

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

**SMITH'S FOOD & DRUG CENTERS, INC.
d/b/a FRY'S FOOD STORES**

and

Case 28-CA-22836

KAREN MEDLEY, an Individual

and

Case 28-CA-22837

KIMBERLY STEWART, an Individual

and

Case 28-CA-22838

ELAINE BROWN, an Individual

and

Case 28-CA-22840

SHIRLEY JONES, an Individual

and

Case 28-CA-22858

SALOOMEH HARDY, an Individual

and

Case 28-CA-22871

JANETTE FUENTES, an Individual

and

Case 28-CA-22872

TOMMY FUENTES, an Individual

**UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 99**

and

Case 28-CB-7045

KIMBERLY STEWART, an Individual

and

Case 28-CB-7047

ELAINE BROWN, an Individual

and

Case 28-CB-7048

KAREN MEDLEY, an Individual

and

Case 28-CB-7049

SHIRLEY JONES, an Individual

and

Case 28-CB-7058

SALOOMEH HARDY, an Individual

and

Case 28-CB-7062

JANETTE FUENTES, an Individual

and

Case 28-CB-7063

TOMMY FUENTES, an Individual

ACTING GENERAL COUNSEL’S EXCEPTIONS

Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46 of the Board’s Rules and Regulations, files the following exceptions to the Decision (ALJD) of Administrative Law Judge William G. Kocol (ALJ), [JD(SF)–10–11], issued on May 3, 2011, in the above-captioned cases:

1. The General Counsel excepts to the ALJ’s findings and conclusions that Respondent Union did not violate the Act “by failing to treat the membership resignation as a checkoff revocation” and that “this argument is untenable under *Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), and *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367 (1991).” (ALJD 3:29-32)

2. The General Counsel excepts to the ALJ’s findings and conclusions that the General Counsel has advanced an “argument” that is “untenable” under “*Frito Lay*,

3. The General Counsel excepts to the ALJ's findings and conclusions that the amended consolidated complaint, herein called the complaint, covers "untimely revocations of checkoff authorizations." (ALJD 3:38-39)

4. The General Counsel excepts to the ALJ's findings and conclusions that he agrees that the General Counsel has "run roughshod" over the "due process rights" of the Respondent Union. (ALJD 3:46-47; 4:1)

5. The General Counsel excepts to the ALJ's findings and conclusions that "Fry's and the Union were unable to agree to a successor contract before the October 25, 2008, date set for expiration of the then existing contract" (ALJD 5:21-22)

6. The General Counsel excepts to the ALJ's findings and conclusions insofar as he found and concluded that the Respondent Union applied the 2003-2008 collective-bargaining agreement to permit "employees who signed authorizations during the last year of the contract [to] revoke their authorizations upon the expiration of that contract." (ALJD 6:27-29; 10:12-13)

7. The General Counsel excepts to the ALJ's findings and conclusions that attribute to the General Counsel the belief that revocations of check-off authorizations "were not timely." (ALJD 7:25-26)

8. The General Counsel excepts to the ALJ's findings and conclusions that "employees could achieve through resignation what they could not achieve through revocation." (ALJD 8:1-2)

9. The General Counsel excepts to the ALJ's findings and conclusions that "*Lockheed [Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991)] and *National Oil [Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367 (1991)] mandate the dismissal" of the complaint allegations concerning employees' resignations of their Union memberships. (ALJD 8:4-7)

10. The General Counsel excepts to the ALJ's findings and conclusions that "Fry's and the Union were unable to agree to a successor contract before the October 25, 2008, date set for expiration for the then existing contract" (ALJD: 8:11-12)

11. The General Counsel excepts to the ALJ's findings and conclusions that because employees who revoked their check-off authorizations between June 28, 2009, and November 12, 2009, did not revoke them "during their 1-year anniversary date specified in the checkoff authorizations," the revocations were "untimely." (ALJD: 8:29-33)

12. The General Counsel excepts to the ALJ's findings and conclusions that employees who revoked their check-off authorizations between June 28, 2009, and November 12, 2009, all did so "during the hiatus period before a new contract was reached." (ALJD: 8:33-34)

13. The General Counsel excepts to the ALJ's findings and conclusions that the letters sent by Respondent Union to employees who revoked their check-off authorizations "described the next opportunity the employee would have to revoke the checkoff authorization." (ALJD: 8:36-39)

14. The General Counsel excepts to the ALJ's findings and conclusions that "the whole matter of the letters is a mere distraction from the allegations in the

15. The General Counsel excepts to the ALJ's findings and conclusions that "the anniversary dates described in the letters were indeed the next chance the employees could revoke their authorizations." (ALJD: 9:22-23)

16. The General Counsel excepts to the ALJ's findings and conclusions that the Board held in *Atlanta Printing Specialties*, 215 NLRB 237 (1974), *enfd.* 523 F.2d 783 (6th Cir. 1975), that the "'applicable collective-bargaining agreement' [under] Section 302(c)(4) of the Act refers only to 'the one in effect at the time the employees signed their checkoff authorizations and *not* subsequent collective-bargaining agreements.'" (ALJD: 9:44-47)

17. The General Counsel excepts to the ALJ's findings and conclusions that "*Food & Commercial Workers Local 1 (Big V Supermarkets)*, 304 NLRB 952 (1991), *enfd.* 975 F.2d 40 (2d Cir. 1992) . . . is clearly inapplicable here because it involved checkoff authorizations with no revocations periods and thus were revocable at will." (ALJD: 10:1-5)

18. The General Counsel excepts to the ALJ's findings and conclusions that "the General Counsel has failed to show that any ambiguity that employees might perceive [from ambiguous check-off authorizations] resulted from the misleading acts of the Union rather [than] ambiguity inherent in the statutory language and the judicial gloss placed on that language." (ALJD: 10:13-16)

19. The General Counsel excepts to the ALJ's findings and conclusions that insofar as the "General Counsel challenges the facial validity of the checkoff

20. The General Counsel excepts to the ALJ's findings and conclusions that "during the time periods before the expiration of the old contract and after the beginning of the new contract the Union and Fry's properly continued to deduct dues pursuant to the checkoff authorization forms; that is to say the authorization forms themselves were lawful." (ALJD: 10:42-47)

21. The General Counsel excepts to the ALJ's recommended order to dismiss the complaint. (ALJD: 11:22-26)

22. The General Counsel excepts to the ALJ's failure to find and conclude that Respondent Union violated Section 8(b)(1)(A) or Section 8(b)(2) of the Act.

23. The General Counsel excepts to the ALJ's failure to find and conclude that Respondent Employer violated Section 8(a)(1) and (3) or Section 8(a)(1) and (2) of the Act.

24. The General Counsel excepts to the ALJ's failure to require Respondents to remedy their unfair labor practices as alleged in the complaint.

Dated at Phoenix, Arizona, this 31st day of May 2011.

Respectfully submitted,

/s/ Johannes Lauterborn

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