term of the parties' 2010 contract, of which the Union received notice in mid-March 2013.

Neither the charge nor the complaint, however, alleges that the Respondent's missed payments covering the period from January to March 2013, during the term of the 2010–2013 contract, violate the Act; indeed, by the time the October 29 charge was filed, the Respondent had made those payments.⁷ Clearly, then, at issue here is the Respondent's failure to abide by the terms of employ-

ment established by the 2010–2013 contract following its expiration on March 31, not its delinquency in making the payments under that contract for January through March 2013. Thus, we agree with the General Counsel that the conduct alleged to constitute an unfair labor practice did not occur until May 15, 2013—well within the 10(b) period—when the Respondent missed its payment for April 2013, the month after the contract expired.⁸

In *Peerless Roofing Co.*, 247 NLRB 500 (1980), enfd. 641 F.2d 734 (9th Cir. 1981), the Board held that even though the employer notified the union that it did not intend to make payments under the expired contract, the union could not claim the payments until they were actually due. Thus, the 10(b) period did not begin to run until the payments' due date at the earliest. Here, the first delinquent payments at issue were not due until May 15, well within the 10(b) period. Even if the Respondent indicated before the 10(b) period began to run that it did not intend to make any payments after the contract expired, it is well established that a statement of intent to commit an unfair labor practice does not start the statutory 6 months running; the 10(b) period commences only once the alleged unfair labor practice actually occurs. See, e.g., *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). Therefore, we find that the Respondent's cessation of payments to the Union's benefit funds violated Section 8(a)(5) and (1).

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act as set forth below.

The Respondent shall be required to recognize and, on request, bargain with the Union as the collective-bargaining representative of all employees performing bargaining unit work, as set forth in the parties' most recent collective-bargaining agreement. The Respondent shall also be required to make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's failure to apply the terms of the expired 2010–2013 collective-bargaining agreement as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

⁸ In fact, the Union did not receive notice of that delinquency until June 2013.

⁵ We find it unnecessary to pass on whether the allegation regarding the cessation of the employees' Union-sponsored health benefits constitutes a separate violation of the Act, because any relief for that cessation will be part of the make-whole relief for the unlawful cessation of benefit funds payments.

⁶ As the General Counsel points out, under *Goya Foods of Florida*, 356 NLRB 1461 (2011), make-whole relief for any losses suffered as a result of a unilateral change in benefit plans is part of the standard remedy regardless of whether the Union chooses to demand restoration of the prior plan.

⁷ This distinguishes the present case from *Chemung Mfg.*, 291 NLRB 793, 794 (1988), a case relied on heavily by the judge. In addition, the Respondent did not repudiate its obligations under the 2010 contract nor its duty to bargain following expiration of the 2010 contract. To the contrary, as the judge's decision makes clear, in May 2013, following the contract's expiration, the Respondent offered to bargain and then did bargain to a limited extent over its continuing benefit payment obligations and a new contract. Given the Respondent's "ambiguous conduct" and "conflicting signals," the Union did not have "clear and unequivocal notice" that the Respondent was refusing to bargain over its later delinquencies. See *ISS Facility Services*, 363 NLRB No. 27, slip op. at 7–8 (2015).

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Likewise, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the expired 2010–2013 collective-bargaining agreement by failing to make the contractually-required contributions to the Union's benefit funds set forth in that agreement, we shall order the Respondent to make all required benefit funds contributions, including any additional amounts applicable to such funds as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses resulting from the Respondent's failure to make the required contributions to the funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The Respondent, Colorado Fire Sprinkler Inc., Pueblo, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit by unilaterally ceasing to make contributions to the Union's health and welfare, pension, education and other benefit funds and unilaterally implementing a new health insurance plan for unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union, rescind the unilaterally implemented changes to unit employees' terms and conditions of employment.

(b) Make whole all bargaining unit employees to the extent they have suffered any losses as a result of the Respondent's unlawful conduct in the manner set forth in the amended remedy section of this decision.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All journeyman sprinkler fitters, apprentices, and unindentured apprentice applicants in the employ of the Employer.

(d) Within 14 days after service by the Region, post at its facility in Pueblo, Colorado, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the position employed by the Respondent at any time since May 15, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. July 22, 2016

Kent Y. Hirozawa, Member

Lauren McFerran Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

The National Labor Relations Act (NLRA or Act) permits two different types of bargaining relationships. One type, governed by Section 9(a), requires a showing that the union has *majority support* among unit employees, and when the collective-bargaining agreement expires, the union enjoys a continuing presumption of ma-

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

majority status, and the employer has a continuing obligation to recognize and bargain with the union.¹ The other type of bargaining relationship, governed by Section 8(f), features *pre-hire* union recognition by construction-industry employers even though the union does not have majority support. Indeed, as its name indicates, a “pre-hire” agreement can be entered into when the employer does not yet have *any* employees.² However, “upon the expiration of such [pre-hire] agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.” *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987) (emphasis added), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

There is an important reason for this key difference between 9(a) “majority support” relationships on the one hand and 8(f) “pre-hire” relationships on the other. As the Board recognized in *Deklewa*, although Section 8(f) permits “pre-hire” agreements without a showing that the union has employee support (based on considerations unique to the construction industry³), Congress “was mindful of employee free choice principles” and “sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees’ representational desires.” 282 NLRB at 1380–

1381. Therefore, after a “pre-hire” agreement’s operative term, “the signatory union acquires no other rights and privileges of a 9(a) exclusive representative. Unlike a full 9(a) representative, the 8(f) union enjoys no presumption of majority status on the contract’s expiration and cannot . . . require bargaining for a successor agreement.” *Id.* at 1387.

In *Deklewa*, the Board adopted a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f), and it placed the burden of proving that the relationship instead falls under Section 9(a) on the party making that assertion (here, the General Counsel). See *Madison Industries*, 349 NLRB 1306, 1308 (2007). A construction-industry union can achieve 9(a) status “either through a Section 9 certification proceeding or ‘from voluntary recognition accorded . . . by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority.’” *Id.* (quoting *Deklewa*, 282 NLRB at 1387 fn. 53) (ellipsis in *Madison Industries*).⁴

In my view, the facts of this case, viewed in light of the above principles, require a finding that the Respondent had an 8(f) “pre-hire” relationship with the Union, and this means the Respondent acted lawfully when, upon the labor contract’s expiration, it exercised its right to “repudiate the 8(f) bargaining relationship.” *Deklewa*, 282 NLRB at 1378. Therefore, I respectfully dissent from my colleagues’ finding that the Respondent violated Section 8(a)(5) of the Act when, following contract expiration, it ceased making contributions to the Union’s benefit funds and implemented a new health insurance plan for its employees.⁵

In all material respects, this case is similar to *King’s Fire Protection, Inc.*, 362 NLRB No. 129 (2015), where I reviewed the difference between 8(f) “pre-hire” relationships and 9(a) relationships that are based on employee majority support. *Id.*, slip op. at 3–6 (Member Miscimarra, dissenting in part). As I expressed in *King’s Fire Protection*— in agreement with the Court of Ap-

¹ Sec. 9(a) states in part: “Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .” (emphasis added).

² Sec. 8(f) states in part: “It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization of which building and construction employees are members . . . because (1) the *majority status of such labor organization has not been established* under the provisions of section 9 of this Act prior to the making of such agreement . . . : Provided . . . , That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)” (emphasis added).

³ As the Board recognized in *Deklewa*, when Congress enacted Sec. 8(f) in 1959 “[i]t had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union . . . even before any employees had been hired.” 282 NLRB at 1380. This practice, Congress found, had come about for two reasons:

One reason . . . [was] that it [was] necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason [was] that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union.

Id. (quoting S. Rep. 86–187 (1959), reprinted in 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 424) (fn. and other citation omitted).

⁴ The Board in *Madison Industries* went on to say that “voluntary recognition under Section 9 may be established solely by the terms of a collective-bargaining agreement that meets [the] minimum requirements” spelled out by the Board in *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717 (2001). 349 NLRB at 1308. As explained below, I believe *Central Illinois* is contrary to Supreme Court precedent and has been rejected by the Court of Appeals for the District of Columbia Circuit. I note that two of the three members who participated in *Madison Industries* expressed no opinion on whether *Central Illinois* was correctly decided. *Id.* at 1308 fn. 8.

⁵ Because I find that the Respondent did not violate Sec. 8(a)(5) when it made these unilateral changes, I find it unnecessary to reach the question, addressed by my colleagues, of whether the 8(a)(5) allegations are time barred.

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peals for the District of Columbia Circuit—"the Board cannot properly conclude that a 9(a) relationship exists unless the General Counsel satisfies the burden of introducing sufficient evidence—separate from collective-bargaining agreement language—that rebuts the presumption that construction-industry collective-bargaining agreements are governed by Section 8(f)." *Id.*, slip op. at 6 (Member Miscimarra, dissenting in part) (citing *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003)); see also *International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altman)*, 366 U.S. 731, 737–739 (1961) (*Garment Workers*).

In the instant case, the Respondent in 1991 entered into a collective-bargaining agreement with the Union, which recited that the Respondent had "confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by [the Union]." However, at the time it entered into this agreement, the Respondent *had no employees*, so the recitation was obviously false. The parties' most recent 8(f) agreement, which expired March 31, 2013, similarly recited that the Respondent "acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act." But to *verify* the Union's majority status, the Respondent would have had to have *seen evidence* of majority support, and the Respondent's owner, Kent Stringer, testified that "to [his] knowledge" his employees had never indicated majority support for the Union. Thus, Stringer's testimony contradicts the recitation in the expired 8(f) agreement.

Nonetheless, my colleagues find that the parties had a 9(a) bargaining relationship, relying on the above-quoted contract language and *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717 (2001). In *Central Illinois*, the Board held that contract language, standing alone, can be sufficient to confer 9(a) status. I believe that the Board's holding in *Central Illinois* is precluded by the Supreme Court's decision in *Garment Workers*, *supra*, and the Board's holding was rejected by the D.C. Circuit in *Nova Plumbing*, *supra*. In my view, *Garment Workers* and *Nova Plumbing* are persuasive and controlling.

In *Garment Workers*, the employer, Bernhard-Altman, signed an agreement that purported to recognize a union as the "exclusive bargaining representative" of "all production and shipping employees" when, in fact, fewer than half the unit employees had authorized the union to represent them. 366 U.S. at 734 fn. 4. The Supreme Court upheld the Board's finding that this grant of 9(a) recognition to a union that lacked majority sup-

port violated Section 8(a)(2) of the Act.⁶ The Court stated:

In their selection of a bargaining representative, § 9(a) . . . guarantees employees freedom of choice and majority rule. . . . Bernhard-Altman granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. *There could be no clearer abridgment of § 7 of the Act*, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity.

366 U.S. at 737 (emphasis added). The Court rejected arguments that the employer's and union's "good-faith beliefs" in the union's majority status should constitute a "complete defense": "To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Id.* at 738–739.

In *Nova Plumbing*, *supra*, the D.C. Circuit relied on *Garment Workers* and squarely rejected the Board's holding in *Central Illinois* that contract language, standing alone, can confer 9(a) status without independent evidence that the union has majority support.⁷ The court of appeals reasoned as follows:

The proposition that contract language standing alone can establish the existence of a section 9(a) relationship runs roughshod over the principles established in *Garment Workers*, for it completely fails to account for employee rights under sections 7 and 8(f). An agreement between an employer and union is void and unenforceable, *Garment Workers* holds, if it purports to recognize a union that actually lacks majority support as the employees' exclusive representative. While section 8(f) creates a limited exception to this rule for pre-hire

⁶ Sec. 8(a)(2) of the Act makes it unlawful for an employer, among other things, to "contribute financial or other support" to a labor organization. Sec. 8(a)(2) has long been held to render unlawful a grant of 9(a) recognition to a union that lacks majority support "because the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'" *Garment Workers*, 366 U.S. at 738 (quoting *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)).

⁷ The judge in the instant case agreed that the D.C. Circuit in *Nova Plumbing* held that 9(a) status cannot be conferred by contract language alone. My colleagues reject the judge's reading of *Nova Plumbing* as overly broad, and they contend that the D.C. Circuit itself rejected that reading in *Allied Mechanical Services v. NLRB*, 668 F.3d 758, 768–769 (D.C. Cir. 2012). I disagree with my colleagues' contention for the reasons stated in my partial dissent in *King's Fire Protection*, 362 NLRB No. 129, slip op. at 6 fn. 15.

agreements in the construction industry, the statute explicitly preserves employee rights to petition for decertification or for a change in bargaining representative under such contracts. . . . The Board's ruling that contract language alone can establish the existence of a section 9(a) relationship—and thus trigger the three-year “contract bar” against election petitions by employees and other parties—creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers'* holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in *Garment Workers*.

Section 8(f) represents a real benefit to both employers and unions in the construction industry, allowing them to establish bargaining relationships without regard to a union's majority status. But the Board cannot, as it did here and in *Central Illinois*, allow this relatively easy-to-establish option to be converted into a 9(a) agreement that lacks support of a majority of employees. Otherwise the Board would be giving employers and unions “the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.”

330 F.3d at 536–537 (quoting *Garment Workers*, 366 U.S. at 738–739).⁸

Again, I agree with the D.C. Circuit that the Board cannot properly conclude that a 9(a) relationship exists unless the General Counsel satisfies the burden of introducing evidence—separate from collective-bargaining agreement language—sufficient to rebut the presumption that construction-industry collective-bargaining agreements are governed by Section 8(f). See *King's Fire Protection*, 362 NLRB No. 129, slip op. at 6 (Member Miscimarra, dissenting in part) (citation omitted). As the D.C. Circuit stated in *Nova Plumbing*, 330 F.3d at 537: “Standing alone . . . contract language and intent cannot be dispositive at least where, as here, the record contains

⁸ Under the contract-bar doctrine the court referred to, collective-bargaining agreements of definite duration “for terms up to 3 years will bar an election for their entire period,” and “contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years.” *General Cable Corp.*, 139 NLRB 1123, 1125 (1962) (fn. omitted); see also *NLRB v. Burns International Security Services*, 406 U.S. 272, 290 fn. 12 (1972).

strong indications that the parties had only a section 8(f) relationship.”

I also believe that the judge improperly applied Section 10(b) to find that the Respondent cannot now challenge the Union's claim to 9(a) status. The 10(b) limitations period only applies to unfair labor practices, and it is *not* an unfair labor practice for a construction-industry employer to confer “pre-hire” recognition pursuant to Section 8(f). Here, the Board is evaluating *whether* the collective-bargaining agreement conferred “pre-hire” recognition under Section 8(f) rather than “majority support” recognition under Section 9(a). When the same 6-month limitations argument was asserted in *Nova Plumbing*, the court of appeals stated that “this argument begs the question” because the “fundamental issue at the heart of this case is whether the . . . contract was subject to section 8(f) or 9(a),” and “only if the parties formed a section 9(a) relationship” was there an “unfair labor practice” that would “thereby trigger the six-month time limit.” 330 F.3d at 539.⁹

For these reasons, I would find the Respondent did not violate Section 8(a)(5), upon the expiration of its collective-bargaining agreement, by treating the relationship as one that had been established under Section 8(f). Accordingly, I respectfully dissent.

Dated, Washington, D.C. July 22, 2016

Philip A. Miscimarra

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

⁹ For additional reasons why the 6-month 10(b) limitations period should not be applied to preclude challenges to an 8(f) agreement's purported conferral of 9(a) recognition, see *King's Fire Protection*, 362 NLRB No. 129, slip op. at 7–8 (Member Miscimarra, dissenting in part).

COLORADO FIRE SPRINKLER INC.

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit by unilaterally ceasing to make contributions to the Union's health and welfare, pension, education and other benefit funds and unilaterally implementing a new health insurance plan for unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request of the Union, rescind the unilaterally implemented changes to unit employees' terms and conditions of employment.

WE WILL and make whole all bargaining unit employees to the extent they have suffered any losses as a result of our unlawful conduct, with interest.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All journeyman sprinkler fitters, apprentices, and unindentured apprentice applicants in the employ of the Employer.

COLORADO FIRE SPRINKLER INC.

The Board's decision can be found at www.nlr.gov/case/27-CA-115977 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Julia M. Durkin, Esq., for the General Counsel.
Thomas A. Lenz, Esq. (Atkinson, Andelson, Loya, Ruud & Romo), of Cerritos, California, for the Respondent.

William W. Osborne, Esq. and Natalie C. Moffett, Esq. (Osborne Law Offices), of Washington, DC, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This case hinges on the nature of the bargaining relationship between the Respondent, Colorado Fire Sprinkler Inc., and Road Sprinkler Fitters Local Union No. 669, as well as on the question of whether the Union brought a timely challenge to the Respondent's cessation of benefit funds contributions. The General Counsel alleges that the Respondent made unilateral changes to employees' terms and conditions of employment by ceasing those contributions following the expiration of the parties' last collective-bargaining agreement, as well as by offering employees a new health insurance plan after the cessation of their union-provided insurance due to the lack of contributions. The Respondent concedes that it made the alleged changes. However, it asserts a number of legal justifications for doing so. Among them are that the parties had an 8(f), as opposed to 9(a), bargaining relationship, and that the allegations are time barred by Section 10(b).

Because the contract language contained in the parties' 2005 assent and interim agreement meets the requirements of *Stanton Fuel & Material*, 335 NLRB 717 (2001), I conclude, as discussed below, that the Respondent and the Union had a 9(a) bargaining relationship. Accordingly, when the parties' collective-bargaining agreement expired on March 31, 2013, the Respondent was required to continue the terms and conditions of that contract, until such time as the parties reached either a new agreement or a bargaining impasse. The failure to make benefit funds contributions, the resulting termination of the union-provided health insurance plan, and the offering of a new health insurance plan constituted material changes to employees' working conditions. The Respondent unilaterally implemented these changes and does not argue that the parties had reached an impasse in negotiations.

However, I also conclude that the complaint allegations addressing the Respondent's cessation of benefit funds contributions and the associated termination of the union-provided health insurance plan are time barred by Section 10(b). The Union filed the charge that forms the basis of these allegations on October 29, 2013. The 10(b) period ran back 6 months to April 29. I find that the Respondent's initial cessation of benefit fund contributions occurred in January 2013 prior to the expiration of the parties' contract, and that the Union had actual notice of that cessation in mid-March 2013, outside of the 10(b) period. The Union also did not file the charge until more than 6 months following the parties' contract expiration on March 31, 2013. Under these circumstances, the Union's charge is untimely. *Natico, Inc.*, 302 NLRB 668 (1991); *Park Inn Home for Adults*, 293 NLRB 1082 (1989); *Chemung Contracting Corp.*, 291 NLRB 773 (1988).

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) only by offering and implementing a new health insurance plan for employees after June 1, 2013.

STATEMENT OF THE CASE

On October 29, 2013, Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (the Union), filed an unfair labor practice charge alleging that Colorado Fire Sprinkler Inc. (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally discontinuing benefit funds contributions since about June 20, 2013. Region 27 of the National Labor Relations Board (the Board) docketed this charge as Case 27-CA-115977. On January 17, 2014, the Union filed a second charge alleging the Respondent violated Section 8(a)(5) and (1) of the Act by discontinuing contributions to the health and welfare plan as negotiated in the parties' collective-bargaining agreement and by implementing a new health insurance plan for employees about December 2013. Region 27 docketed this charge as Case 27-CA-120823. Following an investigation into the charges, the Board's General Counsel, through the Acting Regional Director for Region 27, issued a consolidated complaint on August 22, 2014. The Respondent filed an answer to the complaint on September 4, 2014, denying that it engaged in any unlawful conduct and asserting multiple affirmative defenses.

I conducted a trial on the complaint on December 2, 2014, in Pueblo, Colorado. Counsel for the parties filed posthearing briefs in support of their positions on January 6, 2015, which I have considered. On the entire record, including my observation of the demeanor of witnesses, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent installs, services, and inspects fire sprinkler systems, principally in commercial settings. The base of its business operations is an office in Pueblo, Colorado. On an annual basis, the Respondent purchases and receives at its Pueblo facility goods valued in excess of \$50,000 from points outside the state of Colorado and from other enterprises located within the state of Colorado, each of which other enterprises receives the goods directly from points outside the state of Colorado. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answer to the complaint. The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Owner Kent Stringer founded Colorado Fire Sprinkler in 1991. The Union represents journeymen sprinkler fitters and apprentices. The Respondent first hired such employees in April 1994 and consistently has employed more than one since that time. The Union's business agent is Richard Gessner. He is responsible for represented employees in District 4, which includes Colorado and Wyoming.¹⁰

¹⁰ Five witnesses testified at the hearing, with the two principal ones being Gessner for the Union and Stringer for the Respondent. The record testimony, by and large, is not contradictory. As to overall

A. The Terms of the Parties' Contracts

The Union and the Respondent first entered into an "Assent and Interim Agreement" in 1991, at a time when Stringer did not have any employees. From November 1, 1991, through March 31, 2013, the parties agreed to seven, successive contracts which, by their terms, bound the Respondent to the associated national collective-bargaining agreements negotiated by the National Fire Sprinkler Association (NFSA) and the Union.

On March 28, 2005, the Respondent and the Union entered into their fifth assent and interim agreement (2005 assent agreement). With respect to recognition, this agreement stated:

The Employer hereby freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act, as amended, for the purpose of establishing wages, hours, and working conditions for all journeymen sprinkler fitters, apprentices and unindentured apprentice applicants in the employ of the Employer, and that the Union has offered to provide the Employer with confirmation of its support by a majority of such employees.

By other terms of the 2005 assent agreement, the Respondent agreed to be bound to the national collective-bargaining agreement between NFSA and the Union, which ran from April 1, 2005, to March 31, 2007 (2005 national agreement). Regarding recognition, article 3 of the 2005 national agreement stated:

The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

The parties likewise signed assent and interim agreements in 2007 and 2010. The recognition language in these agreements stated:

The Employer hereby freely and unequivocally acknowledges that it has previously confirmed to its full satisfaction and continues to recognize the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act, as amended, for the

witness credibility where conflicts exist, I credit Stringer's testimony except as otherwise, specifically noted in this decision. None of the witnesses had extensive recall of the material events, including the two bargaining sessions central to the unilateral change allegations. However, Stringer's testimony was specific and detailed with respect to the things he could recall. Gessner, in contrast, appeared to have little recollection of his interaction with the Respondent. He often could not recall events he was asked about or qualified his answers with phrases such as "I think." He also frequently had to be prompted through leading questions or have his memory refreshed with the use of affidavits previously given to the Board for responses, including on certain critical issues. As a result, I find Stringer's testimony to be more reliable.

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purpose of establishing wages, hours, and working conditions for all journeymen sprinkler fitters, apprentices and unindentured apprentice applicants in the employ of the Employer.

The Respondent also agreed to be bound by the respective national agreements for 2007 and 2010. The recognition language in those agreements was identical to that in the 2005 national agreement, quoted above.

The Respondent and the Union did not engage in contract negotiations at any point during the time period covered by their seven assent agreements. The Union simply sent a new agreement to Stringer, who then signed and returned it.

The 2010 national agreement required the Respondent to make monthly contributions to the National Automatic Sprinkler Industry (NASI) Welfare Fund, the NASI Pension Fund, the NASI-Local 669 Industry Education Fund, and the Sprinkler Industry Supplemental (SIS) Defined Contribution Pension Fund (collectively, the benefit funds) for hours worked by Respondent's journeymen sprinkler fitters and apprentices. The payments to the NASI Welfare Fund enabled the Respondent's employees to obtain health insurance coverage through the Union. As an owner, Stringer also received health insurance through the fund.

Fund payments are due on the 15th of each month for the preceding month. Gessner receives a monthly delinquency report from the fund which identifies the employers in his district that are behind on benefit funds contributions. The report operates on a 2-month lag. For example, Gessner received a delinquency report on May 7, 2013, which showed nonpayments through March 2013. (GC Exh. 8A.)

B. THE PARTIES' COMMUNICATIONS PRIOR TO APRIL 29, 2013

After many years of successful business operations, the Respondent began experiencing financial difficulties in 2010. According to Stringer, those difficulties were the result of the poor economy, particularly in Pueblo, as well as competition from nonunion companies.

At the beginning of 2010, Stringer spoke to Gessner before signing the 2010 assent agreement. Stringer advised Gessner that his business was struggling and he did not know whether he could comply with the obligations of the 2010 national agreement. Following the conversation, Stringer waited a couple of months until June 2010, but did ultimately sign the 2010 assent agreement.

Via letter dated November 30, 2012, the Union notified the Respondent of its intent to terminate the 2010 national agreement and negotiate a new national contract. Around this same time, Stringer met with Gessner and again told him that the company was struggling. Stringer said he could not sign a new contract if he did not get some kind of economic relief from the Union. He specifically told Gessner the economy would not support his complying with the contract.

The Respondent stopped making monthly benefit funds contributions beginning in January 2013, 3 months prior to the expiration of the 2010 national agreement.²

² The documentary evidence in the record suggests that the Respondent stopped making contributions even earlier, in December 2012.

In February 2013, the Union sent another assent and interim agreement to Stringer. Gessner then called Stringer and asked him if he was going to sign the agreement. Stringer told him no, stating "I won't enter into a contract I can't comply with." (Tr. 170.)

The 2010 national agreement expired on March 31, 2013. In that same month, Gessner would have received the fund's delinquency report indicating the Respondent had not made the benefit fund contributions for January.

In early April 2013, multiple employees advised Gessner that Stringer had a meeting with them on April 5 where he stated he was going to have to go nonunion because he could no longer afford to be a union contractor. Within about a week, and before April 29, a conversation between the two ensued. Stringer told Gessner again that the national agreement's wages and benefits were too much and he could not compete with a non-union competitor. Gessner told Stringer that he had to continue terms and negotiate a new contract. Stringer replied that he was not aware that he had to do either. Stringer said he wanted to remain a union contractor but could not afford the funds. Gessner mentioned that the Respondent had an outstanding debt with the NASI funds, and advised Stringer that NASI made settlement agreements for contractors that fell behind on fund payments. Stringer told Gessner that he "was going to catch up the funds through the end of the contract," i.e. the funds payments through March 2013. (Tr. 202.)

On April 25, 2013, the Union filed an unfair labor practice charge with the NLRB which alleged: "On or about April 1, 2013, and continuing, the Employer has unilaterally changed the terms and conditions of employment by, inter alia, discontinuing contributions to benefit funds." (GC Exh. 4.) At the time of this charge filing, the Respondent was delinquent on benefit funds payments for January, February, and March 2013. Gessner was aware of this, having received a copy of a letter from counsel for the funds to Stringer noting the delinquency. (GC Exh. 6.)

In a letter dated May 2, Stringer asked the Union to withdraw its NLRB charge because "negotiations would be far more productive" and he "would like to resolve the benefits issues between the Union[,] the Trust and my firm." (GC Exh. 5.) Based upon Stringer's expression that he was willing to negotiate a new contract, the Union withdrew the charge on May 10. (GC Exhs. 9, 10.) The withdrawal was not based on any resolution of the delinquent benefit funds contributions.³ (Tr. 62.)

A letter from the NASI funds dated March 4, 2013, to the Respondent noted delinquent payments for December 2012 and January 2013. (R. Exh. 6.) Also in March 2013, Stringer and employees of the Respondent received "Forecast Termination" letters from the fund stating that their health insurance would be terminated on March 31, 2013, due to delinquent contributions (R. Exhs. 2-5.) Gessner testified that employees lose their insurance after four months of delinquent fund payments (Tr. 44), meaning a such a termination would be based on the cessation of contributions in December 2012. However, both Gessner and Stringer testified that the delinquent contributions began in January 2013 and neither party contends otherwise in their briefs.

³ The findings of fact regarding the pre-April 29 communications, in particular the conversations between Stringer and Gessner, are based on the credited testimony of both individuals. Each person remembered

C. The June 21 Bargaining Session

On June 21, the parties held their first bargaining session for a new contract at the Union's hall in Pueblo. Gessner and Michael Lee, a member of the Union's western region executive board, attended for the Union. Stringer, his brother Marlin Stringer, his daughter Sarah Blackwell, and his son-in-law Robert Blackwell, attended for the Respondent. Most of the discussion that day centered on the Respondent's financial difficulties and potential measures the Union could take to help the company weather the storm.

Regarding the delinquent fund payments, Stringer reiterated that they were too expensive for him and that he was there to negotiate a new contract. He expressed concern to Gessner that the Union was putting forth the 2013 national agreement, and the associated benefit funds contributions, as their initial contract proposal. Stringer noted his ongoing struggle over repaying the contributions he owed under the 2010 national agreement. When Stringer asked Gessner whether the 2013 national agreement was the Union's proposal, Gessner responded "No, that is off the table."⁴ (Tr. 175-176; GC Exh. 26.)

With respect to health insurance, Stringer told Gessner that he eventually would have to get insurance for his people.

At the end of the meeting, Stringer provided his initial contract proposals to the Union. The proposals included deleting all benefit funds contributions and providing employees with a different health insurance plan.⁵ (GC Exh. 18.) Gessner said he would look them over and provide them to his business

different portions of these conversations and their recollections were not contradictory.

⁴ At the hearing, the main factual dispute was over what happened next. Stringer and Sarah Blackwell testified that Gessner then said "you're not accumulating debt." Lee testified that Gessner said he could not do anything about the delinquent fund payments, and Gessner said that he did not agree to waive or resolve the benefit funds issues. As discussed more fully below, whether Gessner said "you're not accumulating debt" does not impact the outcome of the case. However, if a credibility determination was required, I would find that Gessner did not make that statement based upon the record evidence. Unbeknownst to and without the consent of the Respondent, Lee was recording what occurred at this bargaining session. During cross examination, counsel for the General Counsel played a portion of the recording following Gessner's statement that the 2013 national agreement was off the table, and both Stringer and Blackwell acknowledged that the recording did not contain the second statement. Stringer also testified that he previously listened to the entire recording and did not hear Gessner's alleged statement. Sarah Blackwell's contemporaneous notes document Gessner's statement that the 2013 national agreement was off the table, but do not contain the alleged statement concerning no debt being accumulated. Finally, I find it unlikely that Gessner would make such a statement in light of his previously stated position that the Respondent had to continue the terms and conditions of the 2013 national agreement while a new contract was being negotiated.

⁵ The Respondent's proposal included the language "freeze pension contributions for term of agreement." It is not clear from that plain language whether the proposal meant to completely stop pension fund contributions or freeze the contributions at the level contained in the 2010 national agreement. However, given Stringer's consistent position with Gessner prior to these proposals being made, I find the proposal was intended to stop the Respondent's contributions to the pension funds following the 2010 national agreement.

manager. Gessner also told Stringer he would call him to schedule the next negotiation meeting.

At some, unidentified point after this meeting but prior to the next bargaining session on October 29, the Respondent offered its fitters and apprentices the opportunity to join an Anthem Blue Cross Blue Shield health insurance plan which its office employees had access to. At least seven employees signed up for this plan. The Respondent stipulated that it did this without first notifying or bargaining with the Union. Stringer's action was prompted by an employee requesting to get on the office plan, after the employee's wife attempted to use the union health insurance plan for their child's medical care and was denied.

On a date after the June 21 session, the Respondent also paid off its delinquent fund contributions, but only through March 31, 2013.

D. The October 29 Bargaining Session

The parties did not meet again for negotiations until October 29, more than 4 months later. Gessner attributed the delay to things being hectic after a change in business managers. However, he also indicated that he spoke with the new business manager around the end of July concerning the Respondent's bargaining proposals. The Respondent did not contact the Union about the delay prior to Gessner requesting another bargaining session on October 16.

On October 29, Gessner informed Stringer that some or all of the employees had lost their health insurance. Stringer replied that he had allowed the employees to join the office program. Gessner then said that they had violated the contract by doing that and the Union would file charges. Gessner asked for a copy of the new health insurance plan. Gessner also stated that Stringer would have to get his ongoing fund liabilities caught up. He showed Stringer a copy of an unfunded withdrawal liability letter from the benefit funds, which indicated that the Respondent would owe \$1.2 million if it withdrew from the plans.

On this same date, the Union filed an NLRB charge in Case 27-CA-115977 which alleged the following violation of Section 8(a)(5): "On or about June 20, 2013, and continuing, the Employer unilaterally changed the terms and conditions of employment by, inter alia, discontinuing contributions to benefit funds."

Analysis

I. THE 2005 ASSENT AGREEMENT ESTABLISHED A 9(A) BARGAINING RELATIONSHIP

The General Counsel's complaint alleges that the Respondent unlawfully and unilaterally discontinued contributions to union benefit funds since about April 1, 2013, and ceased offering health insurance through the Union's health and welfare fund and began offering employees a new health insurance plan after June 1, 2013. These allegations are premised on the Respondent and the Union having a 9(a), as opposed to 8(f), bargaining relationship. The General Counsel contends the 9(a) relationship is established solely by the contract language in the parties' 2005 assent agreement.

A contract provision will be independently sufficient to es-

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establish a union's 9(a) representation status where the language unequivocally indicates (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority status. *DiPonio Construction Co.*, 357 NLRB 1206 (2011); *Staunton Fuel & Material*, 335 NLRB 717 (2001). A reference to Section 9(a) in the contract language is indicative of the parties' intent to establish such a bargaining relationship. In addition, the request for recognition can be fairly implied from the contract language stating that the employer has granted such recognition.

The language of the 2005 assent agreement meets the requirements of *Staunton Fuel & Material* based upon the clear and unambiguous first sentence of the provision. That sentence states the Respondent "freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act." By acknowledging that it has "verified" the Union's majority status and by signing the assent agreement, the Respondent recognized the Union and the Union's request for recognition can be fairly implied out of that grant of recognition. In addition, the Respondent could not have "verified" majority status without the Union having shown evidence of its majority support. The contract language indicating that the Union "offered to provide the Employer with confirmation of its support by a majority of such employees" is superfluous, but also would demonstrate that the third requirement of *Staunton Fuel & Material* has been met.

The 2005 national agreement contains no provisions to the contrary. Rather, the recognition clause in that agreement reiterates that the Respondent "recognize[s] the Union as the sole and exclusive bargaining representative" of its employees "pursuant to Section 9(a)." Furthermore, nothing in the subsequent assent or national agreements conflicts with the Union's previously established 9(a) status.

My conclusion is consistent with the Board's decision in *King's Fire Protection, Inc.*, 358 NLRB 1548 (2012). That case involved the same union and the identical contract language, with the employer there also contesting the Union's 9(a) status. The Board adopted the administrative law judge's conclusion that the contract language, standing alone, was sufficient to establish a 9(a) bargaining relationship. While the decision is not binding precedent in light of *NLRB v. Noel Canning*, ___ U.S. ___, 134 S.Ct. 2550 (2014), I find the Board's analysis persuasive and I adopt it.⁶

In its brief, the Respondent urges me to follow the D.C. Circuit's decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). In that case, the court of appeals found that 9(a) status could not be attained solely by contract language,

but required an evidentiary showing that a majority of employees supported the union at the time the contract was agreed to. The decision was grounded in concern that the Board's *Staunton Fuel & Material* approach could result in granting 9(a) status to a union that does not have the majority support of employees in the bargaining unit, despite contract language indicating that such a majority exists. This case certainly highlights the concern. Stringer signed the first assent agreement in 1991, when he had no employees. Nonetheless, the agreement still stated the Respondent confirmed that a majority of its sprinkler fitters "have designated, are members of, and are represented by" the Union. Although he hired employees in 1994, Stringer simply signed subsequent assent agreements in 1994, 1997, 2000, and 2005 which union representatives mailed to him, without engaging in any negotiations. (Tr. 158–159.) Despite the contract language indicating that majority status was "verified," Stringer could not recall the Union ever presenting him with evidence of its majority support. (Tr. 160.) That seems likely in light of the sequence of events. Even if it had, such a showing logically would have occurred in 1994, not in 2005.

Nonetheless, a judge's duty is to apply established Board precedent which the U.S. Supreme Court has not reversed. It is for the Board, not me, to determine whether Board precedent should be altered. *Austin Fire Equipment, LLC*, 360 NLRB No. 131, slip op. at 2 fn. 6 (2014). Under extant Board precedent, the contract language in the 2005 assent agreement meets the *Staunton Fuel* requirements.

The Respondent's other arguments regarding the contract language can be dispensed with in short order. The Respondent contends that it should not be bound by the terms of the assent agreements it entered into with the Union because the parties did not negotiate those agreements. However, Stringer signed the agreements as the Respondent's owner and, by that act, bound the Respondent to the contracts' terms. The Respondent also argues that the recognition language in the assent agreements in 1991, 1994, 1997, and 2000 was insufficient to establish a 9(a) relationship. Those agreements are irrelevant in light of the fact that the General Counsel's complaint alleges the 9(a) relationship began with the 2005 assent agreement. Finally, the Respondent asserts that Stringer never intended to establish a 9(a) bargaining relationship and the Union's conduct indicated it did not believe it had that status. While Stringer may have thought the relationship could be terminated at the expiration of a contract, his intent, and the Union's beliefs, are irrelevant in light of the clear and unambiguous contract language in the 2005 assent agreement. Extrinsic evidence regarding the parties' intent is not considered where contract language is clear and unambiguous, and thereby conclusively notifies the parties that a 9(a) relationship is intended. *Madison Industries*, 349 NLRB 1306, 1308 (2007).

Accordingly, I find that the parties' 2005 assent agreement established a 9(a) bargaining relationship between the Respondent and the Union.

With such a relationship established, the Respondent cannot now, almost a decade after signing the 2005 assent agreement, challenge the 9(a) status of the Union. *Staunton Fuel & Material*, supra, 335 NLRB at 719–720 fns. 10, 14. Section 10(b) of

⁶ The *King's Fire Protection* case remains pending. The Board filed a petition for enforcement of its order in the Third Circuit Court of Appeals. In light of the *Noel Canning* decision, the court of appeals remanded the case to the Board, which accepted the remand on September 18, 2014. The Board is now reconsidering the case with its full, five-member complement.

the Act requires that such a challenge be filed within 6 months after written recognition was given. Once that period expires, an employer may terminate its bargaining obligation only by affirmatively showing that the union lost majority support, pursuant to the requirements of *Levitz Furniture Co.*, 333 NLRB 717 (2001). No such showing was made here.

II. THE RESPONDENT UNILATERALLY CHANGED EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT BY CEASING BENEFIT FUNDS CONTRIBUTIONS AND THE UNION-PROVIDED HEALTH INSURANCE PLAN, AS WELL AS BY IMPLEMENTING A NEW HEALTH INSURANCE PLAN

Where parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather, it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bottom Line Enterprises*, 302 NLRB 373 (1991). Pension, health, and welfare plans provided for in an expired contract constitute a term and condition of employment that survives expiration, and cannot be altered without bargaining. *Butera Finer Foods*, 343 NLRB 197 (2004); *Hardesty Co.*, 336 NLRB 258 (2001).

While negotiating with the Union on a new contract, the Respondent was required to maintain the status quo with respect to employees' terms and conditions of employment. This included making benefit funds payments and continuing the health insurance provided by the Union's NASI Welfare Fund. The Respondent stipulated that it ceased making benefit funds contributions as of April 1, 2013, which resulted in employees losing their union-provided health insurance. It also stipulated that, at some point between June and October 2013, it offered bargaining unit employees a new health insurance plan and signed up at least seven employees. Without question, these actions constituted changes to employees' terms and conditions of employment. Moreover, the Respondent made these changes unilaterally and it does not contend that the parties had reached a bargaining impasse on a new contract. Thus, the unilateral changes violated the Act, absent a valid affirmative defense.

III. THE COMPLAINT ALLEGATIONS REGARDING THE CESSATION OF BENEFIT FUNDS CONTRIBUTIONS AND OF THE UNION-PROVIDED HEALTH INSURANCE PLAN ARE TIME BARRED BY SECTION 10(B)

In its answer, the Respondent affirmatively asserted a 10(b) defense to both unilateral change allegations in the consolidated complaint, claiming they are time barred.

Section 10(b) of the Act states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The 10(b) period begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *United Kiser Services*, 355 NLRB 319, 319-320 (2010). The Respondent bears the burden of proving this defense. The General

Counsel's complaint allegation regarding the benefit funds contributions is based on the charge filed by the Union on October 29, 2013. Thus, the 10(b) period runs back 6 months to April 29 and the Respondent must prove that the Union had actual or constructive notice of the cessation of benefit funds contributions prior to then.

In cases like this one alleging a cessation of fund payments, 10(b) bars a finding that an employer violated the Act by failing to make contributions after the expiration of the contract setting forth the payment obligations, when the charge is filed more than 6 months after expiration of the contract and the union had notice of the failure outside the 10(b) period. *Chemung Contracting Corp.*, 291 NLRB 773, 774 (1988). The Board previously has dealt with factual situations comparable to the one in this case and concluded that the General Counsel's allegations were time barred. In *Natico, Inc.*, 302 NLRB 668 (1991), the contract requiring the fund payments expired on December 16, 1985, the payment cessation occurred 20 months earlier, and the charge was not filed until August 19, 1986, or more than 8 months following expiration. In *Park Inn Home for Adults*, 293 NLRB 1082 (1989), the contract expired on October 31, 1976, the payment cessation occurred 2 years prior to expiration, and the charge was not filed until September 11, 1978, or nearly 2 years following expiration. Here, the Union had actual notice of the Respondent's cessation of benefit fund contributions in mid-March 2013 when Gessner received the delinquency report for January 2013. In addition, the contract expired on March 31, 2013, but the Union did not file its second charge until October 29, 2013. Thus, the bright-line test of *Chemung Contracting* has been met in this case, because the Union had notice of the cessation of payments outside the 10(b) period and did not file its charge until almost 7 months following contract expiration.

This case does involve the additional fact, not present in *Natico* or *Park Inn Home*, that the Respondent ultimately cured its delinquent fund contributions through the expiration of the parties' last contract. However, I find that additional fact does not warrant a different outcome. No dispute exists that the Respondent stopped making benefit funds contributions in January 2013. That conduct went beyond a statement of intent or threat and that was when the unfair labor practice occurred. Between that missed payment and April 29, Stringer consistently conveyed to Gessner that he viewed the bargaining relationship as a temporary one, terminable at the end of the contract, and that he would not sign another contract that required the benefit funds contributions. He also told Gessner he was not aware he had to continue employees' terms and conditions of employment. Stringer stated to Gessner that he would try to repay his delinquent funds contributions, but only through the March 31 expiration of the contract. Stringer gave no indication whatsoever that he would continue payments after the contract expired. Based on these communications, the Union knew, or should have known, that the Respondent would not make any contributions following the expiration of the parties' contract.

Stringer's actions after April 29 regarding the contributions likewise were consistent. The Union withdrew the first charge on May 10 after Stringer expressed that negotiations, on a new

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contract, would be far more productive. He gave no assurances, express or implied, that he would resume benefit funds contributions in exchange for the withdrawal of the charge. When he stated in his May 2 letter that he would like to resolve the benefits issues with the Union, he could only have been referencing fund contributions through the March 2013 end of the prior contract, because the April payment was not due until May 15. In a letter dated May 20, he thanked the Union for withdrawing the charge "since we can concentrate on trying to enter into a contract." (GC Exh. 12.) At the June 21 meeting, Stringer again told Gessner that the funds were too expensive for him, then provided a contract proposal pursuant to which all benefit funds contributions would cease. Thereafter, Stringer paid off his delinquent benefit funds payments, but only through March 31, 2013.

Thus, the Respondent did not give conflicting signals or engage in ambiguous conduct after it repudiated its contractual obligation and ceased making benefit funds contributions in January 2013. Rather, Stringer made it clear that he would try to make up delinquent payments through the end of the contract, but would not resume the contributions thereafter.

Accordingly, I conclude that the General Counsel's allegation as to the cessation of contributions to the benefit funds is time barred. I also find that the 10(b) bar applies to the complaint allegation addressing the Respondent's cessation of offering health insurance through the NASI Welfare Fund. That allegation is tied to the Respondent's cessation of benefit funds contributions. Gessner knew employees would lose their health insurance after the 4th month of delinquent contributions. (Tr. 44.) The Union also received copies of the "forecast termination" letters sent to employees in March 2013, which altered Gessner to the possibility that they would lose their health insurance as early as March 31.

However, Section 10(b) does not bar the allegation concerning the Respondent's implementation of the new health insurance plan at some point between June and October 2013. Stringer did not give Gessner clear and unequivocal notice of that unilateral change at the June 21 bargaining session. He expressed only the possibility that he might offer his employees a new health insurance plan in the future. The clear and unequivocal notice of that change occurred at the October 29 session, when Stringer told Gessner he had allowed his employees to join the office plan. The Union's charge asserting that unilateral change was filed on January 17, 2014. The filing was well within the 10(b) period, which ran through April 29, 2014.

Therefore, I find that the Respondent unlawfully offered and implemented a new health insurance plan after June 1, 2013, at a time when it was bargaining for a new collective bargaining agreement and had not reached impasse.

IV. THE RESPONDENT'S REMAINING AFFIRMATIVE DEFENSES WERE NOT SUBSTANTIATED

The Respondent contends that its cessation of benefit funds contributions and subsequent implementation of a new health insurance plan were justified due to economic exigencies. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995). The economic exigency exception carries a heavy burden. An employer must show that a unilateral change was prompted by extraor-

dinary, unforeseeable events having a major economic effect that mandates immediate action. A loss of significant accounts or contracts or operation at a competitive disadvantage do not justify unilateral action. Here, the Respondent's financial difficulties began back in 2010 and were due to the poor economy and increased competition from nonunion companies. Stringer also raised concern over the benefit funds contributions prior to signing the 2010 assent agreement. Because the Respondent's financial difficulties began at least 3 years before it ceased making benefit funds contributions, these circumstances were not unforeseen, extraordinary events that would justify unilateral changes.

The Respondent also defends its unilateral actions by contending the Union engaged in dilatory tactics during bargaining. See *M&M Contractors*, 262 NLRB 1472 (1982). This defense cannot apply to the benefit funds allegation, because the Respondent ceased making contributions prior to the parties' first bargaining session on June 21 and it was at that session where the Respondent first proposed eliminating the contributions. The Respondent did offer the new health insurance plan to employees during a 4-month delay between the June and October bargaining sessions. However, the Respondent made no effort during that period to reach out to the Union and expedite negotiations. This tacit acceptance of the delay prevents the Respondent from using it to justify unilateral action.

Finally, the Respondent contends that the Union either consented to the unilateral changes or waived its right to bargain over them. With respect to the cessation of benefit funds contributions, the Respondent points to the alleged statement by Gessner in the June 21 bargaining session that "you're not accumulating debt." Even if I were to find that Gessner made this statement, its plain language neither constitutes the Union's agreement to the cessation of benefit funds contributions, nor does it reflect a clear and unmistakable waiver of the Union's right to bargain over continued benefit funds contributions. As to health insurance, the Union did not have clear and unequivocal notice of the Respondent's change until the October 29 bargaining session. Gessner immediately objected to the change. That likewise does not constitute consent or waiver. The Union was not required to object at the June 21 session, because Stringer only indicated it was a possibility he would offer new insurance.

V. LEGAL FINDINGS SUMMARY

To summarize, then, I conclude that the parties have a 9(a) bargaining relationship. Given that relationship, the Respondent was required to maintain the status quo as to employees' terms and conditions of employment following expiration of the 2010 national agreement. Its cessation of benefit funds contributions and of the associated health insurance plan, as well as its implementation of a new health insurance plan, were unlawful unilateral changes. However, the complaint allegations regarding the cessation of benefit funds contributions and the cessation of offering the related union health insurance plan are time barred by Section 10(b). Thus, the Respondent violated the Act only by its offering and implementation of a new health insurance plan after June 1, 2013.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) and (5) by unilaterally offering and implementing a new health insurance plan for employees at some point between June and October 2013.
4. The above unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to make benefit funds contributions from April 1, 2003, forward, and the resulting cessation of the employees' health insurance plan provided through the NASI Welfare Fund, are time barred by Section 10(b) of the Act and must be dismissed.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Although I must include in the order a requirement that the Respondent rescind the unilateral change it made at some point from June to October 2013 to employees' health insurance by offering unit employees a new health insurance plan, I note that such a rescission of the employees' new health insurance coverage only will occur upon the request of the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Colorado Fire Sprinkler Inc., Pueblo, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Failing and refusing to bargain collectively with Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (the Union) as the exclusive collective bargaining representative of its unit employees (journeymen sprinkler fitters, apprentices, and unindentured apprentice applicants) by making unilateral changes to the health insurance benefits of those employees in the absence of an overall lawful bargaining impasse.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Upon request of the Union, rescind the unilaterally implemented changes to unit employees' health insurance coverage made after June 1, 2013.
 - (b) Within 14 days after service by the Region, post at its fa-

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

cility in Pueblo, Colorado, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the position employed by the Respondent at any time since June 1, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. March 23, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain collectively with Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (the Union) as the exclusive collective bargaining representative of our unit employees (journeymen sprinkler fitters, apprentices, and unindentured apprentice applicants), by unilaterally changing the health insurance benefits of unit employees in the absence of an overall lawful bargaining impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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WE WILL, only upon request of the Union, rescind the unilaterally implemented changes to unit employees' health insurance coverage made after June 1, 2013.

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The Administrative Law Judge's decision can be found at www.nlr.gov/case/27-CA-115977 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**PROOF OF SERVICE
(CODE CIV. PROC. § 1013A(3))**

STATE OF CALIFORNIA, COUNTY OF Los Angeles

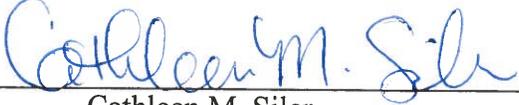
I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive South, Suite 300, Cerritos, California 90703-9364.

On August 1, 2016, I served the following document described as: **PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as indicated on the attached mailing list.

- BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 1, 2016, at Cerritos, California.



Cathleen M. Siler

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