

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

COLORADO SYMPHONY ASSOCIATION

and

**AMERICAN FEDERATION OF MUSICIANS OF
THE UNITED STATES AND CANADA, AFL-
CIO/CLC**

**Cases 27-CA-140724
27-CA-155238
27-CA-161339
27-CA-179032**

**CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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STATEMENT OF THE CASE

Charging Party American Federation of Musicians of the United States and Canada (“AFM”) joins in and adopts Counsel for the General Counsel’s Statement of the Case.

STATEMENT OF ISSUES PRESENTED

Charging Party AFM joins in and adopts Counsel for the General Counsel’s Statement of Issues Presented.

INTRODUCTION

The Colorado Symphony Association (“CSA” or “Respondent”) employs the musicians of the Colorado Symphony and produces Colorado Symphony concert series in Denver, Colorado. It has for many years recognized the AFM as the bargaining representative of its musicians for all matters related to the production of non-local electronic media, and it has been a signatory to multiple collective bargaining agreements with the AFM regarding these subjects. The most recent such agreement – the Integrated Media Agreement (“CSA IMA”) – expired in September 2013. Before that expiration, CSA became unhappy with the cost of its AFM-negotiated compensation structure for electronic media, and, conceiving a strong desire to reduce those costs to zero, it took steps to do so.

These consolidated cases are about the unlawful course of conduct in which CSA engaged in pursuit of its goal to be rid of its obligation to compensate its musicians for the production of electronic media at AFM-negotiated rates. As alleged in the consolidated Complaint, that course of conduct included persistent direct dealing with the bargaining unit musicians regarding the terms applicable to media production without the knowledge (much less the participation) of the AFM – which had its inevitable effect of undermining the AFM; completely frustrating negotiations with the AFM by repeatedly and unlawfully refusing to

produce requested information that was critical for bargaining; unlawfully imposing its first and only proposal (which cut right to the chase by reducing media compensation to zero) short of impasse; making multiple unilateral changes in the terms and conditions applicable to various media projects that CSA decided to pursue; and, ultimately, at the end of 2-1/2 years of litigating these issues in multiple unfair labor practice investigations, withdrawing its longstanding recognition of the AFM.

Trial on the consolidated Complaint took place in Denver over the course of eight days between August 15 and September 14, 2016. On February 14, 2017, Administrative Law Judge (“ALJ”) Geoffrey Carter issued his Decision (“ALJD”). Based upon an extremely careful, detailed, measured and workmanlike review of the evidence¹ – which included over 130 exhibits and the testimony of eleven witnesses – ALJ Carter found that CSA had committed the multiple violations of Sections 8(a)(5) and (1) of the Act alleged in the consolidated Complaint. ALJD 1.

On March 14, 2017, CSA filed 154 Exceptions, asserting that ALJ Carter made factual findings that are “irreconcilable with the record evidence” and reached legal conclusions that “are plainly incorrect” on nearly every page of his Decision. *See* CSA Brief at 1. CSA accuses the ALJ of committing every sort of iniquity, including “carefully obfuscat[ing] the relevant facts in a vain attempt to mask [the] inequity” of his decision, *see* CSA Brief at 2; being “result-driven,” *id.*; and ignoring evidence in service of a “pre-ordained conclusion,” *see* CSA Brief 36.

¹ Our review of the facts in this brief is incorporated into our argument (rather than in a separate statement of facts), and relies on the factual findings of ALJ Carter. ALJ Carter’s Findings of Fact highlight certain testimony and exhibits via numerous citations to the transcript (“Tr.”) and trial exhibits, although he notes that his findings and conclusions are not based solely on those specific citations, but rather on the entire record of the case. ALJD 4 at n. 5. Our citations to the ALJD incorporate ALJ Carter’s record citations even where we do not repeat them in our text; where we do repeat them in our text, we do so for emphasis or to flesh them out by quoting their substance. Record citations are “GC Exh.” for General Counsel Exhibits, “R Exh.” for Respondent’s Exhibits and “CP Exh. 1” for Charging Party AFM’s sole exhibit. ALJD citations include page and line, where ALJD XX:a-b denotes ALJD page XX from lines a-b, and ALJD XX:a – YY:c denotes a citation beginning on line a of page XX and extending through line c of page YY.

But CSA's attack on ALJ Carter's careful factual review and solid legal reasoning is as ill-founded as it is intemperate. The record evidence supporting ALJ Carter's findings of fact is more than ample – indeed it is overwhelming – and his analyses regarding each allegation in the Complaint correctly applied well-settled and unexceptional labor law principles and precedent in reaching his legal conclusions.

As to each issue raised by CSA's Exceptions, we join in and adopt the arguments in the Answering Brief filed by Counsel for the General Counsel in opposition to the Exceptions and in support of the ALJ's Decision, which thoroughly articulate the lack of merit in each of CSA's Exceptions.

We write separately only to respond to two specific arguments CSA makes in its effort to attack ALJ Carter's finding that CSA violated Sections 8(a)(5) and (1) of the National Labor Relations Act ("Act") by refusing to produce relevant requested information, and by unilaterally imposing its initial proposal without having produced that information.

First, CSA argues that there is no basis in the record for ALJ Carter's factual finding that CSA failed to produce requested information that was *relevant*, and that therefore CSA's failure to produce that information could not violate the Act or serve as a predicate for finding that its unilateral implementation violated the Act. In Part I, we demonstrate (via an extensive review of the record) that ALJ Carter's relevance determination was overwhelmingly supported by the evidence, and that CSA's arguments that it was not are utterly lacking in merit.

Second, CSA argues that even though it unilaterally implemented its initial proposal when the parties could not have been at impasse because CSA had failed to produce requested relevant information, CSA's implementation was nonetheless privileged *because it was the AFM*

that was bargaining in bad faith. In Part II, we demonstrate that CSA’s argument is unsupported by the evidence and has no merit.

We pause to make two preliminary points. First, although we write at some length in Parts I and II, that is not because CSA’s arguments are difficult to dispose of – in fact they have no more depth or weight than CSA’s other meritless arguments, all of which are addressed by the Counsel for the General Counsel. We write at length here only because, in an attempt to be helpful, we have focused on the record evidence, which is extensive.

Second, it is worth noting that the kind of unlawful conduct in which CSA engaged can (and does) happen in any industry – it is not unique. But here, it occurred in the context of an industry, and a bargaining structure, that is unique – the recording of electronic media for film scores, CDs, videogame scores and the like, by professional musicians who are represented by their International union, the AFM, for those issues, but who are also represented by an AFM-affiliated Local for matters relating to their live performance season (and a few strictly local media issues, like local radio). Although, as we have said, the structure of AFM media bargaining with symphony orchestras is unusual, we note here that it is well settled and was, when challenged, unanimously approved by the Board, whose approval was unambiguously confirmed by the Court of Appeals. *See Musical Arts Assn.*, 356 NLRB 1470 (2011), *enfd.*

Musical Arts Assn. v. NLRB, 466 F. App’x, 7 (D.C. Cir. 2012).

ARGUMENT

I. ALJ CARTER’S FINDING THAT THE AFM NEEDED THE INFORMATION IT REQUESTED IN ORDER TO UNDERSTAND AND RESPOND TO CSA’S PROPOSAL WAS AMPLY SUPPORTED IN THE RECORD, AND CSA’S EXCEPTIONS TO THE CONTRARY LACK MERIT

ALJ Carter held that CSA violated the Act by refusing to provide complete responses to the AFM’s information requests. ALJD 54-58. The legal principle involved – that an

employer's duty to bargain includes a duty to provide requested information that the bargaining representative needs in order to assess and respond to the employer's claims made in bargaining, *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011), *enfd. sub nom. KLB Indus., Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012); *Caldwell Manufacturing*, 346 NLRB 1159, 1159-1160 (2006) – is unassailable. Because it is unassailable, CSA has taken a different tack: it contends that the ALJ's factual conclusion that the information the AFM requested in this case was relevant to enable the AFM to “gain a better understanding of, and formulate its responses to, the CSA's June 2014 contract proposal,” and was therefore “relevant” within the meaning of the controlling cases, ALJD 55:38 – 56:2, has no basis in the record. *See* CSA Brief at 57, 59.

CSA's exception is utterly lacking in merit. In fact, the record is replete with evidence showing that the information requested by the AFM was relevant because it was crucial to the AFM's ability to understand, evaluate and respond to the CSA proposal. We review that evidence in Part I.D below. Before turning to that review, we put the information request in its proper context by explaining the status quo in which the parties were bargaining, describing the CSA Proposal that gave rise to the information requests, and setting forth the information request.

A. The Status Quo²

1. The AFM and “Commercial” or “Non-symphonic” Electronic Media Standards.

The AFM is an international labor organization that represents professional musicians in a large variety of settings. ALJD 4:31-32. Among other things, the AFM represents musicians when they record music for the creation of electronic media products such as CDs, television, movies,

² In our Introduction, we pointed the Board to its decision in *See Musical Arts Assn.*, 356 NLRB 1470 (2011), *enfd. Musical Arts Assn. v. NLRB*, 466 F. App'x, 7 (D.C. Cir. 2012). While the facts set out in Part I.A are fully developed in the record in this case, they are also described authoritatively in the Board's decision in *Musical Arts Ass'n.*

videogames, commercial announcements, and so on. ALJD 4:31 – 6:12. The AFM Bylaws reserve all bargaining authority over these issues to the AFM, and require union members to work only under AFM media agreements or media agreements approved by the AFM. GC Exh. 23 at Article 15, Sec. 1(a). *See also* ALJD 7:15-23; *see also* GC Exh. 23 at Articles 14.4(b) and 15.6(b).

Pursuant to its bargaining authority, the AFM negotiates various industry-wide collective bargaining agreements that establish terms and conditions for the recording of electronic media, including (among others) the Sound Recording Labor Agreement (“SRLA”) (which covers the recording of CDs and audio digital downloads (together, “audio recordings”)), the Theatrical Motion Picture Agreement (“Motion Picture Agreement”) (which covers the recording of movie scores) and the Video Game/Interactive Media Agreement (“Videogame Agreement”) (which covers the recording of scores for videogames and other interactive media). ALJD 4:31 – 6:12; Tr. 747-752. GC Exh. 16 (SRLA), GC Exh. 52 (Motion Picture Agreement); GC Exh. 47 (Videogame Agreement).

Although specific wages and terms differ among AFM electronic media agreements, all provide for “up-front” scale wages (and pension contributions) to be paid for recording sessions, and various forms of royalties or other “back-end” payments that provide musicians with additional compensation based on the successful exploitation of the product via sales, licensing into different mediums, and/or uses of that recording in secondary markets (like DVD rentals of movies or Netflix streams). ALJD 9:23-40; *see e.g.* GC Exh. 16 at pages 14-44, 59 and 97-116; GC Exh. 52 at pages 65-86, 53-55 and 35-51; GC Exh. 47 at paragraphs 23, 5, 19, 20.

These up-front and back-end payments, together with work rules that regulate break times and other issues, constitute national media standards unique to recording sessions that are

negotiated by the AFM for all union-represented musicians – including symphony orchestra musicians – who record commercial electronic media products. ALJD 5:22 – 6:12; ALJD 9:23-40. Tr. 62-63, 76-79.

2. *The AFM and Symphonic Electronic Media.* Pursuant to its bargaining authority over media, the AFM also negotiates electronic media agreements with orchestra employers (like CSA) that apply to specific forms of electronic media of particular relevance to them, such as concert CDs that are recorded “live” at concert performances. ALJD 4:31 – 5:20. The current symphonic electronic media agreement between the AFM and many symphonic employers consists of variations of an agreement known as the Integrated Media Agreement (“IMA”); some employers still work under predecessor agreements to the IMA (*see infra* n. 6). ALJD 5:8-20; Tr. 95.

In general, the symphonic electronic media agreements provide for lower up-front payments than the non-symphonic agreements, but strictly limit the types of products eligible for these lower rates; where a product is ineligible, the symphonic agreement will require that the musicians be paid as specified in the applicable AFM non-symphonic agreement. The CSA Integrated Media Agreement (“CSA IMA”), discussed in detail below, is such a symphonic electronic media agreement. ALJD 8:39 – 9:40.

The symphonic electronic media agreement structure provides some flexibility for orchestra employers doing certain kinds of symphonic projects, and indeed, the symphonic agreements were negotiated to allow symphonies to do *symphonic* media projects at lower rates than the extant rates for commercial work.³ ALJD 9:29-30; *see also* Tr. 623-624 (negotiations

³ In this regard, it is interesting to note that orchestra employers, who used to participate in SRLA negotiations because they produced CDs, essentially ceased to participate in SRLA negotiations once they

with symphonic institutions take into account the fact that they are non-profit entities). But the structure of the symphonic agreements still ensures that musicians employed by orchestra institutions will be paid as much as non-symphonic musicians for non-symphonic or “commercial” projects, in keeping with the AFM’s national standards. ALJD 9:30-34.

Although orchestra employers negotiate national electronic media issues with the AFM, they do not negotiate with the AFM over the terms and conditions of their musicians’ live concert season performances and rehearsals; rather, they negotiate those issues with the AFM local in their city or town, and reach separate local collective bargaining agreements covering those issues. Over decades, orchestra employers have recognized the AFM as the representative of orchestra musicians for the electronic media products covered by AFM agreements, while simultaneously recognizing the relevant AFM local as the collective bargaining representative of the same musicians for the issues related to their live performance seasons (and certain limited local media). This division of representational authority is longstanding, and was recently upheld as entirely consistent with the Act by the Board in *Musical Arts Assn.*, 356 NLRB 1470 (2011), *enfd. Musical Arts Assn. v. NLRB*, 466 F. App’x, 7 (D.C. Cir. 2012). See ALJD 51:29-46.

3. *CSA and the Status Quo: the Bargaining Structure.* From its inception, CSA has operated squarely within the status quo bargaining structure described above. ALJD 6:14 – 7:23. That finding is not the invention of ALJ Carter: in fact, in the course of the investigation of these consolidated cases, CSA acknowledged that it “has a bargaining relationship with two unions, both of which represent the same CSA musicians: the Denver Musicians Association (the ‘DMA’), the [AFM] local organization that represents employees with respect to live

obtained special symphonic electronic media agreements that gave them better terms than the SRLA for eligible products. Tr. 161.

performance and other ‘local’ issues, and the AFM, which has an agreement with the CSA concerning ‘national’ issues like electronic media.”⁴ *Id.*; GC Exh. 88 at p. 3; ALJD 51:29-46.

Consistent with those bargaining obligations, CSA has signed a series of collective bargaining agreements with DMA (which is the AFM’s Local 20-623 in Denver) covering the orchestra’s live season, ALJD 6:24-34, and has also signed AFM electronic media agreements including, at various points, the SRLA, *see* ALJD 6:10-12, and the CSA Integrated Media Agreement (“CSA IMA”), *see* ALJD 7:7-23, as well as the predecessor agreements to the CSA IMA, *see* ALJD 7 at n. 10.

4. *CSA and the Status Quo: the Local Collective Bargaining Agreement:* As noted above, CSA’s collective bargaining agreement with DMA (“Local CBA”) covers the issues relating to the orchestra’s live performance season, which is the subject matter that lies within DMA’s bargaining authority. ALJD 6:35-36; GC Exh. 53 (Local CBA). Pursuant to the Local CBA, CSA pays a weekly salary of \$1000.83 to its contract musicians, for which they are expected to perform between seven and nine concert or rehearsal “services” per week (each of which may last for up to 2-1/2 hours). ALJD 7:29-33; GC Exh. 53 (Articles 6.1, 6.3, 7.3). The weekly salary under the Local CBA does *not* cover payment for recording electronic media products; up-front payments for media are paid separately and in addition to the weekly salary.⁵ ALJD 8:1-3. And, the weekly services under the Local CBA do not cover recording work on commercial media products, so that, for example, a recording session held for the purpose of

⁴ This acknowledgment by CSA is a complete response to its current position that it never recognized the AFM or had a bargaining relationship with it.

⁵ For certain symphonic electronic media products, the Local CBA allows CSA to offset up-front media payments by considering part of the \$1000.83 weekly salary to be an electronic media guarantee (“EMG”); where AFM electronic media agreements permit, the EMG can serve as a credit toward the up-front media payment required by the applicable electronic media agreement. ALJD 8:3-12; GC Exh. 53 at Articles 4.1, 4.9.

recording a movie score will not be counted as one of the weekly services performed for the weekly salary. ALJD 8:14-20, *see* ALJD 8 at n. 13.

Moreover, other than strictly local media issues (like local radio or recordings kept in an archive), the Local CBA explicitly obligates CSA to comply with AFM national recording agreements when CSA engages in audio or video recording work that they cover. ALJD 6:36 – 7:5; GC Exh. 53 (Local CBA) at 14.1 (“The CSA shall be a signatory to all appropriate AFM national recording agreements, including, but not limited to, the Sound Recording Labor Agreement (SRLA), the Symphonic Limited Pressing Agreement (SLPA), the Symphony Opera Ballet Live Recording Agreement, and the Symphony Opera Ballet Audio-Visual Agreement. All audio and video recording work shall be done in accordance with the AFM national recording agreements”).⁶ Consistent with that obligation, CSA has been a signatory to AFM non-symphonic and AFM symphonic electronic media agreements. ALJD 7:7-12; ALJD 10:10-17; ALJD 51:29-46.

5. *CSA and the Status Quo: the CSA IMA.* On May 31, 2010, CSA and the AFM signed the CSA IMA, which was in effect until September 30, 2013. ALJD 7:7-23; ALJD 51:29-46; GC Exh. 2 (CSA IMA). The CSA IMA is a symphonic electronic media agreement. In general, it covers electronic media products recorded at live performances (or later produced from archival tapes of those performances), and provides for a low up-front payment based on a small percentage of the musicians’ weekly salary under the Local CBA (with the percentage varying depending upon the nature of the product and the medium (e.g. radio, CD, audio-visual stream) in which it is released, pension contributions, and 60% of the net revenue derived from

⁶ The Symphony Opera Ballet Live Recording Agreement and the Symphony Opera Ballet Audio-Visual Agreement are symphonic electronic media agreements that served as predecessors to the CSA IMA. ALJD 7 at n. 10; Tr. 67, 95. The Symphonic Limited Pressing Agreement is an alternative to the SRLA for certain types of symphonic CD projects that cannot be done under the IMA. ALJD 5:8-18; *see* Tr. 74.

the specific product (after deduction of the employer's direct costs for the specific project). ALJD 8:37 – 9:19; GC Exh. 2 at Article 1(A)(scope), Articles 9-16 (terms for types of media products such as radio, audio recordings, audio-visual products, etc.), and Article 20 (revenue participation).

Of specific relevance to some of the issues in this case, the CSA IMA only covers an audio recording (whether exploited as a CD, digital download or stream) if it is recorded live at a concert performance, and if CSA retains the ownership of the copyright in the recording. ALJD 9:3-9; GC Exh. 2 at Article I.B.2 (“[t]his Agreement does not cover studio recording, which is covered by the [SRLA] or other relevant [AFM] recording”); GC Exh. 2 at Articles X (page 7-8) and X-A (page 12) (restricting terms to audio recordings made from live performances where the employer retains copyright ownership in the recording). Audio recordings that do not qualify for CSA IMA rates are required to be paid at rates set by the applicable AFM Agreement, e.g., the SRLA. *Id.*; *see also* GC Exh. 2 at Article VI.

And, the CSA IMA's low “percentage of weekly scale” up-front payments do not apply to commercial products like motion picture scores, videogames or commercial announcements that are covered by existing AFM national media agreements. ALJD 9:21-40; GC Exh. 2 at Articles I(B) (Exclusions from Coverage) and Article VI (Recordings for Purposes Not Set Forth in this Agreement). Article VI of the CSA IMA specifically requires that for recordings made for any purpose not expressly set forth in the CSA IMA – including but not limited to motion pictures, videogames and commercial announcements – musicians must be paid “100% of all amounts that would be required under the appropriate [AFM] agreement.” *Id.* As noted above, this provision ensures that orchestra musicians who record such products at the behest of their

orchestra employer will not be paid less for that recording work than non-orchestra musicians performing the identical work under the applicable AFM agreements. ALJD 9:27-40.

* * *

In sum, when the CSA IMA expired on September 30, 2013, CSA was a party to two agreements – the Local CBA and the CSA IMA – that required it to compensate media production separate from and in addition to the weekly salary it paid to musicians for live performances, to make both up-front and back-end payments for media in accordance with AFM agreements, to apply CSA IMA rates only to projects explicitly set forth in that agreement, and, for any other electronic media projects (such as movie scores, videogame scores, or CDs owned by third parties), to compensate musicians in accordance with the applicable AFM agreement covering those industries. This status quo was consistent with the status quo throughout the orchestra field and the commercial media industries.

B. CSA's Opening Proposal of June 23, 2014

By the expiration of the CSA IMA on September 30, 2013, CSA was dissatisfied with its existing obligations to pay musicians for media production pursuant to the Local CBA and the CSA IMA, including, but not limited to, the requirements in those agreements that CSA apply the AFM rates from other AFM non-symphonic agreements (like the SRLA, Motion Picture Agreement and Videogame Agreement) to certain projects. CSA wanted a new electronic media agreement that would allow it produce all kinds of media products – symphonic and non-symphonic – at little or no up-front cost in the form of separate media payments to musicians. ALJD 10:24-30. Indeed, as the AFM later learned, and as the CSA chief executive officer, Jerry Kern, testified, CSA believed that making up-front media payments to musicians pursuant to AFM electronic media agreements, in addition to paying musicians' live-performance salaries

pursuant to the Local CBA, was prohibitive, and CSA's objective was to cease having to make the media payments. Tr. 1503-1505.

On June 23, 2014, CSA counsel Denise Keyser sent a letter to AFM President Ray Hair that demanded negotiations and enclosed a proposal ("CSA Proposal").⁷ ALJD 16:15 – 17:4; GC Exh. 27 (June 23, 2014 Letter and CSA Proposal). Keyser wrote that "successful media projects simply won't get off the ground" under the terms of the CSA IMA because record companies no longer subsidized orchestra recordings, so that the "costly compensation structure of the IMA" had to be "modified." *Id.* Keyser wrote that CSA's "intent to procure new business opportunities" necessitated the proposal. *Id.*

Pursuant to the CSA Proposal, musician compensation for electronic media products would consist of (a) an up-front payment of 1% of weekly scale (to be deducted from the EMG)⁸; (b) a "Success Sharing Plan" payment if CSA's total revenues from all of its activities (including its concert season) exceeded its total expenditures for all of its activities (including its concert season) for a given year; and (c) a pension contribution. ALJD 17:6-18; GC Exh. 27. Under the CSA Proposal, up-front payments would be much lower than those required by the CSA IMA for the symphonic electronic media that covered by that agreement, and also much lower than those required by the applicable AFM agreements (such as the SRLA, Motion Picture Agreement and Videogame Agreement) for electronic media products covered by those agreements. ALJD: 17:6-29.

⁷ The relevant intervening events between the CSA IMA expiration on September 30, 2013, and the CSA Proposal sent to the AFM on June 23, 2014, are described *infra* at Part II.A.

⁸ As described above at n. 5, the EMG is a portion of the musicians' salaries under the Local CBA which is used to offset up-front media payments for certain eligible symphonic electronic media products. ALJD 8:1-12; GC Exh. 53 at Articles 4.1, 4.9.

In short, the CSA Proposal did not merely propose a few modifications to the status quo. It is not an exaggeration to say that the CSA Proposal took decades of negotiated standards – including up-front payments, back-end payments, and work rules and restrictions - and threw them all out the window.

For example, an up-front payment of 1% of CSA’s weekly scale of \$1000.83 amounted to \$10 per musician. ALJD 7 at n. 12. That is significantly lower than virtually every up-front payment in the CSA IMA, which can be as high as 11% of weekly scale, and which is either 5.5% or 6% of weekly scale (with an \$80.00 floor, which would apply to CSA musicians) for a live concert recording CD as to which CSA retains copyright ownership. ALJD 8:37 – 9:19; GC Exh. 2 at Articles 9-16 (rates for products released in different mediums), and in particular at Articles X and X-A (regarding audio recordings). And, it is *drastically* lower than the up-front payments required by the SRLA, Motion Picture Agreement and Videogame Agreement in those circumstances where the Local CBA and CSA IMA Article VI required those rates to be paid. ALJD 17:20-29. As just one example, ALJ Carter noted that recording session up-front rates under the SRLA ranged from \$421.21 to \$561.64, ALJD 36:23-38 (citing GC Exh. 16 (SRLA), and noting that Motion Picture Agreement rates are also much higher than CSA IMA rates).⁹

But in fact, even the \$10 up-front payment recited in the CSA Proposal is illusory, because the proposal allowed it to be “deducted from the EMG fund,” i.e., from a portion of the musicians’ existing salary under the Local CBA used to offset up-front payments, *see supra* at n. 5 and n. 8, so that musicians would receive no separate media up-front payment unless and until

⁹ The per-session up-front rate standing alone understates the total musician up-front compensation for a project, because it often takes more than one session to complete a project. For example, when CSA used its musicians to record a movie score (*Rendezvous*) for a third party in September 2015, the musicians completed six 3-hour recording sessions. ALJD 38:19-21. In the production of CDs under the SRLA, only thirty minutes of music can be produced in a three-hour session, Tr. 158-159, so that multiple sessions are necessary to produce a full-length CD.

the portion of their weekly salary designated as the “EMG” was exhausted. Thus, in many circumstances, the CSA Proposal would call for no up-front media payment at all.¹⁰

And, the CSA Proposal eliminated the back-end payments tied to the successful exploitation of each electronic media product. The CSA IMA provided for musicians to share 60% of net revenue on a project-by-project basis, and the SRLA, Motion Picture Agreement, Videogame Agreement and other industry-wide AFM electronic media agreements required back-end payments calculated pursuant to specific formulas based on the sale, licensing or secondary market exploitations of the specific product. By contrast, the CSA Proposal included a “Success Sharing Plan” tied to potential overall CSA budget surpluses in its entire operation. That was a drastic change, and one that could be expected to produce much lower, if any, back-end payments. ALJD 17:20-29.

Moreover, the CSA Proposal eliminated all reference to the comprehensive work rules in the CSA IMA and all the applicable AFM agreements such as the SRLA, Motion Picture Agreement and Videogame Agreement; it substituted just over three bare-bones pages for hundreds of pages contained in multiple mature agreements that thoroughly cover every aspect of media work and compensation. ALJD 29:32-39; ALJD 37:1 – 39:42; *compare* GC Exh. 27 (CSA Proposal) to GC Exhs. 2 (CSA IMA), 16 (SRLA), 52 (Motion Picture Agreement), 47 (Videogame Agreement).

Finally, the CSA Proposal contained provisions inconsistent with business realities as the AFM knew them. For example, the CSA Proposal purported to cover commercial products such as movies, television, videogames and commercial announcements recorded for third parties, and provided that CSA would retain copyright ownership in all such products. ALJD 17:20-21; GC

¹⁰ See e.g. ALJD 43:24-34, noting that for the *Oh Heck Yeah* videogame project, the Colorado Symphony musicians received no up-front payment, but only a credit against the EMG (and a pension contribution).

Exh. 27 (at “Creation/Recording of Soundtracks,” B.1) (hereinafter, “Soundtrack Proposal”). However, in the AFM’s experience, movie, television, videogame and commercial announcement producers never give up copyright ownership in their electronic media. ALJD 32:27-31; *see infra* at Part I.D.1.c. As a result, the AFM could not understand what sort of projects CSA’s Soundtrack Proposal could cover in the real world. *Id.*

Although we have gone to some length to lay out exactly how the CSA Proposal unraveled national media standards, we have done so for the sole purpose of providing the context of the bargaining between the parties, and explaining (as we proceed to do *infra*) how the nature of the CSA Proposal made the AFM’s information request critically important to the AFM’s ability to evaluate the CSA Proposal and develop a meaningful response to it. We recognize, as we must, that CSA’s bargaining objectives are lawful, as indeed are the AFM’s principled bargaining objectives to protect and improve standards for musicians wherever they work. But as we discuss *infra* in Part II, while the Act does not forbid the bargaining objectives that were at play in this case, it does require that the parties seek to adjust their differences in good faith, an obligation that includes, among other things, the duty to share relevant information, so that neither party is forced to bargain in the dark. Whatever the AFM’s concerns are at the negotiating table, the AFM’s concern before the Board is that CSA breached this duty when it completely frustrated negotiations by stonewalling the AFM.

C. The AFM’s Requests for Information

On July 18, 2014, the AFM requested information from CSA in order to get a sense of what CSA’s concrete media plans were, so as to be able to analyze the proposal and determine how to respond. ALJD 18:1 – 19:3. CSA responded to some items, but as to the following questions, it asked for a confidentiality agreement as a predicate to providing any information:

- (1) Please identify the media projects that CSA plans for the 2014-2015 season and the 2015-2016 season. As to each, please specify:
 - a. The medium (e.g., radio, audio stream, CD, A-V stream, DVD, theatrical release, television).
 - b. Any distribution, broadcast, artistic, financial or other partner in the project.
 - c. Anticipated project budget.
 - d. Repertoire

- (2) Please explain what CSA understands by the statement, “In 2014 and beyond, the financial model for orchestras will be to make the media available and monetize it through advertising and other revenue streams.”

- (3) Please explain what CSA means by the statement that “The intent of the CSA is to procure new business opportunities for the benefit of all parties.”
 - ...
 - b. Please specify any “business opportunities” obtained by CSA.
 - c. Please specify any “business opportunities” or types of “business opportunities” sought by CSA.
 - ...

- (5) Please describe the types of projects that would be covered by CSA’s proposal for “Creation/Recording of Soundtracks.”

- (6) With regard to projects that would be covered by CSA’s proposal for “Creation/Recording of Soundtracks,” has CSA contracted for any such projects in the past? Does it have contracts or prospects for such projects in the future? Please identify and describe any such projects.

ALJD 18:1 – 19:8; GC Exh. 28 (July 18, 2014 AFM Information Request).

The AFM expressed willingness to sign an appropriate confidentiality agreement, ALJD 19:30-33, but negotiations over the form of the agreement stalled when CSA insisted that the confidentiality agreement include language stating that “CSA shall be entitled to seek injunctive relief and monetary damages, in addition to any and all other remedies permitted by law” if the AFM breached the agreement, ALJD 19: 21-28 and 20:24-26. The AFM objected to the monetary damages language, and the parties did not resolve the issue.¹¹ ALJD 20:30-40.

On August 4, 2014, the AFM executed a confidentiality agreement that was consistent with the language agreed to by the parties – including commitments to hold the information

¹¹ This issue is discussed *infra* at Part I.D.3 and n. 28.

confidential, use it only for negotiations, and restrict access to the information, among other commitments – but which did not provide for the possibility of “monetary damages, in addition to any and all other remedies permitted by law” in addition to injunctive relief. *Id.*; ALJD 20:30-40. Without the damages language, CSA refused to provide information responsive to the requests quoted above. ALJD 20:42-47; ALJD 55:1-19. The AFM repeated its information request on August 4, 2014 (GC Exh. 30) and on August 12, 2014 (GC Exh. 32), in the lead-up to the first negotiation session, which was held on August 20, 2014.¹²

The AFM renewed its information request on June 3, 4 and 17, 2015.¹³ ALJD 30:1-28; ALJD 31:42 – 32:9; ALJD 33:1-21; GC Exh. 39 (June 3, 2015 request); Tr. 1562 (June 3, 2015 request); Tr. 1570-1572 (June 4, 2015 request); GC Exh. 40 (June 17, 2015 request). The renewed requests included one new item: CSA’s media revenue projections. ALJD 32:6-9; GC Exh. 40. But in the absence of language entitling it to “monetary damages, in addition to any and all other remedies permitted by law,” CSA continued to refuse to provide responsive information about its actual media plans, its Soundtrack Proposal or its projected revenue from media projects that would be undertaken pursuant to the CSA Proposal. ALJD 34:28-30; ALJD 55:21-30.

D. The Record Overwhelmingly Supports the ALJ’s Factual Conclusion that the Information Sought by the AFM Was Relevant and Necessary to Enable the AFM to Understand, Evaluate, and Formulate a Response to the CSA Proposal; and the ALJ Applied the Correct Legal Standard in Determining Relevance

ALJ Carter concluded that the information the AFM requested was relevant to enable the AFM to “gain a better understanding of, and formulate its responses to, the CSA’s June 2014 contract proposal,” ALJD 55:38 – 56:2, and indeed, that the AFM had a “strong need” for

¹² The August 20, 2014 negotiation session is discussed *infra* at Part II.C.

¹³ The parties bargained for a second time on June 3 and 4, 2015, as discussed *infra* at Part II.D.-E.

information regarding CSA's media plans for those purposes, ALJD 56:10-11. CSA now excepts to that conclusion on the ground that that conclusion had no basis in the record. *See* CSA Brief at 57, 59. CSA's exception is, in a word, absurd. The record is replete with evidence that the information requested was manifestly relevant.

1. *The Identification of CSA's Specific Media Plans and Actual Media Projects was Manifestly Relevant and Essential to Collective Bargaining*

In the abstract, the regime described in the CSA Proposal would allow CSA to produce any and every kind of media product (including commercial products like movie or videogame soundtracks for third parties, non-symphonic or commercial CDs for third parties, and symphonic media products for itself) with no media payment; musicians would earn only their live concert season salary pursuant to the Local CBA no matter what electronic media products they recorded.¹⁴ It embodied the desires expressed by CSA's Jerry Kern during negotiations on August 20, 2014, to make CSA into an "entertainment company," and "to be free to do whatever [CSA] wanted to do whenever they wanted to do it and with whom they wanted to do it with no restriction," Tr. 225 (Newmark). *See also*, Tr. 227, 228 (Newmark), Tr. 647-648 (Blumenthal)(testifying that CSA's answer to all questions was that "they wanted to be able to take the musician's product and use it in any way that they wished to use it").

But CSA's unlimited proposal, and Kern's broad-brush statements, plainly left the AFM completely in the dark as to what CSA might *actually* do under its proposed regime. It is self-evident (and CSA knows) that there is only so much time in a year (and much of that time must be spent on the live symphonic concert season); CSA has only so much money and so many musicians; there are only so many potential electronic media projects; and those project could

¹⁴ As explained *supra* at n. 5 and n. 8, the 1% up-front payment contained in the CSA Proposal would generate no actual up-front payments as long as there was any EMG portion of weekly salary to credit against it.

vary wildly as to genres, industries and mediums. So what did CSA really plan to do, and what opportunities did it actually have, in the concrete world with its real-life constraints? CSA introduced the CSA Proposal by stating that its “intent . . . is to procure new business opportunities.” GC Exh. 27 at page 2. But what actual, concrete business opportunities did CSA have, or realistically plan to pursue, that formed the underpinning of the CSA Proposal?

The July 18, 2014 AFM Information Request tried to fill in those large blanks. It asked CSA (a) to identify its *specific* media plans for its two upcoming seasons (Request 1), including but not limited to any *specific* projects that would be covered under its Soundtrack Proposal (Request 6); (b) to describe the *types* of projects that would be covered by the Soundtrack Proposal (Request 5); and (c) to identify the specific business opportunities it had obtained and the kinds of business opportunities it sought that it claimed necessitated its proposal (Request 3). ALJD 18:1 – 19:8; GC Exh. 28. The record showed that this requested information about concrete plans and opportunities was relevant and necessary – indeed, essential – for bargaining in at least the following ways.

a. Analyzing Economic Effect. Without knowing what CSA might *actually* do under the CSA Proposal, the AFM could not know what the consequences of the new regime would be for musicians. Would it result in a decrease (or, as CSA claimed, an increase) in compensation for musicians (and by how much)? As AFM counsel Polach testified, the CSA IMA, and its incorporation of the terms and conditions of other AFM media agreements, meant that: “[W]e had extant conditions where there could be an upfront payment to musicians of anything from \$80 to \$1000 or even a couple of thousand dollars, depending on the very specific nature of the project. And their proposal took all of that to essentially nothing upfront and [a] kind of a backend, but not a backend that was related to the success of the project. . . . So the more . . . real

specifics we had about what they had in mind and thought that they were really going to do, the more we could figure out what the effect of their proposal would be in real world terms.” Tr. 1574-75. *See* Tr. 205-211 (testimony of Deborah Newmark regarding the relevance of the specifics requested in Request 1(a)-(d)); *see also* GC Exh. 28.

For example, the up-front compensation for a live concert CD under the CSA IMA was \$80.00 (the “floor” payment), while the up-front SRLA compensation for a commercial CD for a third party would be based on session payments of \$421.21 or \$561.64 per recording session. ALJD 8:37 – 9:19; G Exh. 2; GC Exh. 16 at Ex. A(I)(B)(1), (4), (7). *See supra* at Part I.B. and n. 9. Up-front rates for a three-hour recording session under the Motion Picture Agreement ranged from \$265.97 to \$305.90, GC Exh. 52 at p. 65, and under the Videogame Agreement they ranged from \$300.00 to \$345.00, GC Exh. 47 at II(23). *See also* ALJD 43:24-30; *see supra* at Part I.B; *see also supra* at n. 9. The CSA Proposal would bring all these up-front rates to \$0 (or possibly \$10, if the EMG was not exhausted). Without knowing which things CSA actually planned to do, the AFM could not calculate the actual concessionary effect of the CSA Proposal on CSA’s musicians in real world terms. As a practical matter, would they be relinquishing up-front payments of under \$100 for CDs that qualified for CSA IMA rates, or thousands of dollars for studio recordings of CDs or movie or videogame soundtracks that took multiple sessions to record for a third party?¹⁵

Similarly, without knowing where CSA would really devote its efforts, and what work CSA would actually do, the AFM had no way to evaluate what effect any particular concession to CSA would have vis-à-vis the various markets at play. If CSA’s real – as opposed to abstract – opportunities focused on symphonic CDs where it would own the copyright, the potential

¹⁵ *See* n. 9 *supra*.

reduction or removal of up-front payments would have to be analyzed in light of its effect on the orchestra field, where the AFM negotiated various IMAs, including an EMA IMA with a large multi-employer group. If, on the other hand, CSA did not merely hope (in the abstract) to record film, television and videogame scores, or to record rock or pop CDs for third parties, but actually had real-life contracts or prospects of doing so, the reduction or removal of the AFM's up-front rates for those products would have to be analyzed in light of its effect in those commercial markets. In the absence of the requested information, the AFM had no way to evaluate the likelihood or effect of either, or both, of those market disruptions. Tr. 1577-1578 (Polach testimony that she explained this issue in negotiations).

It is absurd for CSA to suggest that its specific plans and opportunities were not relevant to the economic analysis of the potential effects of the CSA Proposal or to the AFM's internal deliberations about how to respond.

b. Identifying CSA Priorities. Similarly, in the absence of information about CSA's *actual* plans and prospects, the AFM could not know what CSA's priorities were. CSA's insistence that it simply wanted to be able to do anything and everything for nothing was not conducive to the kind of search for common ground that characterizes good faith bargaining. The AFM asked for information aimed at shining some light on CSA's priorities. This was especially, though certainly not exclusively, true of Request 1, which asked CSA to identify the actual media projects anticipated in its upcoming two seasons, information which would show where CSA was focused in the immediate short term.¹⁶

¹⁶ As AFM's Deborah Newmark testified as to symphonic media bargaining generally, AFM "typically ask[s] for real information about projects that have been done or projects that are pending, ... real plans about what types of mediums [the employer] wants to go into, exactly what their plans are, so [it] can make concrete responses," and as to the CSA Proposal in particular, "because the way [it] is structured, it's very, very difficult to understand exactly – this is so broad, it's very difficult to understand exactly

In addition to asking CSA to identify projects simply by name, the AFM asked for specific information about each project that would fill out the details, further elucidate CSA's priorities, and aid in evaluating the economic effect of CSA's proposal on its musicians. *See* GC Exh. 28 at Request 1(a)-(d). Each of these particulars affected the economic analysis of the CSA proposal (because they determined which AFM rates and agreements applied under the existing status quo, and therefore what *precisely* would be given up if the CSA Proposal was adopted), and together they would have allowed a more granular analysis of CSA's priorities¹⁷:

(i) *Request 1(a) – the medium (e.g., radio, audio stream, CD, A-V stream, DVD, theatrical release, television)*: The CSA IMA and all the AFM media agreements apply different rates and rules to different mediums, so that the medium in which a recording is released determines the musicians' compensation.¹⁸ Thus, knowing the medium of planned projects was an essential element in understanding the potential economic effect of the CSA Proposal.¹⁹ Moreover, it was key information for assessing CSA's priorities – i.e., where CSA intended to focus its resources and energies – which was where it would make sense for the AFM to focus its attention in an effort to find common ground.²⁰

what it is they really need to do and what supports the needs of the institution; it was not clear to us.” Tr. 205.

¹⁷ AFM's counsel reviewed these specific requests in detail with CSA's counsel in a side bar on June 4, 2015. Tr. 1573-1574; *see* GC Exh. 40 at page 1 (Polach letter to Keyser dated June 17, 2015, noting “I appreciated the opportunity to explain in detail (and in person) the necessity of each of the items requested”).

¹⁸ Although the electronic media agreements in evidence are somewhat complex, they all plainly show that compensation rates vary by medium, as any producer of electronic media – whether orchestral or commercial – knows. Thus, the CSA IMA has different rates for radio, CDs, audio streams, television, non-television audio-visual, educational products and so on. GC Exh. 2; *see supra* at I.A.5. SRLA, Motion Picture Agreement and Videogame Agreement rates all vary. GC Exhs. 16, 53, 47. *See* ALJD 9:34 – 9:40; ALJD 36:23-38

¹⁹ *See supra* at I.D.1.a. and Tr. 1574-1575.

²⁰ Deborah Newmark testified at trial that existing agreements tie rates to medium of release, so that “as a point of comparison we need to understand ... we need to know exactly what it is they're planning on

(ii) *Request 1(b) – any distribution, broadcast, artistic, financial or other partner in the project:* Similarly, information about distribution partners is relevant in several ways. For example, the status quo rates for CDs and non-television audio-visual products in the CSA IMA differ depending on whether the orchestra owns the copyright in the recording (and then properly enters into a distribution license), or instead assigns the ownership of an audio or audio-visual recording to a third party. GC Exh. 2 at Articles X, X-A, XIV; Tr. 207 (“the partners in a project and the financial structure of a project is indicative to us of whether or not, as an example, the institution is actually maintaining ownership and copyright, because that will come out of the structure of the financial and partnership deals and the distribution deals”); ALJD 9:3-9.

Similarly, the status quo rates for television broadcasts differ for cable television, public television and network television broadcasts, so that knowing the television partner is necessary for determining the appropriate AFM rate in the status quo (and what change would be wrought by the CSA Proposal). Tr. 1573-1574. In addition, whether a distribution partner is a signatory to an AFM agreement, or not, is significant in the AFM’s analysis. Tr. 1231. Indeed, CSA’s Jerry Kern exhibited a keen awareness of this factor at negotiations on August 20, 2014, when in answer to questions about CSA’s anticipated partners, he replied that he was aware that the AFM “was having problems with [the film company] Lionsgate ... and ... maybe we’ll go to them first.” Tr. 231; *see also* Tr. 650.

And, the identity of an *artistic* partner is also relevant to any economic analysis, because the status quo rates under the CSA IMA and the SRLA are quite different depending on whether the repertoire is symphonic or non-symphonic, and the identity of the artistic partner gives

doing so we can have a better understanding of where to go next.” Tr. 207. Patricia Polach testified that given the status quo where medium determines compensation, “the more like real specifics we had about what they had in mind and thought that they were really going to do, the more we could figure out what the effect of their proposal would be in real world terms.” Tr. 1574-1575. *See also supra* n. 16.

insight into that (for example, a recording with Renee Fleming is likely to consist of classical repertoire, while a recording with Katy Perry will generally consist of non-classical repertoire). Tr. 1574; GC Exh. 16 at Ex. A(I)(A) and A(I)(B) (symphonic rates and non-symphonic rates differ); GC Exh. 2 at Articles X and X-A (CSA IMA rates for CDs apply only where institution owns the copyright).

(iii)*Request 1(c) – anticipated project budget:* Project budgets are relevant in numerous ways. As Deborah Newmark testified, budgets that fall under certain levels can trigger the applicability of lower musician compensation – “low budget rates” – in certain circumstances, such as the recording of movie scores. Tr. 208. And it is transparently true that project budgets would be deeply informative about CSA’s priorities, because they would indicate where CSA was motivated to put its resources.

Moreover, budgets are relevant in a variety of ways under the CSA IMA status quo. Project budgets must be shared with musicians wherever they have approval rights, *see* GC Exh. 2 (e.g., Article X and X-A), and they are always relevant to revenue participation under the CSA IMA, because musicians share 60% of net revenue after the deduction of the employer’s direct costs (Article 20). *See* Tr. 208 (“the [CSA IMA] requires the budget to be presented when you’re doing the projects in order to know when revenue will kick in on the back end”). Under the Success Sharing provision of the CSA Proposal, project budgets would not have the same direct effect, because “Success Sharing” was not based on the success of the particular project – but media project budgets would factor into the CSA’s annual profit or loss, which would impact the likelihood (or lack of likelihood) of a payout under that system.²¹ GC Exh. 27 at pages 6-7.

²¹ At the table in June 2015, CSA claimed the “Success Sharing” element of the CSA Proposal, together with the rest of the CSA Proposal, was a good substitute for revenue sharing under the CSA IMA and the other back-end payments required by AFM agreements, because (i) CSA would earn money by going into commercial recording; (ii) that money would result in budget surpluses; and (iii) the surplus would be

(iv) *Request 1(d) – repertoire*: As noted in Part I.D.b.ii above, the nature of the project repertoire, like the identity of artistic partners, is relevant under the status quo both as to whether symphonic or non-symphonic rates apply pursuant to the SRLA, and as to whether the CSA IMA rates may apply. As Deborah Newmark testified, the IMA “is an agreement designed to [produce] symphony, opera and ballet repertoire in the various mediums that are contained within the agreement. So if the repertoire is actually rock music or folk music, or something other than classical music then it would be indicative of whether or not the IMA is the appropriate agreement that that would fall under.” Tr. 208-209. In short, any analysis of how the CSA Proposal compared to, and would affect, the status quo in real world terms would be affected by the repertoire of the projects it planned.

c. *Elucidating Coverage and Testing Reality*. The Soundtrack Proposal in the CSA Proposal stated that CSA would “retain the ownership and copyrights of all soundtracks produced” for “television, movies, videogames and commercials.” GC Exh. 27,

shared under the “Success Sharing” provision. Tr. 1581. To evaluate that assertion, the AFM requested any budget projections that CSA had prepared with regard to media revenue. ALJD 32:6-9; ALJD 33:1-9; GC Exh. 40. The requested information was plainly relevant to CSA’s assertion, and AFM counsel Patricia Polach testified that she made that point at the table in June 2015, having pointed out that the Success Sharing plan already existed under the Local Trade Agreement and had seldom resulted in any payments because institutional revenues practically never exceeded institutional expenses:

And now you're telling us you're going to move the needle by doing this media work and we don't know – we don't have anything from whether to make a judgment whether we think you can move the needle. And you don't actually seem so positive yourself that you can move the needle, because you keep telling us you just want to try this. And I said it's like a pig [in] a poke.

Tr. 1581. *See* ALJD 32:33-38. CSA never replied in any form to this request, nor has it made any argument now why the media revenue projections are not relevant – they plainly are. And indeed, later events bore out the pertinence of the AFM’s efforts to assess and test CSA’s assertion that its Success Sharing proposal would be more beneficial to musicians than the status quo under AFM agreements. As Paul Naslund – a Colorado Symphony musician who appeared under subpoena – testified, the musicians have received *no* back-end payments of any kind – including no payments via the Success Sharing proposal – as a result of the media projects CSA did pursuant to its unlawful implementation. Tr. 1050, 1052, 1054, 1056, 1057, 1060; *see also* ALJD 49:19-21 (*Rendezvous* film score), ALJD 50:40-43 (*Banner Saga II* videogame), ALJD 47:12-16 (*Copland* CD), ALJD 44:44-46 (*Vaughan Williams* CD), ALJD 48:12-17 (*Isakov* CD).

“Creation/Recording of Soundtracks” (section B.1); ALJD 17:20-21. But the AFM’s extensive experience has taught it that in these industries, the producers insist on owning all the copyrights in their products.²² See Tr. 225-226 (Newmark); Tr. 1567 (Polach); Tr. 644 (Blumenthal). The AFM did not understand what the Soundtrack Proposal, as written, could cover: Was there some kind of third-party soundtrack work of which the union was unaware, and for which CSA had a realistic opportunity of being hired while retaining copyright ownership? Or was CSA simply asking for rights that it had no prospect of ever using? *Id.* As Polach testified, “We just wanted the specifics so that we had some idea what we were trying to work with.” Tr. 1567. ALJD 32:28-33. See also Tr. 209-210.

The AFM raised these questions with CSA on numerous occasions, including: at negotiations on August 20, 2014 (Tr. 225-226; Tr. 643-644); by letter dated August 25, 2014, GC Exh. 34²³; and at negotiations in June 2015, where Polach testified as to how she answered when asked what AFM’s response was to the Soundtrack Proposal:

²² The correctness of the AFM’s experience, and the pertinence of its request for specifics about whether the Soundtrack Proposal could cover any projects in the real world, is borne out by the facts elicited at trial. Notwithstanding that the “Soundtrack Proposal” imposed (unlawfully) as part of the CSA Proposal called for CSA to maintain copyright ownership in “soundtracks,” in fact, CSA was not able to (or at least, did not) retain copyright ownership in the soundtrack recordings it made, following that implementation, for the film score *Rendezvous* or the videogame *Banner Saga II*. See GC Exh. 82 and GC Exh. 83. Nor did CSA retain copyright ownership in the four CDs it recorded, despite the fact that the CSA Proposal said that it would. See GC Exh. 85 (contract for *Vaughan Williams: Dona nobis pacem*); GC Exh. 81 (contract for *Copland: Billy the Kid - Rodeo*); GC Exh. 84 (contract for *Amos Lee Live at Red Rocks with the Colorado Symphony*); GC Exh. 87 (contract for *Alan Isakov with the Colorado Symphony*). See also ALJD 49:35-59 (*Banner Saga II* videogame); ALJD 48:30-33 (*Rendezvous* film score); ALJD 44:44-46 (*Vaughan Williams* CD); ALJD 46:45 – 47:4 (*Copland* CD); ALJD 46:11-14 (*Amos Lee* CD); ALJD 47:34-40 (*Isakov* CD).

²³ That letter stated: “[Y]ou have said that the ‘intent of CSA is to procure new business opportunities,’ and have described CSA’s proposal in general terms as designed to further that intention. But CSA has refused so far to produce the requested information regarding what ‘business opportunities’ or types of ‘business opportunities’ CSA may have obtained or seeks to obtain. Similarly, the specific terms of CSA’s proposal include terms regarding ‘Creation/Recording of Soundtracks’ in commercial, for-profit industries like commercial announcements and videogames[b]ut CSA has refused to describe the types of projects that would be covered by this proposal. Moreover, it has refused to reveal whether it has

[W]e don't know how to respond to your specific soundtrack proposal until we know – we don't have enough information to know how to respond to your specific soundtrack proposal because we don't understand what it would really do. For example, their soundtrack proposal talked in broad terms about film and videogame and that kind of scoring work, but also proposed that they would own the copyright and own all the rights in that kind of work.

And we couldn't – we could not understand, as a practical matter, what that work would be. Because the Union's experience is that if you're doing a film score or a television score for a program or a videogame, no producer of that kind of product is going to release to you or let you retain your rights in the recording. It's just part of the business is that they keep all the rights.

And so we didn't know whether they had any realistic opportunities that their proposal was actually referring to or whether there was some other kind of soundtrack work that we were not familiar with that they were describing that way, but we didn't know what it was.

Tr. 1567.

d. Brainstorming and Evaluating Possible Compromises and Solutions. All the analytical purposes described above had critically important twin goals: to help the AFM think through possible solutions to the bargaining dilemma that the CSA Proposal presented, and in turn, to help the parties find mutually acceptable compromises.²⁴ As Polach and Newmark testified, the CSA Proposal was very broad and deeply concessionary, but it was not a new thing under the sun; to the contrary, the AFM had received similar sweeping proposals in the past from orchestra employers and employer groups, and had nonetheless been able to reach mutually satisfactory agreements when it focused the bargaining process on the employers' actual plans and concrete

contracted for any such projects (either in the past or for the future), *or whether it has any prospects for projects that would be covered by its 'Creation/Recording of Soundtracks' proposal*" (emphasis supplied).

²⁴ As AFM President Ray Hair explained, "[I]n order to understand and in order to attempt to move through a tough proposal like this, ... we're going to need to know everything we could know about the business that they wanted to get in. I mean, what – what – what were their plans, you know, we needed to find that out," Tr. 791-792, and "We needed to know what the – what the media plans were. We needed to know why they were requesting such – why they were making such a proposal. It was so severe and so far reaching it was like going from everything to nothing. ... And – why, you know, what's the model you're going to have, what – what is this – what are you going to do, what kind of business opportunities do you need to have ... this kind of radical proposal for," Tr. 792-793.

opportunities rather than on broad-brush demands. Tr. 1561-1562 (Polach testimony); Tr. 270-271 (Newmark testimony). And the union told CSA as much. As Polach testified:

The end of [my] opening statement [at negotiations] was, so now I've explained to you what are the elements of these agreements that are important to the Union. And your proposal to us, essentially, has thrown them all out the window. There's no upfront payment that recognizes the separate value of the media. There's no, as we read your proposal, musician approval. There's not a backend that is related to the success of the project. And I'm telling you we've seen these kinds of proposals before. This is not the first time we've seen very broad brush throw out all the rules, throw out all the restrictions, throw out the upfront payments, and let us just have our heads with the revenue share. We've seen very broad brush proposals before and the way we get past that in bargaining or get through the bargaining issues and get to agreements is that we try to get the conversation going about real specific things. What is it that you really want to do, what is it you really intend to do? What are your real opportunities, what really matters? And that was the spirit in which we were making the information request and we really needed that in order to try to focus on the concrete.

Tr. 1561-1562. The fact that Polach made these remarks is confirmed by CSA counsel's own bargaining notes. *See* CP Ex. 1 at p. 6; *see* Tr. 1288-89 (Testimony of Denise Keyser). The AFM explained this to CSA many times, including in Hair's May 5, 2015 letter to Kern, *see* GC Exh. 69 ("The information AFM requested ... would enable AFM to design proposals that respond to *specific* and *real* plans and opportunities, rather than to theoretical differences of opinion); Hair's March 17, 2015 off-the-record meeting with Kern, *see* Tr. 807; and at the August 20, 2014 negotiations.²⁵

2. *The Relevance of Information About CSA's Specific Media Plans and Actual Media Projects Was Obvious on Its Face, Explained by AFM and Acknowledged by CSA*

²⁵ At the August 20, 2014 negotiations, Deborah Newmark asked questions about the types of projects CSA wanted to do, and tried to elicit some specifics about those projects, including what kinds of film scores or commercial projects CSA thought it could obtain that would be consistent with the CSA Proposal provisions saying that CSA would retain copyright ownership. *See* Tr. 223-232. As Jay Blumenthal explained, the level of detail Newmark was seeking was necessary "[b]ecause in order for us to understand and make a counter proposal, we have to have a complete understanding of what has been proposed to us." *See* Tr. 649.

Faced with overwhelming evidence of the relevance of the requested information, CSA suggests that the record nonetheless does not support ALJ Carter’s relevance determination because the AFM allegedly did not *explain* why it needed the information. CSA Brief at 57. CSA’s assertion is baseless: as we have just shown in Part I.D.1, the AFM discussed the specifics of the request with CSA many times and in many ways.

Moreover, even if it were true, it could hardly be relevant where, as here (and as set forth in detail in Part I.D.1), the need for specific information about CSA’s plans was so obvious on its face. In the complex world of media production, how could the AFM have any idea what the real effect of the CSA Proposal would be without knowing how CSA realistically planned to use it? The AFM might not have needed any information to simply surrender all of its own principled positions and bargaining goals, and accept the CSA Proposal – but how could the AFM seek out compromises that met *both* sides’ needs without knowing CSA’s real plans and priorities? Anyone involved in media production – much less anyone planning to be “an entertainment company” – would understand the relevance of the information requested in trying to structure a deal. Any suggestion to the contrary is disingenuous in the extreme.

And CSA certainly gave every appearance of understanding that the requested information was relevant to bargaining, given that it based its refusal to produce the information *solely* on the ground that it needed a damages clause in the confidentiality agreement, not on the ground that the information was not subject to production at all because it was irrelevant.²⁶ GC Exh. 29 (“specific information will be provided upon the execution of a Confidentiality

²⁶ CSA never wavered – from the date of its first reply to the information request through the trial before the ALJ – from the position that it would produce information if it got a damages clause. CSA counsel Denise Keyser testified that at the August 20, 2014 negotiations, CSA told the AFM that if the AFM signed a confidentiality agreement “with a meaningful damages clause, we’ll be happy to give you that information. We want to give you that information.” Tr. 1201-1202. *See also* Tr. 1509 (Jerry Kern testimony that CSA would provide information if it had an agreement for damages in case of a confidentiality breach).

Agreement”). Indeed, CSA’s first response acknowledged that the AFM’s Request 1(a)-(d) “goes to the heart of CSA’s business plans.” GC Exh. 29 at page 2. Because CSA had already squarely identified those business plans as the basis for the CSA Proposal, GC Exh. 27 at page 2, its acknowledgment that the requests went to the heart of its business plans is an acknowledgment of their relevance. CSA’s contention to the contrary now is not only unfounded, it is merely an afterthought.

The same is true of CSA’s claim that the AFM never told CSA that it needed the information it requested in order respond to the CSA Proposal, so that Judge Carter was improperly “provid[ing] AFM with a post hoc rationale for its request,” *see* CSA Brief at 59. This suggestion is cut from whole cloth. The record shows that the AFM *repeatedly* told CSA that it needed the information in order to construct a meaningful response to the CSA Proposal:

- GC Exh. 30 (August 4, 2014 letter stating that the requested information “is necessary to enable the AFM to evaluate and respond to CSA’s opening proposal);
- GC Exh. 32 (August 12, 2014 letter stating that the AFM “requested information that is critical to understanding, evaluating and responding to CSA’s proposals and its assertions made in support of its proposals” and demanding a response);
- Tr. 651-652 (Jay Blumenthal testimony that he explained on August 20, 2014 that without the requested information, the AFM would not be able to formulate a meaningful counterproposal);
- R Exh. 32 at page 7 (August 20, 2014 bargaining notes of CSA counsel Denise Keyser, confirming that the AFM’s first comments after her opening remarks included the statement that not having all the information the AFM had requested “is a problem for us” and that the AFM needed the information to understand the CSA Proposal);
- R Exh. 32 at page 19 ((August 20, 2014 bargaining notes of CSA counsel Denise Keyser, confirming that Jay Blumenthal told CSA that the AFM needed the requested information in order to make a proposal);
- GC Exh. 34 (August 25, 2014 letter stating that “[t]he requested information is essential for meaningful and productive negotiations”);

- GC Exh. 67 (April 1, 2015 e-mail from AFM President Ray Hair stating that the AFM needed the requested information “in order to develop reasonable proposals and counter-proposals”);
- GC Exh. 69 (May 5, 2015 letter from President Ray Hair stating that the information AFM requested “would enable AFM to design proposals that respond to *specific* and *real* plans and opportunities, rather than to theoretical differences of opinion” (emphasis in original));
- Tr. 1562 (Testimony of Patricia Polach that at June 2, 2015 negotiations, she told CSA that the purpose of the information request was to enable the parties to get to an agreement by focusing on specific things, because focusing on real intentions, real opportunities and concrete plans was the way the union had always been able to resolve tough bargaining issues); and
- CP Exh. 1 at page 6 (June 3, 2015 bargaining notes of CSA Denise Keyser confirming that the AFM told CSA that the purpose of the information request was to find concrete ways to resolve the differences between the parties).

And, other witnesses and participants in the course of bargaining heard the AFM explain that it needed the information it requested in order to construct a response. CSA witness Justin Bartels acknowledged that Ray Hair told him in August 2014 that the AFM needed information about CSA’s media projects in order to move negotiations forward. *See* Tr. 1534. CSA’s Jerry Kern acknowledged at trial that he recalled the AFM saying at the August 20, 2014 negotiations that the AFM needed the information it had requested in order to formulate a counterproposal. Tr. 1464. And Paul Naslund testified that having attended the negotiations in August 2014 as well as June 2015, he was aware that the fact that the AFM had not gotten the information it requested was an impediment to negotiations. Tr. 1007.

Plainly, Judge Carter’s factual conclusion that the AFM needed the requested information to formulate counterproposals was based on the entire record, including the AFM’s specific statements as well as all the evidence discussed above in Part I.D.1, and not on providing the AFM with a “post-hoc rationale.”

3. *CSA's Other Objections to ALJ Carter's Relevance Determination Lack Merit in Light of the Intimate Connection Between the AFM's Information Request and CSA's Proposal and Assertions in Bargaining*

As we have demonstrated in Part I.D.1 and 2 above, ALJ Carter's relevance finding is supported by extensive evidence showing the intimate connection between the requested information and CSA's assertions in bargaining – e.g., that the proposal was necessary because of CSA's business opportunities, and that the Success Sharing element of the proposal would earn more money for musicians than the back-end payments required by AFM agreements – as well as to the AFM's ability to understand the CSA Proposal, evaluate its economic impacts, and attempt to develop meaningful counterproposals and find possible common ground. ALJ Carter properly concluded that this met the standard for relevance set forth by the Board in *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011), *enfd.* 700 F.3d 551 (D.C. Cir. 2012), and *Caldwell Manufacturing*, 346 NLRB 1159, 1159-1160 (2006).

CSA argues that ALJ Carter wrongly failed to consider the financial nature of the information, and, citing *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 158-59 (1st Cir. 1995), argues that CSA's financial data need not be disclosed unless it is “especially relevant to the bargaining taking place.” CSA Brief at 57. But that argument is fatally flawed. First, the “especially relevant” standard discussed in *Rivera-Vega* applies when a union is seeking an employer's general financial data (which is not considered presumptively relevant), 70 F.3d at 158-159, but the AFM was not seeking CSA's general financial data or asking to look at its books.²⁷ Rather, the AFM requested specific information about CSA's media projects (some of

²⁷ In any event, even if the AFM were seeking general financial information, CSA itself would have made the request relevant by effectively asserting an inability to pay the wages set forth in the CSA IMA and other AFM electronic media agreements. *See Rivera-Vega, supra*, 70 F.3d at 159 (where an employer puts inability to pay into issue, financial information is presumptively relevant to the bargaining process). CSA introduced its proposal with assertions that it was necessary because the AFM agreements were so costly as to be prohibitive.” *See GC Exh. 27* at 1-2. *See also* Tr. at 1466 (Kern's testimony that “every

which information included financial elements). That information plainly is “especially relevant to the bargaining taking place,” as ALJ Carter found and as we have demonstrated in Parts I.D.1 and 2 above, so that the *Rivera-Vega* “especially relevant” standard is met in any case.

CSA’s argument that ALJ Carter failed to properly weigh CSA’s confidentiality concerns against the AFM’s need for information fares no better. CSA Brief at 58-60. The record shows that the information was essential to the AFM’s ability understand and respond to the CSA Proposal, *see supra* Part I.D.1 and 2, and it also shows that the AFM accommodated CSA’s confidentiality concerns by signing a Confidentiality Agreement that committed it to keeping the information confidential, strictly limiting its use to collective bargaining purposes, strictly limiting the number of persons who could see it, and subjecting itself to enforcement actions for injunctive relief in the event of a breach, GC Exh. 30 (Confidentiality Agreement signed by the AFM); ALJD 56:12-14; ALJD 20:30-40. In these circumstances, ALJ Carter plainly struck the proper balance.²⁸ ALJD 55:32 – 57:23.

one of those agreements requires large up-front payments which most orchestras in this country can't afford”); Tr. 1503 (Kern testimony that “[t]hese agreements provide for up-front payments to the musicians in addition to their salaries, just so that's clear. In light of the record evidence on this point, CSA’s current assertions that it was not claiming inability to pay have no merit.

²⁸ In balancing the AFM’s need for information against CSA confidentiality interests, ALJ Carter properly dispensed with several other CSA arguments that have no merit. In particular, ALJ Carter found that CSA’s insistence on a monetary damages provision in the confidentiality agreement was unreasonable, because the confidentiality agreement that the AFM signed accommodated CSA’s concerns as set forth in text, and CSA acknowledged that it had no basis to anticipate a breach. ALJD 56:25 – 57:23. ALJ Carter also properly rejected CSA’s contention that the AFM did not need the requested information because it eventually made a counterproposal without it in June 2015, on the ground that the AFM could not be faulted for attempting to find a way forward in the face of CSA’s intransigence. ALJD 56 at n. 37. In this regard, it is worth noting that CSA complained at the table in June 2015 that the AFM’s proposal did not adequately respond to CSA’s Soundtrack Proposal, because it was based on improvements to the existing CSA IMA rather than on accepting (or modifying) CSA’s Soundtrack Proposal. ALJD 31:5-7. But the AFM *could not* make a meaningful response to CSA’s Soundtrack Proposal in the absence of the information it needed to understand and evaluate that proposal – which was precisely what the AFM had been saying all along. CSA’s attempt to have it both ways – accusing the AFM of bad faith because it made no counterproposal in August 2014, *see* ALJD 31:5-7, and then accusing the AFM of bad faith because it *did* make a proposal in June 2015 – is absurd, and shines a light on CSA’s own bad faith. Finally, ALJ Carter soundly rejected CSA’s bootstrap contention that the AFM did not need the requested

In sum, the structure of the CSA Proposal, lacking all detail and focus, together with CSA's utter refusal to fill in any of the blanks, set any priorities, or provide any information that would allow the AFM to analyze or evaluate it, was an attempt to force the AFM to bargain in the dark, as Polach testified:

You're asking us to buy a pig [in] a poke, which was the whole nature of their proposal to us, was asking us to buy a pig [in] a poke because we didn't know what the specifics of it were really going to be, how it was going to work, and how it would affect any of the markets and whether it was symphonic employers or the non-symphonic markets.

Tr. 1581-1582.

But that is exactly what the Section 8(a)(5) duty to provide information exists to prevent, because there can be no open and *good faith* negotiations between parties where only one side has the relevant information. Indeed, it is axiomatic that the one of the elements forming "the essence of the bargaining process" is the "communication of facts peculiarly within the knowledge of either party." *Allen, S.L., & Co., Inc.*, 1 NLRB 714, 728 (1936).

II. CSA'S UNILATERAL IMPLEMENTATION OF THE CSA PROPOSAL WAS NOT PRIVILEGED BY ANY UNION BAD FAITH, AND WHERE ALJ CARTER'S FINDINGS ON THAT SCORE RELIED ON HIS CREDIBILITY DETERMINATIONS, THERE IS NO BASIS IN THE RECORD TO REVERSE THOSE DETERMINATIONS BECAUSE THEY ARE SUPPORTED BY AMPLE EVIDENCE

When CSA unilaterally implemented the CSA Proposal on October 20, 2014, the parties were not at lawful impasse, because "[u]nder consistent Board precedent, a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to

information because it had no intention of bargaining about commercial media. ALJD 56 at n. 37. As we show in Part II *infra*, ALJ Carter correctly found that the AFM was bargaining in good faith. And the evidence we have reviewed in Part I.D.1 *supra* (and particularly at Part I.D.1.d) shows that the AFM was seeking information to enable it to address the Soundtrack Proposal in a way that could lead to common ground based on concrete and specific projects planned by CSA, rather than vainly fighting with CSA over philosophical differences regarding media payments.

the core issues separating the parties.” ALJD 59:20-38 (citing *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1170 (2006), *Centinella Hospital Medical Center*, 363 NLRB No. 44, slip op. at 2-3 & fn. 8 (2015), and *E.I. Du Pont Co.*, 346 NLRB 553, 558 (2006)). CSA’s Exceptions to the factual underpinnings of this conclusion – i.e., ALJ Carter’s findings that the information CSA refused to produce was necessary for the AFM to understand and respond to the CSA Proposal, ALJD 55:38 – 56:2 – have no merit, as we have demonstrated in Part I, *supra*. What follows, therefore, is exactly what ALJ Carter concluded – that CSA’s unilateral implementation violated Section 8(a)(5) and (1) of the Act. ALJD 61:18-21.

CSA tried to evade this inevitable conclusion by arguing that its conduct was privileged by bad faith bargaining on the part of the AFM. ALJD 60:1-5. But CSA failed to convince ALJ Carter, and its exceptions to ALJ Carter’s conclusions to the contrary have no merit. We address each of them in turn. It is worth repeating here what we said in our Introduction: the length of our presentation in this Part is not because CSA’s argument has any potential merit or is difficult to dispose of, but only by the fact that we review the extensive record evidence.

A. Nothing in AFM’s Conduct from October 2013 to June 2014 Privileged CSA to Unilaterally Implement the CSA Proposal Four Months Later On October 20, 2014

Between October 2013 (when the CSA IMA expired) and June 2014 (when CSA sent the CSA Proposal to the AFM), the AFM suggested (at various points) to CSA: (a) that CSA join the new group of orchestra employers (the “Employers’ Media Association” or “EMA”) with which it was about to negotiate a new multi-employer IMA,²⁹ or sign on to the completed

²⁹ CSA argues that the AFM insisted to impasse that it join the EMA, but that is nonsense. The AFM explicitly acknowledged CSA’s right to decline to join the EMA, and to negotiate instead on its own behalf. GC Exh. 63 (AFM President Hair e-mail acknowledging that CSA “declined to join the EMA, as is its right”). And when encouraging CSA to coordinate its individual bargaining with the EMA, the AFM explicitly acknowledged that in so doing, CSA would be bargaining on its own behalf and would not be bound by actions or agreements made by EMA. R Exh. 4.

agreement (the “EMA IMA”) when it was done,³⁰ ALJD 11:3-10, GC Exh. 59, GC Exh. 60; (b) in the alternative, that CSA coordinate its individual bargaining with the group bargaining, a suggestion which CSA rejected “at this point,” while expressing an interest in observing the bargaining to see whether joining “is appropriate,” ALJD 11:15-19, R Exh. 11; (c) that CSA send musicians who were also CSA trustees to observe on its behalf as guests of the AFM, in light of the EMA’s refusal to admit CSA as an observer, ALJD 11:19-26, R Exh. 9; and, (d) when all of these efforts to coordinate bargaining failed, stated that the AFM would meet with CSA after the multi-employer bargaining concluded, ALJD 11:26-33, R Exh. 9.

CSA filed unfair labor practice charges alleging that during this period, the AFM violated the Act by failing to meet at reasonable dates, times and places. GC Exh. 91 (Charge in Case 27 CB 142595). Although the AFM believed its conduct was lawful because it was trying, in good faith, to coordinate bargaining on media issues which – by the very nature of media – are national in scope, there is no Board finding that the AFM engaged in bad faith bargaining, and the AFM settled those charges with a non-admissions clause. ALJD 34 at n. 26; GC Exh. 92 at pages 1 and 4.

CSA’s assertion that the AFM’s conduct in this period privileged CSA to unilaterally implement the CSA Proposal many months later, on October 20, 2014, has no merit, because, as ALJ Carter rightly found, and as we show in the next section, once the AFM received the CSA Proposal, it completely changed course and actively pursued individual negotiations with CSA.³¹

³⁰ CSA had frequently signed completed AFM electronic media agreements in the past. *See e.g.* GC Exhs. 11-14 and 17-21.

³¹ CSA’s argument that there could be no “cure” for AFM’s conduct in the period prior to June 2014, CSA Brief at 42, makes no sense. The AFM’s alleged bad conduct consisted of not meeting with CSA while trying to coordinate with national bargaining, or failing that, not until after national bargaining concluded. *See* GC Exh. 91. Plainly, cessation cures such conduct: that is what any Board order or settlement would require. Whether or not AFM’s failure to meet with CSA from October 2013 through

ALJD 60:15-20. And CSA's arguments that ALJ Carter "carefully avoided [the] facts" regarding the period of October 2013 – June 2014 is absurd, in light of the careful factual review in the ALJD, as cited above, in which ALJ Carter cited transcript pages embodying the testimony of CSA witnesses Denise Keyser and Jerry Kern, AFM witnesses Deborah Newmark, Jay Blumenthal and Ray Hair, and multiple exhibits including GC Exh. 59-63 and 91-92 and R Exh. 6, 9, 11-12, all of which dealt with this period. *See e.g.* ALJD 11:1 – 12:37 and ALJD 14:3-39.

B. The AFM Engaged in Good Faith Bargaining Conduct in July and August 2014, and Nothing in the AFM's Conduct in this Period Could Privilege CSA's Unilateral Implementation of the CSA Proposal

Having received the CSA Proposal, the AFM moved to advance the bargaining in two ways. It sought the information it needed to understand, evaluate and respond to the proposal. *See supra* at Part I.C.-D. And it proceeded to schedule negotiations with CSA. We address these efforts in reverse order.

1. The Evidence Shows that the AFM Sought in Good Faith to Schedule Negotiations. ALJ Carter found, and the evidence supports the finding, that the AFM actively communicated with CSA in July and August 2014 to schedule negotiations. ALJD 17:36-44. The AFM's good faith efforts included: (a) an offer of any two days within a ten-day window in August, in New York, R Exh. 16; (b) when CSA insisted instead that negotiations should occur in July, an offer to rearrange President Hair's schedule to enable negotiations in New York on July 24th and 25th, R Exh. 18; (c) upon finding that CSA was no longer willing to come to New York (though it had earlier offered to do so)³², but finding itself unable to send appropriate

June 2014 was unlawful, that conduct plainly ceased in July and August 2014, when the AFM agreed to meet individually with CSA, arranged the meeting, and then met with CSA.

³² CSA asserts that the offer of dates in New York was unreasonable, but CSA had twice previously offered to negotiate in New York, so that it could not have been unreasonable for the AFM to think that CSA would be willing to have at least an initial session in New York. GC Exh. 61 (Kern's October 25, 2013 e-mail stating "[t]he Colorado Symphony negotiators ... are willing to travel to New York City for

negotiators to Denver in July as CSA demanded, offering to initiate negotiations on July 24th and 25th via tele- or video-conference,³³ in order to expedite scheduling in CSA's desired time frame, R Exh. 26, R Exh.28; and (d) ultimately agreeing to meet on August 20-21, 2014 in Denver (without President Hair,³⁴ but with top staff Jay Blumenthal and Deborah Newmark). *See* ALJD 17:36-44.

CSA's attempts to portray these efforts by the AFM as "obstructionist" rather than sincere did not persuade ALJ Carter and they have no merit. This is true particularly in the light of CSA's own obstructionist conduct, including: (a) first and foremost, CSA's refusal to provide information about the CSA Proposal; (b) CSA's repeated accusations that every AFM scheduling offer was bad faith or amounted to a refusal to bargain, while itself being unavailable at various dates and places³⁵; (b) CSA's unreasonable suggestion (in light of the nature of the CSA Proposal) that a successor agreement could be reached in two days and in the absence of any

at least some of the negotiating sessions"); GC Exh. 62 (Kern's December 13, 21013 e-mail stating "we are ready to commence negotiations in either Denver or NY").

³³ CSA argues that the AFM unlawfully *insisted* on meeting by tele- or video-conference, but that is unsupported in the record. The record shows that the AFM simply made the *offer* of tele- or video-conferencing in an effort to break through the logistical problems of time and place in a way that accommodated CSA's preferred schedule. R Exh. 26. In that offer, the AFM explained why it thought that tele- or video-conferencing could be appropriate in the circumstances: "Judging from CSA's proposal, the parties are very far apart on the substance; there is plenty to do that can readily be done via teleconference or videoconference this week in order to begin the work of getting to an agreement acceptable to both sides. CSA has made a proposal which it has not yet had the opportunity to explain; the AFM has questions about that proposal which it has not yet had the opportunity to ask. Your letter in response to the [AFM's] information request offers to provide certain responses in negotiation meetings. Those discussions can readily take place via tele- or video-conference if the parties can't meet in person." *Id.*

³⁴ CSA tries to make much out of the fact that after trying to accommodate President Hair's calendar in scheduling negotiations, the AFM agreed to meet without him. But that complaint can hardly lie in CSA's mouth in light of the fact that it had insisted that AFM send other negotiators with schedule availability if President Hair was not available. R Exh. 19 ("[i]f Mr. Hair cannot make the bargaining dates in Denver and the suggested "back up" August dates, the AFM is obligated to designate someone who is available and has the authority to negotiate a new contract"). CSA can hardly argue that it was bad faith for the AFM to do exactly what it proposed (and said was required by law).

³⁵ The correspondence between the parties is at R Exh. 17, R Exh. 18, R Exh. 19, R Exh. 20, R Exh. 25, R Exh. 26; R Exh. 27, R Exh. 28, R Exh. 29.

concrete information, R Exh. 17; (c) CSA's unreasonable and unfounded accusations that AFM's creative offer to hold a first meeting by tele- or video-conference on CSA's preferred dates was a demand, was unlawful and/or was in bad faith, *see* n. 33 *supra*; and (d) very significantly, CSA's July 17, 2014 ultimatum that it would unilaterally implement the CSA Proposal if the AFM did not schedule negotiations on dates it knew full well were impossible for the AFM.³⁶ CSA's conduct led the AFM to believe that CSA was not serious about meeting, but only desired to set up a unilateral implementation. *See supra* n. 36 and R Exh. 20.

ALJ Carter's determination that the AFM was acting in good faith was based on his review of all the above evidence (including his implicit credibility determinations), and there is no basis to disturb it. ALJD 60:15 – 61:1; ALJD 17:36-44. In this regard, it is worth noting (although we realize that it did not bind ALJ Carter nor does it bind the Board) that Region 27 came to the same conclusion based on its investigation of the unfair labor practice charges filed against the AFM in Case 27 CB 142595.³⁷

2. *The AFM Sought Information Necessary to Understand, Evaluate and Respond to the CSA Proposal.* In addition to its efforts to schedule negotiations, the AFM sought throughout July and August to obtain from CSA the information it needed in order to understand, evaluate

³⁶ On July 16, 2014, the AFM explained that pre-existing obligations meant that the AFM negotiators could not be in Denver on July 25th and 26th but that it would reschedule meetings to allow negotiations to occur in New York on those days, and that AFM negotiators could not negotiate anywhere on August 25th and 26th due to the ICSOM Conference (a union governance conference involving musicians in orchestras including the Colorado Symphony). R Exh. 18. On July 17, 2014, CSA issued an ultimatum: bargain in Denver on July 24th and 25th, and commit to August 25th and 26th, or "CSA will implement its proposal." R Exh. 19 at page 2. On July 18, 2014, the AFM strenuously objected to this ultimatum: "CSA's ultimatum – which you know the AFM cannot satisfy – apparently is designed simply as a predicate for CSA to unilaterally implement its proposal". R Exh. 20. As for CSA's assertion tht the scheduling conflict with ICSOM was a "make weight" excuse to reject the August 25-25, 2014 dates, CSA's own witness, Justin Bartels, testified regarding the importance of the ICSOM Conference. Tr. 1520-1521.

³⁷ As ALJ Carter noted at ALJD 34 at n. 26, the un rebutted evidence is that the settlement of the charges against the AFM in this case only covered the period from October 2013 to June 2014, and that upon the conclusion of Region 27's investigation, CSA withdrew the charges insofar as they alleged that the AFM refused to meet at reasonable times and places after June 2014. *See* R Exh. 6; Tr. 818-819.

and respond to the CSA Proposal. *See supra* Part I.C and D. We rely on the arguments in that section, and all of the evidence cited therein (including but not limited to GC Exh. 28 (July 14, 2014 request for information); GC Exh. 30 (August 4, 2014 letter repeating request for information); GC Exh. 32 (August 12, 2014 letter repeating request for information); GC Exh. 34 (August 25, 2014 letter repeating request for information)) to show the seriousness of the AFM’s efforts to advance negotiations in this period by trying to come to grips with the CSA Proposal – an effort that was completely obstructed by CSA’s adamant refusal to provide any concrete information about its specific media plans and opportunities.

C. ALJ Carter’s Conclusion that the AFM Bargained in Good Faith on August 20, 2014, Is Amply Supported by the Record, and CSA’s Arguments to the Contrary Are Completely Unfounded

ALJ Carter bluntly rejected CSA’s contentions that the AFM bargained in bad faith when the parties met on August 20, 2014, and CSA’s corollary argument that, as a result, the AFM’s conduct that day privileged CSA to unilaterally implement the CSA Proposal. He determined that the October bargaining session “went poorly because of Respondent’s unlawful refusal to provide information in response to the AFM’s July 18, 2014 information request, ALJD 61:1-3, and that contrary to CSA’s contention, the AFM’s stated concerns that day about needing the information were not “a sham to avoid discussing the merits of Respondent’s contract proposal,” but rather, that “the AFM was well within its rights” both to request information that would enable it to understand and evaluate the proposal and “to refrain from making a counterproposal until it received the information ... that it needed,” ALJD 61 at n. 44.

We have already shown that the record fully supports ALJ Carter’s determination that the requested information was necessary to enable the AFM to understand and evaluate the CSA Proposal, *see* Part I.D *supra*. And his determination that the AFM’s conduct *on August 20, 2014* was in support of the AFM’s justified efforts to obtain necessary information, and not a sham, is

also amply supported in the record, which ALJ Carter painstakingly reviewed in ALJD 21:7 – 22:25 with extensive citations to the evidence in the record, including CSA counsel’s bargaining notes (R Exh. 32) as well as the testimony about that day from CSA’s witnesses Denise Keyser and Jerry Kern and the AFM’s witnesses Deborah Newmark and Jay Blumenthal.

In a vain attempt to establish that the preponderance of the evidence goes the other way, CSA resorts to misstating the record, misstating the substance of the discussions that day, and poking at details that are far from the heart of the matter.

For example, CSA misstates the record when it contends that Jay Blumenthal “admitted” that he had no authority to bargain over the commercial terms contained in the CSA Proposal.³⁸ See CSA Brief at 25-26. For example, CSA cites testimony (Tr. 717 and 729) to the effect that Blumenthal did not bargain the AFM’s commercial agreements with the employer groups in the motion picture or jingle (commercial announcement) industries. *Id.* That is true, but irrelevant. The fact that someone else at AFM bargained the contracts with motion picture, television and

³⁸ The text of the CSA Brief wrongly attributes the testimony it discusses to Deborah Newmark; the accompanying footnote 14 on page 26 correctly attributes it to Jay Blumenthal. In footnote 14, CSA also objects to the ALJ Carter’s credibility determination in crediting the testimony of Ray Hair and Jay Blumenthal that the AFM – through its negotiators at the CSA table – could negotiate terms for CSA that would allow it to do motion picture, videogame or other non-symphonic or symphonic media work at rates other than those in the extant AFM agreements with those industries. It is absurd to suggest that those witnesses were lying: of course the AFM *could* do that, and the negotiators it sent knew they had the authority to do so, if it seemed necessary or prudent, as Blumenthal’s testimony quoted in text *infra* shows. In fact, that is exactly what the AFM’s *symphonic* electronic media agreements all represented – the AFM’s negotiation of beneficial terms for orchestra employers (as compared to the non-symphonic employers in non-symphonic agreements) in circumstances agreed to by the parties. See *supra* at Part I.A.2 and n. 3. And, the AFM had a track record of reaching accommodations in negotiations with individual orchestra institutions that were responsive to their specific needs. See *supra* at Part I.D.1.d and *infra* at Part II.E.2. There is no reason to believe, and no credible evidence to support a belief, that AFM negotiators had no authority in this regard when it came to negotiations with CSA. It is true that Jerry Kern and Denise Keyser gave some self-serving testimony that AFM negotiators said they had no authority, but that is inherently not credible – what negotiator would say that? And, it was rebuffed by Paul Naslund, a Colorado Orchestra musician testifying under subpoena, who testified that he had heard no such statements from the AFM at negotiations, Tr. 1095-1096, and by DMA President Michael Allen, who testified to the same effect, Tr. 945-946. ALJ Carter made implicit credibility determinations regarding this conflicting testimony, and there is no basis whatever to set them aside.

record companies proves nothing at all about Blumenthal's authority to bargain the full range of recording issues with a symphonic employer. To that point, Blumenthal's *actual* testimony (Tr. 717) – as opposed to CSA's characterization of it – was that he “always had the authority” to bargain the separate rates for commercial works *with CSA* (*see id.* at line 20), and that that was his precise testimony is made clear by the extended questions and answers on Tr. 728-729:

Q: All right, you also discussed on cross your authority to bargain, the authority that you had been granted to bargain?

A: Yes.

Q: You discussed that you did not have authority to rebargain the jingles contract?

A: I did not, but I certainly had the authority if I felt that I needed to negotiate conditions that would affect those agreements. I was not precluded from doing that. I could have done that if I wanted to.

Q: Okay. What contract did you have the authority to rebargain?

...

A: The IMA.

Q: Okay. And what subjects in the IMA did you have the authority to bargain?

A: Any subject under the IMA.

Q: Okay. And what subjects in Colorado's proposal to the AFM did you have the authority to bargain over?

A: All.

And on re-cross-examination, Blumenthal re-emphasized the point that he had the authority to negotiate commercial rates for CSA that conflicted with commercial rates in the AFM's commercial media agreements, if he determined that it was necessary or advisable to do so:

- Q: ...[Y]ou didn't have authority in that meeting to negotiate those other rates, correct?
- A: ... I had the authority to negotiate any rates that I felt were necessary to come to agreement in the IMA.
- Q: Okay. In the IMA.
- A: And if that affected those other contracts, it affected those other contracts.
...
- Q: So you could have said, you don't have to apply by any – you don't have to comply with any of those other contracts?
- A: I had the authority to negotiate the IMA in whatever direction it went, even if it conflicted with those other contracts[,] had I wished to do it.

Tr. 732-733.

CSA also misstates the record when it contends that the “sole reason” that the AFM offered for not presenting a counter-offer on August 20, 2014 was that summer was a busy time for the AFM, just because Keyser’s bargaining notes show that Blumenthal talked about that fact early on. *See* CSA Brief at 25. CSA counsel’s own bargaining notes make clear that Blumenthal told CSA on August 20, 2014, that the AFM was not prepared to make a counterproposal until it got the information it had requested. R Exh. 32 at 18. CSA attempts to make much of the fact that this precise notation in Ms. Keyser’s notes comes at the end of the day. But that is a patently disingenuous interpretation of her notes, because those same notes make clear that AFM brought up its need for the information at the very beginning of the day – immediately after Keyser’s opening remarks. R Exh. 32 at 7 (Noting that Blumenthal said at the outset that the AFM had an outstanding information request, that not having the information “is a problem for us” and that the AFM needed the information “to understand CSA’s proposals”). And shortly thereafter, Ms. Keyser’s notes show that when Jerry Kern said the information would not be forthcoming, Deborah Newmark replied that “we have a problem then.” R Exh. 32 at 8. Moreover, contrary

to CSA's assertions, the AFM told CSA *even before* the August 20, 2014 negotiation that it needed the requested information in order to respond to the CSA proposal. *See supra* at Part I.D.2; GC Exh. 30 (August 4, 2014 letter); GC Exh. 32 (August 12, 2014 letter).

CSA tries to make much of the fact that the substance of the discussion on August 20th centered on the AFM's questions about the CSA Proposal. But as the testimony cited by ALJ Carter shows, the AFM's questions were exactly those any accomplished labor negotiator would expect in the circumstances. For example, CSA had asserted that its musicians would do better under its Success Sharing proposal (even factoring in the lack of prior up-front payments) than they would do under the AFM agreements with their back-end payment requirements, and Blumenthal and Newmark logically asked questions to help them understand and evaluate the Success Sharing system. ALJD 21:36 – 22:4 and record citations therein, including Tr. 224-229, 426-427, 643-647, 1196-1199, 1204, and R Exh. 32 at 9-11, 14; R Exh. 32 at 18.

Similarly, through its Soundtrack Proposal in the CSA Proposal, CSA claimed it would obtain commercial recording work for third parties while maintaining copyright ownership in the recorded music, and, since the AFM had no basis in its experience to see how that was possible or what work could be obtained that would fit those parameters, it asked questions to ascertain what work the CSA realistically anticipated doing – questions that also went to the underlying premise of the CSA Proposal, i.e., that it needed the new terms to exploit “business opportunities.” ALJD 22:6-17 and record citations therein; Tr. 222-229, 643-647, 1196-1199; *see also supra* Part I.D.1.c.

In addition, the AFM negotiators asked questions aimed at understanding exactly how the bare-bones outline of the CSA Proposal (which was barely over three pages long) related to the status quo rates and terms contained in the fifty-plus page CSA IMA and hundreds of pages of

other electronic media agreements. ALJD 21: 36-42 and record citations therein; Tr. 227. There is no merit to CSA's suggestions that such questions were trivial or asked in bad faith. For example, Jerry Kern testified that questions like those about the meaning of the term "wireless" in the CSA Proposal, and about the actual coverage of its "wireless" provisions, were "idiotic." Tr. 1481. But his testimony on cross-examination made clear that "wireless" was *not* a self-evident term in the CSA Proposal, given that in that proposal, the only apparent coverage of television was in the outline section regarding "National Radio and Wireless Audio-Visual Broadcast," while in fact "most television is delivered by wires still today." Tr. 1482. Kern was unable to describe how the CSA Proposal covered wired television delivery, or how it compared to the detailed provisions regarding television in Article XII of the CSA IMA (GC Exh. 2). Tr. 1482-1483. But the AFM was entitled to explore the actual meaning and coverage of the proposal, and as Kern acknowledged on cross-examination, specifics do matter. Tr. 1483-1484.

In fact, the questions attempted to get at the same essential information as the AFM's information request – information necessary to understand the CSA Proposal, evaluate its actual economic effects, ascertain CSA's real priorities, and look for concrete projects or plans upon which to brainstorm possible bargaining solutions containing mutually acceptable compromises. As Deborah Newmark testified, in the absence of a response to the information request, the AFM hoped to get the information "face-to-face" with CSA, Tr. 222-224, *see also* Tr. 637 – and that information was necessary to flesh out the CSA Proposal and be able to find common ground, Tr. 426. Newmark testified that they hoped through this face-to-face process to get enough information to craft a counterproposal. Tr. 232-233.

Finally, CSA makes much of exactly who said what about exactly how many minutes were spent across the table on August 20, 2014. But tabulating the minutes – either alone, or in

conjunction with the other evidence about the negotiation session – cannot possibly lead to the conclusion that the weight of the evidence necessitates a conclusion that the AFM bargained in bad faith on August 20, 2014. The CSA Proposal had set up a perniciously difficult bargaining problem, and that problem never was going to be resolved on the first day of bargaining, no matter how many hours the parties spent across the table.³⁹

In sum, CSA has utterly failed to undermine ALJ Carter’s conclusion that its October 20, 2014 unilateral implementation of the CSA Proposal was unlawful in the face of its failure to produce requested information that was necessary for bargaining. CSA has not shown, and cannot show, that the unilateral implementation was privileged by bad faith bargaining on the part of the AFM in any of the time periods prior to its unilateral implementation, whether the periods are examined separately or together, and ALJ Carter’s conclusion (ALJD 60:1-5) that it was not so privileged is amply supported by the record.

D. CSA’s Contention that the AFM Made a Bad-Faith, Regressive Proposal is Not to the Point (Because the Alleged Offer Post-dated CSA’s Unilateral Implementation), Not Supported by the Record, and Contrary to the Law

In March of 2015 - months after CSA’s unlawful implementation of the CSA Proposal, AFM President Ray Hair reached out to CSA’s Jerry Kern to arrange an informal and off-the-record lunch, which took place on March 17, 2015, in Denver. ALJD 26:16-26. At that lunch, Hair gave Kern a copy of the new multi-employer IMA, which had just been concluded. *Id.* He did so “as a courtesy (and not to impact the bargaining with the CSA).” ALJD 26:20-21. Kern later reviewed it, and said it did not meet CSA’s needs. ALJD 26:28-42. Ultimately, the two men agreed to resume negotiation and scheduled them for June 3-4, 2015, in Denver. ALJD

³⁹ For reference, the negotiation of the EMA IMA – which dealt with issues identical to those raised by CSA – took over one year to complete, as CSA was aware. Tr. 1173.

27:22-24. At those negotiations, in which AFM counsel Patricia Polach served as AFM spokesperson, the AFM gave CSA a proposal that was based upon the status quo CSA IMA, with several improvements (for the union) and a few concessions (in favor of CSA). ALJD 30:30 – 31:4. The AFM explained that its proposal did not use the new multi-employer EMA IMA as its starting point, because, among other reasons, EMA IMA had been the product of a year-long negotiation, and the proper starting point for CSA was its own IMA. ALJD 30 at n. 24. It did not propose any changes to the status quo regime of requiring CSA to apply the rates of applicable AFM agreements to any electronic media projects that were not covered explicitly by the CSA IMA. GC Exh. 36 (AFM Proposal June 3, 2015).

CSA now argues that the AFM proposal in June 2015 was a bad-faith, regressive proposal, and that, therefore, it forms part of a pattern of AFM bad faith conduct sufficient to privilege CSA’s prior unilateral implementation of the CSA Proposal in October 2014.

The complete answer to this argument is, of course, ALJ Carter’s answer: the AFM’s conduct in March and June 2015 could not justify CSA’s unilateral implementation in October 2014. ALJD 60 at n. 43. We pause to respond to it here only because it demonstrates CSA’s twin propensities to mischaracterize the record and to misunderstand the duty to bargain.

As to the first point, CSA now argues that ALJ Carter’s factual conclusion that Ray Hair was providing Kern with the new EMA IMA “as a courtesy (and not to impact the bargaining with the CSA)” ALJD 26:20-22, “is entirely unsupported by the record.” CSA Brief at 33. That is nonsense. In fact, Kern *admitted at trial* that Hair told him at the time that he was providing the multi-employer agreement as a courtesy, and not in order to impact the CSA bargaining.⁴⁰

⁴⁰ Kern had testified on direct examination that Hair gave him the agreement as an offer. Tr. 1470. His admission about what Hair really said, cited in text, was prompted by his review of his Board affidavit on cross-examination. Tr. 1509-1512.

Tr. 1511. CSA's mischaracterization of the record is, of course, in service of its attempt to set up its argument that the AFM made a regressive offer in June 2015. But the AFM offer could not be "regressive" where no prior offer was made.

As to the second point, the law does not, in any event, forbid the withdrawal of a previous proposal where a party has a legitimate reason for doing so. *Oklahoma Fixture Co.*, 331 NLRB 1116 (2000), *enfd.* 332 F.3d 1284 (10th Cir. 2003); *Amalgamated Transit Union, Local 1433* (Case 28-CB-127045), Advice Memorandum, November 19, 2014. Assuming, *arguendo*, that Hair had "propose[d]" the new EMA IMA, CSA reviewed and rejected it, GC Exh. 67; that would have been a legitimate reason to take it off the table, were it on the table in the first place.

More fundamentally, CSA's apparent conviction that the AFM had an obligation to propose the new EMA IMA to CSA, and that anything short of that amounts to bad faith, defies common sense and is frankly absurd. The EMA agreement was the product of very difficult bargaining over a one-year period, and contained trade-offs in which the employers achieved important concessions, on the one hand, and the union achieved certain important union goals, on the other hand. ALJD 25:39 – 26:12; ALJD 30 at n. 24. CSA refused to be bound by the multi-employer group's trade-offs in advance, and when the trade-offs were completed, CSA said they did not meet its needs. As a matter of normal labor relations, no bargaining partner in these circumstances would offer to give away the agreed-upon concessions with no assurance of getting the agreed-upon (or any) gains – as an opening move. The AFM proposal is evidence of normal labor relations common sense, not bad faith.

E. ALJ Carter’s Rejection of CSA’s Argument that the AFM Had No Intention of Bargaining with CSA About Commercial Media Is Amply Supported By the Record, and CSA’s Arguments to the Contrary Have No Merit

At bottom, all of CSA’s allegations regarding union bad faith rest on its argument that the AFM had no intention of bargaining commercial media terms with CSA and refused ever to do so: that is what underlies CSA’s attempt to portray the issues disposed of in Parts II.A.-D. above as elements of some kind of pattern that ALJ Carter failed to view as a whole. CSA Brief 39-41.

But ALJ Carter did see the whole picture, and, based on the evidence regarding that whole picture adduced at trial, he rejected CSA’s argument that the AFM’s conduct was a refusal to bargain with CSA, as opposed to an insistence that it not be forced to bargain in the dark, without the information necessary to understand, evaluate, and test the CSA Proposal, and to conceptualize *acceptable* ways to find common ground with CSA.

Specifically, ALJ Carter found, and the record shows, that “the AFM was willing to negotiate with Respondent about commercial media (particularly if Respondent was willing to offer more money to musicians as part of the deal) once the AFM received more information about Respondent’s specific plans,” ALJD 56 at n. 37, and that there was no demonstrated “unwillingness to bargain with Respondent for a different arrangement concerning commercial media (such as an agreement that would increase compensation for musicians in exchange for more flexibility for Respondent to do certain media projects on terms that differed from the AFM’s media agreements), much less [one demonstrated] before October 20, 2014, when the parties had only completed one bargaining session and the AFM was still waiting for information request responses that would shed light on the specific media plans underlying Respondent’s

contract proposal.” ALJD 61:9-16. That was the conclusion to which the facts and the law ineluctably led.⁴¹

1. The evidence showed that the status quo between the parties was part and parcel with a system of AFM national standards for musicians who record electronic media, in virtually all media industries, pursuant to which the AFM negotiated agreements in the field (including with CSA) that (a) required up-front, pension and back-end payments for all media products, in all industries, whether or not the musicians were receiving a separate payment for a live performance; (b) established lower up-front payments and different back-end payments (60% of net revenue from the project) for certain expressly identified symphonic media projects pursuant to symphonic electronic media agreements negotiated with orchestra employers; and (c) established that pursuant to the symphonic media agreements and local collective bargaining agreements, orchestra musicians would be paid the same as other musicians when they did the same work for commercial media products. *See supra* Part I.A. This structure of union standards served important union goals to protect musicians. Tr. 751-752; Tr. 1578-1579.

⁴¹ Before marching through the record evidence that supports ALJ Carter’s finding, we pause to comment on CSA’s spurious claim that the AFM did not want to reach an agreement. That notion, on its face, is preposterous. The AFM had nothing to gain and everything to lose – unilateral imposition, resulting erosion of standards, erosion of member support, and ultimately a possible decertification – in the absence of concluding a contract. CSA on the other hand, has made clear that it had little interest in concluding an agreement *with the AFM*. It imposed the CSA Proposal, and then proceeded to engage in extensive direct dealing with its musicians. And, as four witnesses (Deborah Newmark, Jay Blumenthal, Michael Allen and Patricia Polach) testified, Jerry Kern all but endorsed the Guild petition at the June 2015 negotiation session when he asked why the AFM did not remove its block and let the musicians decide whether to continue to be represented by the AFM. Tr. 267, 670, 886-887, 1569. The Board recognizes that the motives and leverage of the respective parties are relevant in assessing the totality of the circumstances and a party’s good or bad faith in negotiations – and that it is more often the employer, with the weapon of unilateral imposition, that enjoys a benefit from failure to reach agreement, while “[a] union, by contrast, rarely is motivated not to seek some sort of contract.” *Graphic Arts International Union, Local 280*, 235 NLRB 1094, 1095 (1978), *enfd.* 596 F.2d 904 (9th Cir. 1979). In this case, the AFM’s need for an agreement contrasts sharply with CSA’s desire to get out from under any obligations to the AFM.

2. Notwithstanding the seriousness with which the AFM regarded national media standards, it had a history of making accommodations and changes in collective bargaining. In fact, the symphonic electronic media agreements like the CSA IMA were themselves such accommodations, negotiated with orchestra employers to greatly reduce up-front rates and expand orchestra employer flexibility with regard to certain types of projects of special interest to orchestras. *See supra* Part I.A.2. More specifically, the existence of the symphonic electronic media contracts did not stop all orchestra employer efforts, singly or in groups, to lower or eliminate even the reduced symphonic up-front payments, as well as the rates applicable to non-symphonic projects when recorded by orchestras. The evidence showed that the AFM had a track record of dealing successfully with such employer initiatives by focusing the bargaining on employers' specific priorities and the concrete projects and opportunities that underpinned their bargaining demands, and seeking compromises and creative ideas that would meet their precise needs in ways acceptable to the union. *See supra* at part I.D.1.d. For example:

- Deborah Newmark testified that the AFM had negotiated various individualized agreements that provided greater flexibility and/or discounted rates (generally in return for some form of financial commitment or other incentive) to orchestra employers that had specific projects, or specific mediums in which they desired to release projects, and that the AFM discussed examples of these agreements (including the Metropolitan Opera and the San Francisco Opera) with CSA in negotiations. Tr. 270-271.
- Patricia Polach testified that in her opening statement on June 3, 2015, she told CSA that “we've seen these kinds of proposals before. This is not the first time we've seen very broad brush throw out all the rules, throw out all the restrictions, throw out the upfront payments, and let us just have our heads with the revenue share. ... [A]nd the way we get past that in bargaining or get through the bargaining issues and get to agreements is that we try to get the conversation going about real specific things.” Tr. 1562; *see supra* at Part I.D.1.d.
- Ray Hair testified that the way the union dealt with “tough proposals” was to focus on specifics. Tr. 791-793; *see supra* at Part I.D.1.d.
- The new multi-employer EMA IMA, finalized in 2015, itself expanded the scope of non-symphonic commercial CDs that signatory orchestras could make at significantly lower cost than under the SRLA. *See* GC Exh. 36(a) at Exhibit B.

3. The evidence showed that in response to the CSA Proposal, which in just over three pages appeared to throw out every element of the CSA IMA and national standards, the AFM sought to employ the approach it had used successfully elsewhere – to seek the information necessary to focus negotiations on concrete specifics, where it could hope to reach common ground with CSA, and work through compromises that would meet specific CSA needs in some ways acceptable to the union. *See supra* Part I.B-D; ALJD 29:41 – 30:28; Tr. 271-272; Tr. 1562; CP Exh. 1 at page 6 (CSA counsel’s June 3, 2015 bargaining notes recording AFM’s statements that “AFM has seen these types of proposals before. Sets up huge philosophical problem – we have gotten to [agreements] before by discussing specifics of projects [orchestra] was going to do ... So when got CSA proposal – AFM sent info request. ... purpose was to find concrete way to resolve differences”). But CSA completely stonewalled the AFM by adamantly refusing to reveal any specifics.⁴² As ALJ Carter concluded, that left the AFM “still waiting for information request responses that would shed light on the specific media plans underlying [the CSA] Proposal.” ALJD 61:9-16.

4. The evidence included the following testimony from AFM witnesses that fully supports ALJ Carter’s conclusion that the AFM was bargaining in good faith and had *not* demonstrated any unwillingness to reach some alternative commercial terms with CSA – perhaps one that gave

⁴² CSA is fond of accusing the AFM of sham behavior, but that is actually the description that most aptly applies to CSA’s behavior in refusing to produce specific information in the absence of a monetary damages clause allegedly for fear of competitive risk – even after projects were *completed* and there could be no competitive risk whatsoever. For example, CSA recorded the *Vaughan Williams* CD in March of 2014, *see* GC Exh. 79, and there could have been no possible danger of losing that project to a competitor when the AFM asked for information in July 2014, but CSA never revealed the existence of the project at that time, nor in response to any other request, and, in fact, it even refused to answer the AFM’s questions about it June 2016, *see* GC Exh. 43. Similarly, CSA recorded an *Amos Lee* CD on August 1, 2014, but never revealed it to AFM until the AFM (having learned about it in the press) asked specifically about it on June 17, 2015. GC Exh. 40. And, of course, there is no competitive risk in providing the AFM with CSA’s media revenue projections, but CSA never replied to that request.

CSA more flexibility in return for some quid pro quo – if CSA would stop stonewalling and “shed some light” on the specific plans that underpinned the CSA Proposal:

- Deborah Newmark’s testimony that the AFM needed more information to flesh out the CSA proposal in order to be able to find common ground. Tr. 426.
- CSA’s bargaining notes kept by CSA counsel Keyser record Patricia Polach’s statement on June 3, 2015 that the AFM “would like to find common ground on some of the things you would like to do.” CP Exh. 1 at p. 8; ALJD 31:8-11.
- CSA’s bargaining notes kept by CSA counsel Keyser record Patricia Polach’s statement on June 3, 2015 that it was “[g]enerally speaking [a] ‘pretty tough bargaining position’ for CSA to propose doing commercial projects not per commercial agreements. Let’s look at some concrete things.” *Id.*
- CSA’s bargaining notes kept by CSA counsel Keyser record Patricia Polach’s statement that the AFM might be willing to reach agreement on “condensed” media terms if CSA put enough money into the proposal, but that it was too soon to tell, since CSA had not indicated that it would move. CP Exh. 1 at p. 17; ALJD 31:27-29
- Patricia Polach testified that she told CSA at the June 3, 2014 negotiation “that the Union had a real track record of granting more flexibility in agreements in return for compensation, basically, that you know, when employers put money on the table, we could get a lot more flexible. ... And I gave them the example of the Met Opera agreement.” Tr. 1576; ALJD 32:13-17.
- Jay Blumenthal’s testimony that when Jerry Kern asked if the union could negotiate with CSA over commercial media conditions and show some flexibility, Polach responded that the union had negotiated flexible conditions in return for compensation. Tr. 672-673; ALJD 32:13-17.
- Patricia Polach’s testimony that on June 4, 2015, she gave three types of answers to CSA’s repeated questions whether the AFM had any movement on the CSA Soundtrack proposal: (1) that the AFM needed the requested information to figure out what CSA really intended and “see if there is some ... common ground or way to bridge the gap that we can come up with,” Tr. 1577; (2) that the AFM could not bargain in the abstract, in a situation where it could not determine what the effect of movement would be in the symphonic or other markets, Tr. 1577-1578, 1580; and (3) that CSA was wrong to think that the union’s concerns about media standards were aimed at protecting “musicians in L.A.,” because in reality they were aimed at protecting all musicians from a race to the bottom, and indeed, they were also aimed at protecting orchestra employers from a “tip jar” mentality on the part of third party producers who wanted content from orchestras but did not want to pay for it, Tr. 1578-1579. *See* ALJD 32:17-22.

- Testimony from DMA President Michael Allen corroborating that Polach did not say that the AFM would not bargain over commercial terms, but that she did say the AFM needed specific information to do so. Tr. 945-946; ALJD 32:17-22.
- Testimony from Paul Naslund, a Colorado Symphony musician testifying under subpoena, corroborating that Polach never said she had no authority to negotiate commercial terms nor did she say that the AFM would not bargain them; rather she asked for specifics about projects that CSA wanted to do so that the AFM could “establish a groundwork ... of what you have in mind,” and that the AFM said it “needed to know the details.” Tr. 1079-1080, 1095-1096, 1103-1104; ALJD 32:17-22.
- Testimony from Patricia Polach indicating that the AFM discussed its willingness to negotiate over certain commercial uses of archived recordings. Tr. 1582-1578; ALJD 32:22-25.

In sum, the record contains substantial evidence of the AFM’s willingness to negotiate over commercial terms – if the negotiation was not in the dark, and involved a real effort to reach acceptable compromises based on concrete realities, rather than demands for unconditional surrender, in the abstract, of the AFM’s principled positions regarding national media standards. To be sure, Denise Keyser and Jerry Kern testified that the AFM said it had no authority and would not negotiate commercial terms. But where the testimony of witnesses differed on material facts, ALJ Carter was entitled to make credibility determinations. The ones he made were supported by the weight of the evidence, including CSA’s own bargaining notes and the testimony of Michael Allen and Paul Naslund who corroborated the AFM witnesses. There is no basis for overruling them. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

5. Plainly, the AFM and CSA had quite different bargaining goals. The AFM wanted to protect its standards, which call for up-front and back-end payments under its agreements; and CSA’s contrary objective was to be able to cease making those payments. Tr. 1502-1505 (Jerry

Kern’s testimony acknowledging that these were the parties’ opposing bargaining goals).⁴³ Each side’s goals were lawful; the Act regulates only the bargaining *process* by requiring the parties to attempt to adjust their differences in good faith. CSA’s accusations of union bad faith rest on a misstatement – or at least a misunderstanding – of the way the Act regulates the bargaining process.

At bottom, CSA’s argument that the union acted in bad faith by not countering CSA’s Soundtrack Proposal without the benefit of the requested information reduces to CSA’s apparent belief that the duty to bargain in good faith *obligated* the AFM to make a counterproposal embodying concessions moving toward CSA’s bargaining goals, without the ability to measure what that move would mean in the real world, and without regard to accommodating its own concerns and principles. That is a fundamentally silly proposition; more importantly, it is not the law.

Sections 8(a)(5) and (8)(b)(3) of the Act impose on employers and unions a duty to bargain, which Section 8(d) defines as a “duty to confer in good faith.” Section 8(d) goes on to make clear that the duty to bargain in good faith “does not compel either party to agree to a

⁴³ CSA has raised a red-herring accusation that the AFM and its media agreements *prohibited* CSA from undertaking commercial media projects. But that is false, and Kern’s testimony proves that he knew it to be false. The truth is that as a signatory to the CSA IMA, CSA had every right to engage in any kind of media project it wanted (or could obtain from a third party) – its only constraint was that if the work did not fall within the express provisions of the IMA (therefore qualifying for the low up-front payment provisions of that agreement), then both Article VI of the CSA IMA and Article 14 of the Local CBA required CSA to pay the rates set forth in the applicable AFM agreement. *See supra* Part I.A.4 and I.A.5. In short, the CSA IMA does not govern what CSA can do; like any other collective bargaining agreement, it governs what CSA *must pay*. CSA was not *forbidden* to do commercial work; it just did not want to pay the status quo rates for it. And Kern knew, and testified, that this was so:

Q: So there wasn’t anything in the IMA, other than the economic terms, which prohibited your from engaging in that activity, correct?

A: Yes.

Tr. 1504. As Kern’s testimony makes crystal clear, the CSA and the AFM simply had a garden variety economic dispute about wages.

proposal or require the making of concessions.” Rather, what is required is a “serious intent to adjust differences and to reach an acceptable common ground . . . [which] presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.” *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960).

Within this statutory scheme, there is no compulsion to abandon a principled position. *Id.*; *Teamsters Local 282 (E.G. Clemente Contracting)*, 335 NLRB 1253, 1254 (2001). Indeed, a union has a legitimate right to uphold union standards and to seek the same or similar terms of employment it has negotiated elsewhere, and to be clear about those goals at the table, as long as the entirety of its conduct shows a willingness to seek common ground. *Castle Hill Health Care*, 355 NLRB 1156, 1184 (2010); *Monmouth Care Center*, 354 NLRB 11, 74-75 (2009), *enfd.* 672 F.3d 1085 (D.C. Cir. 2012). The question merely is whether the party bargained with “a sincere desire to reach a collective-bargaining agreement. *Universal Fuel, Inc.*, 358 NLRB 1504, 1504 (2012).

And there is no question but that the AFM *did* have a “serious intent to adjust [its] differences [with CSA] and to reach an *acceptable* common ground.” *NLRB v. Insurance Agents*, 361 U.S. at 485 (emphasis added). That was the whole point of all of its efforts to elicit concrete and specific information about CSA’s anticipated media program – to focus the bargaining on actualities and specifics, which is exactly how it has been able to find common ground in the past with orchestras seeking to undo the up-front and back-end payment structure, and how it hoped to forge an *acceptable* agreement with CSA, one that could break some new ground for CSA without heedlessly (and needlessly) eviscerating the whole system of media compensation upon which musicians depend.⁴⁴ The parties’ mutual obligations to bargain in

⁴⁴ It is hornbook law that a party’s good or bad faith is determined by the totality of its conduct in the circumstances. The Board has recognized that in the face of hard bargaining on both sides, a union’s

good faith entitled the AFM to search for acceptable common ground in that way, notwithstanding CSA's desire for an unconditional surrender.

We do not intend to suggest by the length of our argument here that CSA's affirmative defense of union bad faith has the slightest bit of weight. We end where we began: CSA's prolonged course of direct dealing, its obstructive refusal to provide information, its bad-faith insistence that the AFM should bargain in the dark while utterly uninformed as to what media plans and opportunities were really at issue in Denver, its unlawful imposition and repeated unilateral changes, and its concerted course thereby to thoroughly undermine the AFM as the musicians' bargaining representative – that is what has frustrated negotiations. CSA has tried the time-honored strategy of defending itself by launching an offense – but not a good one.

effort to obtain information that will elucidate and focus the issues shows good faith on the part of the union. *Castle Hill Health Care*, 355 NLRB at 1180 (“Had the information sought by the union been provided in a timely fashion, it is reasonable that it could have been used to determine strategy and tactics in the negotiations ...[p]riority of issues ... might well have been impacted”); *Monmouth Care Center*, 354 NLRB at 75. It could hardly be otherwise where information requests are designed to “narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves,” which is at the heart of “[d]iscussion conducted under [the] standard of good faith.” *NLRB v. Insurance Agents*, 361 U.S. at 488. The law is also clear that a party standing firm on an issue nevertheless gives evidence of its good faith desire to reach agreement when it exhibits a willingness to explain its position on a principled basis, to “discuss freely and fully” the respective positions on the table and “when these are opposed, to justify [one's own] on reason.” *Graphic Arts International Union, Local 280*, 235 NLRB at 1094.

In this case, the evidence shows that the AFM made careful and comprehensive efforts to explain the history and basis of the media standards at issue, to justify its concerns about eroding them (particularly in the abstract), and to explain its desire for concrete information as a way to search out solutions to the bargaining dilemma faced by the parties. The totality of the AFM's conduct shows its good faith without a doubt. CSA has tried to build a monument to various intermittent communications showing the strength of the union's views about media standards. ALJ Carter rightly noted that none of these communications demonstrated an unwillingness to bargain on the part of AFM's bargaining team. But even if there *had* been occasional negotiator comments that sounded harsh or inflexible, such comments would not outweigh the totality of the AFM's good faith conduct. *Monmouth Care Center*, 354 NLRB at 51.

CONCLUSION

For all of the above reasons, and the reasons set forth in the Answering Brief of Counsel for the General Counsel, the AFM respectfully requests that the ALJ's Decision and Order in this case be adopted (with the exception of his inadvertent omission of standard remedial language as to one of the violations at issue, which is the subject of the General Counsel's Cross-Exceptions).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2017, a true and correct copy of the foregoing CHARGING PARTY’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION AND ORDER was E-filed with the NLRB E-Filing System and served via email to the following:

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