

NATIONAL LABOR RELATIONS BOARD

IN RE:

NATIONAL LABOR RELATIONS BOARD; FRY’S FOOD STORES; UNITED FOOD AND COMMERCIAL WORKERS UNION (UFCW) LOCAL 99,

And

(Karen Medley, Kimberley Stewart, Elaine Brown, Shirley Johns, Saloomah Hardy, Janette Fuentes, Tommy Fuentes)

Case: 28-CA-022836; 28-CA-022837; 28-CA-022838; 28-CA-022840; 28-CA-022858; 28-CA-022871; 28-CA-022872; 28-CB-7045; 28-CB-7047; 28-CB-7048; 28-CB-7049; 28-CB-7058; 28-CB-7062; 28-CB-7063;

UFCW LOCAL 99’S STATEMENT OF POSITION WITH RESPECT TO ISSUES RAISED BY REMAND

This statement of position explains why the Board should reaffirm its dismissal of the Amended Consolidated Complaint.

Statement of the Case

A. The Undisputed Facts

Local 99 and Fry’s Food Stores were parties to a collective-bargaining agreement that expired on October 25, 2008. *Smith’s Food & Drug Centers*, 358 NLRB at 706; G.C. Exh. 5. They did not reach agreement on the terms of a new agreement until November 12, 2009. *Smith’s Food & Drug Centers*, 358 NLRB at 706. During the hiatus between these two contracts, some employees notified Local 99 that they wanted to stop dues checkoff and/or resign their membership in Local 99. *Smith’s Food & Drug Centers*, 358 NLRB at 707;

G.C. Exhs. 7-15. Each of these employees had authorized Fry's to deduct dues from their paychecks and remit it to Local 99 by signing a form containing the following language:

This Check-Off Authorization and Agreement is separate and apart from the Membership Application and is attached to the Membership Application only for convenience.

CHECK-OFF AUTHORIZATION

To: Any Employer under contract with United Food and Commercial Workers Union, Local 99, AFL-CIO

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 of the United Food and Commercial Workers Union, AFL-CIO, and remit same to said Secretary-Treasurer.

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.

The Secretary-Treasurer of Local 99 is authorized to deposit this authorization with any Employer under contract with Local 99 and is further authorized to transfer this authorization to any other Employer under contract with Local 99 in the event that I should change employment.

Smith's Food & Drug Centers, 358 NLRB at 706; G.C. Exhs. 7-15.

The authorization references two periods: one tied to the collective-bargaining agreement's termination date and one tied to the anniversary of the date each employee signs

the authorization. No employee notified Local 99 or Fry's that he or she desired to stop dues checkoff during the 15-day window before the collective-bargaining agreement expired (i.e., between September 11, 2008 and September 26, 2008). *Smith's Food & Drug Centers*, 358 NLRB at 707. The earliest that any of the Charging Parties sent such a notice is September 29, 2009 – more than a year after the pre-contract termination window closed, *Smith's Food & Drug Centers*, 358 NLRB at 707; *see also* Amended Consolidated Complaint (“Complaint”), ¶¶ 6-12; and the earliest that the Acting General Counsel alleged that any employee sent such a notice is June 2008. Complaint, ¶ 13. The employees could have notified Local 99 and Fry's that they desired to stop dues checkoff during the contractual hiatus in the 15-day window before the anniversary that each employee signed the checkoff authorization, but no employee did so. *Smith's Food & Drug Centers*, 358 NLRB at 707. Accordingly, Fry's continued to deduct dues from the employees' checks and to remit the deducted dues to Local 99. *Id.*

B. The Court of Appeals' Decision

The D.C. Circuit remanded this case to the Board because “[t]he Board treated the case as a straightforward application of its precedent pertaining to the revocability of dues-checkoff arrangements.” *Stewart v. NLRB*, 851 F.3d 21, 23 (D.C. Cir. 2017). The referenced Board precedent is *Frito-Lay, Inc.*, 243 NLRB 137 (1979), but according to the Court, “the circumstances of this case turn out to differ significantly from those in *Frito-Lay*, so much so that we cannot sustain the Board's decision on the rationale on which it was grounded.” *Id.* at 27.

Frito-Lay's core holding is that § 302(c)(4) of the Labor Management Relations Act does not categorically require that a checkoff authorization be revocable at will during the

hiatus between collective-bargaining agreements. That holding is not at issue in this case, as we explain in Section A.2 of the Argument. But, in the course of reaching that conclusion, the Board also explained when a checkoff authorization must be revocable in order to comply with § 302(c)(4). 243 NLRB at 138. This is the aspect of *Frito-Lay* on which the D.C. Circuit was focused when it said that the Board “interpreted § 302(c)(4) to call for *some* revocation opportunity tied to the collective-bargaining agreement’s expiration (along with a revocation opportunity connected to the yearly anniversary of an employee’s checkoff authorization),” 851 F.3d at 27 (emphasis in the original) (citing 243 NLRB at 138-39). According to the *Frito-Lay* Board, a limited window for revocation tied to the collective-bargaining agreement’s termination date satisfies § 302(c)(4)’s condition that a checkoff authorization not be irrevocable “beyond the termination date of the applicable collective-bargaining agreement.” 243 NLRB at 138. The ALJ in this case interpreted Local 99’s checkoff-authorization language in such a way that it did not meet this standard. He said that some employees did not have an opportunity to revoke checkoff authorization in a window tied to the collective-bargaining agreement’s expiration:

Applying the checkoff-authorization form in the context of the October 26, 2003 to October 25, 2008 collective-bargaining agreement, every employee who signed an authorization during that contract could revoke the authorization during the window periods preceding the yearly anniversary date that the employee signed the authorization. In addition, employees who signed authorizations during the last year of the contract could revoke their authorizations upon the expiration of that contract.

Smith’s Food & Drug Centers, 358 NLRB at 706. The D.C. Circuit acknowledged that this interpretation might have been incorrect but said “[f]or our purposes” – i.e., on appeal – “what matters is the way in which the ALJ construed the employees’ checkoff authorizations.” 851 F.3d at 27.

Argument

A. This case is on all fours with *Frito-Lay*.

1. Local 99 interprets its checkoff-authorization form differently than the ALJ did.

The ALJ's explanation when employees who signed Local 99's checkoff-authorization form could revoke that authorization is partially incorrect. The ALJ correctly identified two window periods: one before the collective-bargaining agreement expired and one before the anniversary of date that the employee signed the authorization. But the ALJ was incorrect when he said that only employees who signed the authorization form during the final year the collective-bargaining agreement was in effect (i.e., from October 26, 2007 to October 25, 2008) could revoke their authorization in the first window. This represents the ALJ's own interpretation of the authorization form's language, but it is not the only possible interpretation. The Acting General Counsel described the authorization's language as "ambiguous", thereby recognizing that multiple interpretations are plausible. Acting General Counsel's Brief in Support of Exceptions, at 8.

The ALJ's interpretation is not the one that matters. The Board does not "'impose upon the parties its interpretation of the meaning of ambiguous contract checkoff provisions as implemented by employees' authorization cards where, a respondent acted reasonably and in good faith.'" *American Smelting & Refining Co.*, 200 NLRB 1004, 1011 (1972) (quoting *Miller Brewing Company*, 193 NLRB 528 (1971) and citing *Morton Salt Company*, 119 NLRB 1402, 1403 (1958)); see also *NLRB v. Cameron Iron Works, Inc.*, 591 F.2d 1, 3 (5th Cir. 1979). Local 99 interpreted the checkoff-authorization language differently than the

ALJ did, as demonstrated by how Local 99 implemented the revocation windows. This is what matters. Local 99 allowed all employees – regardless of when they signed the authorization -- to revoke checkoff authorization in either window. Rep. Tr. 170:7-20 (Jan. 18, 2011). This testimony is undisputed. The ALJ did not say that the witness lacked credibility, and no contradictory evidence was introduced.¹ Counsel for the Acting General Counsel also said employees could revoke in the window prior to contract termination. Rep. Tr. 211:8-10 (“Well, I think both parties agree that during the 15 day period before October of 2008 that the parties could revoke.”).

There is a reason why Local 99’s checkoff-authorization form is written as it is. It tracks the statutory language. *Compare* 29 U.S.C. § 302(c)(4) (“a written assignment which 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.”) *with* Local 99’s checkoff-authorization form (“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, . . .”). The authorization language is ambiguous because the statute is ambiguous. It was proper for Local 99 to incorporate the statutory language in its authorization and then give that language the same meaning the Board has given it. *Cf. Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 43-44 (1998) (union does not violate the NLRA by negotiating a union security clause that tracks the language of § 8(a)(3) without expressly explaining how the courts have interpreted § 8(a)(3)).

¹ In Section C, we address the letters that Local 99 sent in response to revocation requests during the contract hiatus, and the Acting General Counsel’s argument about their significance.

As Local 99 interpreted and implemented it, the checkoff authorization is consistent with what the Board in *Frito-Lay* said was required.

2. The General Counsel did not ask the Board to overrule *Frito-Lay*.

The Complaint contains only a barebones legal theory. The Acting General Counsel alleged that Fry's violated §§ 8(a)(1), (2), and (3) by continuing to deduct money from employees' wages and remitting that money to Local 99 after employees resigned their union memberships and revoked their dues-checkoff authorizations, Complaint, ¶¶ 14, 16 and 17; and that Local 99 violated §§ 8(b)(1)(A) and (2) by receiving, accepting, and retaining such money. Complaint, ¶¶ 15, 18 and 19. Local 99 interpreted the Complaint allegations as in conflict with *Frito-Lay*, so it alleged, as an affirmative defense, that "[t]he Complaint should be dismissed because its legal theories have been considered and rejected by the Board in *Frito-Lay, Inc.*, 243 NLRB 137 (1979)." Answer to Complaint, at 10. Local 99 was wrong about the Acting General Counsel's intent. In his briefs to the Board, the Acting General Counsel expressly and repeatedly disclaimed that his legal theory would require the Board to overrule *Frito-Lay*:

- *Acting General Counsel's Brief in Support of Exceptions* (page 5): "There is no violation of § 302(c)(4) if check-off authorizations are irrevocable for stated periods and automatically renewed for like periods, as long as employees are accorded an opportunity to revoke their authorizations at least once a year and at the termination of any applicable collective-bargaining agreements" and the union "may provide for a window period during which revocation will be appropriate. *Frito-Lay, Inc.*"
- *Acting General Counsel's Reply Brief (to Fry's brief) in Support of Exceptions* (first two sentences): Fry's "argues that the General Counsel is attempting to overturn established law. This is not the case."

- *Acting General Counsel’s Reply Brief (to Local 99’s brief) in Support of Exceptions* (page 6): “The General Counsel is neither attempting to overrule *Frito-Lay* nor desirous of doing so to prevail in this matter. The General Counsel, moreover, does not allege that a contract hiatus gives employees carte blanche to revoke their check offs during the hiatus.”
- *Acting General Counsel’s Reply Brief (to Local 99’s brief) in Support of Exceptions* (page 7) and *Acting General Counsel’s Reply Brief (to Fry’s brief) in Support of Exceptions* (page 4): “General Counsel’s theory does not in any way implicate *Frito-Lay*’s main holding that check-off authorizations do not automatically become revocable at will during a contract hiatus.”

When the General Counsel expressly disclaims a legal theory arguably encompassed by the complaint allegations and chooses to proceed on a more narrow theory, the General Counsel is not entitled to a “second bite at the apple” on remand to pursue a different theory. *Paul Mueller Co.*, 332 NLRB 1350, 1350 (2000); *see also Local Union No. 1827*, 357 NLRB 415, 415 n.2 (2011); *Mid-Atlantic Regional Council of Carpenters*, 356 NLRB 61, 61 n.2 (2010); *Local 190, Laborers Int’l Union of N. Am.*, 355 NLRB 532, 534 (2010); *The New York Post*, 353 NLRB 343, 344-45 (2008); *Sierra Bullets, LLC*, 340 NLRB 242, 243 (2003). Given the Acting General Counsel’s disclaimers, the Board should not now reconsider the rule set out in *Frito-Lay*: so long as there is an opportunity to revoke checkoff authorization tied to the collective-bargaining agreement’s termination, § 302(c)(4) does not preclude a checkoff authorization that remains in effect during the hiatus between collective bargaining agreements.

It makes no difference what the Charging Party argued because the General Counsel has exclusive authority to decide what issues to put before the Board. A charging party cannot prevail on a theory that the General Counsel has disclaimed, *Raley’s*, 337 NLRB 719, 719 (2002); or “enlarge upon or change the General Counsel’s theory of the case.” *Kimtruss*

Corp., 305 NLRB 710, 711 (1991); *see also Atlantic Queens Bus Corp.*, 362 NLRB No. 65, at slip op. 2 n.5 (Apr. 21, 2015); *Area Trade Bindery Co.*, 352 NLRB 172, 173 (2008); *Nott Co., Equip. Div.*, 345 NLRB 396, 402 (2005). “[T]o permit the Charging Party to introduce . . . evidence to support theories of violations [other] than the theory relied upon by the General Counsel is tantamount to granting to the Charging Party authority to amend the complaint in derogation of the authority of the General Counsel who has exclusive authority as to the issuance and conduct of the complaint.” *IBEW Local No. 903*, 230 NLRB 1017, 1019-20 (1977), *enfd* 503 F.2d 1044 (9th Cir. 1975). This rule is rooted in the National Labor Relations Act’s allocation of authority. In enacting the 1947 Taft-Hartley amendments, Congress created the office of the General Counsel and invested it with exclusive authority over the prosecution of unfair labor practice charges. *NLRB v. UFCW Local 23*, 484 U.S. 112, 123-125 (1987). Section 3(d) of the NLRA provides that the General Counsel possesses “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complains under section 160 of this title, and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. § 153(d). Accordingly, the General Counsel has sole discretion to issue and prosecute complaints based on theories that he determines are meritorious. *UFCW Local 23*, 484 U.S. at 123-125; *see also New England Health Care Employees Union, District 1199*, 448 F.3d 189, 193 (2d Cir. 2006) (“The General Counsel declined to assert the business necessity argument. The General Counsel has complete discretion to decide whether or not to issue a complaint, and to determine which issues to determine in that complaint.”); *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1350 (5th Cir. 1978) (holding that the statute “leaves to the general counsel the decision as to what is and what is not at issue in an unfair labor practice

hearing”); *United Steelworkers of America v. NLRB*, 393 F.2d 661, 664 (D.C. Cir. 1968) (scope of litigation may not be expanded over General Counsel’s objection); *GPS Terminal Svcs.*, 333 NLRB 968, 969 (2001) (ALJ improperly amended complaint over General Counsel’s objection).

B. Even if the ALJ’s interpretation of Local 99’s checkoff-authorization form were correct, the Board should still not find a violation.

1. There is not an “as applied” violation.

There is no evidence that Local 99 applied the authorization language in an unlawful manner. None of the Charging Parties attempted to revoke, or inquired about revoking, their checkoff authorizations in the window preceding the October 25, 2008 contract termination. *Smith’s Food & Drug Centers*, 358 NLRB at 704 n.2. This is not dispute. See Acting General Counsel’s Reply Brief (to Local 99’s answering brief) in Support of Exceptions, at 3-4 (with respect to a “window period prior to October 25, 2008”, “there is no record evidence that any member had sought to revoke a checkoff during this window period or had sought to resign his or her Union membership during this period”); Acting General Counsel’s Reply Brief (to Fry’s answering brief) in Support of Exceptions, at 3 (same). The earliest date that the General Counsel alleged in the Complaint that any employees notified Local 99 or Fry’s that they resigned membership and/or desired to revoke their checkoff authorizations was June 28, 2009. Complaint, ¶ 13.²

² If an employee had attempted to revoke his or her checkoff authorization in the window preceding the October 25, 2008 contract termination and been denied the right to do so, that unlawful application of the checkoff-authorization language would have been outside the § 10(b) statute of limitation period. The earliest of the unfair labor practice charges in this case was filed on December 28, 2009. Complaint, ¶ 1.

2. The Acting General Counsel disclaimed a “facial” violation theory.

The only other possible theory is that the checkoff authorization form is unlawful on its face. In other words, if the authorization does not give employees a right to revoke in a window before the contract expiration, then the limitation on revocation is invalid. This is the theory that the D.C. Circuit’s identified, but it is not a theory that the Acting General Counsel pursued. The opposite is true. The Acting General Counsel expressly disclaimed that theory. In his Brief in Support of Exceptions, at page 14, the Acting General Counsel stated, “The agreements obviously are not facially invalid. If given the natural interpretation of the language of these agreements, they would be valid.” During the hearing, when the ALJ specifically asked the Acting General Counsel whether his theory was based on a facial violation, the Acting General Counsel said repeatedly that it was not. *Smith’s Food & Drug Centers*, 358 NLRB at 708-09.

The Board should reject this theory for the same reason that it should reject the Charging Party’s attack on *Frito-Lay*. The General Counsel cannot prevail on a theory that he disclaimed.

C. The evidence does not support the Acting General Counsel’s fact-specific theory.

The Acting General Counsel’s theory has two overlapping prongs. First, the General Counsel says that, *during the hiatus*, Local 99 did not interpret its checkoff authorization form as creating a right to revoke before the collective-bargaining agreement expired.³ Second, the General Counsel says that each of the short-term extensions of the 2003-08

³ As indicated above, the Acting General Counsel agreed that Local 99 recognized a window before the October 2008 termination date.

collective-bargaining agreement were essentially new collective-bargaining agreements, and therefore there should have been a right to revoke tied to the expiration of each of those extensions.

The only evidence to which the Acting General Counsel pointed in support of his argument about how Local 99 interpreted the checkoff authorization is a form letter that Local 99 sent to the Charging Parties (and other employees). Local 99 sent this letter to employees who sought to revoke their authorizations in 2009 during the hiatus between the 2003-08 bargaining agreement and the 2009 agreement which, at the time, did not exist. In those letters, Local 99 informed the employee that the window for revocation “is not less than thirty (30) days and not more than forty-five (45) days prior to the anniversary date of the execution of the agreement” and either told the employee when window would open or invited the employee to contact Local 99 for that information. *See* G.C. Exhs. 7-15. The General Counsel thinks that this form letter is a smoking gun because Local 99 neglected to mention the window for revocation prior to the collective-bargaining agreement’s termination. But there is an obvious reason why: the window associated with the 2003-08 agreement had already passed and the 2009 collective-bargaining agreement had not yet been negotiated. Local 99 could not identify when the next pre-contract termination window would open because the termination date had not yet been determined at the bargaining table. Instead, Local 99 did what was reasonable and informed employees about the window that would open next, which was the window prior to the anniversary of their authorization execution dates.

The Acting General Counsel’s response is to argue that each of the short-term extensions of the 2003-08 collective-bargaining agreement (put in place to maintain labor

stability during negotiations for a successor agreement) was a separate collective-bargaining agreement. There were eight such extensions, which initially lasted between 28 and 82 days and which continued on a day-to-day basis after the stated term. Complaint, ¶ 5(c); G.C. Exh. 6. The Acting General Counsel argues that Local 99 should have recognized a window associated with the termination of each extension.

The problem with this argument is that an extension of a contract is not a new contract. This is black-letter contract law. *See* 17B C.J.S. Contracts § 500 (“Generally an option to renew a contract is the right to require the execution of a new contract while an option to extend the term merely operates to extend the term of the original agreement.”); *see also* *Garrett v. Branson Commerce Park Community Improvement Dist.*, 645 Fed. Appx. 710, 712 (10th Cir. 2016) (“[A]s ordinarily understood, a ‘renewal’ suggests ‘the recreation of a legal relationship of the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract.’ *Renewal*, Black’s Law Dictionary (10th ed. 2014).”); *IUOE Local 542 v. Allied Erecting & Dismantling Co., Inc.*, 556 Fed. Appx. 109, 113 (3d Cir. 2014); *Jack Tyler Engineering Co., Inc.*, 294 Fed. Appx. 176, 180 (6th Cir. 2008) (“The difference between ‘renewal’ and ‘extension’ is not merely semantic – while a renewal results in a new contract, an extension acts simply as a continuation of the original contract.”); *The Providence Journal Co. v. Providence Newspaper Guild*, 308 F.3d 129, 133 (1st Cir. 2002) (use of word “extended” in agreement makes clear “that the parties intended to extend their existing agreement rather than create a new, succeeding, one”). The extension agreements that Local 99 and Fry’s entered into make clear that their intent was to extend the 2003-08 collective-bargaining agreement, not

make a new agreement. Each agreement is entitled “Extension Agreement” and uses the phrase “shall be extended.” G.C. Exh. 6.

This argument is also requires the Board to disregard *Atlanta Printing Specialties & Paper Prods. Union Local 527*, 215 NLRB 237 (1974), *enf’d* 523 F.2d 783 (5th Cir. 1975). In that case, the union and employer entered into a new collective bargaining agreement before the window period prior to the existing collective bargaining agreement’s termination opened. The union then took the position that because there was a new agreement, employees were unable to revoke checkoff authorization during the pre-termination window period. The Board rejected that argument and held that when parties change a collective-bargaining agreement’s termination date by negotiating a new agreement, the “parties 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.” 215 NLRB at 237. That is what Local 99 did here. When it agreed with Fry’s to extend the 2003-08 agreement, it preserved employees’ right to revoke checkoff authorization during the window that opened before the October 2008 expiration date. It did not move that window forward with each extension agreement.

D. The membership resignations did not revoke dues-checkoff authorization.

The Board should reaffirm the ALJ’s conclusion, in Section C of his opinion, rejecting the Acting General Counsel’s theory that resignation of union membership triggered a revocation of dues-checkoff authorization. The D.C. Circuit did not reach this issue, but it is squarely foreclosed by *Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991). In *Lockheed*, the Board held that checkoff authorizations are contracts, and as such, employees may be held to the terms of checkoff

authorizations that they sign even after resigning union membership, so long as the authorization language makes clear that it is not contingent on union membership. *Id.* at 328. Local 99’s checkoff-authorization form contains such a waiver. It states, “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.”⁴ Accordingly, membership resignations had no impact on the viability of checkoff authorizations.

Conclusion

For all of the foregoing reasons, Local 99 asks that the Board correct the error in the ALJ’s decision regarding interpretation of Local 99’s checkoff-authorization form and dismiss the Complaint.

Dated: August 28, 2017

Respectfully Submitted,

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⁴ Notably, the Acting General Counsel left out this sentence when he quoted the checkoff-authorization language in a Complaint allegation. Complaint, ¶ 5(e).

PROOF OF SERVICE
STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and country of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 595 Market Street, Suite 800, San Francisco, CA 94105.

I hereby certify that a true and correct copy of the foregoing document entitled **UFCW Local 99's Statement of Position with Respect to Issues Raised by Remand** was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were therefore served upon the following parties via electronic mail; thereafter parties not having access to the on-line E-filing system were served via U.S. mail on this 28th day of August, 2017:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 28, 2017 at San Francisco, California.

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