

Nos. 18-1189, 18-1194

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COLORADO SYMPHONY ASSOCIATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

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

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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Petitioner/Cross-Respondent)	Nos. 18-1189, 18-1194
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	27-CA-140724
)	
and)	
)	
AMERICAN FEDERATION OF MUSICIANS)	
OF THE UNITED STATES AND CANADA,)	
AFL-CIO/CLC)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. *Parties and Amici:* The Colorado Symphony Association was the respondent before the Board, and is the Petitioner/Cross-Respondent in this Court proceeding. The Board’s General Counsel was a party before the Board. The American Federation of Musicians was the charging party before the Board, and has intervened in support of the Board.

B. *Rulings Under Review:* The ruling under review is a Decision and Order of the Board, *Colorado Symphony Association*, 366 NLRB No. 122 (July 3, 2018).

C. *Related Cases:* This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

/s/ David Habenstreit

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Dated at Washington, DC
this 15th day of November, 2019

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Issue presented	2
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board’s findings of fact.....	3
A. CSA’s bargaining relationship with AFM and DMA.....	3
B. The IMA expires; CSA demands bargaining	6
C. CSA makes its opening bargaining proposal; AFM requests information.....	8
D. The August 20 bargaining session	11
E. AFM attempts to revive bargaining; CSA implements its initial bargaining proposal.....	12
F. The parties resume bargaining; AFM makes three more information requests.....	14
G. CSA bargains directly with musicians.....	17
H. AFM produces a video game and music albums with wages and working conditions different from those in the IMA	18
I. CSA rejects AFM’s final information request and withdraws recognition from AFM	20
II. Procedural history.....	21
A. The complaint and the Administrative Law Judge’s decision.....	21

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The Board's conclusion and order	22
Summary of argument.....	23
Standard of review	26
Argument.....	27
I. Substantial evidence supports the Board's findings that CSA recognized AFM as its employees' collective-bargaining representative, then violated the Act by refusing to provide information to AFM, and by unilaterally implementing its contract proposal	27
A. Substantial evidence supports the Board's finding that CSA had a duty to bargain with AFM.....	27
1. An employer that voluntarily recognizes a union as joint collective-bargaining representative must bargain with that union.....	27
2. Substantial evidence supports the Board's finding that CSA recognized AFM as joint-bargaining representative	29
3. Section 10(b) precludes CSA's untimely challenge to AFM's Representative status, and CSA's recognition of AFM through the IMA was not void or unlawful.....	31
4. The Court lacks jurisdiction to consider CSA's claim that the IMA violates federal anti-trust law	37
B. Substantial evidence supports the Board's finding that CSA unlawfully failed to provide AFM with relevant information	40
1. An employer violates the Act by refusing to provide the union with information relevant to its duty to bargain	41

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
2. CSA unlawfully conditioned the production of relevant information on AFM's agreement to damages liability.....	42
3. CSA's argument lack merit.....	46
C. CSA's unlawful refusal to provide information precluded a valid impasse, rendering the unilateral implementation of its initial proposal an unfair-labor-practice	48
1. CSA's refusal to provide AFM with requested, relevant information precluded a valid impasse	48
2. AFM's conduct did not privilege unilateral implementation	50
II. Given CSA's duty to bargain with AFM, the Board is entitled to summary enforcement of the uncontested portions of its order	57
Conclusion	62

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A-1 Door & Building Solutions</i> , 356 NLRB 499 (2011)	42
<i>AAA Motor Lines, Inc.</i> , 215 NLRB 793 (1974)	50
<i>Ampersand Pub’g, Inc. v. NLRB</i> , 2017 WL 1314946 (D.C. Cir. 2017)	39
* <i>Allied Mech. Servs., Inc. v. NLRB</i> , 668 F.3d 758 (D.C. Cir. 2012).....	26,28,33,34
<i>Alpha Assoc.</i> , 344 NLRB 782 (2005)	32
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	26, 27
<i>Brockton Hosp. v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002).....	26
<i>Caldwell Mfg. Co.</i> , 346 NLRB 1159 (2005)	48
<i>Colorado Fire Sprinkler, Inc. v. NLRB</i> , 801 F.3d 1031 (D.C. Cir. 2018).....	33,34
<i>Detroit Ed. Co. v. NLRB</i> , 440 U.S. 301 (1979)	42
<i>Detroit Typographical Union No. 18 v. NLRB</i> , 216 F.3d 109 (D.C. Cir. 2000).....	50
<i>E.I. Dupont Co. v. NLRB</i> , 489 F.3d 1310 (D.C. Cir. 2007).....	52

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>E.W. Buschman v. NLRB</i> , 820 F.2d 206 (6th Cir. 1987).....	45
<i>Exxel/Atmos, Inc. v. NLRB</i> , 28 F.3d 1243 (D.C. Cir. 1994).....	28
* <i>Flying Food Group, Inc. v. NLRB</i> , 471 F.3d 178 (D.C. Cir. 2006).....	56
<i>Hendrickson Trucking Co. v. NLRB</i> , 770 F. App'x 1 (D.C. Cir. 2019)	48
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002)	38
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996)	26
<i>Hotel & Restaurant Employees Local 355 (Doral Beach Hotel)</i> , 245 NLRB 774 (1979)	37
<i>Int'l Ladies' Garment Workers' v. Quality Mfg. Co.</i> , 420 U.S. 276 (1975)	39
<i>Isl. Creek Coal</i> , 289 NLRB 851 (1988)	44
<i>Jacksonville Area Ass'n for Retarded Citizens</i> , 316 NLRB 338 (1995)	42
<i>Johnson Controls, Inc.</i> , 368 NLRB No. 20 (2019)	59
<i>KLB Indus. v. NLRB</i> , 700 F.3d 551 (D.C. Cir. 2012).....	41

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Levitz Furniture,</i> 333 NLRB 717 (2001)	59
<i>Litton Financial Printing Div. v. NLRB,</i> 501 U.S. 190 (1991)	57
<i>Marquez Bros. Enter., Inc. v. NLRB,</i> 650 F. App'x 25 (D.C. Cir. 2016)	39
<i>Metro. Edison Co. v. NLRB,</i> 460 U.S. 693 (1983)	27
<i>Mike Sells Potato Chip Co. v. NLRB,</i> 807 F.3d 318 (D.C. Cir. 2015).....	57
<i>Mine Workers District 31 v. NLRB,</i> 879 F.2d 939 (D.C. Cir. 1989).....	44
<i>M & M Contractors, Inc.,</i> 262 NLRB 1472 (1982)	50
* <i>Musical Arts Assoc. v. NLRB,</i> 466 F. App'x 7 (D.C. Cir. 2012)	28,29
* <i>N.Y. Rehab. Care Mgmt., LLC v. NLRB,</i> 506 F.3d 1070 (D.C. Cir. 2007).....	56
<i>NLRB v. Acme Industrial Co.,</i> 385 U.S. 432 (1967)	40,41
<i>NLRB v. Iron Wrkrs Local 229,</i> No. 17-73210, 2019 WL 5539505 (9th Cir., Oct. 28, 2019).....	38
<i>NLRB v. Katz,</i> 369 U.S. 736 (1962)	48

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Nat'l Truck Rental Co.</i> , 239 F.2d 422 (D.C. Cir. 1956).....	28
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013), <i>affirmed</i> 573 U.S. 513 (2014).....	39
<i>Nova Plumbing, Inc. v. NLRB</i> , 330 F.3d 531 (D.C. Cir. 2003).....	33,34,35
<i>Oak Hill</i> , 360 NLRB 359 (2014)	52
<i>Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB</i> , 711 F.2d 348 (D.C. Cir. 1983).....	41
* <i>Olivetti Office USA, Inc. v. NLRB</i> , 926 F.2d 181 (2d Cir. 1991).....	44
<i>Parkwood Development Ctr. v. NLRB</i> , 521 F.3d 404 (D.C. Cir. 2006).....	37
<i>Permanente Med. Grp.</i> , 332 NLRB 1143 (2000)	58
<i>Pub. Serv. Co. of N.M. v. NLRB</i> , 843 F.3d 999 (D.C. Cir. 2016).....	40
<i>R.C. Aluminum Indus., Inc. v. NLRB</i> , 326 F.3d 235 (D.C. Cir. 2003).....	29

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>*Raymond F. Kravis Ctr. for Performing Arts, Inc. v. NLRB</i> , 550 F.3d 1183 (D.C. Cir. 2008).....	28,32,34,35
<i>Reis Viking</i> , 312 NLRB 622 (1993)	43
<i>San Manuel Indian Bingo and Casino v. NLRB</i> , 475 F.3d 1306 (D.C. Cir. 2007).....	38
<i>Serramonte Oldsmobile, Inc. v. NLRB</i> , 86 F.3d 227 (D.C. Cir. 1996).....	50
<i>Shell Oil Co. v. NLRB</i> , 457 F.2d 615 (9th Cir. 1972).....	45,47
<i>Staunton Fuel and Material, Inc.</i> , 335 NLRB 717 (2001)	33,34
<i>Stephens Media, LLC v. NLRB</i> , 677 F.3d 1241 (D.C. Cir. 2012).....	26
<i>Strand Theatre of Shreveport Corp. v. NLRB</i> , 493 F.3d 515 (5th Cir. 2007).....	28,35
<i>Teamsters Local Union No. 639 v. NLRB</i> , 924 F.2d 1078 (D.C. Cir. 1991).....	48
<i>Teamsters Local 688</i> , 302 NLRB 312 (1991)	37
<i>Times Publishing Co.</i> , 72 NLRB 676 (1947)	51
<i>*U.S. Testing Co., Inc. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998).....	42,48

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>United States v. L.A. Tucker Truck Lines</i> , 344 U.S. 33 (1952)	37
* <i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	26
<i>Wash. Gas Light Co.</i> , 273 NLRB 116 (1984)	42
* <i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	37

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	22
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2,21,29,41,45,48,57,58,59,60
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2,21,27,29,40,41,45,48,57,58,59,60
Section 8(f) (29 U.S.C. § 158(f)).....	33,34,35
Section 9(a) (29 U.S.C. § 158(a))	27,28,31,32,33,34,35
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(b) (29 U.S.C. § 160(b)).....	24,31,32,35
Section 10(e) (29 U.S.C. § 160(e))	2,26,36,37,39
Section 10(f) (29 U.S.C. § 160(f)).....	2
Fed. R. App. P.28(a)(8)(A)).....	57

GLOSSARY¹

A.	The parties' Joint Appendix
Act	The National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i>)
AFM	The American Federation of Musicians
Board	The National Labor Relations Board
Br.	The opening brief of CSA to this Court
CSA	The Colorado Symphony Association
DMA	The Denver Musicians Association
IMA	The Integrated Media Agreement
SA.	The Board's Supplemental Appendix

¹ The Board is aware of and seeks to comply with the Court's policy on limiting the use of acronyms. In this case, to avoid confusion, the Board used the acronyms that CSA used in its opening brief.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

The Colorado Symphony Association (“CSA”) petitions for review of, and the National Labor Relations Board cross-applies to enforce, a Board Order issued

against CSA on July 3, 2018 (366 NLRB No. 122). (A.3119-61.)¹ The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a). This Court has jurisdiction over this appeal pursuant to Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely, as the Act places no time limit on those filings. The American Federation of Musicians (“AFM”) has intervened on behalf of the Board.

ISSUES PRESENTED

1. Does substantial evidence support the Board’s findings that CSA violated Section 8(a)(5) and (1) of the Act by refusing to furnish AFM with relevant, requested information, and unilaterally implementing its initial contract proposal without bargaining to a valid impasse.

2. Is the Board is entitled to summary enforcement of the portions of its order remedying its uncontested findings.

¹ “A.” refers to the Joint Appendix, “SA.” refers to the Board’s Supplemental Appendix, and “Br.” refers to CSA’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

AFM has served as the joint collective-bargaining representative for CSA's musicians since at least 2002, with CSA routinely agreeing to be bound by AFM's national media agreements. This case arises from the parties' negotiations for a successor collective-bargaining agreement, during which CSA refused to provide relevant information, unilaterally implemented proposals absent impasse that changed employees' terms and conditions of employment, directly dealt with employees and then implemented those terms, and ultimately, withdrew recognition. AFM filed charges, and the General Counsel issued a complaint alleging the numerous ways that CSA violated its statutory duty to bargain. The judge found merit to the allegations, and the Board upheld all of the judge's findings. The Board's factual findings are as follows.

I. THE BOARD'S FINDINGS OF FACT

A. CSA's Bargaining Relationship with AFM and DMA

CSA is a symphony orchestra based in Denver, Colorado. AFM is an international union that represents musicians who perform in a broad variety of settings. (A.3224.)

CSA has long recognized both AFM and its local affiliate, the Denver Musicians Association, AFM Local 20623 (“DMA” or “local”), as the joint collective-bargaining representatives of its musicians. DMA represents employees with respect to live performances and other local issues, and AFM represents employees with regard to national issues involving the production of electronic media, both symphonic and commercial. (A.3225, 3243, 3248; SA.3, A.1267, 2359-60.)

AFM’s Symphonic Services Division administers AFM agreements covering the employer’s production and release of national symphonic media in various media, e.g., radio, television, and CDs. (A.3224-25 (listing agreements); A.59-64, 79-81, 623-24.) On May 31, 2010, CSA signed AFM’s Symphony, Opera or Ballet Orchestra Integrated Media Agreement (“IMA”), effective from October 1, 2009, to September 30, 2013. (A.3225; A.1804, 1850-52.) CSA had also signed multiple legacy agreements covering recorded audio and audio-visual media that the IMA replaced. (A.3225 & n.10; A.78-79, 101, 117-32, 1854-1950, 2359-60; *see* A.1870, 1951-60.) As with those prior agreements, in signing the IMA, CSA recognized AFM as the exclusive collective-bargaining representative of musicians employed by CSA concerning their wages and other terms and conditions of employment that apply to their work when CSA creates audio and

audio-visual media covered by the agreement. (A.3225; A.1805, art.2; *see* A.97, 522-23.)

Generally speaking, the IMA covers various national or regional releases of symphonic recordings of live performances or archival tapes, so long as the symphony retains ownership of the master and copyrights. That agreement compensates musicians with an up-front payment that is a percentage of their weekly pay scale, plus back-end profit sharing and a pension contribution.

(A.3226; A.1804-05, 1809-12; *see* A.99-100, 159-61, 526-29, 1305-08.) The IMA also provides that CSA will give AFM advance notice of any production or use of recordings not covered by the IMA, including any studio work or other commercial releases, and that CSA will then comply with the wages and terms of the applicable AFM agreement. (A.3227; A.1804-06, art.1(B), 6, 1839, art.19.) Moreover, the IMA reiterates the division of bargaining between AFM and the DMA, and AFM's authority over national-media issues. Thus, the IMA provides that the local (DMA) agreement may not contain terms less favorable to musicians than those contained in the IMA, i.e., a local union may not undercut or waive any IMA term. (A.3225; A.1806, 1849; *see* A.176.)

In addition, AFM's electronic-media services division negotiates and administers non-symphonic agreements ("commercial agreements"), including the Video-Game Agreement. (A.3225) (listing agreements). Those agreements cover

a wide range of other forms of media production and release, including television or radio performances, motion pictures, and video-game soundtracks. While those agreements are typically negotiated with entertainment-industry producers, e.g., for music, film, and video-games, symphonic employers like CSA can and do sign on and work under them. (A.3225; A.68-69, 72, 81-85, 309.) For example, CSA signed onto AFM's Sound Recording Labor Agreement, for production of recorded albums, CDs, and downloads, etc., in 2002, 2005, and 2008, and had performed some recording work under that agreement. (A.3225; A.2101-06.)

Meanwhile, since the 1990s, CSA has signed multiple collective-bargaining agreements with the DMA. The most recent, effective from July 1, 2013, through June 30, 2015, addresses musicians' terms and conditions of employment regarding live performances and other "local issues." (A.3225; 2583-84.) In addition, the DMA agreement provides that the "CSA shall be signatory to all appropriate AFM national recording agreements." (A.3225; A.2611, art.14.1; *see* A.881-84, 965-68.) The local agreement likewise obligates CSA to comply with AFM's national recording agreements when engaging in audio and video recording work not covered by the local agreement. (A.3225; A.2611, art.14.1.)

B. The IMA Expires; CSA Demands Bargaining

After the IMA expired on September 30, 2013, CSA's Chief Executive Officer, Jerry Kern, requested that AFM bargain over an individualized media

contract. (A.3227; A.177, 375, 772.) AFM President Raymond Hair responded that AFM was willing to do so, but first needed to conclude then-pending negotiations with a multi-employer group, the Employer's Media Association, for the IMA's successor. Several months of correspondence ensued wherein Hair tried to convince CSA to participate in multi-employer bargaining or wait until that process had concluded. Hair explained that this was because AFM could not entertain individual proposals until the "national" context and standards were set in the multi-employer IMA negotiations. Kern continued to demand individual negotiations, and stated that CSA would be willing to travel to New York City for that purpose. In February 2014, while again demanding individual bargaining, Kern requested copies of AFM agreements with other symphonies covering similar media work, which AFM provided in March. (A.3227-28; A.2236, 2703-12, 2824, 2827-29; *see* A.177, 182-84, 200, 1250-51.)

Around early April 2014, AFM learned through public sources that CSA had, without notifying AFM, recorded the musical piece "Take the Field" for the Colorado Rockies major-league-baseball team. AFM filed a contractual grievance, alleging CSA had not complied with the IMA regarding that project. (A.3228-29; A.536, 1282-84, 1509-10.) CSA agreed to process the grievance, but claimed that given the months that had passed since the IMA expired, CSA would assume AFM had waived its bargaining rights, allowing CSA to make unilateral changes, unless

AFM promptly provided bargaining dates. (A.3229; A.2839-40.) AFM responded that its prior efforts to initiate bargaining were in good faith, it had not waived any rights, and it remained willing to enter into individualized negotiations with CSA. Finally, AFM noted that since it had responded to CSA's information request, there had been no substantive proposals or discussions. (A.3229; A.2806.)

CSA filed an unfair-labor-practice charge alleging that AFM unlawfully delayed bargaining during the October 2013-June 2014 timeframe. In May 2016, the parties reached an agreement to settle that charge. (A.3239 & n.26; A.2748, 2752-57, 2811.)

C. CSA Makes Its Opening Bargaining Proposal; AFM Requests Information

On June 23, 2014, CSA demanded that AFM be available for bargaining in Denver on or before July 15. CSA also attached its opening proposal for a successor contract; until then, neither party had made any substantive proposals. (A.3230-31; A.2242-48.) The proposal purported to cover all national-media work, including both IMA-covered projects and projects covered by AFM commercial agreements to which CSA, by signing the IMA, had previously agreed to be bound. (A.3230-31; A.2245-48; *see also* A.209-12, 642-45, 798, 1156.)

With CSA's first proposal on the table, in July 2014, CSA and AFM attempted to set a bargaining date and location. Scheduling was difficult on both

sides. Hair could only meet on certain days in New York City, whereas CSA, despite its prior willingness to meet there, preferred Denver. After considerable back and forth, the parties agreed to meet on August 20-21 in Denver. AFM assured CSA that AFM negotiators Deborah Newark and Jay Blumenthal would have full authority to negotiate on AFM's behalf. (A.3231; A.2842-50, 2861, 2867-72; *see* A.183-84, 198-99, 641-42.)

On July 18, AFM responded to CSA's initial contract proposal by requesting information regarding CSA's media plans. Specifically, AFM sought details about CSA's media production plans for the next two symphonic seasons, including the medium (e.g., radio, CD, or television), partners (e.g., distribution, broadcast, or financial), budgets, the types of business opportunities CSA was seeking, what projects would be covered by CSA's proposal for the "Creation/Recording of Soundtracks," and whether CSA had contracted for such projects in the past, or had contracts or plans for future projects. (A.3231; A.2249-50.) AFM requested that information to understand what concrete media plans CSA might apply to its proposal and to help AFM present a counter-proposal. (A.3231; A.212-18, 645, 800-02, 1606.)

CSA provided limited information, but asserted that information about its media plans was confidential. Before CSA would provide a complete response, it asked AFM to execute its proposed confidentiality agreement which provided that,

among other things, it could seek “injunctive relief and monetary damages” upon a breach by AFM. (A.3231-32; A.2251, 2255, ¶12.)

Over the ensuing weeks, CSA’s and AFM’s attorneys exchanged confidentiality-agreement proposals. AFM’s initial modification to CSA’s proposed confidentiality agreement included language that could be read to include monetary damages. (A.3232; 2849-53, ¶12.) That inclusion was inadvertent and AFM promptly corrected it in its next proposal. (A.3232; A.222-23, 1583-84, 1604-06, 2260-65, 2855-59.) AFM signed an agreement which limited access to the information, limited the use of the information to bargaining, and provided injunctive relief for a breach. (A.3232, 3250; A.2260-65.) Ultimately, the parties were unable to agree on the remedies provision. CSA insisted on “monetary damages, in addition to any and all other remedies permitted by law,” but AFM refused because it could not afford to risk a damages lawsuit if CSA lost a business opportunity and blamed AFM. Accordingly, CSA did not provide AFM with the requested information. (A.3232; A.221-23, 804-06, 1584, 2266-68, 2271-74, 2857-59.) CSA counsel Denise Keyser and CEO Kern were unaware of any instance where AFM had released information in violation of a confidentiality agreement, only that it had once contacted their business partner (the Colorado Rockies) based on public information. (A.3232; A.1281-84, 1509-10.)

D. The August 20 Bargaining Session

On August 20, the parties met in Denver as planned for their first bargaining session. The session began at 12:30 p.m. because AFM requested time to meet that morning with CSA musicians. (A.3232 & n.19; A.2869; *see* A.648-50, 1193-94.) Newmark and Blumenthal re-confirmed that they were authorized to negotiate an agreement on AFM's behalf. (A.3232-33; A.649-50.) Blumenthal reiterated AFM's need for the requested information to evaluate CSA's proposal, and CSA counsel Keyser insisted on the confidentiality agreement with the monetary-damages clause before CSA would provide the information. (A.3233; A.231, 479, 648-51, 2273-75.)

Deadlocked on the confidentiality issue, Blumenthal and Newmark turned the discussion to CSA's contract (media) proposal. Newmark walked through the proposal, asking what CSA meant by various terms, what work the proposal would cover, and how CSA would implement its terms. (A.3233; A.231-38, 433, 651-55, 1493, 2883-85.) Kern described CSA's proposal as essentially that CSA would do whatever media projects it wanted to do, subject to its musicians' approval, not AFM's. Keyser asked if AFM had a counter-proposal, but AFM was unable to respond meaningfully absent the requested information. (A.3233; A.231-34, 238-40, 433, 652, 655, 1206, 1211-12, 1216-17, 2881-83.)

The session ended at 3:50 p.m., with AFM reiterating its need for the requested information and inability to present a counter proposal without it, and CSA reiterating that it would not provide the information without a confidentiality agreement that included a monetary-damages clause. When Keyser suggested that the parties further discuss the confidentiality agreement, Blumenthal stated that this was a question for the parties' lawyers. (A.3233; A.239-40, 479, 659-60, 1195, 1213, 1216, 2889-93.)

The next morning, Keyser and Blumenthal again discussed the confidentiality agreement; neither side was willing to change its position. They agreed to cancel that day's bargaining session, and that the parties' attorneys would discuss the next steps. (A.3233; A.239-40, 659-60, 1217-18.)

E. AFM Attempts to Revive Bargaining; CSA Implements Its Initial Bargaining Proposal

In late August, AFM attorney Patricia Polach and CSA attorney Keyser corresponded over further bargaining dates and the outstanding information, which Polach reiterated was essential to meaningful negotiations over CSA's June proposal. Polach also maintained that the confidentiality agreement that AFM had already signed was sufficient. Keyser rejected Polach's proposal of dates in mid-September in New York City, where CSA had previously been willing to meet. Keyser also stated that the last bargaining session was unproductive due to AFM

not presenting a counter-proposal, that there was no reason to meet again until AFM presented one, and that AFM should be able to proceed without the requested information. (A.3233-34; A.2273-74, 2760-61.)

Around the same time, Newark, Blumenthal, Hair, and AFM Executive Board Member Tino Gagliardi met with CSA musician Justin Bartels. At Hair's request, Bartels agreed to talk to Kern to get CSA back to the table. Hair expressed concern about the severity of CSA's opening proposal, and that the dispute over the confidentiality agreement was delaying bargaining. Hair reiterated his willingness to bargain with CSA about symphonic media. (A.3234 & n.21; A.354, 807-10, 847-49, 1537, 1544-46, 1557-58.) The next day, Bartels spoke to Kern, relaying Hair's message that AFM was willing to bargain over symphonic media, but adding that Hair was unwilling to bargain over commercial media. (A.3234 & n.21; A.1476-77, 1542-43.)

On October 20, Keyser informed AFM that CSA was implementing its June 23 contract proposal without engaging in further bargaining. After one bargaining session—which had stalemated over the terms of the confidentiality agreement related to the requested information—Keyser claimed that CSA had given AFM “a more than reasonable” opportunity to bargain. While Keyser acknowledged that the parties had only bargained for an “unproductive” half-day, she blamed that on

AFM not presenting a counter-proposal, and its officials' purported lack of authority to reach an agreement. (A.3234; A.2275-76.)

Soon thereafter, CSA began doing commercial media projects under its unilaterally implemented proposal. In December 2014, the negotiations were completed for the new multi-employer IMA. (A.3234-35.)

F. The Parties Resume Bargaining; AFM Makes Three More Information Requests

In March 2015, at Hair's request, DMA President Pete Vriesenga arranged a meeting between himself, Kern, and Hair in Denver. Hair gave Kern a copy of the new multi-employer IMA, which Kern later stated did not meet CSA's needs. Both men expressed a willingness to restart negotiations, but they remained at odds over AFM's information request and whether the confidentiality agreement required a monetary-damages clause. (A.3235; A.453, 570-72, 807-17, 1481-82, 1521-24, 2277.) Nonetheless, the parties agreed to resume bargaining on June 3-4 in Denver. (A.3236; A.820-21, 825-26, 2721, 2894.)

On June 3, the parties met in Denver. AFM attorney Polach reiterated the importance of the outstanding information requests and made AFM's second information request, seeking updated information regarding CSA's media projects. Polach also explained that CSA's proposal threw out the IMA's rule and structure, but expressed hope that the parties could resolve their differences, as the AFM had

done when it successfully bargained over similar proposals from other symphonies. (A.3237; 266-67, 270-71, 277, 670-72, 957-58, 1299, 1573-75, 1629-33.)

Polach then presented AFM's opening contract proposal, which used the expired IMA as a starting point. The proposal modified the IMA in ways favorable to CSA, but CSA rejected it. (A.3237; A.257-64, 272, 454, 674-75, 2283-2334.)

Polach replied that AFM remained interested in finding common ground and was willing to discuss ideas for media work. (A.3237; A.272-79, 282, 680-81, 1577, 1580, 1636-37.) Keyser asked if AFM would consider a "condensed" version of CSA's proposal if it offered more up-front money to musicians for their work on media projects. Polach replied that AFM might be willing to agree if the CSA provided enough money for the musicians, but that she needed specifics. (A.3238; A.673, 680-81, 1580, 1583.)

On June 4, Polach and Keyser met before bargaining re-convened and discussed the confidentiality-agreement dispute over the outstanding information. Polach indicated that AFM would accept a partial response without waiving its right to complete information. The parties, however, remained stalemated because AFM was unwilling to agree to a monetary-damages clause as CSA insisted before it would provide more information. (A.3238; A.281, 1241-44, 1255-56, 1584-90.) Polach then made AFM's third information request, orally asking for "budget

projections regarding possible media income,” a request she repeated in writing. (A.3238; A.2339, ¶ 3.)

During the full bargaining session, Kern and Polach continued to discuss AFM’s stated flexibility to negotiate media terms specific to CSA in exchange for additional compensation to musicians, as AFM had negotiated with other symphonies. (A.3238; A.680-81, 1589-90.) Kern asked if Polach would negotiate a short and simple contract about commercial media, and Polach said she could do so only if CSA provided requested information about its media plans. (A.3238; A.1114, 1276, 1589-93.) The session ended without plans to reconvene, but Keyser and Polach agreed to continue discussing what information CSA would provide. (A.3238; A.684-85.)

On June 17, Polach noted by letter to CSA that AFM had learned (but not through CSA) about new media projects involving CSA, which were covered by AFM’s prior information requests, such as Amos Lee at Red Rocks (discussed below at p.19.) AFM supplemented its prior requests to seek information about those projects, thus making its fourth information request, and suggested that the parties set dates for further bargaining. (A.3239; A.2339.) CSA responded by providing some public information about some of those projects. Keyser asserted that AFM had requested that and other information as a “tactic” to avoid bargaining, and reiterated that CSA would not provide complete information

absent a confidentiality agreement with a monetary-damages clause. CSA did not provide additional information. (A.3239 & n.25; A.2342-44, 2350.)

G. CSA Bargains Directly with Musicians

By spring of 2015, CSA had begun meeting directly with the DMA Negotiating Committee—comprised of CSA unit musicians authorized to bargain on the DMA’s behalf—to re-negotiate the local agreement that was set to expire on June 30. (A.3236, 3239-40.) AFM had not authorized those employees to bargain for AFM. From about April to June, CSA and the Negotiating Committee met to bargain over the application of CSA’s implemented media proposal, including how substitute and extra musicians would be compensated for work on media projects. (A.3240.)

In August and September, CSA met directly with employees to bargain over their terms and conditions of employment for audio-visual media production, including break times, scheduling, and service credits for recording sessions. CSA proposed, and the employee Negotiating Committee accepted, new language for the local agreement that changed those terms and conditions of employment, and deleted the requirement that CSA comply with the relevant AFM agreement. The Negotiating Committee announced the change to musicians on September 7. Accordingly, the musicians’ studio-recording session work was thereafter scheduled and credited under the new language. (A.3240-41.) Moreover, CSA

compensated musicians on those projects pursuant to its implemented media proposal, so musicians did not receive front-end, back-end, or residual payments as would have been due under the relevant AFM commercial agreements (Theatrical Motion Picture Agreement or Video Game Agreement). (A.3241-42.)

The foregoing terms and conditions of employment regarding the musicians' work on media projects fell within AFM's representative jurisdiction and were subject to its media agreements. CSA did not notify AFM or afford it an opportunity to participate when it bargained directly with the employees over, and made changes to, those terms. (A.3242.)

H. AFM Produces a Video Game and Music Albums with Wages and Working Conditions Different from those in the IMA

From early 2014 to 2015, including while the parties were bargaining over a successor IMA, CSA recorded music for a video game and three albums. CSA did not notify AFM of those media projects in advance as the IMA required, or in response to AFM's outstanding requests seeking information on such projects since July 2014. CSA compensated musicians for those projects on terms different from those in the IMA or applicable AFM agreement.

Specifically, on February 5, 2014, CSA musicians recorded a soundtrack for an interactive video installation called *Oh Heck Yeah*, which was publicly displayed that summer in downtown Denver. For that work, musicians received

only their weekly salary and not the additional compensation for video-game recording work required under the applicable AFM Video Game Agreement. CSA retained the copyrights to the material, but it was made available for unrestricted public download. (A.3243-44.) AFM learned about the project from employees, not from CSA, around August 2014. (A.3254.)

In March 2014, CSA musicians performed the symphonic pieces *Missa Mirabilis* and *Dona Nobis Pacem*, and CSA recorded the rehearsals and performances. CSA sold the master recordings and copyrights to a record company, which released the recordings as an album. AFM learned about this project in May 2015, when the DMA's president saw it for sale and informed AFM. (A.3244-45.)

On about August 1, 2014, CSA musicians performed at a live concert. CSA recorded the rehearsal and performance. On May 8, 2015, CSA contracted with a record company for the sale of the copyright and release of an album entitled *Amos Lee Live at Red Rocks with the Colorado Symphony*. AFM learned about the recording and album in June 2015 through press releases. (A.3245.)

On about July 13-14, 2015, CSA musicians did recording sessions with folk musician Gregory Isakov. CSA sold the master recordings and copyrights to a record company, which released the recordings as an album in 2016. AFM learned of the recording through press reports. (A.3246.)

CSA compensated musicians for the three album releases through rates set in the proposal CSA implemented in October 2014. As a result, musicians did not receive front-end session payments, residual payments, and pension payments, as would be required under the applicable AFM agreements. CSA did not seek or obtain AFM approval before engaging in the foregoing projects. (A.3244-46.)

I. CSA Rejects AFM’s Final Information Request and Withdraws Recognition from AFM

On June 16, 2016, after learning of the foregoing albums, AFM sent CSA its fifth and final information request seeking detailed information about those projects, including copyright ownership, partners, budgets, and payments to musicians. AFM wanted to determine if CSA, in working on those projects, had complied with the IMA or other applicable AFM agreements. AFM stressed that information about those projects was encompassed by its pending information requests and sought similar information about any additional media projects that CSA had not reported. (A.3242; A.2353-56; *see* A.290-95, 332-34.)

On June 17, CSA refused to supply the requested information, asserting for the first time that AFM was not the CSA musicians’ certified-bargaining representative. CSA stated that unless AFM provided evidence of its majority-employee support, it had “no arguable entitlement to request the information.” (A.3242-43; A.2357.)

On June 22, AFM responded that CSA's assertion was surprising given that it had, since October 2013, demanded negotiations with AFM over a successor IMA. AFM also noted that CSA's position was contrary to its "[decades-]long history of recognizing [AFM] as bargaining representative of its musicians with respect to the media terms and conditions covered by the many [AFM] agreements to which CSA has been a party." (A.3243; A.2359-60.) As AFM noted, CSA had signed, accepted, or adopted many agreements over the years, through which it had recognized AFM as its musicians' bargaining representative. (*Id.*) (listing agreements.) In response, CSA reiterated its position that AFM is not the collective-bargaining representative of CSA musicians. (A.3243; A.2408.)

II. PROCEDURAL HISTORY

A. The Complaint and the Administrative Law Judge's Decision

Acting on unfair-labor practice charges filed by AFM, the Board's General Counsel issued a complaint alleging that CSA violated Section 8(a)(5) and (1) of the Act by refusing to provide AFM with relevant, requested information; unilaterally implementing its opening contract proposal without bargaining to a valid impasse; unilaterally changing bargaining-unit musicians' terms and conditions of employment for electronic and recorded media production without notifying AFM and affording it an opportunity to bargain; bypassing AFM and dealing directly with bargaining-unit musicians about their wages and other terms

and conditions of employment for national media projects and then unilaterally changing their working conditions based on those direct dealings; and withdrawing recognition from AFM absent evidence it had lost majority-employee support. (A.3223; A.1769.) On February 14, 2017, after a hearing, the administrative law judge issued a decision and recommended order finding that CSA had violated the Act as alleged. (A.3223-61.)

B. The Board's Conclusions and Order

On July 3, 2018, the Board (Members Pearce and McFerran; Member Kaplan dissenting in part), affirmed the judge's rulings, findings and conclusions, amended the remedy, and adopted the recommended order as modified.² (A.3219-21 & nn.3-5.) To remedy those violations, the Board's order requires CSA to cease and desist from the violations found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (A.3220.) Affirmatively, the Board's order directs CSA to timely furnish AFM with the requested information; notify, and on request, bargain with AFM before implementing unilateral changes; rescind the unilateral changes; make unit employees whole for any loss of earnings and

² Member Kaplan dissented only to the findings that CSA unlawfully refused to provide information to AFM, and unlawfully made unilateral changes involving one media project. (A.3219 n.3.)

other benefits suffered as a result of the unilateral changes; reimburse employees for any expenses resulting from the failure to make required benefit-fund payments or contributions; compensate affected employees for any adverse-tax consequences of receiving a lump-sum payment award; recognize and, on request, bargain with AFM; and post a remedial notice. (A.3220-21.)

SUMMARY OF ARGUMENT

1. Substantial evidence and well-settled precedent support the Board's contested findings that AFM is the lawfully recognized collective-bargaining representative with whom CSA has a duty to bargain, and that CSA violated that duty by refusing to provide AFM with requested, relevant information, and by unilaterally implementing its opening contract proposal absent a valid bargaining impasse. CSA defends against those findings by claiming it never had a valid bargaining relationship with AFM. In doing so, CSA offers its own view of the facts and relies on discredited testimony, but fails to prove, as it must, that the Board's contrary view was unsupported or its credibility determinations were hopelessly incredible.

Substantial evidence shows that CSA had a duty to bargain with AFM regarding national media. CSA, in its position statement submitted to the Board, admitted to a bargaining relationship with AFM—an admission fully consistent with the parties' extensive bargaining history, including CSA's voluntarily and

repeatedly signing AFM agreements recognizing AFM as the exclusive-bargaining representative. Moreover, CSA, during events preceding this appeal, certainly behaved as though AFM was the lawful representative by filing unfair-labor-practice charges against AFM alleging it was violating its duty to bargain.

CSA ignores that evidence and attempts to evade its obligation by claiming that, years after it first signed a collective-bargaining agreement with AFM, AFM was never the lawfully recognized representative because it purportedly lacked majority status at the time of recognition. The Board properly rejected those stale claims, finding them untimely under Section 10(b) of the Act, which bars any challenge to an established bargaining relationship based on a claim more than 6 months old that a union lacked majority status at the inception of the bargaining relationship. CSA's attempt to evade the Section 10(b) bar inexplicably relies on the standard for establishing bargaining relationships in the construction industry—a standard that is inapplicable here because CSA is indisputably not a construction-industry employer.

CSA violated its duty to bargain and the Act by refusing to provide AFM with relevant information regarding CSA's opening contract proposal. CSA concedes relevance, but claims confidentiality. CSA, however, undermined that claim by refusing to provide all of the information until AFM signed a confidentiality agreement that provided for monetary damages liability. The Board

found that demand was unreasonable because AFM had already signed an agreement that would protect CSA's interests, and CSA had no basis to believe AFM would violate confidentiality. The evidence does not support CSA's claim that AFM's purported bad faith in bargaining for an accommodation excused CSA's continued refusal to provide the information.

Under settled precedent, CSA's unlawful refusal to provide information precluded a valid bargaining impasse, rendering unlawful its unilateral implementation of its opening contract proposal. AFM did not engage in any bad-faith bargaining that would privilege CSA's unilateral conduct. After an initial delay, AFM came to the table willing and ready to bargain.

2. CSA's brief does not address, and it has therefore waived, any challenge to the Board's findings that CSA further violated its statutory duty to bargain by unilaterally recording and releasing media projects without applying the applicable AFM agreement or affording AFM notice and an opportunity to bargain; directly dealing with employees and changing their terms and conditions of employment regarding media work without affording AFM notice and an opportunity to bargain; refusing to comply with AFM's final information request; and withdrawing recognition from AFM absent evidence that it had lost majority-employee support. The Board is, therefore, entitled to summary enforcement of the portions of its order remedying those uncontested findings, so long as the Court

agrees that AFM was the lawfully recognized bargaining representative with whom CSA was obligated to bargain.

STANDARD OF REVIEW

The Court accords adjudications by the Board “a very high degree of deference.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Board’s findings of fact are “conclusive” when supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002); *accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). And this Court accepts credibility determinations unless they are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted). Thus, the “Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 772 (D.C. Cir. 2012) (quoting *Bally’s*, 646 F.3d at 935).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT CSA RECOGNIZED AFM AS ITS EMPLOYEES’ COLLECTIVE-BARGAINING REPRESENTATIVE, THEN VIOLATED THE ACT BY REFUSING TO PROVIDE INFORMATION TO AFM, AND BY UNILATERALLY IMPLEMENTING ITS CONTRACT PROPOSAL

A. Substantial Evidence Supports the Board’s Finding that CSA Had a Duty To Bargain with AFM

The record evidence amply supports the Board’s finding that CSA had long recognized AFM as its employees’ bargaining representative over national media, and, accordingly, was obligated to bargain with AFM about those terms and conditions of employment. The Board also reasonably found that CSA’s challenge to AFM’s representative status is time-barred, and properly rejected CSA’s claim that its recognition of AFM was illegal.

1. An employer that voluntarily recognizes a union as joint collective-bargaining representative must bargain with that union

Section 8(a)(5) of the Act makes it an unfair-labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees” 29 U.S.C. § 158(a)(5).³ Section 9(a) of the Act, 29 U.S.C. §159(a), requires

³ A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1), 29 U.S.C. § 158(a)(1), which makes it an unfair-labor-practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

employers to bargain with unions that have been “designated or selected for the purposes of collective bargaining by the majority of the employees” in an appropriate unit. Under Section 9(a), a union may attain representational status through either Board certification or, as happened here, an employer’s voluntary recognition through a collective-bargaining agreement; the duty to bargain exists either way. *See Raymond F. Kravis Ctr. for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1188-89 (D.C. Cir. 2008); *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 519-20 (5th Cir. 2007); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994). *See also Musical Arts Assoc. v. NLRB*, 466 F. App’x 7, 8-9 (D.C. Cir. 2012). A union that has been so recognized “is entitled to a presumption of majority support during and after the contract period, and the agreement need not expressly reflect the union’s majority status.” *Strand Theatre*, 493 F.3d at 519-20 (sufficient that contract recognized union as “exclusive” bargaining representative); *accord Raymond F. Kravis*, 550 F.3d at 1188-89 (same). Under a Section 9(a) relationship, the duty to bargain continues after contract expiration, unless and until the union is shown to have actually lost majority support. *Allied Mech. Svcs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

Further, it is long settled that an employer may recognize multiple unions as the joint collective-bargaining representatives of its employees. *See Musical Arts Assoc.*, 466 F. App’x at 8-9; *NLRB v. Nat’l Truck Rental Co.*, 239 F.2d 422, 425

(D.C. Cir. 1956). The parties' bargaining history and contractual language, including union-recognition clauses, informs the Board's determination of whether an employer has recognized multiple unions as joint-bargaining representatives. *Musical Arts Assoc.*, 466 F. App'x at 8-9. Accordingly, an employer violates Section 8(a)(5) and (1) by refusing to bargain with a union that it has voluntarily recognized as its employees' joint-bargaining representative. *Musical Arts Assoc.*, 466 F. App'x at 8-9; *R.C. Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 241-43 (D.C. Cir. 2003).

2. Substantial evidence supports the Board's finding that CSA recognized AFM as joint-bargaining representative

Applying the foregoing principles, the Board found (A.3248) that CSA's admissions and conduct in litigating this case, the parties' bargaining history, the recognition provisions in AFM agreements that CSA signed, and the language in the local agreement relating to AFM, all show that CSA recognized AFM (and its local, the DMA) as its employees' joint bargaining representatives. Indeed, as the Board noted, in its position statement submitted to the Board during the investigation of the underlying unfair-labor-practice charges, CSA admitted that it has a collective-bargaining relationship with two unions that represent "the same" CSA musicians: AFM, which "has an agreement with CSA concerning 'national' issues like electronic media," and the DMA, which "represents employees with

respect to live performances and other ‘local’ issues.” (A.3248; SA.3.) As the Board observed, CSA’s admission is consistent with record evidence concerning CSA’s long history of recognizing and bargaining with AFM about national media. This includes: CSA’s decision to sign or accept multiple AFM agreements, including the IMA; CSA’s recognition in the IMA, which CSA signed in 2010, of AFM as the “exclusive bargaining representative of musicians” employed by CSA concerning the wages, terms, and conditions that apply when CSA creates audio and audio-visual media covered by the IMA; and CSA’s commitment in the local agreement to be a signatory to all appropriate AFM national-recording agreements. (A.3248; A.1805, art.2; *see* pp.4-6, above.)

Moreover, CSA confirmed its recognition of AFM when it demanded that AFM bargain for a successor agreement to the IMA after it expired in 2013, and filed a refusal-to-bargain charge with the Board alleging that AFM had not fulfilled its duty to bargain. (A.3227-39 & n.26; *see* pp.6-8, above.) Indeed, CSA’s sudden about-face regarding AFM’s status rings hollow given its not-so-distant claim that AFM allegedly was shirking its collective-bargaining duties. And, as shown (pp.28-29), the Board with judicial approval may rely on such evidence in finding that CSA recognized AFM as joint collective-bargaining representative. *See Musical Arts Assoc.*, 466 F. App’x at 8-9 (parties’ bargaining history and recognition provisions in AFM agreements the symphony signed supported

determination that symphony voluntarily recognized AFM and was therefore bound to bargain with it), and cases cited at pp.28-29.

Thus, substantial evidence shows that AFM was the lawfully recognized bargaining representative. When the IMA expired, therefore, AFM enjoyed a rebuttable presumption that it remained the employees' representative, and absent evidence that it had lost majority support, which CSA failed to show, CSA had a duty to bargain with AFM.

3. Section 10(b) precludes CSA's untimely challenge to AFM's representative status, and CSA's recognition of AFM through the IMA was not void or unlawful

CSA does not dispute that it consistently recognized and bargained with AFM over national media, including by signing the IMA in 2010, or that settled law (*see* p.28) holds that such voluntary recognition creates a duty to bargain. Instead, CSA challenges the legitimacy of its recognition, years after the fact, claiming that AFM lacked majority-employee support at the time of recognition,

allowing CSA’s refusal to recognize and bargain with AFM. (Br.47-48.) As the Board found (A.3248), Section 10(b) of the Act bars that claim.⁴

When considering challenges to a union’s majority support in the context of a voluntary Section 9(a) relationship, the Board has consistently held that Section 10(b) “precludes an employer from defending against a refusal-to-bargain allegation on the basis that its initial recognition of the union, occurring more than six months prior to the filing of unfair labor practices raising the issue, was invalid or unlawful.” *Alpha Assoc.*, 344 NLRB 782, 782-84 (2005). *Accord Raymond F. Kravis*, 550 F.3d at 1189-90 (Section 10(b) “requires that any challenge to the initial majority status of a union be made within six months of recognition”). As the Board observed, that rule certainly applies here, where for several years (and at a minimum since signing the IMA in 2010) CSA has recognized AFM as the exclusive collective-bargaining representative of CSA musicians regarding national media, and has demanded that AFM bargain with CSA about those issues. (A.3248-49.) Yet, it was several years after that recognition—in June 2016, well

⁴ Section 10(b) provides, in relevant part, that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board” 29 U.S.C. § 160(b).

after Section 10(b)'s six-month period had expired—when CSA first disputed AFM's representative status.

CSA errs in claiming that Section 10(b)'s time-bar is inapplicable because the IMA, upon which its recognition of AFM was partly based, was “void” on its face.⁵ Specifically, CSA claims that because the IMA lacks “[Section] 9(a) [recognition] language” and because AFM “failed to present any evidence of majority support” when the agreement was signed, AFM was never the employees’ lawfully recognized representative. (Br.48.) CSA, however, mistakenly finds this claim on precedent addressing the special standard used only for construction-industry employers, whose relationships with unions are governed by an entirely different section of the Act, Section 8(f), 29 U.S.C. §158(f). (Br.48-50) (citing *Colorado Fire Sprinkler, Inc. v. NLRB*, 801 F.3d 1031, 1039-40 (D.C. Cir. 2018); *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 533, 536-37 (D.C. Cir. 2003); *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 719-20 (2001)).

Section 8(f) provides an exception to the usual Section 9(a) majority-recognition requirement, whereby a construction-industry employer may recognize a union regardless of how many employees support it, and even before the

⁵ In addition to the IMA's recognitional language, the Board found that the parties' series of contracts and a decades-long pattern of bargaining also demonstrated lawful recognition (A.3248; see pp.4-8, 29-31, above), facts that CSA largely ignores.

employer has hired any employees. *Colorado Fire Sprinkler*, 801 F.3d at 1035-36; *Allied Mech.*, 668 F.3d at 765-66. Unlike a Section 9(a) relationship, a Section 8(f) relationship is terminable at will upon expiration of the current agreement, unless the parties have in the meantime converted to a Section 9(a) relationship. *Id.* A construction-industry employer may convert its Section 8(f) relationship with a union into one governed by Section 9(a) if it obtains a “written agreement” that “unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer’s recognition was based on the union’s having shown, or having offered to show, an evidentiary basis of its majority support.” *Staunton Fuel*, 335 NLRB at 717, 719-20. Those requirements, which CSA finds lacking in the IMA, are applicable only to employers seeking Section 9(a) (or majority) recognition *in the construction industry*. See *Raymond F. Kravis*, 550 F.3d at 1189 (“[E]xcept in the construction industry . . . the agreement need not expressly reflect the Union’s majority status”) (quoting *Strand Theatre*, 493 F.3d at 520); *Nova Plumbing*, 330 F.3d at 534 (describing Section 8(f) as “a limited exception” due to “the unique nature of the [construction] industry”). See also *Colorado Fire Sprinkler*, 801 F.3d at 1035-40; *Allied Mech.*, 668 F.3d at 766, 768-69; *Staunton Fuel*, 335 NLRB at 717, 719-20.

CSA is therefore simply wrong in claiming (Br.48-51, 53-54) that this Court’s precedent, particularly *Nova Plumbing*, bars a finding of Section 9(a) representative status absent “actual proof,” stated in the agreement or otherwise, that the union enjoyed majority support when the agreement was signed. As this Court has explained, such a view “reflects an overreading of *Nova Plumbing*,” whose “precise holding” is simply that “an employer and union *in the construction industry* are not free to ‘convert’ an 8(f) relationship into a 9(a) bargaining relationship ‘that lacks support of a majority of employees.’” *Allied Mech.*, 668 F.3d at 766, 768-69 (emphasis added) (quoting *Nova Plumbing*, 330 F.3d at 537). Thus, *Nova Plumbing* merely reflects the narrower principle—inapplicable here—that contract language, standing alone, should not suffice to establish 9(a) status in the construction industry, “‘at least where . . . the record contains strong indications that the parties had only a section 8(f) relationship.’” *Id.* at 766 (emphasis removed) (quoting *Nova Plumbing*, 330 F.3d at 537). *See Strand Theatre*, 493 F.3d at 519-20 (rejecting claims that *Nova Plumbing* and other “8(f) cases” are “equally applicable outside the construction industry” and a “non-construction union must claim 9(a) status through the same process as an 8(f) construction union”). It is undisputed that CSA is not a construction-industry employer, and it follows that the IMA is not void for its purported failure to meet the recognition requirements applicable only to that industry. Thus, the well-

settled Section 10(b) bar applies here, and CSA cannot challenge its recognition of AFM. *See Raymond F. Kravis*, 550 F.3d at 1189 (Section 10(b) barred non-construction employer's untimely challenge to union's representative status on the ground that it lacked majority support at the time of recognition).

CSA's remaining arguments regarding the validity of AFM's bargaining-representative status are meritless. It objects, for example, that neither "AFM [nor the contract through which CSA recognized AFM] was voted on by CSA musicians." (Br.47.) That ignores settled law (p.28) that an employer may attain Section 9(a) representational status through either a Board certification (e.g., after an election), or an employer's voluntary recognition through a contract, as happened here. The duty to bargain applies either way.

Finally, the Court need not be detained by CSA's argument that the IMA was void because the bargaining unit recognized by CSA contained "zero employees" when it executed the IMA. (Br.47-48.) It is undisputed that CSA employed musicians at that time. CSA claims that none of them were performing IMA-covered work upon recognition. (Br.51.) The Board reasonably rejected that strained reading of the IMA-recognition clause, which, like the other AFM agreements signed by CSA, stands for the unremarkable proposition that when CSA seeks to have its *existing* musicians perform work on national-media projects,

CSA is obligated to comply with the terms of the applicable AFM agreement.

(A.3248 & n.35.)

4. The Court lacks jurisdiction to consider CSA's claim that the IMA violates federal anti-trust law

CSA, admitting that “this argument was not raised before the Board,” claims for the first time in this proceeding that the IMA violates the Sherman Act, 15 U.S.C. § 1. (Br.54-58 & n.9.) That claim is not properly before the Court. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). A reviewing court is thus jurisdictionally barred from deciding claims not properly presented below. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *Parkwood Development Ctr. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2006). Section 10(e) accords with the bedrock principle that “[s]imple fairness” requires “that courts should not topple over administrative decisions unless the administrative body . . . has erred against objection made at the time appropriate under its practice.” *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

CSA wrongly asserts that Section 10(e)'s bar on judicial review of claims not presented to the Board is inapplicable here because the Board lacks

“jurisdiction” to decide matters implicating the Sherman Act. (Br.54 n.9.) That argument lacks merit. The Board, in exercising its jurisdiction to find and remedy unfair-labor practices, routinely addresses arguments that parties timely raise based on statutes other than the Act, including the Sherman Act. *See Teamsters Local 688*, 302 NLRB 312, 313-14 (1991) (finding no evidence supported claim that federal anti-trust law privileged union’s refusal to provide information); *Armored Transfer Srv.*, 287 NLRB 1244, 1251-52 (1988) (finding strikers not part of conspiratorial combination in restraint of trade in violation of Sherman Act); *Hotel & Rest. Emps. Local 355 (Doral Beach Hotel)*, 245 NLRB 774, 774 n.1, 775-76 (1979) (rejecting claim that Sherman Act privileged union’s refusal to provide information). *See also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144, 147-50 (2002) (reiterating Board’s obligation to consider other federal statutes and policies and reversing Board’s determination that Immigration Reform and Control Act did not prevent remedial backpay award to undocumented workers); *NLRB v. Iron Wrkrs Local 229*, No. 17-73210, 2019 WL 5539505, at *1, 4 (9th Cir., Oct. 28, 2019) (Board properly considered and rejected arguments premised on Religious Freedom Restoration Act); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1318-19 (D.C. Cir. 2007) (agreeing with Board that Indian Gaming Regulatory Act did not prevent Board from asserting jurisdiction over an Indian casino).

In such circumstances, this Court will review *de novo* the Board's interpretation of the other statute, rather than hold, as CSA wrongly suggests, that the Board lacks jurisdiction even to consider another statute. *Hoffman Plastic*, 535 U.S. at 144; *Iron Wrkrs. Local 229*, 2019 WL 5539505, at *2; *San Manuel Indian Bingo*, 475 F.3d at 1312. Thus, had CSA timely raised its anti-trust concerns to the Board, it could have considered them. CSA's failure to do so deprived the Board of an opportunity to address an alleged issue involving the Act and another statute, and deprived the Court of the Board's views as the agency charged with developing and applying federal labor law.

Moreover, the fact that an objection involves another statute does not itself constitute "extraordinary circumstances" that excuse the failure to bring the objection to the Board, as this Court has recognized. *See, e.g., Marquez Bros. Enter., Inc. v. NLRB*, 650 F. App'x 25, 27 (D.C. Cir. 2016) (holding that "typical NLRA exhaustion doctrine [under Section 10(e)] applies" to bar challenge to validity of Acting General Counsel's service brought under the Federal Vacancies Reform Act). *See generally Int'l Ladies' Garment Workers' v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (constitutional due-process argument forfeited under Section 10(e)); *Ampersand Pub'g, Inc. v. NLRB*, 2017 WL 1314946, at *2 (D.C. Cir. 2017) (same regarding First Amendment argument). CSA overreads (Br.54 n.9) this Court's decision in *Noel Canning v. NLRB*, as broadly shielding from

Section 10(e)'s application any belated arguments involving other statutes. 705 F.3d 490 (D.C. Cir. 2013), *affirmed* 573 U.S. 513 (2014). That case stands for the much narrower proposition—inapplicable here—that challenges to the Board's lack of a valid quorum, and consequent lack of authority to take any action at all, fall within the "extraordinary circumstances" exception to Section 10(e)'s exhaustion requirement. *Id.* at 496-97.

B. Substantial Evidence Supports the Board's Finding that CSA Unlawfully Failed To Provide AFM with Relevant Information

Five times—once in July 2014, three times in June 2015, and once in June 2016—AFM requested information about future-media projects that was indisputably relevant to its understanding of CSA's bargaining proposal and critical to AFM's ability to bargain meaningfully over that proposal. Each time, CSA refused to comply. Before the Court, CSA does not dispute the relevancy of the requested information, but instead asserts that its confidentiality interest in this information outweighs AFM's need for it. As shown below, the Board reasonably found that CSA could not lawfully condition turning over that information on

AFM signing a confidentiality agreement that would subject AFM to monetary-damages liability in the event of a breach.⁶

1. An employer violates the Act by refusing to provide the union with information relevant to its duty to bargain

An employer's duty to bargain in good faith under Section 8(a)(5) of the Act includes the obligation "to provide information that is needed by the bargaining representative for the proper performance of its duties." *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967)). Accordingly, an employer's failure to provide relevant information violates Section 8(a)(5) and (1). *Acme Indus. Co.*, 385 U.S. at 436-39.

The critical question in determining whether information must be produced is typically that of relevance to the union's bargaining duties. Here, CSA does not dispute that the requested information regarding its future media plans was relevant and, thus, has waived that argument. *See* cases cited at p.57. In any event, substantial evidence supports the Board's finding that the requested information was relevant, given that the Board's "relevancy-based, pro-disclosure standard . . . allows a union to request specific information to verify a company's stated

⁶ CSA did not rely on confidentiality concerns when it rejected the June 2016 information request but instead unlawfully claimed that AFM was not the bargaining representative. (A.3251.) This particular violation, which CSA does not contest before the Court, is addressed below, p.60.

position” made at the bargaining table. *KLB Indus. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). In other words, the duty to provide information relevant to issues on the bargaining table is a “fundamental obligation” that is “predicated on the need of the union for information that will promote intelligent representation of the employees.” *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358-59 (D.C. Cir. 1983) (internal quotation omitted). It follows that the information AFM sought in its July 2014 and June 2015 information requests regarding CSA’s media plans was certainly relevant (if not presumptively relevant) because AFM needed the information “to gain a better understanding of and formulate its responses to CSA’s June 2014 contract proposal and . . . underlying plans to do more media projects under terms that differed from the IMA.”

(A.3250.)

2. CSA unlawfully conditioned the production of relevant information on AFM’s agreement to damages liability

As AFM sought relevant information, CSA was obligated to provide it unless it established a legitimate, countervailing confidentiality interest, and fulfilled its duty to engage in accommodative bargaining. In considering union requests for information that the employer considers confidential, the Board balances the union’s need for the information against any legitimate and substantial confidentiality interest established by the employer. *See A-1 Door & Bldg.*

Solutions, 356 NLRB 499, 500-01 (2011) (citing *Detroit Ed. Co. v. NLRB*, 440 U.S. 301 (1979)). The party asserting confidentiality has a burden of proving that such interests exists and that they outweigh the requesting party's need for the information. *Id.* (citing *Jacksonville Area Ass'n for Retarded Citizens*, 316 NLRB 338, 340 (1995)); *Wash. Gas Light Co.*, 273 NLRB 116, 117 (1984). Further, the party invoking confidentiality has the burden of seeking a reasonable accommodation of its concerns and the union's request for relevant information, such as through a confidentiality agreement. *See U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20-21 (D.C. Cir. 1998) (“[T]he onus is on the employer because it is in the better position to propose how best it can respond to a union request for information.”). An employer's failure to show that the union is unreliable concerning confidentiality agreements is an important factor in assessing the employer's confidentiality defense and whether it fulfilled its obligation to seek a reasonable accommodation. *Reis Viking*, 312 NLRB 622, 622 n.4 (1993) (collecting cases).

Applying the foregoing precedent, the Board properly began by balancing CSA's legitimate confidentiality concerns with AFM's need for the information. Thus, the Board acknowledged both CSA's “understandable concern about not publicizing future media projects,” and AFM's “strong need” for information about CSA's “media plans so that [AFM] could understand and respond to [CSA's]

contract proposal” for future media projects. (A.3250.) The Board determined, however, that CSA’s accommodation proposal—premised on the non-negotiable inclusion of a monetary-damages clause in the confidentiality agreement—was unreasonable because AFM had already signed an adequate confidentiality agreement, and CSA had no grounds to believe AFM would breach it. (A.3219 n.3, 3250-51.) As the Board found, AFM had agreed to sign (and signed) a confidentiality agreement that would adequately protect CSA’s confidentiality interest; that is, AFM agreed to limit access to the information to certain AFM officials, and stipulated that AFM would use the information exclusively for bargaining. AFM further agreed to be subject to an action for injunctive relief in the event of a breach—an expensive and time-consuming deterrent. (A.3250; *see* p.10, above.) Yet, despite AFM’s having agreed to a sufficient confidentiality agreement, discussions “broke down” when CSA went a step further and insisted that AFM agree to a clause that would permit it to seek monetary damages if AFM breached the agreement. (A.3250-51; *see* pp.10-16, above.) As the Board explained, CSA’s insistence was unreasonable because it “lacked a foundation” for it, having no objective reason to believe AFM was unreliable in honoring confidentiality agreements. (A.3250-51.)

Applicable precedent supports the Board’s finding that CSA “undermined its confidentiality defense” when it unyieldingly insisted that AFM add a monetary-

damages clause despite lacking any basis to believe AFM would breach the confidentiality agreement. (A.3251.) *See, e.g., Olivetti Office USA, Inc. v. NLRB*, 926 F.2d 181, 188-89 (2d Cir. 1991) (employer’s claim that confidentiality prevented disclosure of requested information unpersuasive where union agreed to keep information confidential and there was no evidence union was likely to breach agreement); *Isl. Creek Coal*, 289 NLRB 851, 851 n.1 (1988) (union’s representation that it would “honor the confidentiality of the information” was sufficient absent evidence union was unreliable regarding confidentiality), *enforced sub nom. Mine Workers District 31 v. NLRB*, 879 F.2d 939 (D.C. Cir. 1989).

In contrast, CSA points to caselaw that does not compel a different result and is easily distinguishable. For example, CSA cannot rely (Br.46) on cases like *E.W. Buschman v. NLRB*, 820 F.2d 206, 209 (6th Cir. 1987), where the employer offered a “facially reasonable” accommodation, but the union refused to agree to maintain the confidentiality of the information. Indeed, CSA admitted that the one incident that it referred to—concerning the Colorado Rockies and the Take the Field media project—involved AFM’s use of publicly available information, and, thus, provided no basis for believing AFM would misuse confidential information. (A.3251; *see* p.10, above.) CSA provides no other basis for its bare assertion that it “presented bona-fide concerns that its confidential information would be made

public” by AFM. (Br.44-45.) This case is therefore also unlike *Shell Oil Co. v. NLRB*, 457 F.2d 615, 620 (9th Cir. 1972) (cited at Br.44), where the employer presented “bona fide concerns” that prior harassment of employees indicated that the union (or others) would misuse requested information regarding employees’ home addresses. Thus, both substantial evidence and applicable caselaw support the Board’s finding that CSA violated Section 8(a)(5) and (1) of the Act by refusing to provide the relevant information that AFM requested on July 18, 2004, and June 3, 4 and 17, 2015.

3. CSA’s arguments lack merit

In response, CSA offers nothing that warrants disturbing the Board’s findings, which it mischaracterizes or ignores. For example, CSA erroneously claims the Board focused only on CSA’s conduct and failed to balance AFM’s need for the requested information with CSA’s confidentiality concerns. (Br.43.) Rather, as just shown (pp.42-43), the Board balanced those interests, and assessed both parties’ conduct, in finding that CSA failed to bargain in good faith over an accommodation. Nor did the Board “irrationally” conclude that CSA acted in bad faith by attempting to negotiate a confidentiality agreement. (Br.43-44.) In fact, the Board found no fault in seeking such an agreement, but only in unreasonably (and unyieldingly) insisting that the agreement contain a monetary-damages clause, which was “at best only tangentially related to preserving confidentiality.”

(A.3251.) Thus, while CSA asserts it went to “great lengths” to accommodate AFM (Br.44), the only accommodation it ever offered (or would accept) was an unreasonable one. And, while it claims to have responded to every information request *except* those involving confidential information (Br.44), it was its unreasonable response to *those* requests that violated its duty to bargain in good faith.

Nor, as CSA claims, did AFM engage in bad faith and “regressive” bargaining by initially agreeing to monetary damages, then seeking to remove such language. (Br.45-46.) CSA refers to AFM’s one-time, inadvertent inclusion of the phrase “any other remedy available at law” in AFM’s early proposed revisions of the confidentiality agreement, which CSA rejected even though it “arguably still contemplated ‘money damages.’” (A.3232.) This inclusion was an oversight, which AFM corrected in subsequent drafts. (A.3232; *see* p.10, above.) CSA, however, cites no law that a party’s prompt correction of a good-faith mistake during bargaining constitutes bad faith. It claims the Board “wrongly excused” AFM’s “regressive” negotiations by finding that CSA rejected AFM’s proposal. (Br.45.) The simple response is that there was no regressive conduct or bad faith by AFM to excuse. *Cf. Shell Oil Co.*, 457 F.2d at 618 (cited at Br.46) (employer behaved in “reasonable and conciliatory manner throughout while [union was] demanding, arrogant, and intransigent”).

Finally, the Board did not engage in an “impermissible assessment” of CSA’s bargaining proposal. (Br.47). Rather, the Board followed settled law that where an employer has demonstrated a confidentiality interest, it must seek a reasonable accommodation of its concerns and the union’s need for the requested information. Applying that law, the Board found that CSA’s proposal was not a reasonable accommodation in the circumstances, and, thus, CSA failed to adequately fulfill its duty to accommodate. (A.3219 n.3.)

C. CSA’s Unlawful Refusal To Provide Information Precluded a Valid Impasse, Rendering the Unilateral Implementation of Its Initial Proposal an Unfair-Labor-Practice

It is undisputed that CSA unilaterally implemented the terms of its opening contract proposal in October 2014. Substantial evidence supports the Board’s findings that CSA’s unlawful refusal to furnish AFM its requested relevant information led to the breakdown in negotiations, and that this refusal precluded impasse, rendering CSA’s unilateral implementation unlawful.

1. CSA’s refusal to provide AFM with requested, relevant information precluded a valid impasse

An employer violates its duty to bargain under Section 8(a)(5) and (1) by unilaterally implementing terms and conditions of employment without first bargaining to valid impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir.

1991). A lawful impasse cannot exist where, as here, an employer has failed to satisfy its statutory obligation to provide information relevant to the matters on which the parties are divided. *See, e.g., U.S. Testing Co.*, 160 F.3d at 22 (employer that did not provide requested, relevant information could not declare impasse in contract negotiations); *Hendrickson Trucking Co. v. NLRB*, 770 F. App'x 1, at *5 (D.C. Cir. 2019) (same). *Accord Caldwell Mfg. Co.*, 346 NLRB 1159, 1170 (2005) (valid impasse precluded where employer failed to supply information relevant to “the core issues separating the parties”).

Based on that precedent, the Board reasonably found that CSA’s unlawful refusal to furnish AFM with information precluded impasse. The withheld information would have enabled AFM to understand and formulate responses to CSA’s contract proposal concerning national-media projects—“the core issue separating the parties.” (A.3252) (citation omitted). Indeed, “it is clear that bargaining broke down in August 2014 because of the information request dispute.” (A.3252 n.40.) As the Board observed, AFM’s July 18, 2014 information request was very much at issue during the parties’ initial bargaining session in August. Thus, during that session, AFM repeatedly stated that it needed the information to understand CSA’s proposal and would not be able to make a counter-proposal or meaningfully bargain without it. (A.3252; *see pp.9-16, above.*) As CSA categorically refused to provide that information unless AFM

first executed a confidentiality agreement with a monetary-damages clause (a refusal the Board found to be unlawful), the parties agreed to end bargaining that day, and to forgo bargaining the next day. (A.3252.) When the on-going dispute involving CSA's refusal to provide information prevented the parties from scheduling additional bargaining sessions in Fall 2014, CSA declared impasse and unilaterally implemented its contract proposal on October 20. (A.3252.)

Thus, substantial evidence supports the Board's finding that because CSA "unlawfully refused to provide AFM with the information relevant to the core issues separating the parties," CSA's unilateral implementation of its initial proposal was unlawful. (A.3252 n.41.) Given CSA's unlawful refusal, it cannot analogize this case to others that did not involve whether an employer's unlawful refusal to provide information precluded impasse. (Br.35-36, 38-41) (citing *Detroit Typographical Union v. NLRB*, 216 F.3d 109, 121 (D.C. Cir. 2000); *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 235 (D.C. Cir. 1996); *M & M Contractors, Inc.*, 262 NLRB 1472, 1476 (1982); *AAA Motor Lines, Inc.*, 215 NLRB 793, 794 (1974)).

2. AFM's conduct did not privilege unilateral implementation

CSA claims AFM engaged in bad-faith bargaining, privileging CSA to unilaterally implement its initial proposal. Specifically, CSA faults AFM for: (a) delaying individual bargaining with CSA, initially, from October 2013 to June

2014, because AFM first wanted to complete the multi-employer IMA negotiations, and later, in June and July 2014, when the parties struggled to agree on a location and date for bargaining; (b) bargaining only for a half-day on August 20, 2014, without presenting a counterproposal; and (c) making comments at and away from the bargaining table that purportedly show its unwillingness to bargain. (Br.32-41.) The Board reasonably rejected those claims, however, because they rely on discredited testimony and immaterial considerations, and ignore that CSA's unlawful refusal to provide information was the real cause of the breakdown. (A.3253.)

First, contrary to CSA's claim (Br.37, 40), the events between October 2013 and June 2014 do not justify its unilateral action. As the Board acknowledged, AFM delayed bargaining with CSA during that time period to focus on the multi-employer IMA negotiations. During that period, AFM consistently stated that it intended to bargain with CSA, albeit on "an improperly delayed time-table." (A.3252-53 & n.42.) The parties, however, settled an unfair-labor practice charge that CSA had filed against AFM regarding that very delay. (A.3239 n.26, 3253; *see* p.8, above.) Moreover, as the Board noted, during that time period, there was no bargaining proposal on the table. (A.3252 n.42.)

Second, CSA largely ignores what happened thereafter, when AFM returned to the table to bargain in good faith, and CSA's unlawful conduct precluded

meaningful bargaining. *See Times Publ'g Co.*, 72 NLRB 676, 683 (1947) (cited at Br.35) (a union's refusal "to bargain at one time" does not "absolve an employer from obeying the mandate . . . to bargain collectively on any subsequent occasion"). Thus, once CSA made a proposal in June 2014, AFM promptly responded, in July, by requesting information that it needed in order to evaluate and meaningfully bargain over the proposal. (A.3252 n.42.) Such was not bad faith. *See Oak Hill*, 360 NLRB 359, 403-04 (2014) (union conduct did not justify employer's unilateral implementation where union changed course after initially refusing to meet). *See generally E.I. Dupont Co. v. NLRB*, 489 F.3d 1310, 1318 (D.C. Cir. 2007) ("good faith or the lack of it depends upon a factual determination based on overall conduct") (internal quotes and citation omitted). CSA, however, precluded meaningful bargaining by unlawfully refusing to provide that information. (A.3252-53.)

CSA mischaracterizes the Board as finding that AFM's delay in the October 2013-June 2014 timeframe was "cured" when the parties met to bargain on August 20. (Br.39-40.) Rather, as shown, the Board acknowledged that the parties' settlement addressed the prior delay, and found that AFM thereafter came to the table and bargained in good faith. CSA claims the prior delay "informs" on AFM's conduct in August 2014, but AFM was at that time bargaining in good faith while CSA was unlawfully refusing to provide information.

CSA also errs in claiming (Br.32, 38-40 n.8) that AFM’s purported delay in bargaining in June and July of 2014 justified CSA’s unilateral action. As the Board found, however, both parties struggled to agree on a date and location for bargaining. (A.3253.) For example, CSA faults AFM, during this time-period, for blaming its inability to meet on Hair’s busy schedule, and proposing that the parties meet in New York City. (Br.38, 40 n.8.) As the Board explained, the parties had trouble agreeing on a date and location, in part because CSA was no longer willing to meet in New York City (as it had for prior negotiations), and in part because AFM initially worked from Hair’s limited availability. (A.3253.) Thus, as the Board found, it does not follow that either side was acting in bad faith. Rather, both sides corresponded in summer 2014, and ultimately agreed to meet and bargain in Denver—as CSA requested—on August 20 and 21. (*Id.*)

As for what happened when the parties met on August 20, the Board found that “session went poorly because of [CSA’s] unlawful refusal to provide information.” (*Id.*) Without that information, AFM could not evaluate, meaningfully bargain over, or provide a counter-offer to CSA’s proposal. (*Id.*) CSA, therefore, misses the mark in criticizing AFM for not presenting a counter-proposal and instead asking questions about CSA’s proposal. (Br.38). Rather, as the Board noted, AFM asked those questions as part of its good-faith effort to

conduct meaningful bargaining despite CSA's ongoing refusal to provide information. (A.3252.)

Given that context, it is particularly specious for CSA to argue that it was a "sham" when AFM claimed that it could not make a counterproposal until it received the requested information. CSA wrongly asserts (Br.42) that AFM did not previously indicate that it was unable to respond absent the information, when, in fact, AFM did exactly that, both prior to and during the August 20 meeting. (See pp.9, 11, above.) In any event, as the Board observed, AFM was "well within its rights" to request information that would enable it to understand CSA's contract proposal, and to refrain from making a counterproposal until it received the information. (A.3253 & n.44.)

CSA also errs in suggesting that bad faith lies in AFM purportedly bargaining for only two hours on August 20. (Br.38.) That claim mischaracterizes the facts and ignores that bargaining was abbreviated by CSA's unlawful refusal to provide information. The session began at 12:30 p.m. that day, with prior notice to CSA, after AFM met with musicians that morning. (A.3232 n.19; see p.11, above.) Bargaining over the next few hours bogged down over CSA's refusal to provide information, and, accordingly, the parties agreed to end the session at 3:50 p.m. (A.3232-33.)

This leaves CSA's unsupported assertion that AFM made statements indicating an unwillingness to bargain over an individualized agreement with CSA regarding commercial-media work. (Br.36-37.) As the Board explained, while AFM's bargaining representatives indicated a strong belief in the existing framework set by the IMA and other AFM media agreements, they did not go so far as to state an unwillingness to bargain to a different arrangement. (A.3253.) Indeed, AFM's representatives indicated the opposite: that they would bargain over such an arrangement once CSA provided the requested information, that AFM had reached similar arrangements with other symphonies, and that it could do so here if CSA provided musicians with sufficient money. (*See* pp.14-16, above.)

To challenge those findings, CSA wrongly relies on discredited testimony and statements that are not attributable to AFM bargaining representatives. For example, CSA relies heavily on musician Justin Bartel's testimony that AFM President Hair stated, away from the bargaining table, that AFM would not bargain with CSA over commercial-media projects. (Br.36-37.) The Board, however, reasonably discredited Bartel's vague and confusing testimony on that point, and CSA does not argue that this determination was "hopelessly incredible." (A.3234 n.21; A.1537, 1544-46, 1557-58.) That discredited testimony, moreover, is the sole source of the so-called "smoking gun" that CSA touts as confirming AFM's

purported disinterest in bargaining.⁷ (Br.37 n.7.) Further, CSA is simply wrong in claiming (Br.42) that AFM bargaining agents Blumenthal and Newmark stated that they lacked authority to reach agreement on AFM's behalf. Rather, the record shows they repeatedly confirmed their willingness and authority to reach an agreement with CSA. (*See* pp.9, 11, 14-16, above.)

Finally, CSA errs in finding bad faith (Br.36) in the away-from-the-table comment of AFM Executive Board Member Gagliardi to DMA President Vrisenga that, "if you think your little orchestra will be getting into this recording business, you are in for a surprise." As the Board explained, there is no evidence that Gagliardi was involved in bargaining with CSA, either directly at the bargaining table or indirectly as someone who influenced AFM bargaining strategy. Thus, his statement does not detract from how AFM's actual bargaining team was open to bargaining with CSA concerning its media plans, particularly if the final deal included more money for musicians. (A.3253 n.45.) Because CSA presented no credible evidence of bad-faith conduct by AFM that privileged CSA's unilateral implementation of its opening contract proposal, that implementation was unlawful.

⁷ CSA also asserts that Hair's March 2015 comment indicated bad faith. (Br.37.) That comment, however, occurred months after CSA unilaterally implemented its proposal in October 2014, and would not have privileged CSA's action. (A.3253 n.43.)

II. GIVEN CSA’S DUTY TO BARGAIN WITH AFM, THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

In its opening brief, CSA failed to raise, and has therefore waived any challenge to, the Board’s findings that CSA had in many other ways violated its duty to bargain with AFM. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citing Fed. R. App. P. 28(a)(9)) (presently Rule 28(a)(8)(A)). CSA’s oblique references to some of those violations in its issue statement are insufficient to preserve any challenge (Br.2); a party must actually make its arguments in the argument section of its brief. *N.Y. Rehab.*, 506 F.3d at 1076. Therefore, should the Court agree that AFM was the lawfully recognized representative with whom CSA was obligated to bargain (*see* pp.28-36), “[t]he Board is entitled to summary enforcement of the uncontested portions of its order.” *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

First, CSA does not challenge the Board’s findings that CSA violated Section 8(a)(5) and (1) of the Act by engaging the unit-musicians in media projects without first notifying AFM and affording it the opportunity to bargain. With each project, CSA indisputably did not comply with the IMA or other applicable AFM agreements, which resulted in unilateral changes to employees’ compensation and other terms and conditions of employment. Those media projects are:

- Recording a music soundtrack for the *Oh Heck Yeah* video-game, which was made available for unrestricted public download;
- Recording unit employees playing the pieces *Dona Nobis Pacem* and *Missa Mirabilis*, and selling the recording to a record company that later released it as an album;
- Recording and releasing an album entitled *Amos Lee Live at Red Rocks* through a third-party commercial production company; and
- Recording and releasing an album of bargaining-unit employees playing in accompaniment to recording artist Gregory Isakov.

(A.3254-55, 3258, ¶¶ 6-9; *see* pp.18-19, above.) CSA’s duty to bargain includes the obligation to refrain from making unilateral changes to the terms and conditions of employment set forth in an expired collective-bargaining agreement such as the IMA. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Mike Sells Potato Chip Co. v. NLRB*, 807 F.3d 318, 325 (D.C. Cir. 2015). As the Board explained, the IMA sets forth the terms that CSA must apply when it produces and releases recordings of live symphonic performances, and requires CSA to comply with the applicable AFM agreement if the IMA is inapplicable.

(A.3227, 3254; *see* p.5, above.) CSA’s refusal to adhere to those agreements and its alteration of the status quo plainly violated the Act. And CSA does not, as it did before the Board, defend that conduct by claiming it was lawful under the terms of its unilaterally implemented June 2014 contract proposal. In any event, as the Board observed, even if the CSA lawfully implemented that proposal, the proposal did not sanction the unilateral changes, and, except for the Isakov CD, the

recordings involved in the unchallenged violations preceded the October 2014 implementation. (A.3255 n.48, 3253-57; *see* pp.18-19, above.)

Second, CSA does not address, and has therefore waived any challenge to the Board's findings that CSA violated Section 8(a)(5) and (1) when, between April and June 2015, it bypassed AFM to deal directly with CSA musicians (via the DMA employee-negotiating committee) over issues such as the terms and conditions of employment for bargaining-unit substitute and extra musicians; and again, in August 2015, when CSA dealt directly with that committee regarding changes to recording-sessions work and break times and lengths. (A.3256-57, 3258, ¶¶ 10-11; *see* pp.17-18, above.) An employer violates Section 8(a)(5) and (1) of the Act when it engages in direct dealing with union-represented employees for the purpose of establishing or changing wages, hours, and other terms and conditions of employment, and excludes the union from such communication, as CSA undisputedly did here. (A.3256.) *See Permanente Med. Grp.*, 332 NLRB 1143, 1144 (2000).

CSA has also abandoned any challenge to the Board's finding that, in September 2015, CSA violated Section 8(a)(5) and (1) when it unilaterally implemented the new terms that it had negotiated directly with employees by applying those terms to their work on national media projects. (A.3257, 3258, ¶ 12.) That implementation involved departures from the status quo established by

the applicable AFM agreements, and CSA does not dispute that it excluded AFM from the discussion.

CSA also does not address, and has therefore waived any challenge to, the Board's finding (A.3257, 3258, ¶ 13) that, on June 17, 2016, CSA unlawfully withdrew recognition from AFM, claiming that it was not its employees' joint exclusive collective-bargaining representative. When the parties' IMA expired, AFM had a rebuttable presumption of majority support, and CSA could not withdraw its recognition absent evidence that AFM actually lost that support—evidence that CSA has never claimed to have. (A.3257, *citing Levitz Furniture*, 333 NLRB 717, 725 (2001).)⁸ Before this Court, CSA has abandoned any assertion that it had not actually withdrawn recognition from AFM—an argument that, in any event, the Board reasonably rejected. (A.3219 n.3). CSA also does not defend this unfair-labor-practice finding by relying on its meritless argument (*see* pp.28-36) that it never recognized AFM as bargaining representative.

Finally, CSA does not challenge the Board's finding that CSA violated Section 8(a)(5) and (1) when it refused AFM's June 2016 information request, claiming that AFM was not the lawful bargaining representative. (A.3251, 3258, ¶ 4.) As discussed, that claim was invalid, and the Board properly found that CSA

⁸In *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019), the Board modified part of *Levitz* but left untouched the actual-loss of majority support test.

was required to provide AFM with its relevant requested information. The Board is, therefore, entitled to summary enforcement of the portions of its order remedying those uncontested findings.

CONCLUSION

The Board respectfully requests that the Court deny CSA's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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November 2019

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COLORADO SYMPHONY ASSOCIATION)	
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Petitioner/Cross-Respondent)	Nos. 18-1189, 18-1194
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v.)	
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NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	27-CA-140724
)	
and)	
)	
AMERICAN FEDERATION OF MUSICIANS)	
OF THE UNITED STATES AND CANADA,)	
AFL-CIO/CLC)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,935 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
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Dated at Washington, DC
this 15th day of November 2019

STATUTORY ADDENDUM

Except for the following, all pertinent statutes, rules, and regulations are contained in the statutory addendum to CSA’s opening brief to the Court.

Table Of Contents

National Labor Relations Act, 29 U.S.C. § 151, et seq.

Section 7	ii
Section 8(a)(1).....	ii
Section 8(a)(5).....	ii
Section 8(f).....	ii
Section 9(a)	iii
Section 10(a)	iii
Section 10(b)	iii
Section 10(e)	iv

Federal Rules of Appellate Procedure

Rule 28(a)(8)(A)	v
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National Labor Relations Act

Sec. 7. [§157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec. 8 [§158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(f) [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such

employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 10 [§ 160] (a) [Powers of Board generally] The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer

to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

* * *

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Federal Rules of Appellate Procedure

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(8) the argument, which must contain: (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

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Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 15th day of November 2019