UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC, d/b/a HAWAII TRIBUNE-HERALD Respondent and HAWAII NEWSPAPER GUILD LOCAL 39117, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO Charging Party	)	Cases 37-CA-7043 37-CA-7045 37-CA-7046 37-CA-7047 37-CA-7048 37-CA-7084 37-CA-7085 37-CA-7086 37-CA-7087 37-CA-7112 37-CA-7114 37-CA-7115 37-CA-7186

BRIEF OF *AMICI CURIAE*
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
COUNCIL ON LABOR LAW EQUALITY, AND
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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INTRODUCTION

The Chamber of Commerce of the United States of America (the "Chamber"), the Council on Labor Law Equality ("COLLE"), and the Society for Human Resource Management ("SHRM") submit this *amicus* brief pursuant to the Board's Notice and Invitation to File Briefs dated March 2, 2011. The Notice and Invitation sets forth the issues to be addressed as follows:

> Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held confidential). This case illustrates, however, that Board precedent does not clearly define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore decided to sever this allegation from the case and to solicit briefs on the issues it raises.

The NLRB's website, however, suggested that the issue to be addressed is whether the Board should continue to adhere to the holding of *Anheuser-Busch* as a general matter. While the Board has retracted the statement of the issue on its website, the Chamber, COLLE, and SHRM are concerned that the Board will nonetheless use this case as an opportunity to modify or overturn the longstanding and well-accepted rule of *Anheuser-Busch*, which holds that witness statements are a categorical exception to the duty to provide information under Section 8(a)(5) of the Act. Therefore, our brief focuses on the important policies that support the *Anheuser-Busch* rule and the reasons why, from the perspective of the national business community, those policies remain vital today. In addition, we address the scope of the attorney work product privilege, a privilege that is supported by different, but equally important, policy considerations.

The rule of *Anheuser-Busch* exists primarily to protect the integrity of the labor arbitration process. If witness statements are required to be disclosed prior to the arbitration hearing, the witness may be subject to harassment and intimidation designed to alter the witness's testimony or to persuade the witness to refuse to testify at the hearing. Therefore, just as the Board steadfastly refuses to disclose witness statements to a charged party prior to the hearing in an unfair labor practice case, the Board in *Anheuser-Busch* held that a party has no statutory duty to produce a witness statement prior to the hearing in a labor arbitration case.

In addition to protecting the integrity of the labor arbitration process, the *Anheuser-Busch* rule is important to the national business community because it enables employers to conduct effective investigations into allegations of serious workplace misconduct, such as threats or acts of violence, harassment, theft, or drug or alcohol use. If employee witnesses cannot be assured that their statements will remain confidential, unless their testimony is required in arbitration or another legal proceeding, an employer's ability to encourage employees to report such misconduct and to secure the cooperation of witnesses in the investigation process will be severely impaired.

The *amici* are also concerned that this case will result in an overly narrow interpretation of the attorney work product privilege in Board litigation. That privilege is an important protection for employers who seek candid legal advice about potential claims or demands for arbitration under a collective bargaining agreement. Ultimately, candid legal advice may lead to a course of action that will avoid the need for arbitration or litigation of workplace disputes. Therefore, the proper application of the work product privilege is in the public interest, as well as the interest of employers who seek candid legal advice before a claim or demand for arbitration is actually filed.

INTEREST OF THE *AMICI CURIAE*

The Chamber is the world's largest federation of businesses, representing 300,000 direct members and an underlying membership of over 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act ("NLRA" or the "Act"). COLLE's single purpose is to follow the activities of the NLRB and the courts as they relate to the NLRA. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

ARGUMENT

I. The Board Should Adhere to Its Holding in *Anheuser-Busch*.

A. *Anheuser-Busch* Promotes the Integrity of the Arbitration Process.

The Board's decision in *Anheuser-Busch* reflects a well-considered accommodation of two important policy objectives under federal labor law: (1) enforcement of the duty, under Section 8(a)(5) of the Act, to produce information that is relevant to the administration of a collective bargaining agreement; and (2) protecting the integrity of the arbitration process as the favored method for the prompt resolution of disputes arising under a collective bargaining agreement. These policy objectives are generally consistent, but not always. In *Anheuser-Busch*, the Board wisely recognized that the arbitration process would not be well-served by requiring, as an element of the duty to bargain, either party to produce confidential witness statements prior to an arbitration hearing.

In recognizing a statutory duty to produce information that is relevant to evaluate grievances, the Supreme Court in *NLRB v. Acme Industrial*, 385 U.S. 432 (1967), was sensitive to whether the assertion of the Board's jurisdiction would be "consistent … with the national labor policy favoring arbitration." *Id.* at 439. The Court found the Board's assertion of jurisdiction in *Acme Industrial* was "in aid of the arbitral process" because the information would help the parties "sift out unmeritorious claims" during the pre-arbitration grievance procedure. *Id.* at 438. Otherwise, the arbitration process would be "woefully overburdened" by unmeritorious grievances, pursued based on a lack of information or simply in an effort to obtain information about the underlying grievance. *Id.* at 438-39. Thus, the Court found that "the Board's order in this case was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law." *Id.* at 439.

In *Anheuser-Busch*, the Board concluded that the twin policy goals of *Acme Industrial* – enforcing a statutory duty to provide information in order to aid the grievance and arbitration process – would not be advanced by mandating the production of witness statements. Unlike the other categories of information contemplated in *Acme Industrial*, the Board found that mandating the pre-arbitration production of witness statements "would diminish rather than foster the integrity of the grievance and arbitration process." *Anheuser-Busch*, 237 NLRB at 984.

The Board reached this conclusion because witness statements are "fundamentally different from the types of information contemplated in *Acme*" and requests for their disclosure raise "critical considerations which do not apply to requests for other types of information." *Id.* In particular, the Board focused on the potential for coercion and intimidation of witnesses whose statements are disclosed prior to an arbitration hearing. Like witnesses in an unfair labor practice proceeding, witnesses in an arbitration proceeding may face pressure to change their testimony, or not testify at all, if their statements are disclosed prior to the hearing. *See id.* (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)). In addition, witnesses may be reluctant to give a statement in the first place without an assurance that the statement will not be disclosed prior to the hearing. *Id.* As the Supreme Court noted in *Robbins Tire*, witnesses may be willing to give statements based on this assurance because the vast majority of unfair labor practice cases are resolved prior to a hearing, and so there is no need for the witness to testify or for their statement to be disclosed in those cases. *Robbins Tire*, 437 U.S. at 241.

The Board in *Anheuser-Busch* concluded, correctly, that the same considerations apply in the context of an arbitration proceeding. *Anheuser-Busch*, 237 NLRB at 984. Therefore, like the rule against pre-hearing disclosure of witness statements in unfair labor practice cases, the

Anheuser-Busch rule is a categorical exception – "without regard to the particular facts of this case" – to the general duty articulated in *Acme Industrial*. *Id.* at 984-85.[1]

B. The Analogy to *Robbins Tire* Remains a Valid One.

The rules applicable in unfair labor practice litigation remain an appropriate analogy for the labor arbitration process. Like Board litigation, the arbitration process generally does not provide for pre-hearing discovery. While there may be some exceptions based on the specific terms of the parties' collective bargaining agreement or the views of a particular arbitrator, the general rule remains one of no pre-hearing discovery. *See, e.g.*, *California Nurses Ass'n*, 326 NLRB 1362, 1362 (1998) (finding no violation of Section 8(b)(3) when union failed to provide names of witnesses and evidence for arbitration because "it is well settled that there is no general right to pretrial discovery in arbitration proceedings"). Indeed, in *Tool & Die Makers' Lodge No. 78, IAM (Square D Company)*, 224 NLRB 111 (1976), the Board held that a union was not obligated to produce, during the grievance process, a document signed by company executive that the union representative claimed would "win the case for him at the arbitration hearing." *Id.* at 111. The Board reasoned that there is "no statutory obligation on the part of either to turn over to the other evidence of an undisclosed nature that the possessor of the information believes relevant and conclusive with respect to its rights in an arbitration proceeding." *Id.*

A principal value of labor arbitration is that it is an informal, expeditious process that is unencumbered by pre-hearing disputes about discovery. *See 14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1471 (2009) (the parties "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration" (citation omitted)).

[1] As the Board successfully argued in *Robbins Tire*, "a particularized, case-by-case showing is neither required nor practical." 437 U.S. at 222.

While some arbitrators have argued for pre-hearing discovery, those arguments have been rejected as inconsistent with the very nature and purpose of the labor arbitration process:

> As to discovery, I wish to note only that I also do not agree with the calls to legislate discovery for labor matters. Although proponents of this idea assert that the legal procedure would affect only a small number of appropriate, complex cases, I believe that the very *availability* of sanctioned discovery would encourage its greater use and increase both the formality and legalism of matters that would otherwise do very nicely without it.

Susan R. Brown, *Pre-Hearing Processes – Old and New*, 49 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 94, 97 (1996) (emphasis in original) (footnote omitted).

Nor is any change in the *Anheuser-Busch* rule warranted based on a "general maturation of labor relations in this country." *Fleming Cos.*, 332 NLRB at 1089 n.5 (Members Fox and Liebman, concurring). While it is true that the parties to a collectively bargained labor arbitration proceeding have a long-term relationship that tends to foster civility and fair dealing, arbitration is nonetheless an adversarial process in which each party advocates zealously in favor of its position. Moreover, there is no apparent basis for concluding that unfair labor practice litigation is more contentious than labor arbitration proceedings. *See id.* at 1089. Indeed, unfair labor practice litigation frequently involves parties to well-established, mature collective bargaining relationships.

In any event, even when the parties have a mature collective bargaining relationship, the potential for harassment and intimidation of witnesses remains a serious concern in labor arbitration. *See Local 365 v. Woodlawn Cemetery*, 152 LRRM 2360, 2363 (S.D.N.Y. May 31, 1995) (upholding arbitrator's decision to keep witness identity secret and sequester witnesses based on fear of possible intimidation from grievant and employees); *NLRB v. Int'l Union of Elec., Radio & Machine Workers, Local 745*, 759 F.2d 533, 534-35 (6th Cir. 1985) (enforcing order finding Section 8(b)(1)(A) violation when union stewards threatened union member with

fines for testifying against another employee in arbitration); *United Steelworkers of Am., Local Union 555*0, 223 NLRB 854, 855 (1976) (finding that local union president communicated a "veiled threat" to encourage employee not to testify for the employer in arbitration); *Cannery Warehousemen, Local Union No. 788*, 190 NLRB 24, 27 (1971) (holding that union violated Section 8(b)(1)(A) and (3) based on internal discipline and threats against testimony of employee witness in arbitration); Elkouri & Elkouri, *How Arbitration Works* 424 (6th ed. 2003) ("In some situations, giving testimony in arbitration proceedings may subject the witness to varied risks of retaliation.").

There is no empirical basis for concluding that harassment and intimidation of witnesses occurs with less frequency now than it did when *Anheuser-Busch* was decided. Nor is there any empirical basis for concluding that harassment and intimidation of witnesses is any less of a concern in labor arbitration than in Board litigation. Therefore, the analogy to *Robbins Tire* remains a valid one.

C. *Anheuser-Busch* Does Not Impede a Union's Ability to Investigate Grievances or Prepare for Arbitration.

Protecting witness statements from disclosure does not inhibit a union's ability to investigate or evaluate grievances, which is the core objective of *Acme Industrial*. The Board in *Anheuser-Busch* recognized that an employer has a duty to disclose the names of witnesses so that the union can conduct its own investigation of the grievance. *Anheuser-Busch*, 237 NLRB at 984 n.5; *Transport of New Jersey*, 233 NLRB 694, 694-95 (1977). In addition, the Board may find that an employer is required to provide the union with a summary of the substance of the witness statements, without producing the actual witness statements or divulging the witnesses' identity. *See Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1107-08 (1991). Thus, as long

as the union has an understanding of the facts underlying the grievance and is not impeded in its ability to interview the witnesses on its own, the employer's duty to bargain is satisfied.

As the Board recognizes in its own practice, witness statements are categorically different from other types of information that may be disclosed in the course of investigating a claim. That is why the Board, in the course of investigating an unfair labor practice charge, will inform the charged party of the nature of the allegations, but will vigilantly refuse to produce the witnesses' affidavits or any information that would reveal the identity of the witnesses. *See NLRB Casehandling Manual*, §§ 10052.5, 10054.4. In this sense, an employer's required disclosures during the grievance process are equivalent to the Board's disclosures to a charged party during the investigation of an unfair labor practice charge.

Contrary to the suggestions made in some Board opinions,[2] the danger of harassment and intimidation is much greater if a witness statement is produced than if a party is provided only with the names of the witnesses to the grievance at issue. If the witness statement is produced, a party or a co-worker may scrutinize the witness's recorded testimony and pressure the witness "in an effort to make them change their testimony or not testify at all." *Robbins Tire*, 437 U.S. at 239; *Anheuser-Busch*, 237 NLRB at 984. By contrast, if a party is provided only with a list of witness names, the party will have no prior knowledge of what the witness will say, and the witness is free to provide as much or as little information as they wish to divulge to the interviewer. *See, e.g.*, *City of Miamisburg*, 117 LA 559, 568-69 (Bell, 2002) (union had opportunity to seek out employees who witnessed incident that resulted in grievant's suspension,

[2] *See Fleming Cos.*, 332 NLRB at 1089-90 (Members Fox and Liebman, concurring); *New Jersey Bell Telephone Co.*, 300 NLRB 42, 53 n.13 (1990); *Pennsylvania Power & Light Co.*, 301 NLRB at 1112.

but "the failure of such employees to acknowledge their witnessing of the incident … provides credence to the employer's assertion they feared retaliation by the grievant").[3]

Witness statements also should be treated differently than other information required to be disclosed under *Acme Industrial* because witness statements are not simply a means of providing the union with information to "evaluate intelligently the grievances filed." *Acme Industrial*, 385 U.S. at 435. Witness statements have intrinsic value in the arbitration process itself. Witness statements are valuable as tools for cross-examination and impeachment, and may be introduced as substantive evidence if the witness's testimony at the arbitration hearing deviates from what is set forth in the statement. *See Fairweather's Practice & Procedure in Labor Arbitration* 168 (Ray J. Schoonhoven ed., 3d ed. 1991) ("Arbitrators frequently admit evidence of . . . prior inconsistent statements for impeachment purposes."). In addition, witness statements may be introduced as evidence in an arbitration hearing if the witness is unavailable to testify. *See* AAA Labor Arbitration Rules, Rule 29 ("The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objection made to its admission.").

For all of these reasons, production of witness statements exceeds what is necessary to serve the objective of *Acme Industrial* – to enable a union to investigate grievances intelligently and "sift out unmeritorious claims" rather than pursue them unnecessarily to arbitration. *Acme Industrial*, 385 U.S. at 438. This objective is met by producing the names of witnesses and/or anonymous summaries of the content of their testimony, as required under current Board law.

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[3] In some cases, the identity of the witness may be withheld as confidential, if the mere act of identifying the witness presents a risk of harassment. *See Pennsylvania Power & Light Co.*, 301 NLRB at 1107.

Compelling the production of the witness statements themselves would have a real and significant impact on the arbitration process itself.

D. Overturning *Anheuser-Busch* Would Delay and Undermine the Integrity of the Arbitration Process, and Would Interfere with Investigations of Serious Workplace Misconduct.

If the Board were to overturn the bright-line rule of *Anheuser-Busch*, disputes over the production of witness statements would have to be resolved under the case-by-case balancing test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1976). *See Fleming Cos.*, 332 NLRB at 1088 (Members Fox and Liebman, concurring) (advocating that the *Detroit Edison* balancing test should apply in lieu of the *Anheuser-Busch* rule). Prolonged Board litigation under the *Detroit Edison* standard would substantially delay the resolution of grievances in arbitration. This is manifestly contrary to the national labor policy favoring the prompt resolution of disputes through the relatively informal process of arbitration. *See Fairweather's Practice & Procedure in Labor Arbitration* 135-36 (Ray J. Schoonhoven ed., 3d ed. 1991) ("[W]hile the use of a Section 8(a)(5) or an 8(b)(3) unfair labor practice proceeding is available in a situation where a party refuses to disclose relevant information, such remedy may be impractical given the time-consuming nature of such a proceeding, because, if the information is critical, the arbitration must be put 'on hold' until the resolution of the unfair labor practice charge. Thus, the function of arbitration, that is, the quick resolution of []employment disputes, is destroyed." (footnotes omitted)).

In addition, Board-mandated disclosure of witness statements likely would increase the need for arbitral subpoenas to compel the testimony of witnesses who have suffered harassment and intimidation as a result of the pre-hearing disclosure of their statements. *See Fairweather's Practice & Procedure in Labor Arbitration* at 158 ("In many situations, witnesses may refuse to appear at an arbitration hearing, fearing reprisal or retaliation because of their testimony.").

Litigation to enforce arbitral subpoenas would further delay and encumber the arbitration process. Moreover, even if the witness is ultimately compelled to testify, the integrity of the witness's testimony may be compromised by a legitimate fear of retaliation. *See Anheuser-Busch*, 237 NLRB at 984 ("[R]equiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process.").

Compelling the production of witness statements also would undermine employers' ability to investigate claims of workplace violence, harassment, theft, drug and alcohol use, and other forms of serious misconduct in the workplace. These types of investigations rely on the candid testimony of co-workers, who may be part of the same bargaining unit. If the co-workers cannot be assured that their statements will remain confidential, unless they are actually called to testify in arbitration or another legal proceeding, they may simply refuse to "get too involved" in the investigation. *Cf. Robbins Tire*, 437 U.S. at 240. This chilling effect will undermine the effectiveness of the employer's investigations, the vast majority of which will never result in an arbitration proceeding in which the witness statements would otherwise be subject to disclosure. The public policies supporting the myriad laws against workplace violence, harassment, theft, and drug and alcohol use would not be well-served by this outcome.

II. Attorney Work Product Protection Is a Separate Defense, Which Arises From Entirely Different Policy Considerations Than *Anheuser-Busch.*

The Board's Notice and Invitation to File Briefs suggests that litigation concerning the production of witness statements involves "two levels of analysis" – "first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product." The Chamber, COLLE, and SHRM respectfully submit that the two "levels of analysis" are separate and distinct issues that

arise from entirely different policy considerations. The Board should apply the attorney work product privilege where applicable – and wholly independent of its jurisprudence under *Anheuser-Busch*.

The attorney work product privilege, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, exists in order to allow "lawyers to advise their clients regarding the prospect of litigation at the preclaim stage," and it also "foster[s] the peaceful resolution of labor disputes through voluntary compliance with the NLRA." *Central Telephone Co. of Texas*, 343 NLRB 987, 990 (2004). "Work product protection will be accorded where a 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.'" *Id.* at 988 (citation omitted). Notably, the work product privilege only applies to the documents themselves, and not the facts included in the documents. 6-26 Moore's Federal Practice – Civil § 26.70[2][a]. This fully comports with the Board's current law generally mandating disclosure of witness names and a summary of the facts contained in witness statements, while keeping the statements themselves confidential.[4]

In this case, the Administrative Law Judge ("ALJ") failed to apply the work product privilege according to its well-established interpretation in the federal courts. The ALJ concluded that the witness statement at issue was not protected by the work product privilege because it was created at a time when the employee had been suspended, but "no decision had been made concerning his discipline." *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 24. The ALJ also found that the union "was not yet in possession of the information to make a decision whether to pursue a grievance much less decide to proceed to arbitration." *Id.*

[4] Furthermore, under Rule 26(b)(3), a party may obtain access to attorney work product in situations where the party shows "substantial need" and "undue hardship." 6-26 Moore's Federal Practice – Civil § 26.70[1].

Contrary to the ALJ's analysis, neither a grievance nor a demand for arbitration must have been made at the time the statement was created, at the direction of counsel, in order for the work product privilege to apply. *See Central Telephone Co. of Texas*, 343 NLRB at 989 ("[I]t is not necessary for a specific claim to have been threatened or filed at the time of the document's creation, as long as the document was prepared in anticipation of foreseeable litigation."); *U.S. v. Roxworthy*, 457 F.3d 590, 600 (6th Cir. 2006) (holding that work product privilege applied to memoranda because company had identified a specific transaction that *could* precipitate litigation based on "opposing party's general inclination to pursue this sort of litigation"); *EEOC v. Lutheran Social Servs.*, 186 F.3d 959, 968-69 (D.C. Cir. 1999) (applying work product privilege to investigation report prepared after employees alleged a hostile work environment, but *prior to* any administrative claim or lawsuit being filed); 6-26 Moore's Federal Practice – Civil § 26.70[3][a] ("Even if the anticipated litigation never is commenced, as long as the document was prepared in anticipation of litigation, it is entitled to protection."). Indeed, the purpose of the work product privilege is to foster candid legal advice that will lead to the resolution of disputes, through voluntary compliance with the law (and the collective bargaining agreement), before a formal claim is filed. *Central Telephone Co. of Texas*, 343 NLRB at 990.

The Board should correct the ALJ's error and apply the widely-accepted federal court standard to determine whether the work product privilege protects from disclosure the witness statement at issue in this case. The ALJ's overly narrow interpretation of the work product privilege ultimately does not advance the purposes of the Act.

CONCLUSION

For all of the foregoing reasons, the Chamber, COLLE, and SHRM urge the Board to adhere to the rule of *Anheuser-Busch* and to apply the attorney work product privilege consistent with the Federal Rules of Civil Procedure.

Respectfully submitted,

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I, the undersigned, hereby certify that on this 1st day of April, 2011, I served the foregoing amicus brief, via the Board's electronic filing system and via e-mail, upon the following:

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