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NATIONAL LABOR RELATIONS BOARD

<p><u>IN RE:</u></p> <p>NATIONAL LABOR RELATIONS BOARD; FRY'S FOOD STORES; UNITED FOOD AND COMMERCIAL WORKERS UNION (UFCW) LOCAL 99</p> <p>(Karen Medley, Kimberley Stewart, Elaine Brown, Shirley Jones, Saloomah Hardy, Janette Fuentes, Tommy Fuentes)</p>	<p>28-CB-7045; 28-CB-7047; 28-CB-7048; 28-CB-7049; 28-CB-7058; 28-CB-7062; 28-CB-7063</p> <p>UFCW LOCAL 99'S OPPOSITION TO THE ACTING GENERAL COUNSEL'S AND THE CHARGING PARTIES' EXCEPTIONS AND BRIEFS</p> <p>Hearing: January 18, 2011 Time: 9:00 am</p>
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INTRODUCTION

Counsel for the Acting General Counsel (“CAGC”) and the Charging Parties would have this Board believe that this case involves convoluted facts and complex, if unintelligible, legal theories. It does not. As the Administrative Law Judge (“ALJ”) found, this case involves the straightforward question of whether the Charging Parties’ dues revocations were timely under United Food and Commercial Workers (“UFCW”), Local 99’s dues check-off clause and binding Board law.

As the ALJ appropriately concluded, UFCW Local 99 properly denied all of the untimely dues revocation requests. Indeed, the seven Charging Parties did not even attempt to comply with the terms of the dues check-off authorization but rather asserted that they could revoke at-will because of a “contract hiatus”, despite the authorization’s window periods. In a misguided attempt to excuse these untimely requests, CAGC has issued a sprawling Consolidated Complaint that has no support in Board law or the undisputed facts of this case.

As the ALJ discussed in the decision, the CAGC’s theories have morphed and been somewhat opaque throughout these proceedings. Nonetheless, it and the Charging Parties principally contend (1) that UFCW Local 99 should have honored all dues revocation requests submitted during the “contract hiatus” period, and (2) membership resignations submitted during the same time should have operated to cease dues deduction. Neither contention is correct. The Board has considered and firmly rejected each argument. The facts of this case do not warrant taking a different approach.

The ALJ’s decision should be affirmed and the Consolidated Complaint should be dismissed because none of the Charging Parties revoked their dues authorizations during

an appropriate window period – either 30 to 45 days prior to their anniversary date or 30 to 45 days prior the expiration of the collective bargaining agreement in October of 2008. In addition, there is no merit to CAGC’s and the Charging Parties’ theory that employees may revoke at-will during a contract hiatus. The Board has firmly rejected such a legal theory. *Frito-Lay, Inc.*, 243 NLRB 137, 138 (1979); *American Nurses’ Association*, 250 NLRB 1324 (1980).

CAGC’s attempt to argue that UFCW Local 99’s dues authorization clause is unlawful or ambiguous is equally without merit and illogical. It is obvious that the dues authorization complies with the plain language of § 302(c)(4), Department of Justice guidance, and Board law on the subject. In any event, CAGC is not empowered to police the interpretation of allegedly ambiguous dues check-off language where the union’s interpretation is plausible. *American Smelting & Refining, Co.*, 200 NLRB 1004 (1972). It is clear that the UFCW Local 99’s interpretation is reasonable and complies with Board law. The Union’s interpretation is long-standing, consistent, and supported by other unions with similar clauses. Several Board cases demonstrate that the CAGC’s various, morphing theories cannot possibly be correct.

Regarding the membership allegations in the Consolidated Complaint, Board law is clear: under UFCW Local 99’s dues authorization, a membership resignation is *not* tantamount to a dues check-off revocation request. *International Broth. of Electrical Workers, Local No. 2008*, 302 NLRB 322, 328 (1991); *United Steelworkers of America, Local 4671*, 302 NLRB 367 (1991) The membership allegations are entirely without legal support and fail to recognize the important policy and practical reasons behind the distinction between membership and the obligation to pay dues. CAGC’s theories ask

this Board to make a departure from decades of black-letter Board law and to overrule cases that employers and unions have relied on for years. This Board should decline the invitation.

UFCW Local 99 respectfully requests the Board to affirm the ALJ's decision and dismiss the Consolidated Complaint . UFCW Local 99 did not commit any unfair labor practice when it properly denied the dues revocation requests of the seven Charging Parties.

STATEMENT OF FACTS

A. Background of the Case.

In the fall of 2009 – due to a potential strike with its grocery employers – several members of UFCW Local 99 attempted to revoke their dues check-off authorizations. CAGC Ex. 1(b1). Additionally, several members attempted to resign their membership. *Id.*

As a result of the labor unrest, several employees resigned their membership so they could continue working and avoid fines for crossing picket-lines during any potential strike.¹ UFCW Local 99 honored all the requests for membership resignation. CAGC Ex. 8-15. It did not, however, honor the requests for dues revocation. *Id.* The Union only honored revocations requests that were submitted either 30 to 45 days prior to the anniversary date of execution or 30 to 45 days prior to contract termination in October of 2008. *Id.*; RT 48, 170-171.

¹ The record evidence reveals that hundreds of employees rescinded their membership resignations or dues revocations within days of their original requests and the execution of the new collective bargaining agreement in November of 2009. *See, e.g.* CAGC's Ex. 7. The logical inference, therefore, is that they were merely attempting to work and avoid picket-line fines. For example, consider the case of Manuel Arizmendi. CAGC Ex. 7, 000604. He sent a letter to the Union on November 11, 2009. He then rescinded that letter and re-signed with the Union on November 13, 2009, one day after the new collective bargaining agreement was reached.

B. UFCW Interprets its Clause As Providing Two Escape Periods.

Employees sign dues check-off authorizations with the following language:

You are hereby authorized and directed to deduct from my wages commencing with the next payroll period, an amount equivalent to dues and initiation fees as shall be certified by the Secretary-Treasurer of Local 99

This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent upon my present or future membership in the Union. This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 99, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union written notice of revocation bearing my signature thereto

Un. Ex. 1.

The Union interprets this clause as providing a window period 30 to 45 days prior to the anniversary date of signing the check-off authorization and another window period 30 to 45 days prior to the termination of the applicable collective bargaining agreement. RT 48; 170-171. This interpretation is long-standing, consistent and supported by other locals with similar language. RT 170-171.

C. The Collective Bargaining Agreement was set to Expire on October 25, 2008.

UFCW Local 99's collective bargaining agreement with Fry's Food and Drug Stores ran from October 26, 2003 through October 25, 2008. CAGC Ex. 5. Thereafter, the parties entered into several extension agreements. CAGC Ex. 6. The parties reached agreement on a new collective bargaining agreement on November 12, 2009. *Id.*; RT 72.

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D. The Charging Parties Allege that They are Entitled to Revoke Because of a Contract Hiatus. The Union Denies the Untimely Requests.

During the fall of 2009, the Charging Parties wrote to the Union purportedly revoking their dues check-off authorizations. CAGC Exs. 8-15. The letters alleged that because of “contract hiatus”, they were entitled to a new revocation window or to revoke at will. *Id.* The Union accepted any membership resignations but denied the untimely dues revocations because they were not submitted 30 to 45 days prior to the employees’ anniversary date or the expiration of the contract in October of 2008. *Id.*; RT 48; 170-171.

E. CAGC’s Legal Theories.

Throughout these proceedings, CAGC has offered convoluted or, in some instances, entirely unintelligible explanations of its legal theories. Indeed, the ALJ recognized the due process implications of this conduct for the Union in responding to the charges. RT 28, 30-32, 41-44 (finding the legal theory “incomprehensible”), 61, 89-91; *see also*, ALJ Opinion at 3-4.

Despite its ever-changing and unclear theories, CAGC and the Charging Parties appear to principally contend (1) that UFCW Local 99 should have honored all dues revocation requests submitted during the “contract hiatus” period, and (2) membership resignations submitted during the same period should have operated to cease dues deductions. As the following brief demonstrates, neither argument is correct.

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ARGUMENT

I. The Undisputed Facts and Board Law Demonstrate that UFCW Local 99 Properly Denied the Untimely Dues Revocation Requests.

A. The nature of dues check-off.

Section 302 of the Labor-Management Relations Act (“LMRA”) authorizes a dues deduction, which “shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner.” 29 U.S.C. § 186(c)(4). This provision is enforced by the Department of Justice. *See, e.g.*, Dept. of Justice Opinion Letter of May 13, 1948, 22 L.R.R.M. 45 (1948).

The statutory language authorizes a dues check-off, which is “a procedure through which the employer withholds union dues from employees’ pay and remits the amount to the union. Its primary value to the union is administrative convenience” Higgins, John E., *The Developing Labor Law*, Vol. II at 2177. In 1948, the Justice Department announced that it would not prosecute unions with authorizations that had an automatic renewal provision so long as an annual escape period is maintained. 22 L.R.R.M. 45 (1948). Specifically, the Justice Department found that an automatically renewing check-off clause was lawful so long as it “include[s] an automatic renewal from year to year with a 10-day escape period.” *Id.* The Justice Department reasoned that such a clause “[e]ven with the automatic renewal provision . . . does not appear to be ‘irrevocable for a period of more than a year.’” *Id.*

The Board has held that employees must strictly adhere to the window periods in the dues check-off clause; otherwise the revocation attempt is ineffective. *United Elec. Radio & Mach. Workers of America v. Westinghouse Elec. Corp.*, 345 F.Supp.274 (W.D.

Pa. 1972) (holding that it is immaterial that Virginia is a “right-to-work” state, employees must strictly adhere to the annual escape provisions); *Monroe Lodge No. 770 v. Litton Business Systems, Inc.*, 334 F.Supp. 310 (W.D. Va. 1971) (employer must restart dues deduction because employees did not revoke during the appropriate escape period); *Frito-Lay, Inc.*, 243 NLRB 137 (1979) (strictly construing escape periods and finding that there is no merit to the argument that employees may revoke during a “contract hiatus”).

Similarly, the Board has held that dues check-off authorizations survive and continue after the expiration of the collective bargaining agreement. *Lowell Corrugated Container Corp.*, 177 NLRB 169 (1969) (holding that dues authorizations survived the expiration of the contract); *Frito-Lay, Inc.*, 243 NLRB 137 (1979) (dues authorizations survive a contract hiatus); *The Associated Press*, 199 NLRB 1110 (1972) (upholding an arbitrator’s decision that dues check-off is not revocable at will at contract expiration); *American Nurses Association*, 250 NLRB 1324 (1980) (relying on *Frito-Lay* in finding the revocations ineffective because they were not made during a window period and rejecting a contract hiatus theory).

Here, the ALJ strictly adhered to the escape periods outlined in UFCW Local 99’s dues check-off authorization. Given the above authorities, that approach was entirely correct. *None* of the Charging Parties revoked their dues authorizations during an appropriate window period - either 30 to 45 days prior to an anniversary date or 30 to 45 days prior to the expiration of the 2008 contract. CAGC Ex. 8-15; RT 48; 170-171. Consequently, it was appropriate and fully consistent with Board law for UFCW Local 99 to reject the dues check-off revocation requests.

B. The undisputed facts demonstrate that there was no violation of the Act.

The Union interprets its clause as providing for two escape periods in subsequent yearly periods: (1) 30 to 45 days prior to the employee's anniversary date, and (2) 30 to 45 days prior to the expiration of the collective bargaining agreement. RT 49-50; 170-171. Indeed, even CAGC concedes this is how UFCW Local 99 interprets the clause. RT 48 ("I think both parties agree that during the 15 day period before October of 2008 that the parties could revoke."). This interpretation is longstanding, consistent, and supported by the interpretation of other locals with the same or similar dues authorization language. RT 170-171.

Yet the undisputed evidence at trial demonstrated that *none* of the charging parties – or the other members of the “class” – revoked their dues check-off authorizations 30 to 45 days prior to their anniversary date or 30 to 45 days prior to the expiration of the collective bargaining agreement in October of 2008. CAGC Exs. 7-15. With the expiration of the collective bargaining agreement occurring on October, 25, 2008, if employees wanted to revoke during a “contract expiration window period”, they would have had to revoke between September 10, 2008 and September 25, 2008.

Yet none of the Charging Parties even attempted to comply with the dues authorization's window periods. Instead, the Charging Parties simply asserted that they were entitled to revoke based on a rejected theory of labor law: that employees may revoke “at-will” during a contract hiatus. The Charging Parties were incorrect.

1. Elaine Brown

Ms. Brown signed her dues check-off authorization on October 25. CAGC Ex. 11. As such, her annual escape period would be from September 10 through September

25. The Union received letters on September 30, 2009 and November 10, 2009. *Id.* Neither of these letters falls within the appropriate revocation periods outlined above – either 30 to 45 days before her anniversary date or 30 to 45 days prior to contract expiration in October of 2008.² Accordingly, the Union and Employer were correct in continuing to deduct Ms. Brown’s dues.

2. Janette Fuentes.

Ms. Fuentes signed her dues check-off authorization on June 16. CAGC Ex. 14. As such, her annual escape period would be from May 1 through May 17. The Union received a letter on November 11, 2009. *Id.* This letter was not within the anniversary period or the contract termination period outlined above. Accordingly, UFCW Local 99 and the Employer were correct in continuing to deduct Ms. Fuentes’s dues.

3. Tommy Fuentes.

Mr. Fuentes signed his dues check-off authorization on October 16. CAGC Ex. 15. As such, his annual escape period would be from August 31 through September 16. The Union received Mr. Fuentes’s letters on October 2, 2009 and November 11, 2009. Neither of these letters falls within the appropriate revocation periods outlined above. *Id.*

4. Salomeh Hardy.

Ms. Hardy signed her dues check-off authorization on October 6. CAGC Ex. 12. As such, her annual escape period would be from August 22 to September 6. The Union received Ms. Hardy’s letters on September 29, 2009 and November 10, 2009. *Id.* Neither of these letters falls within the appropriate revocation periods outlined above –

² CAGC’s Complaint alleges that Ms. Brown wrote to the Employer on November 16, 2009. CAGC Ex. 1(b1). Ms. Brown’s testimony at the hearing confirmed that the letter was sent to the employer on November 16, 2009. RT 149-150.

either 30 to 45 days prior before her anniversary date or 30 to 45 days prior to contract termination in October of 2008.³

5. Shirley Jones

Ms. Jones signed her dues check-off authorization on November 15. CAGC Ex. 10. As such, her annual escape period would be from September 30 through October 16. The Union received letters from Ms. Jones on October 27, 2009 and November 10, 2009. Neither of these letters falls within the appropriate revocation periods outlined above – either 30 to 45 days prior before her anniversary date or 30 to 45 days prior to contract termination in October of 2008.

6. Karen Medley

Ms. Medley signed her dues check-off authorization on October 11. CAGC Ex. 13. As such, her annual escape period would be from August 26 through September 11. The Union received letters on October 6, 2009 and November 9, 2009. *Id.* Neither of these letters falls within the appropriate periods outlined above – either 30 to 45 days prior before her anniversary date or 30 to 45 days prior to contract termination in October of 2008

7. Kimberly Stewart

Ms. Stewart signed her dues check-off authorization on July 29. CAGC's Ex. 8. As such, her annual escape period would be from June 13 through June 29th. The Union

³ Ms. Hardy never sent a letter to the employer during the appropriate period. *See, Id.* And although no evidence was produced to corroborate the Complaint's contentions, the Complaint alleged that Ms. Hardy did not send a letter to the Employer until December 4, 2009, which is outside of the alleged hiatus period anyway. *See, CAGC Ex. 1(b1), Consolidated Complaint.*

received letters from Ms. Stewart on September 30, 2009 and November 12, 2009. *Id.* at 1-3. Neither letter falls within the appropriate revocation periods outlined above.⁴

As the foregoing demonstrates, none of the charging parties sent in letters to the Union and Employer during their appropriate window periods. Consequently, neither the Union nor the Employer committed any unfair labor practice in denying the requests. This Board should affirm the ALJ's well-reasoned decision and dismiss the Consolidated Complaint.⁵

C. The Charging Parties were not entitled to revoke because there was a “contract hiatus.” That theory has been considered and firmly rejected by the Board.

All of the letters sent to UFCW Local 99 by the Charging Parties alleged that because there was a “contract hiatus” they were entitled to either a new window period or to revoke at-will. *See*, GC Exs. 8-15. The charges themselves make the same contention. *See*, GC Ex. 1(a)-1(bc) (“Within the past six months, there existed a contractual ‘hiatus,’ in which no collective bargaining agreement was in effect During that contract hiatus period, the Charging Party . . . submitted . . . letters resigning from union membership and revoking their dues deduction authorization cards.”). Thus, it is clear that none of the charging parties even attempted to comply with the window periods as outlined in their dues check-off authorization forms.

⁴ CAGC's Complaint alleges that Ms. Stewart sent letters to the Employer on November 16, 2009. CAGC Ex. 1(bl). Ms. Stewart's testimony at trial corroborated the fact that she sent it on or around November 16, 2009, outside of the contract hiatus period anyway. RT 120-122

⁵ As will be discussed in a later section, quite apart from the issue of timeliness, several of the Charging Parties and purported members of the “class” did not even minimally comply with the dues check-off revocation procedure by sending notice to *both* the employer and union. Additionally, several employees failed to sign their letters. None of these requests could be honored under the terms of the dues check-off.

Instead, CAGC's legal theory is that a "contract hiatus" occurred after the expiration of the collective bargaining agreement on October 25, 2008 through November 12, 2009, when a new contract was settled.⁶ CAGC posits that any employee revoking either membership or dues during this period should have had their dues deduction stopped.

The theory is simply untenable as a matter of law. Firmly established and relied upon Board law holds that employees are not afforded new window periods because of a "contract hiatus". *Frito-Lay, Inc.*, 243 NLRB 137, 138 (1979). In *Frito-Lay*, the Board faced *precisely the same contention* as in this case. There, several employees attempted to revoke their dues authorizations during a "contract hiatus." The employees, as here, argued that the "hiatus" provided them with a new window period or, in the alternative, that they could revoke their authorizations at-will. The ALJ ruled against the employees and found that there was no merit to the argument that dues check-off authorizations are revocable at will during a contract hiatus. The Board fully affirmed the ALJ's ruling and rejected the contract hiatus theory, finding it inconsistent with other authorities and the Department of Justice's guidance on the issue. *Id.*

Here, the ALJ properly applied Board law to the facts of this case in concluding that the Consolidated Complaint must be dismissed. This Board's holding in *Frito-Lay* entirely forecloses CAGC's and the Charging Parties' theory that the contract hiatus afforded employees another opportunity to revoke. UFCW Local 99 and Fry's acted perfectly reasonable in relying on what has become firmly established Board law on the issue.

⁶ In order to reach the conclusion regarding the "contract hiatus" period, CAGC must entirely ignore the extension agreements entered into by the Union and Employer. *See*, GC Ex. 6.

The Board's holding in *American Nurses' Association*, 250 NLRB 1324 (1980) further shows that CAGC's and the Charging Parties' position is legally untenable and should be rejected by this Board. There, employees similarly argued that they were entitled to revoke dues at-will during a contract hiatus. In rejecting that contention, the ALJ noted that the dues authorization made "[n]o mention . . . of an interim between agreements." *Id.* The dues authorization read, in part:

This assignment and authorization shall be irrevocable for one (1) year from date or until the termination date of the collective bargaining agreement between the Union and ANA, whichever is sooner, and shall renew automatically with the same irrevocability for successive like periods, unless terminated by me in writing within ten (10) days prior to the expiration of any irrevocable period. Such written termination shall be effectuated by certified mail to ANA and the Union.

Id. at 1325. The ALJ applied *Frito-Lay* and found that the employees could not revoke during a contract hiatus. The Board fully affirmed the ALJ's reasoning.

Here, as in *American Nurses Assoc.*, UFCW Local 99's dues authorization makes no mention of an interim between agreements. The clause and its long-standing interpretation demonstrate that the Union never intended for the clause to be revocable where there is no contract in effect. Indeed, a member must revoke 30 to 45 days prior to either the anniversary date or contract termination.

It is also worth noting that the dues check-off clause in *American Nurses Assoc.* is somewhat similar to UFCW Local 99's. UFCW Local 99's, however, is even more generous to employees in that it grants them two 15 day window periods, rather than the 10 day revocation period outlined in *American Nurses Assoc.* There is simply no possible way to square *Frito Lay* and *American Nurses* with the CAGC's legal theory in

this case. This Court should dismiss the Complaint in full because its legal theories have been considered and firmly rejected.⁷

D. The Board should reject CAGC's and the Charging Parties' request to overrule firmly established Board precedent.

The Charging Parties' exceptions and Brief to the Board concede that the facts of this case are governed by the holding in *Frito Lay, Inc.*, 243 NLRB 137 (1979); *see also*, Charging Parties Brief to NLRB at 14-16. Indeed, given the overwhelming similarity between the facts in *Frito-Lay* and this case, the Charging Parties expressly ask this Board to overrule *Frito-Lay*. This concession simply highlights the weakness of CAGC's and the Charging Parties' case. The Board should reject the Charging Parties' request to overrule *Frito-Lay*.

In any event, finding in favor of the Charging Parties would require more than simply overruling *Frito-Lay*. It would require overruling a long history of cases and advice that either relies on similar reasoning, or expressly relies on the decision in *Frito-Lay*. *See, e.g., The Associated Press*, 199 NLRB 1110 (1972) (pre-dating *Frito-Lay* and upholding an arbitrator's decision that dues check-off is not revocable at will at contract expiration); *American Nurses Association*, 250 NLRB 1324 (1980) (relying on *Frito-Lay* in finding the revocations ineffective because they were not made during a window period and rejecting a contract hiatus theory); *Southwestern Bell Telephone Company*, 1985 WL 54651(N.L.R.B.G.C.) (General Counsel's advice memorandum relying on

⁷ It is also worth noting, as the ALJ did, that CAGC's and the Charging Parties' reliance on *UFCW District One*, 304 NLRB 952 (1991) is wholly misplaced. In that case, the Board found that employees could revoke their dues authorizations at will because the authorizations "had no limitations whatsoever on revocation." *Id.* at 952; *see also*, ALJ Opinion at 10 (distinguishing *UFCW District One* and holding "that case is clearly inapplicable here because it involved checkoff authorizations with no revocation periods and thus were revocable at will."). The Board, therefore, only stated the obvious in *UFCW District One*. In this case, by contrast, the dues authorization clearly has several limitations on revocation.

Frito-Lay and recommending the dismissal of charges for dues revocations submitted during a hiatus period); *Johnson Controls World Services, Inc.*, 1994 WL 1865870 (1999) (relying on analysis in *Frito-Lay*); *Steelworkers Local 7450 (Ascaro)*, 246 NLRB 878, 882 (1979) (a dues revocation “must be accomplished during the time periods set out in the checkoff authorization itself, even during the hiatus between contracts.”).

This Board should reject CAGC’s and the Charging Parties’ invitation to overrule long-standing and well-reasoned precedent. As is evidenced from the hundreds of dues check-off authorizations around the country, unions and employers have come to rely on the Board’s reasoning in *Frito-Lay* and similar cases. Overruling *Frito-Lay* and its progeny would be illogical and create “widespread disruptive effect[s] on existing dues-checkoff arrangements or place undue burdens on unions or employers.” *Lockheed Space*, 302 NLRB at 329.

Moreover, in its Special Appeal of the ALJ’s previous, pre-trial rulings to this Board, CAGC asked for leniency because it was allegedly fashioning some “new” theory of liability regarding dues check-off. *See*, CAGC’s Special Appeal. Even though CAGC utterly failed to explain this “new theory” in that Special Appeal, this Board granted CAGC the opportunity to develop it at trial. *See*, NLRB’s Order on Special Appeal. It is now clear that there is nothing “new” about CAGC’s or the Charging Party’s theory. Indeed, CAGC – with the assistance of the National Right to Work Foundation, who have pushed this ideological agenda for years – is simply re-raising theories of liability that have already been firmly rejected by this Board. *See*, RT 28 (Judge Kocol: “It simply says you argue there’s a new theory and I’ve read your appeals again. I went through step by step in my analysis trying to figure out what is novel here’s

that's not covered by existing law and it, frankly, came out to be the same result.”). CAGC's inability to show its “new theory” again demonstrates the weakness of its original legal position. The ALJ's decision should be affirmed and the Consolidated Complaint should be dismissed.

E. The contract expiration window period must be construed as the one tethered to the expiration of the contract in 2008.

The ALJ was correct in rejecting CAGC's and the Charging Parties' argument that the extension agreements somehow alter the result here. *See*, ALJ Decision at 9-10. As it has all along, UFCW Local 99 contends that in order to validly revoke the dues check-off authorization an employee had to revoke 30 to 45 days prior to the employee's anniversary date or 30 to 45 days prior to the expiration of the collective bargaining agreement in 2008. RT 48; 170-171.

CAGC and the Charging Parties have construed the “hiatus period” as running from October 25, 2008 through November 12, 2009. *See*, CAGC's Brief at 7-10; Charging Parties Brief at 10-16. Nonetheless, CAGC has been equivocal in that position and suggested or implied that perhaps the contract termination revocation period could be tethered to the 9 extension agreements the Union and Employer entered. *See*, GC Ex. 6, RT 49. Or, that because there were 9 extension agreements, magically, employees should be afforded an opportunity to revoke at will for over a one-year hiatus period. In typical fashion, neither CAGC nor the Charging Parties have supported their arguments with any applicable legal authority. There is no merit to the CAGC's constantly evolving theories in this case.

In addition to the Union's practice being perfectly consistent with its dues check-off language, the fact that UFCW Local 99 required a contract termination revocation to

be received 30 to 45 days prior to the expiration of the 2008 contract, rather than some other date, is consistent with Board law and common sense. As the ALJ found in his opinion, “[p]arties must preserve the statutory right of the employees to revoke their checkoff authorizations *during the previously established escape period occurring before the originally intended expiration date of the old contract.*” *Atlanta Printing Specialties and Paper Products*, 215 NLRB 237, 238 (1974) (emphasis added).

In *Atlanta Printing Specialties*, the parties – similar to the Union and Employer in this case – had a 15-day escape period preceding the termination date of the CBA. *Id.* at 237. The CBA was set to expire on November 1, 1973. *Id.* at 238. The parties, however, prematurely negotiated a new CBA with a new expiration date in 1975. When employees attempted to revoke their dues during the contract expiration window period prior to the 1973 agreement expiring, the union rejected the revocations as untimely. *Id.* The union argued that the new contract superseded the previous contract and that members had to revoke 15 days prior to the contract expiring in 1975. In rejecting that argument, the Board held that “in changing the termination dates, therefore, the parties must preserve the statutory right to revoke their checkoff authorizations *during the previously established escape period occurring before the originally intended expiration date of the old contract.*” *Id.* at 238 (emphasis added).

Here, it is equally clear based on *Atlanta Printing* that the contract termination window period had to be tethered 30 to 45 days prior to the expiration of the 2008 contract. In order to take advantage of this window period, employees had to revoke from September 10, 2008 through September 25, 2008. Moreover, it is immaterial that the Union and Employer entered into extension agreements – contrary to the fleeting

suggestion by CAGC. The entire rationale of *Atlanta Printing, Frito-Lay* and other applicable Board precedents is to provide a date-certain for revocation of dues.

Extending that date-certain into the future because of uncertain extension agreements would have run afoul of the principles enunciated in *Atlanta Printing Specialties*.

Moreover, simple common sense demonstrates that what the Union did was perfectly appropriate. Construing extension agreements as conferring more escape periods or extending the escape period would create great uncertainty amongst the employees as to when the revocation period is. In this case, the parties entered into 9 extension agreements during the course of 2008 through 2009. Can it seriously be argued that employees had 9 opportunities to revoke in one year, in addition to their anniversary date? The obvious answer is no. There is no credible authority to support this position. Parties must be held to the “previously established escape period occurring *before* the originally intended expiration date of the old contract,” which was in October of 2008. *See, Atlanta Printing Specialties*, 215 NLRB 237, 238 (1974).

Finding the extension agreements rather than the expiration of the 2008 contract to be the appropriate period to revoke would also likely run afoul of Congressional intent in drafting § 302(c)(4), 29 U.S.C. § 186. As recounted in *Litton Business*, 334 F.Supp. at 314, section 302(c)(4) as passed by the House provided that authorization could be revocable any time upon thirty days written notice to the union. *Id.* That section was amended by the Senate and passed into law as it presently reads. “It was thought that a period of one year would better protect the union’s position from deterioration through revocation of check-off authorizations.” *Id.*; *see also, Lockheed Space*, 302 NLRB 322 (1991) (reaching its decision based, in part, on the fact that it would “not have

widespread disruptive effect on existing dues-checkoff arrangements or place undue burdens on unions or employers.”); *The Developing Labor Law*, Vol. II at 2176 (the “primary value [of dues check-off] is the administrative convenience” it afford to the union.”).

Construing the clause or Board law as allowing the employees here to revoke at will during a 12-month hiatus period or, alternatively, to revoke on 10 separate occasions within one year would run afoul of these principles. In any event, it would have been impossible to construe the extension agreements as providing such a right. Most of the extension agreements were only entered into for a 30-day period. It would have been impossible, therefore, to revoke one’s dues authorization 30 to 45 days prior to an extension agreement *that had not even been entered into yet*. Board law and common sense dictate rejecting CAGC’s legal theories and dismissing the Complaint.

F. CAGC’s and the Charging Parties’ conclusion that all dues revocation requests submitted during the hiatus period should have been honored does not follow from its premise.

Putting aside CAGC’s tortured logic and internally contradictory arguments regarding an alleged ambiguity in the dues check-off authorization, CAGC’s conclusion does not even follow from its premise. CAGC concludes that the Union should have honored the requests of all employees who submitted a dues revocation request during the 12 to 13 month contract hiatus. CAGC makes this conclusion because, in its view, the “Union denied employees their right to revoke a check off after the termination date of the 2003 CBA on October 25, 2008.” CAGC Brief at 8. But, of course, employees did *not* have a right to revoke after the expiration of the October 25, 2008 contract since the dues authorization requires a revocation 30 to 45 days prior. Under any reading of

the authorization, even the CAGC's erroneous reading, employees had to revoke during a 15-day window period preceding either the anniversary date or contract expiration in subsequent yearly periods. How CAGC and the Charging Parties magically conclude that employees are permitted to revoke for an unlimited 12 to 13 month period in between contracts is anyone's guess. Such language appears neither in the dues authorization form itself nor in any Board case discussing the topic. *See, e.g., American Nurses Association*, 250 NLRB 1324 (1980) (rejecting the argument that employees can revoke at will during a contract hiatus because the dues authorization made "[n]o mention . . . of an interim between agreements."). The Board should affirm the ALJ's decision and dismiss the Consolidated Complaint.

II. The Union's Dues Check-Off Authorization is Not Ambiguous.

CAGC and the Charging Parties argue that employees must have been provided an unlimited opportunity to revoke during the 13-month contract hiatus period because the union's dues authorization clause is "ambiguous." CAGC Brief *et seq.*; Charging Parties Brief *et seq.* Neither party identifies precisely what the ambiguity is in the authorization form itself. *See, id.* And, as discussed in subsequent sections, CAGC's argument is actually contradictory in nature. *See*, Section III.

In any event, CAGC's and the Charging Parties' theories about why the authorization is ambiguous have changed over time. Despite the changing theories, the ALJ properly rejected the ambiguity argument and found the authorizations were "sufficiently clear." ALJ Opinion at 10. The ALJ stated that CAGC "failed to show that any ambiguity that employees might perceive resulted from the misleading acts of the Union rather [than] ambiguity inherent in the statutory language and the judicial gloss

placed on that language.” *Id.*; *see also*, RT 38-39. The ALJ’s decision and reasoning are correct and should be affirmed.

A. As the ALJ acknowledged, the Union’s check-off authorization complies with § 302(c)(4). The clause tracks the statutory language.

Section 302(c)(4) states that “a written assignment . . . shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.” 29 U.S.C. § 186(c)(4). UFCW Local 99’s clause tracks that statutory language. In light of the similarity between the statutory language and the Union’s authorization form, it is difficult to understand why the CAGC claims the Union’s actions were unlawful in this case.

Indeed, the ALJ expressly recognized the fallacy of CAGC’s position during pre-trial conference calls with all of the parties and on the record at the hearing. RT 37 (Judge Kocol: “[The clause] repeats the language of the statute . . .”). There is no merit to the CAGC’s Complaint and it should be dismissed with prejudice.

B. The authorization complies with Department of Justice’s guidance on the issue.

The Department of Justice is the federal agency with enforcement authority over § 302(c)(4) of the LMRA.⁸ In 1948, it was asked to issue an opinion on the legality of a dues check-off clause that automatically renewed in subsequent yearly periods. *See*, DOJ Opinion on Checkoff, 22 L.R.R.M. 46. The Department of Justice concluded that “an automatic renewal provision from year to year with a 10-day escape period” would not violate the statute. *Id.* It further reasoned that “[e]ven with the automatic renewal provision, the proposed form of authorization does not appear to be ‘irrevocable for a

⁸ As will be discussed in subsequent sections, it is not even clear that the CAGC has jurisdiction to proceed with this case in the first instance. The Department of Justice is the governmental agency with responsibility for enforcing and interpreting the requirements of dues check-off.

period of more than one year.” *Id.* at 47. In light of that finding, the Department of Justice found no violation.

Here, it is obvious that UFCW Local 99’s clause complies with the Department of Justice’s guidance on the issue. Indeed, it certainly is not irrevocable for a period of more than a year. The CAGC’s Complaint should be dismissed.

C. Any argument that the dues authorization is unlawful *per se* is incorrect as a matter of law.

At different points in this litigation, CAGC has asserted that UFCW Local 99’s clause is unlawful on its face. *See, e.g.*, CAGC Ex. 1(a)-1(bc) (“[T]he dues deduction authorization form . . . is unlawful either facially or as applied . . .”). At other points it has stated that it is it is “not alleging that it is a facially invalid clause.” RT 41. As will be discussed in following sections, CAGC even contradicts itself in its briefing to this Board.

While the CAGC’s theory is not entirely clear, the Board’s rulings on the issue are – they foreclose such an argument. A long line of Board cases hold that there “is nothing in the nature of a check-off agreement which is *per se* illegal under any of the provisions of Section 8.” *Salant & Salant*, 88 NLRB 816, 888 (1950); *see also, Frito-Lay, Inc.*, 243 NLRB 137 (1979) (rejecting “the suggestion that that the validity of checkoff arrangements for purposes of Section 8 must be judged in light of the provisions of Section 302(c)(4) [a]s contrary to well-settled law.”). The CAGC’s unsupported and directly contradicted legal theory must be rejected and the Complaint should be dismissed.

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III. CAGC’s Arguments Regarding the Alleged Ambiguity in the Union’s Dues Check-Off Authorization Are Contradictory.

In its Special Appeal to the Board, CAGC argued that the “irrevocability language contained in the check-off clause is so vague that it cannot reasonably be construed to mean that an employee would have the right to revoke his or her check-off authorization upon the termination of any collective bargaining agreement” Special Appeal Brief at 13. Putting aside for the moment the fact that the clause is clear, a point on which the ALJ clearly agreed, at trial CAGC appeared to contradict that statement when he said, “let me be clear that we are not and . . . we have not alleged in the Complaint that [the authorization] is facially invalid” RT 31. At another point, CAGC stated “[y]our honor, we are not alleging that it is a facially invalid clause.” RT 41. It is impossible to reconcile the CAGC’s various statements: is the clause ambiguous and thus facially invalid or not?

CAGC does not clarify its morphing, contradictory and erroneous theories in its Brief to this Board. At one point, CAGC challenges the ALJ’s findings that it has shifted its theory over and over in this case to no avail. CAGC Brief at 14-15. In discussing the alleged ambiguity in the dues authorization, CAGC actually concedes that the “agreements obviously are not facially invalid.” CAGC Brief at 14. CAGC goes on to state – *on the very next page* – that “the General Counsel also argued that it would be anomalous to conclude that employees clearly and unmistakably waived their right to refrain from assisting the Union *when they agreed to have their dues deducted via unlawfully worded check-off authorizations.*” *Id.* at 15 (emphasis added).

Again, CAGC’s arguments are contradictory. Is the authorization unlawfully worded or not? First, the CAGC says there is nothing facially invalid about the

authorization and then goes on to conclude that, in fact, the authorizations are “unlawfully worded.” The CAGC’s inability to state a cogent theory of this case shows that the ALJ was entirely correct in dismissing the Consolidated Complaint. *See*, RT 44. This Board should affirm that order.

IV. In Any Event, The Board Does Not Police the Interpretation of Allegedly Ambiguous Check-Off Authorization Language. The Board Defers to the Union’s Reasonable Interpretation.

While the CAGC’s theories regarding the authorization’s language are unclear, there is simply no dispute that CAGC claims the authorization is “ambiguous.” RT 27, 31, 37. Notwithstanding the alleged ambiguity, CAGC essentially argues that the clause should be interpreted in manner to allow all persons who revoked during the “contract hiatus” to be released from the dues obligation. UFCW Local 99 and the Fry’s argue that the clause should be interpreted to mean what it says: that employees must revoke 30 to 45 days prior to their anniversary date or 30 to 45 days prior to contract expiration. Accordingly, at its core there is a dispute over the interpretation of dues check-off language that the CAGC claims is ambiguous.

Even assuming *arguendo* that the CAGC is correct that the authorization is ambiguous, a long line of Board and federal court cases hold that “it will not effectuate the policies of the Act for the Board to impose on the parties its interpretation of the meaning of ambiguous contract checkoff provisions as implemented by employees’ authorization cards where, . . . a respondent acted reasonably . . .” *American Smelting & Refining, Co.*, 200 NLRB 1004 (1972); *citing, Miller Brewing Company*, 193 NLRB 528 (1971); *see also, Morton Salt Co.*, 119 NLRB 1402, 1403 (1958) (Board is not empowered to police the interpretation of check-off authorization disputes); *N.L.R.B v.*

Cameron Iron Works, Inc., 591 F.2d 1, 3 (5th Cir. 1979) (deferring to the reasonable interpretation of the dues check-off authorization by the parties).

In *American Smelting & Refining, Co.*, the union and employer had a check-off authorization that read:

This assignment and authorization shall be effective and cannot be cancelled for a period of one (1) year from the date appearing above or until the termination date of the current collective bargaining agreement between the Company and the Union, whichever occurs sooner.

I hereby voluntarily authorize you to continue the above authorization and assignment in effect after the expiration of the shorter of the periods above specified, for further successive periods of one (1) year from such date. I agree that this authorization and assignment shall become effective and cannot be cancelled by me during any of such years, but that I may cancel and revoke by giving to the appropriate management representative of the plant in which I am then employed, an individual written notice signed by me and which shall be postmarked or received by the Company within fifteen days following the expiration of any such year or within the fifteen days following the termination date of any collective bargaining agreement between the Company and the Union covering my employment if such date shall occur within one of such annual periods
.....

Id. at 1008. The union and employer had bewildering interpretations of the dues check-off authorization language. The union contended that the “the checkoff anniversary date controlled until a contract expired at which point the employees' anniversary dates became the contract expiration date . . .” *Id.* at 1010. To make matters worse, the parties even changed their interpretation of the authorization over its life. *Id.* (“They informed the employees of the Company's new interpretation of the language in the checkoff authorization.”). The employer ultimately agreed with the union’s interpretation and denied requests for revocation. The general counsel argued that the requests should have been honored. In rejecting the general counsel’s position, the Board quoted *Miller*

Brewing Company, 193 NLRB 528 (1971) and found that it should defer to the “plausible” interpretation of the union and employer.

The Board stated that “[i]n the instant proceeding the principal issue posed by the dispute is whether the employees' checkoff revocations were effective. In other words, whether they were effective under the terms of the authorization. *Without deciding which interpretation of the portion of the authorization which relates to revocation is the most valid, the Respondents' or the General Counsel's, I am of the opinion that the Respondents' interpretation is not unreasonable and is a plausible one.*” *Id.* at 1011 (emphasis added).

Here, as in *American Smelting & Refining*, there is simply no question that CAGC and UFCW Local 99 disagree about the interpretation of the dues check-off language. Like *American Smelting & Refining*, CAGC contends that the revocation letters were effective and should have been honored while the Union contends they were not. Without deciding which interpretation is correct, it is obvious that the Union's interpretation is at least “plausible”. Indeed, it is much less confused and muddled than the interpretation of the clause in *American Smelting & Refining* or the CAGC's theories in this case.

A slew of other Board cases also demonstrate the weakness of CAGC's and the Charging Parties' position. In *Miller Brewing Company*, 193 NLRB 528 (1971) several employees signed dues check-off cards that provided they were irrevocable for a period of one year and that they could be revoked during an escape period tethered to the anniversary date. The ALJ found that the cards were ambiguous because they did not contain a date whereby the company could determine when the employees signed their

cards. The company refused to honor revocations of the untimely cards and interpreted the clause as when the employees *received* the cards. The Board held that the company's construction of the ambiguous check-off clause was reasonable and therefore there was no violation of the Act.

In *Morton Salt Co.*, 119 NLRB 1402 (1958), the Board found that “[a]mbiguity [in a dues authorization] . . . does not establish illegality.” There, the parties maintained a check-off clause that provided for a supposed escape period “at least 60 days and not more than ____ days before any periodic renewal date of this authorization and assignment” *Id.* at 1405. The escape period was *entirely* ambiguous because it did not provide a second date. The employer and union construed the blank as requiring revocation between 60 and 70 days before the renewal date. The general counsel argued, like here, that as a result of this ambiguity, employees could essentially revoke at will. In rejecting the general counsel's argument and finding that “[a]mbiguity . . . does not establish illegality”, *id.* at 1406, the Board deferred to the reasonable interpretation of the parties.

Here, there is simply no way for CAGC's and the Charging Parties theories to be squared with the above authorities. As mentioned, CAGC reads the dues check-off authorization in one manner, the Union and Employer assert that it must be interpreted in another. Consequently, this is essentially a dispute over the interpretation of what the CAGC contends is an ambiguous check-off clause. As the above authorities make clear, however, CAGC is not empowered to impose its interpretation on the Union and Employer.

Lastly, if the CAGC is attempting to make new law with respect to dues check-off, as it has asserted, the above authorities make clear that UFCW Local 99 should not be punished as a result. Clearly, UFCW Local 99 has a right to rely on binding federal court and Board authority in administering its dues check-off agreement. Consequently, based on the above authorities, it is clear there is no violation of the Act and the Complaint should be dismissed in its entirety. The ALJ's decision should be affirmed.

V. CAGC's Legal Theories on Dues Check-Off Are Contradicted by Numerous Board Decisions on the Subject.

CAGC contends that a union must *always* provide an opportunity to revoke at or around contract expiration in subsequent years. While UFCW Local 99 complies with CAGC's proposition of law because it interprets its clause as permitting revocation 30 to 45 days prior to contract termination, it is not even clear that CAGC's baseline theory is correct.⁹

A. Cameron Iron Works, Inc.

In *N.L.R.B v. Cameron Iron Works, Inc.*, 591 F.2d 1 (5th Cir. 1979), the 5th Circuit considered the following dues check-off language:

(t)his authorization is voluntary and shall be irrevocable for the period of one (1) year from the date signed and I agree that it shall be automatically renewed and shall be irrevocable for successive Collective Bargaining Agreements between the Company and the Union unless revoked by me giving written notice to the Company during the period of fifteen (15) days following the anniversary date of

⁹ For example, CAGC's interpretation of Board law contradicts the plain language of Section 302(c)(4). CAGC's position is that, in a contract termination year, employees must receive two opportunities to revoke – once around the anniversary date and once around contract termination. CAGC argues that employees should be able to utilize both escape periods – as UFCW Local 99 allows. But this construction of the statute contradicts its plain language because the statute requires the employee to choose “whichever is sooner.” *See*, 29 U.S.C. § 186(c)(4). Several Board have approved of clauses that only permit the one escape period yearly. *See, e.g., Allied Production Workers Union, Local 12*, 337 NLRB 16 (2001); *American Smelting*, 200 NLRB No. 140 (1972).

the signing of this authorization. Otherwise, this authorization shall continue in effect unless revoked by me during a period of revocation as above provided.

Id. at 2. The union and employer did not honor dues revocations after the expiration of a collective bargaining agreement because the employees had not provided notice to *both* the employer and the union – a requirement implemented *after* employees received the above language. The 5th Circuit found no violation of the Act.

Here, it is impossible to square any of the CAGC’s theory with the dues check-off language in the above authorization. The clause in *Cameron Iron Works* provides an escape period *only* during the fifteen days following the anniversary date of the signing of the authorization. Despite this omission and contradicting CAGC’s theories in this case, the Fifth Circuit did not find the authorization to be “ambiguous.” The Fifth Circuit held that the union and the employer’s actions were reasonable and not a violation of the Act. Indeed, the federal court even upheld a limitation of revocation that was not expressly required by the plain language of the authorization (i.e. that it be sent to both employer and union).

B. Litton Business Systems, Inc.

In *Litton Business Systems, Inc.*, 334 F.Supp. at 312, a federal district court considered the following dues check-off language:

All authorized deductions shall be effective and irrevocable for a period of one year or to the termination of the Agreement, which ever occurs sooner.

This authorization shall continue in full force and effect for yearly periods beyond the irrevocable period set forth above, and each subsequent yearly period shall be similarly irrevocable unless revoked within fifteen (15) days after an irrevocable period hereof. Such revocations shall be effective by Registered written notice to both Company and the Union within such fifteen (15) day period.

Id. at 311. The court found that there was no violation of § 302(c)(4) or of the NLRA. Indeed, the court held that because employees were afforded a chance per year to revoke, that the clause did not violate the Act.

Here, once again, CAGC's theory simply cannot be squared with this language. The ALJ's decision should be affirmed and the Consolidated Complaint should be dismissed.

C. American Nurses Association

In *American Nurses Association*, 250 NLRB 1324 (1980), the Board considered the following dues check-off language:

This assignment and authorization shall be irrevocable for one (1) year from date or until the termination date of the collective bargaining agreement between the Union and ANA, whichever is sooner, and shall renew automatically with the same irrevocability for successive like periods, unless terminated by me in writing within ten (10) days prior to the expiration of any irrevocable period. Such written termination shall be effectuated by certified mail to ANA and the Union.

Id. at 1330. The Board determined whether some revocations after contract expiration were effective. It rejected the general counsel's argument and did not permit employees to revoke during a contract hiatus because the clause demonstrated it "was not the intent of the parties to allow for an escape period during the interim between agreements." *Id.* at 1331.

Here, once again, this case cannot be squared with the CAGC's theory. Indeed, the clause in *American Nurses Association* is somewhat similar to UFCW Local 99's. The Board found no violation of the Act and precluded employees from revoking during a contract hiatus. CAGC's Complaint must be dismissed.

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D. Sun Harbor Caribe, Inc.

In *Sun Harbor Caribe*, 237 NLRB 444 (1978), the employer ceased deducting dues after the expiration of a collective bargaining agreement in light of a representational dispute. Once the representational dispute was resolved, it recommenced dues check-off and a member brought a charge alleging that there was no authority to continue dues. The Board construed the authorizations, which read in part:

This authorization shall be irrevocable for a period of one (1) year from this date, or until the expiration of the existing Collective Bargaining Agreement is in effect between the Company and the Union, whichever occurs first. This authorization shall continue in full force and effect from year to year from one (1) year periods beyond the irrevocability periods set forth above, and shall be likewise Irrevocable [sic] each subsequent 1 year period unless revoked within 10 days of the last day of any such irrevocable period by me in writing

Id.

Here, the above clause in many ways is almost unintelligible. Undeterred, the Board found no problem with the clause regarding its limitations. Rather, it found the respondent had acted in reasonably in administering it. *Id.* at 44.

E. Allied Production Workers Union, Local 12

In *Allied Production Workers Union, Local 12*, 331 NLRB 1 (2000) the union maintained a check-off authorization with the following language:

This authorization and direction shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever occurs first, unless I give written notice to the Company and the Union at least sixty days, and not more than seventy-five days, before any annual renewal date of this authorization and direction of my desire to revoke same. My Employer is further authorized and directed to turn over the said monies as they become due to the proper officer of the Local Union.

Id. at 2. Ultimately, the Board dismissed the charge because it failed to comply with the applicable statute of limitations. Nevertheless, the Board said nothing of the ambiguity

or invalidity of the above-clause. And, again, the clause simply cannot be squared with what CAGC argues in this case.

F. Morton Salt Co.

In *Morton Salt Co.*, 119 NLRB 1402 (1958) the Board analyzed the following language:

this authorization and assignment shall be irrevocable for the term of the applicable contract between the Union and the Company or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is the lesser, until I give written notice to the Company and the Union at least 60 days and not more than ____ days before any periodic renewal date of this authorization and assignment of my desire to revoke the same.

Id. at 1404. The above clause is *entirely* ambiguous as to when the appropriate escape period is because it lacks a second number. Moreover, under CAGC's theory, it would be ambiguous as to whether members are allowed to revoke at contract expiration and, if so, when. Undeterred, the Board held that the union did not violate the Act by refusing to honor untimely dues revocations. All of the above-authorities demonstrate that the Consolidated Complaint should be dismissed.

IV. The Employees' Membership Resignations Were Not the Equivalent of Dues Check-Off Revocations. The Union Was Correct in Continuing to Deduct Dues.

The ALJ properly dismissed the membership allegations in the Consolidated Complaint and found that they were precluded by existing Board law. *See*, ALJ Opinion at 6-8. CAGC's Consolidated Complaint inappropriately attempts to combine the separate and distinct concepts of membership resignations with dues check-off revocations. CAGC alleges that by keeping dues after a member resigned, UFCW Local 99 violated the Act. Specifically, CAGC alleges that "[s]ince on or about [DATE], the

Respondent Union has failed and refused to honor [EMPLOYEE's] resignation of her Union membership *by continuing to receive, accept, and retain money from [EMPLOYEE's] wages remitted to Respondent Union by Respondent Employer.*" Consolidated Complaint *et seq.*

As the ALJ found, this legal theory has been considered and firmly rejected by the Board. *See, e.g., International Broth. of Electrical Workers, Local No. 2008*, (Lockheed Space Operations Company, Inc.), 302 NLRB 322, 328 (1991) ("We recognize that paying dues and remaining a union member can be two distinct actions); *United Steelworkers of America, Local 4671*, (National Oil Well, Inc.), 302 NLRB 367 (1991) ("Because there is explicit language within the checkoff authorization clearly setting forth the obligation to pay dues even in the absence of union membership, dues were still owing . . . after his resignation of membership."); *American Nurses Assoc.*, 250 NLRB 1324 (1980) (finding that the "*the general rule applies* and that the resignations from the Union did not revoke the dues checkoff authorization.") (emphasis added); *Graphic Communications Dist. Council 2*, 278 NLRB 365, 367 ("Of course, resignation from a union does not constitute revocation of dues check-off authorizations A revocation of [dues checkoff] must be accomplished during the time periods set out in the checkoff authorization itself"); *San Diego County Dist. Council of Carpenters*, 243 NLRB 147, 149 (1979) (directly contradicting CAGC's theory and finding that members who resigned during a contract hiatus could revoke dues because the clause *did* make the obligation to pay dues the *quid pro quo* of membership); *District Lodge No. 99*, 194 NLRB 938 (1972) (rejecting the contention that a membership resignation should be construed as a dues check-off revocation); *Schweitzer Local # 1752*, 320 NLRB 528

(1995) (“[R]esignation of membership by an employee who is obligated to pay dues . . . does not privilege the employee to make an untimely revocation of his checkoff authorization”);

Stated simply, CAGC’s legal conclusion does not follow from its premise. Dismissing the membership allegations of the Consolidated Complaint is entirely consistent with decades of binding Board and federal court precedent recognizing the distinction between membership and the obligation to pay dues. CAGC’s legal theories ask this Court to make a radical departure from that doctrinal framework and to ignore the express language in UFCW Local 99’s dues check-off authorization. Binding legal precedent, practicality, and sound policy reasons militate against adopting the CAGC’s unsupported and incomprehensible approach.¹⁰

A. UFCW Local 99’s clause expressly provides that the obligation to pay dues is distinct from membership in the union.

UFCW Local 99’s clause expressly provides that “[t]his authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining *and is not contingent upon my present or future membership in the Union.*” Un. Ex. 1 (emphasis added); *see also*, *AT&T*, 303 NLRB 944 (1991) (the Board found the precise same language to mean that a membership resignation is not tantamount to a dues check-off revocation).

¹⁰ Prior to trial, the ALJ dismissed the membership allegations. On a Special Appeal of that ruling, this Board reversed, finding that dismissal of those charges was premature at that juncture. *See*, Board’s Order on Special Appeal. The Board did not, however, endorse CAGC’s various theories but rather merely provided it with an opportunity to present the arguments at trial. As the ALJ found after trial, CAGC presented no new facts that warrant revisiting the previously correct decision.

Here, the language in the authorization clearly demonstrates that merely revoking one's membership is not equivalent to revoking one's dues. Indeed, the dues authorization is "not contingent upon" membership in the union. The clause, therefore, expressly recognizes that there may be some non-members who choose to pay dues under the authorization. Based on the plain language in the check-off clause itself, the Union cannot violate the Act by continuing to collect dues from an employee who merely resigned his or her membership.

In previous filings with the Board, CAGC expressly recognized that UFCW Local 99's dues check-off clause is not contingent on present or future membership in the Union. *See*, CAGC Ex. 4; CAGC's Special Appeal Brief at 8. That concession should be enough for this Board to dismiss the membership allegations.

B. A long line of Board cases hold that membership resignations and dues check-off revocations are separate and distinct where there is appropriate language in the authorization.

"[P]aying dues and remaining a union member can be two distinct actions."

International Broth. of Electrical Workers, Local No. 2008, (Lockheed Space Operations Company, Inc.), 302 NLRB 322 (1991). In *Lockheed*, a member resigned his membership in the union and demanded that the union cease deducting his dues even though he did not revoke during the pre-established window period mandated by the dues check-off authorization. *Id.* at 322-323. Notwithstanding that failure, the General Counsel alleged that the union violated the Act because it continued to collect dues post-membership revocation. *Id.* at 322. The General Counsel argued that membership revocation is tantamount to a revocation of dues. *Id.* at 323.

In rejecting that basic contention and construing several previous Board and federal court cases as well as the concept of “voluntary unionism”, the Board held that “there is no reasonable basis for precluding an employee from individually agreeing that he will pay dues to a union whether or not he is a member of it and that he will pay such dues through a partial assignment of his wages, i.e., dues checkoff.” *Id.* at 328. This is especially true, the Board found, when the language in the dues authorization “*does not hinge the irrevocability of the authorization on an employee’s continued status as a union member*” *Id.* at 325 (emphasis added).

Here, it is clear that the principles enunciated in *Lockheed* apply equally to the present situation. The language in UFCW Local 99’s authorization could not be clearer: its irrevocability does not hinge on continued membership in the union. *See*, Un. Ex. 1. Under the principles enunciated in *Lockheed*, the membership allegations in the Consolidated Complaint have no merit and should be dismissed.

As found by the ALJ, *United Steelworkers of America, Local 4671* (National Oil Well, Inc.), 302 NLRB 367 (1991) is directly on point and governs the outcome of the membership allegations. In *National Oil Well*, an employee resigned his membership on the anniversary date of signing the dues check-off authorization. The letter resigning his membership said nothing of dues. Under the terms of his check-off agreement, however, had he mentioned revocation of dues, the union would have been obligated to revoke because the resignation letter was sent during a window period for dues revocation. *Id.* at 367-368. As it stood, the union only allowed resignation of membership and continued to collect dues.

At a later date outside of his window period for revoking dues, the employee inquired as to why his dues had not been stopped in light of his membership resignation. *Id.* at 367. The employer and union refused to revoke dues at that juncture because his request was untimely. The general counsel argued that his previous membership revocation should have operated to stop dues collection. *Id.* In rejecting this argument, the Board focused on the contractual language and found that “the dues-checkoff authorization signed by the Charging Party obligated him to pay dues after his effective resignation from membership in the Local” *Id.* at 368. As a result, his membership resignation by itself could not operate to revoke his dues.

And in *AT&T*, 303 NLRB 944 (1991), the Board considered whether *the exact same language as that used by UFCW Local 99* fell under the *National Oil Well* rule. There, a union inserted language in its dues check-off clause stating that the authorization was “voluntarily made and is neither conditioned on my present or future membership in the Union” *Id.* at 945. The Board concluded that this language meant that a membership resignation is *not* tantamount to a dues check-off revocation.

Here, as the ALJ properly concluded, *National Oil Well Inc.* and *AT&T* are directly on point. Any purported membership resignation could not also operate to revoke dues because the language used in the Union’s authorization clearly precludes such an interpretation. Like *National Oil Well*, there is clear language in the authorization “setting forth an obligation to pay dues even in the absence of union membership” *Id.* at 368. The membership allegations in the Consolidated Complaint must be dismissed.

V. There is No Merit To, and No Authority to Support, CAGC's and the Charging Parties' Proposed Radical Departure from Established Board Law Respecting the Separation Between Membership and Dues.

In its briefing to the ALJ and this Board, CAGC and the Charging Parties appear to construct an argument that takes a radical leap from established precedent. They can only reach their conclusion through a distorted reading of *Lockheed Space* and by ignoring subsequent Board law precluding the theory.

Although no Board has *ever* interpreted *National Oil Well* or *Lockheed Space* in the manner they advance, CAGC and the Charging Parties argues that “if the check-off authorization’s language establishes that the employee has bound himself or herself to pay dues to the union even after resignation of his or her union membership, the employee’s communication to the union of his or her resignation of union membership will put the union on notice that it must cease accepting . . . the employee’s dues upon the expiration of the irrevocability period specified in the check-off authorization.” CAGC Ex. 3, CAGC Special Appeal Brief; *see also*, Charging Parties Exceptions and Brief at 5.

CAGC essentially makes two contentions: (a) if an employee resigns membership during a window period (i.e. alternatively named “outside of the period of agreed-upon irrevocability”) such a request also operates to revoke dues, *see*, CAGC Brief to NLRB at 10-13, and (b) if an employee resigns membership outside of the dues check-off window period, the union must keep track of that resignation and stop deducting dues once the window period does open. CAGC Ex. 3, CAGC Special Appeal Brief.

There are several problems with this theoretical framework: (1) most importantly, it has no support in *any* Board authority and has been expressly rejected in *National Oil Well, Inc.*, 302 NLRB 367 (1991), (2) it goes against what has been considered by the

Board to be black-letter law for decades, (3) there are strong policy and practical reasons to reject the approach, and (4) such a doctrine would have widespread disruptive effects on existing dues check-off arrangements and would pose an undue burden on both unions and employers.

A. *National Oil Well, Inc. and American Nurses Association* entirely foreclose the CAGC’s erroneous and unsupported argument.

As discussed above, *United Steelworkers of America, Local 4671* (National Oil Well, Inc.), 302 NLRB 367 (1991) involved a case where an employee resigned his membership during his dues check-off revocation window period. *Id.* at 367. Because the union’s authorization contained language making the obligation to pay dues not contingent on membership in the union, the union continued dues deduction but accepted his membership resignation. Similar to the CAGC in this case, the general counsel argued that his previous resignation of membership should have operated to cease dues deduction because the employee sent it during a window period (i.e. outside the period of irrevocability). The Board rejected that argument and found that employees must send *dues revocation* requests during the window period.¹¹

In *American Nurses Association*, 250 NLRB 1324 (1980), several employees attempted to revoke their dues check-off during a contract hiatus. In addition, as here, several employees resigned their membership during the hiatus. First, the Board relied on *Frito-Lay* and rejected the contract hiatus revocations. Second, as the CAGC does in this case, the general counsel argued that the membership resignations submitted during

¹¹ Indeed, the case for allowing the employee out of his dues obligation was *stronger* in *National Oil Well* because the Board expressly recognized that there was some evidence in the record that the union actually knew he intended to revoke his dues. Notwithstanding that evidence, the Board still held that the union was under no obligation to cease deducting dues because of the membership resignation.

the contract hiatus should have also ceased dues deduction. In rejecting that argument that Board found that “*the general rule applies and that the resignations from the Union did not revoke the dues checkoff authorization.*” *Id.* at 1331 (emphasis added).

Here, it is clear that *National Oil Well* and *Am. Nurses Assoc.* presented the factual situation CAGC describes, but reject the theory. That is, the Board held that a membership resignation submitted during the window period is *not* tantamount to a dues revocation request, and a union need not treat it as such.¹² The Board, moreover, said nothing in that case or in any other membership or dues check-off case implying that a union and employer have an obligation to revoke the employee’s dues once the dues check-off window period arises again at some point in the future based merely on the previous membership revocation.

In fact, *National Oil Well* implicitly rejects this additional theory.¹³ It is hard to imagine how the Board would reject a membership resignation submitted *during the dues check-off window period*, as in *National Oil Well*, but hold that the Union has some obligation to honor an untimely membership resignation, as the CAGC posits. Indeed, the case for letting an employee out of the dues obligation is undoubtedly stronger where the employee submits the request during the dues revocation window period. The Board nonetheless rejected CAGC’s theory.

¹² In this case, it is important to remember that the membership resignations were not submitted during an appropriate window period, as CAGC contends. Even if the membership resignation requests *were* submitted during the appropriate dues revocation window period, the above-cases demonstrate that the Union was correct in continuing to deduct dues.

¹³ In addition to it being legally incorrect, CAGC should be precluded from making this argument. Throughout the entire litigation, CAGC has argued that the dues revocations should have been honored because they were, in fact, submitted during an appropriate window period. Under the CAGC’s theory, all employees must have resigned membership during a “window period”, as in *National Oil Well*. Indeed, CAGC is judicially-estopped from claiming otherwise.

One essential conclusion remains: it is simply impossible to reconcile the *National Oil Well* and *Am. Nurses Association* holdings with the CAGC's theory in this case. Whatever the CAGC's various theories, simply put, a membership resignation under the terms of this authorization is not equivalent to a dues check-off revocation. Ultimately, it is irrelevant when employees choose to resign their membership because the check-off clause clearly makes the obligation to pay dues "not contingent upon . . . present or future membership in the Union." Un. Ex. 1. The ALJ was correct in finding that *National Oil Well* is directly on point. This is precisely why CAGC spent no time attempting to distinguish or discuss that holding. CAGC's and the Charging Parties' departure from black-letter law should be rejected. The ALJ's decision should be affirmed and the Consolidated Complaint should be dismissed.¹⁴

B. In addition to binding Board law, there are important policy and practical reasons why this Board should maintain the distinction between a membership resignation and a dues revocation.

As in this case, unions often receive increased membership resignations where there is a possible strike. Understandably, many members are concerned about working during a strike and being fined for crossing picket-lines. *See, e.g., San Diego County*

¹⁴ In their Briefing, CAGC and the Charging Parties suggest that some special analysis of the membership resignation procedure should take place here because Arizona is a right-to-work state. CAGC Ex. 3, Special Appeal Brief at 10; CAGC Brief to NLRB at 10; Charging Parties Brief to NLRB at 6. But, *National Oil Well*, took place in right-to-work state and, therefore, rejects such an approach. Moreover, as other authorities have made clear, on this issue there is no difference between right to work and non right to work states since the analysis should be based on the language in the authorization form itself. *SeaPak v. Industrial, Technical and Professional Emp. Div.*, 300 F.Supp.1197 (D.C. Ga. 1969). In addition, several Boards have rejected conflating forced membership with forced payment of dues. *See, e.g., Amalgamated Meat Cutters v. Shen-Mar Food Products, Inc.*, 405 F.Supp. 1122 (W.D. Va. 1975); *accord International Broth. of Electrical Workers, Local No. 2008*, (Lockheed Space Operations Company, Inc.), 302 NLRB 322, 328 (1991) ("In reaching this conclusion we are not identifying forced union membership with forced payment of dues. As noted above, we agree that the Board's decision in Shen-Mar rejecting that equation is still good law.").

Dist. Council of Carpenters, 243 NLRB 147 (1979) (employees revoked their membership, in part, out of a fear of being fined for crossing picket-lines).

With this background in mind, it is obvious that an employee could reasonably conclude that it wants dues to flow to the union during a difficult period while at the same time not wanting to be fined for continuing to work and cross picket-lines. *See, International Broth. of Electrical Workers, Local No. 2008*, (Lockheed Space Operations Company, Inc.), 302 NLRB 322 (1991) (“[T]here is no reasonable basis for precluding an employee from individually agreeing that he will pay dues to a union whether or not he is a member of it and that he will pay such dues through a partial assignment of his wages, i.e., a checkoff. Neither is there a reasonable basis for precluding enforcement of such a voluntary agreement.”).

The employee could accomplish this by resigning membership but not revoking dues. Thus, aside from the important contract principles and established case law, it is obvious there are important policy and real-world reasons for rejecting the CAGC’s position and maintaining the critical distinction between membership and the obligation to pay dues. The above policy argument is not mere abstract pondering – it has real world implications.

The Charging Parties claim that there is no reason to maintain the distinction between membership and dues. The Charging Parties Brief characterizes UFCW Local 99’s belief that employees might want to resign membership in the union but still pay dues as “wishful thinking.” Charging Parties Brief at 10. Yet, this contention is contradicted by evidence in the record of this case, demonstrating that this is exactly what happened here. Hundreds of employees appear to have resigned membership so they

could cross-picket lines. *See*, CAGC Ex. 7. CAGC's voluminous Exhibit 7 lists close to 120 employees who resigned their membership but who rescinded that request only a few days after the new collective bargaining agreement was settled on November 12, 2009. *Id.*¹⁵ It is clear that these employees wanted to continue working and avoid picket-line fines. This evidence simply adds gloss to the argument that the distinction between membership and dues should remain. CAGC's theory would obliterate this distinction.

In addition, the dues check-off authorization in this case requires notice to both the employer *and* the union in order to cease deducting dues. The requirement that an employee contact both the union and the employer is extraordinarily common in the context of dues check-off authorizations. It is used by literally hundreds (and possibly thousands) of locals around the country. *See, e.g., American Nurses Ass'n*, 250 NLRB 1324, 1325 (1980) (containing a dues check-off clause requiring notice to both the employer and union); *Morton Salt Co.*, 119 NLRB 1402, 1404 (1958) (same); *Monroe Lodge No. 77 v. Litton Business Systems*, 334 F.Supp. at 312 (1971) (same); *Gerland's Foods*, 302 NLRB 341, FN 5 (1991) (same); *Holly Farms Corp.*, 311 NLRB 273, FN 223 (1993) (same); *Allied Production Workers Union, Local 12*, 331 NLRB 1 (2000) (same); *Frito-Lay, Inc.*, 243 NLRB 137 (1979) (same); *The Associated Press*, 199 NLRB 1110, 1111 (1972) (same); *United Elec. Radio & Mach. Workers of America v. Westinghouse Elec. Corp.*, 345 F.Supp. 274 (W.D. Pa. 1972) (same); *Amalgamated Meat Cutters v.*

¹⁵ For example, consider the case of Manuel Arizmendi. CAGC Ex. 7, 000604. He sent a membership resignation letter to the Union on November 11, 2009. He then rescinded that letter and re-signed with the Union on November 13, 2009, one day after the new collective bargaining agreement was reached. The logical inference from this conduct is that he wanted to work and avoid picket-line fines.

Shen-Mar Food Products, Inc., 405 F.Supp. 1122 (W.D. Va. 1975) (same); *Miller Brewing Co.*, 193 NLRB 529, FN 5 (1971) (same).

Yet CAGC's and the Charging Parties' theory has no answer to this problem. It appears as if the CAGC would argue that employees are simply entitled to ignore their contractual obligations and unions should allow for revocation of dues even though both the employer and union were not notified. But, as highlighted by the above-cases, such a rule would have "widespread disruptive effect[s] on existing dues-checkoff arrangements" and confuse employers and unions as to what the law requires for an effective dues revocation. See *International Broth. of Electrical Workers, Local No. 2008* (Lockheed Space), 302 NLRB at 329. Such an approach should be rejected by this Board.

C. CAGC's theories would create an undue burden for unions and require them to constantly monitor the membership status of employees, in violation of *Lockheed Space*.

The Board has consistently been concerned about whether its rulings would destabilize existing dues check-off agreements and pose undue burdens on either the union or employer. For example, in *Lockheed Space*, the Board stated that it only reached its decision because it was "satisfied that [the] holding here will not have a widespread disruptive effect on existing dues-checkoff arrangements or place undue burdens on unions or employers." 302 NLRB at 329; see also, *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1277 (9th Cir. 1983) ("The dues checkoff procedure of section 302(c)(4) is designed to ensure not only the 'protection of the employee' but also administrative convenience in the collection of dues."). The *Lockheed Space* Board further stated that "nothing we say in this case is

intended to suggest that, in order to avoid unfair labor practice liability, an employer must continually monitor the membership status of employees who have signed checkoff authorizations.” *Id.* at 329.

Here, as noted above, CAGC’s theories would disrupt the hundreds and possibly thousands of dues check-off authorizations that require notice to both the union and employer. But the widespread disruptive effects do not stop there: CAGC argues that unions and employers must keep a running tally of employees who resigned membership so that their dues are ceased once the window period arises. *See, e.g.*, CAGC’s Special Appeal.¹⁶ To illuminate one of CAGC’s arguments, consider the following:

An employee’s annual window period arises for 15 days from March 1st-15th. The employee resigns his or her membership on June 1, 2010. Under the CAGC’s formulation and assuming no CBA expires in the interim with an accompanying window period, the union and employer (even though it may not have received notice) must keep track of the June 1, 2010 membership resignation and automatically cease deducting dues once the dues revocation period arises *nearly 9 months later*. This obligation to revoke 9 months later would open regardless of whether the union or employer received any notice during the actual window period.

But such a theory clearly runs afoul of the principles enunciated in *Lockheed Space*. The CAGC’s new added requirement, with no support in the language of the dues authorization itself, would have widespread disruptive effects on existing dues check-off arrangements. Contrary to *Lockheed Space*, the theory requires that “in order to avoid unfair practice liability, an employer [and union] continually monitor the membership status of employees who have signed checkoff authorizations.” *Id.* at 329. Accordingly, the theory should be rejected by this Board.

¹⁶ Although it is unclear from its Briefing, CAGC appears to have abandoned this argument because it does not explicitly appear in its Briefing to the Board. *See*, CAGC Brief to NLRB, *et seq.* Instead, CAGC simply argues that the membership resignations were submitted during a window period and the union, therefore, was obligated to treat them as dues revocation requests – a situation covered and rejected by *National Oil Well, Inc.*

VI. There is No Merit to the CAGC's and Charging Parties' Argument that the Union's Responsive Letters Misled Employees.

Although these allegations do not appear in the Consolidated Complaint, CAGC has also argued that UFCW Local 99's responsive letters misled employees. CAGC raised this argument for the first time at trial. RT 89-90, 93. Despite CAGC's attempt to obtain this procedural advantage, the ALJ properly concluded that the Union did not mislead employees. In fact, the ALJ concluded that "the whole matter of the letters is a mere distraction from the allegations in the complaint." ALJ Opinion at 9. CAGC takes UFCW Local 99 to task because its responsive letters sent to employees who either revoked dues or resigned membership do not mention the contract expiration dates as an appropriate window period. As the ALJ recognized, there are several very good reasons why this is the case. *See*, ALJ Opinion at 9.

First, as is obvious from the undisputed evidence, UFCW Local 99's collective bargaining agreement expired October 25, 2008. CAGC Ex. 5. Thereafter, although it entered a series of extension agreements, the Union did not have in place a new collective bargaining agreement until November 12, 2009. CAGC Ex. 5; RT 71-72. Consequently, from June through November of 2009, it would have been impossible to inform employees about when a future contract termination window period would arise. *See also*, ALJ Opinion at 9 ("The letters in fact did not provide information of the dates on which the employees could next revoke their authorizations upon the expiration of the contract. But remember no new contract had been reached so there were no dates to provide.").

Second, UFCW Local 99's President, Jim McLaughlin, testified that in sending the responsive letters the Union would normally want to inform the employee of their

next occurring dues revocation window period. RT 85, 87-88. When an employee writes in requesting dues revocation, it is reasonable for the Union to believe that the employee would like to revoke dues as soon as possible. The anniversary window period arises yearly, whereas a contract termination window period only arises once every 4 to 5 years. It is clear that the Union's responsive letters did not mislead employees in any way that is material to this case.

Lastly, once again the CAGC's conclusion does not follow from its premise. That is, even if the Board was to find that employees were somehow misled by the responsive letters, the CAGC's proposed remedy does not follow from the violation. At the time that employees received the letter, there was no contract expiration window period. Indeed, the next occurring contract termination window period would be 30 to 45 days prior to the expiration of the contract presently scheduled to expire in October of 2012. Any failure to inform employees of a contract expiration window period is harmless since that window period does not arise again for over a year and a half. Moreover, the employees received the letter *after* the attempted untimely revocation. *See*, ALJ Opinion at 9 (The letters "were sent *after* and in reply to the resignations and attempted revocations and therefore could not have caused any confusion among employees concerning their *earlier* attempts to revoke the authorization.").

Even if CAGC's theory is correct, which it is not, it is hard to understand how allegedly misinforming an employee about a contract termination window period arising in 2012 should operate to make a dues check-off revocation in 2009 valid. The Board should recognize the fallacy of the CAGC's argument, as the ALJ did at trial and in its

opinion. *See, e.g.*, RT at 41-43. The ALJ's decision should be affirmed and the Consolidated Complaint should be dismissed.

VII. It is Not Even Clear CAGC Has Jurisdiction Over this Case.

Section 302(c)(4) and its limitations are enforced by the Department of Justice. 29 U.S.C. § 186; *see also*, Justice Department's Opinion on Checkoff, 22 L.R.R.M. 46 (1948); *Salant & Salant*, 88 NLRB 816 (1950).

In *Salant & Salant*, the Board held that the "limitations on checkoff in Section 302 were intended neither to create new unfair labor practice, *nor even to be considered in determining whether checkoff violates s 8 of the Act.*" *Id.* at 818-819 (emphasis added). Based on the structure of the Act and its legislative history, the Board concluded that "Congress did not intend the newly created limitations on checkoff in Section 302 to have any impact on the unfair labor practice jurisdiction of the Board under Section 8." *Id.* at 819; *see also*, *N.L.R.B. v. Cameron Iron Works, Inc.*, 591 F.2d 1 (5th Cir. 1979) (The union and employer "argue *persuasively* that the Board cannot redress a mere s 302 violation. Pointing out that enforcement of that section is the responsibility of the Department of Justice."); *Lockheed Space Operations Company, Inc.*, 302 NLRB 322 *FN 8 (1991) (recognizing that the Board does not have the authority to enforce § 302(c)(4)); *Frito Lay, Inc.*, 243 NLRB 137, 138 (1979) (rejecting the "suggestion that the validity of checkoff arrangements for purposes of Section 8 must be judged in light of the provisions of Section 302(c)(4)" and finding that such an analysis "is contrary to well-settled law."); *Pacific Intermountain Express Co.*, 107 NLRB 837 (1954) ("[I]n determining whether checkoff violates the Act, the limitations on checkoff imposed by Section 302 of the Act should not be considered.").

Here, throughout the initial proceedings, CAGC argued that employees must be provided two window periods to revoke: (1) an anniversary window period, and (2) a window period occurring around contract termination. CAGC argues that UFCW Local 99 did not properly protect the right to revoke at or around contract termination. Regardless of the underlying merits of that theory, it is clearly based on enforcing the purported limitations found in § 302(c)(4). The requirement to have a contract termination window period arises directly from the language and limitations imposed by § 302(c)(4). Stated differently, the only way to understand CAGC's theory is by understanding the limitations imposed by § 302(c)(4). Yet, that is an area for the Department of Justice's regulatory authority, not the NLRB's.

Contrary to CAGC's and the Charging Parties' arguments in previous filings, it is immaterial it has not *mentioned* § 302(c)(4) in the Consolidated Complaint because it is clear that the entire legal theory rests on imposing the limitations of that Section. Parties cannot avoid jurisdictional arguments merely by conveniently excluding the word "302" from a complaint. Based on the above authorities, the Consolidated Complaint should be dismissed for lack of jurisdiction.

VIII. CAGC's Proposed Class is too Large. Aside from the Issue of Timeliness, Many Employees Did Not Validly Revoke Under the Terms of the Authorization.

Even in the unlikely event that this Board reverses the ALJ's findings and conclusions, CAGC's proposed class is entirely too large. At trial, CAGC submitted Ex. 7. That exhibit contains the authorization forms, revocation or resignations letters, and the union responses for any employee who submitted a request during the 10(b) period relevant to this case. CAGC Ex. 7.

While this issue may be more appropriate for a hypothetical compliance stage, there are several subclasses of employees who cannot possibly be part of this class because, regardless of timing, (1) a substantial number of employees did not send a request to *both* the Union and Employer, (2) several requests failed to include a signature, (3) a substantial number of employees signed authorizations *after* the expiration of the 2008 contract and cannot possibly be entitled to a contract expiration window period under CAGC's theory, and (4) several letters were received by the Union when the "contract hiatus" had ended. *See, e.g., Professional Ass'n of Golf Officials*, 317 NLRB 774, 779 (1995).

CONCLUSION

For the foregoing reasons, this Board should affirm the ALJ's well-reasoned and carefully constructed decision and dismiss the Consolidated Complaint. UFCW Local 99 did not commit unfair labor practices when it denied the revocation requests of the Charging Parties.

Dated: June 14, 2011

Respectfully Submitted,

DAVIS, COWELL & BOWE, LLP.

/s/Adam J. Zapala

Steve Stemerman
Adam Zapala
Attorneys for UFCW Local 99

CERTIFICATE OF SERVICE
STATE OF CALIFORNIA, CITY AND COUNTY OF SAN
FRANCISCO

I am a citizen of the United States and a resident of the State of California. I am over the age of eighteen years and not a party to the within matter. My business address is 595 Market Street, Suite 1400, San Francisco, CA 94105. I hereby certify that a true and correct copy of the foregoing:

NLRB Case Nos.: 28-CB-7045; 28-CB-7047; 28-CB-7048; 28-CB-7049; 28-CB-7058;
28-CB-7062; 28-CB-7063

RESPONDENT UFCW LOCAL 99'S POST-HEARING BRIEF

was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were thereafter served upon the following parties via Electronic Transmission on March 29th, 2011 and via U.S. First Class Mail on this 29th day of March, 2011.

[X] E-MAIL or ELECTRONIC TRANSMISSION: Based on an agreement of the parties to accept service be e-mail or electronic transmission, I caused the document(s) to be sent to the persons at the e-mail addresses listed below. My electronic notification address is az@dcbsf.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 29, 2011, at San Francisco, California.

/s/ Adam J. Zapala

Adam J. Zapala

[X] FIRST CLASS MAIL: I caused each such envelope, with first class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. mail in San Francisco, California for collection and mailing to the addressee on the date shown below, following ordinary business practices and via:

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 29, 2011, at San Francisco, California.

/s/ Verna Owens

Verna Owens

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