

**No. 09-70922**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 4, AFFILIATED WITH UNITED FOOD  
AND COMMERCIAL WORKERS UNION**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board” or “the NLRB”) for enforcement of its Order issued against United Food and Commercial Workers Union, Local 4, affiliated with United Food and Commercial Workers Union (“the Union”). The Board’s

Decision and Order issued on October 31, 2008, and is reported at 353 NLRB No. 47.<sup>1</sup>

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a) (“the Act” or “the NLRA”)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over this case under the same section of the Act, because the unfair labor practice occurred in Montana.

The Board filed its application for enforcement on March 30, 2009. The application is timely; the Act places no limit on the time for filing actions to enforce Board orders.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether Chairman Liebman and Member Schaumber, sitting as a two-member quorum of a properly-established three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board’s Order in this case.

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<sup>1</sup> “ER” refers to the excerpts of record filed by the Union. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether the Board reasonably found that the Union unlawfully failed to provide Pamela Barrett, a *Beck* objector, with sufficiently verified expenditure information to support the calculation of its agency fee.

### STATEMENT OF THE CASE

Acting on charges filed by Pamela Barrett—a unit employee who objected to paying dues for nonrepresentational activities and therefore became a nonmember agency fee payer—the Board’s General Counsel issued an unfair labor practice complaint against the Union, alleging that the Union violated its duty of fair representation and therefore Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)). The complaint alleged that the Union, in calculating Barrett’s agency fee, unlawfully failed to provide her with an adequate explanation for the discrepancy between the Union’s total amount for chargeable expenses (95 percent) and the International Union’s total amount for chargeable expenses (85 percent). (ER 9.)

However, the subject of both the hearing before the administrative law judge and the rulings in this case was whether the expenditure information that *the Union* did provide to Barrett on May 11, 2007—categorizing *its* expenses and forming the basis for the 95 percent chargeable expense rate comprising the agency fee—was

sufficiently verified pursuant to settled Board law.<sup>2</sup> (ER 9-10.) Following the hearing, the judge issued a recommended bench decision, in which he found that the Union had provided Barrett with sufficiently verified expenditure information and therefore had not violated the Act. (ER 11-14.)

The General Counsel filed exceptions to the judge's decision and the Union filed cross-exceptions. (ER 8.) On review, the Board reversed the judge's finding that the Union had not violated the Act. Contrary to the judge, the Board found that the expenditure information provided to Barrett was insufficient, because it did not meet the independent-verification requirements described in settled Board law. As the Board explained, the information was not properly verified, because it was not audited by an auditor who independently verified that the expenditures were actually made. (ER 9-10.) Accordingly, the Board found that, by failing to provide Barrett with sufficiently verified expenditure information, the Union breached its duty of fair representation and therefore violated the Act. The Board entered an order remedying the Union's unlawful conduct. (ER 10.)

Subsequently, the Union filed a motion for reconsideration of the Board's Decision and Order, and the General Counsel filed a motion to modify certain remedial aspects of the Board's Decision and Order. On January 21, 2009, the

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<sup>2</sup> The Board, applying settled law relating to the litigation of issues closely connected to the subject matter of a complaint allegation, found—without any dispute from the parties—that the judge's decision to exclusively address this particular issue was proper. (ER 9-10.)

Board (Chairman Schaumber and Member Liebman) issued an order denying the Union's motion and granting the General Counsel's motion in part. (ER 3-7.)

The facts supporting the Board's Order are summarized below; the Board's conclusions and order are described thereafter.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background; the Union's Collective-Bargaining Agreement with Safeway Contains a Union-Security Clause Requiring Unit Employees To Become "Members" of the Union

The Union is the collective-bargaining representative of a unit of retail employees at a Safeway grocery store in Whitefish, Montana. (ER 9, 11-12; ER 73, 187.) The unit employees are covered by a collective-bargaining agreement between Safeway and the Union. (ER 11-12; 187.)

The collective-bargaining agreement contains a union-security clause. (ER 9, 11-12; ER 187.) The union-security clause requires that within 30 days of employment, "employees must be or become members of the Union" as a condition of employment.<sup>3</sup> (ER 12; ER 187.) The Union spends money collected

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<sup>3</sup> In practice, and in accord with Supreme Court decisions and Board law, actual "membership" in a union has been "whittled down to its financial core," and requires only the payment of uniformly required union dues and initiation fees. *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). Further, as discussed in detail below, while employees subject to a union-security clause may decide not to join the union, the union can require them to pay an agency fee. *Id.* at 742.

pursuant to the union-security clause on activities germane to its role as collective-bargaining representative (representational activities), as well as activities that are not germane to its role as collective-bargaining representative (nonrepresentational activities). (ER 12; 187.)

**B. Unit Employee Pamela Barrett Becomes a Nonmember  
*Beck* Objector; She Asks the Union for Verified Financial  
Information Supporting the Union’s Calculation of Her  
Agency Fee, but the Union Fails To Provide Her with It**

Pamela Barrett began working as a general clerk at the Safeway store in April 2007. (ER 9, 12; ER 73, 122, 125.) General clerks are included in the bargaining unit. (ER 187.)

In early May, the Union sent a “welcome aboard” letter to Barrett, notifying her that she was “required as a condition of employment to pay dues or fees to the Union.” (ER 8; ER 128-29, 233-35.) The letter also notified Barrett of her right to join or be a financial core member of the Union and, in the latter case, to object under *Beck* to paying union dues for nonrepresentational purposes. (ER 9-12; ER

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These nonmembers may also become objectors under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988) (“*Beck*”). Nonmembers who are also “*Beck* objectors[,]” such as Barrett, are entitled to demand that the union charge them agency fees only for activities “germane to collective bargaining, contract administration, and grievance adjustment.” Such activities are referred to as representational activities and they are chargeable. Thus, a *Beck* objector is entitled to have his or her agency fee reduced by an amount reflecting the percentage of union expenses that were nonrepresentational and thus nonchargeable. *Beck*, 487 U.S. at 752-54.

128-29, 234.) The letter stated that Barrett's monthly membership dues would be \$33.00. (ER 235.)

Barrett, who had concerns about the membership dues she would have to pay, sent a letter to the Union on May 9 asserting her rights as a *Beck* objector. (ER 8; ER 74-76, 191.) In her letter, she stated she did not want to be a member of the Union and was resigning from union membership. She further stated that she wanted to pay only the "agency" fee. To that end, she requested that the Union provide her with a "full" and "verified financial disclosure of union expenditures." (ER 8; ER 191.)

The Union responded to Barrett in a letter dated May 11. (ER 8; ER 192-93.) In its letter, the Union acknowledged Barrett's request for nonmember status. (ER 8; ER 78, 192.) The Union informed Barrett that, as an agency fee payer, her dues would be \$31.50 per month. According to the Union, that amount represented 95 percent of the Union's current member dues rate of \$33.00. (ER 8; ER 78, 192-93.)

The Union enclosed two attachments with this letter. (ER 8; 194-204.) As support for its \$31.50 agency fee calculation, the Union enclosed a one-page financial statement entitled "United Food Commercial Workers Union Local #4 Statement of Expenses and Allocation of Expenses Between Chargeable and Non-Chargeable Expenses." (ER 8; ER 78, 194.) The statement listed the Union's

“[c]hargeable and [n]on-chargeable expenses” for the year ending December 31, 2006. It also stated that the Union’s chargeable expense rate for representational activities was 95 percent of the Union’s total expenses, and that the Union’s nonchargeable expense rate for nonrepresentational activities was 5 percent.<sup>4</sup> (ER 8; ER 194.) Neither this statement nor the letter mentioned above contained any indication that the expenditure amounts listed had been independently verified.<sup>5</sup> (ER 8-10; ER 193-94.)

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<sup>4</sup> The statement listed the Union’s total expenses as \$525,428; chargeable expenses as \$497,687 (which it calculated as 95 percent of the total expenses); and nonchargeable expenses as \$27,741 (which it calculated as 5 percent of the total expenses). (ER 194.)

<sup>5</sup> In the other attachment to the letter, the Union provided Barrett with the *International Union’s* audited financial statement from 2005, entitled “United Food and Commercial Workers International Union Statement of Expenses Between Chargeable Expenses and Non-Chargeable Expenses And Report of Independent Auditors.” (ER 195-204.) That document stated that the chargeable expense rate for the International Union was 85 percent.

Under Board law, a local union—as an alternative to determining its agency fee by conducting an audit of its own chargeable and nonchargeable expenditures—may use what is called the “local presumption” to calculate its agency fee. The “local presumption” allows a local union to use the same allocation of chargeable and nonchargeable expenses as that of its parent affiliate. The Board permits this alternative because the Board has found that parent organizations almost always have more nonchargeable expenses than their locals, which means the *Beck* objector will actually pay a smaller agency fee when the “local presumption” is used. *See Thomas v. NLRB*, 213 F.3d 651, 661 (D.C. Cir. 2000). When a local union uses the local presumption, it will get less dues’ money from those paying the agency fee, but it will also be able to avoid the Board’s requirement of a local audit. *Auto Workers Local 95 (Various Employers)*, 328 NLRB 1215, 1217 (1999), *petition for review denied in relevant part, Thomas v. NLRB*, 213 F.3d 651

The Union instructed Barrett to contact it by May 21 if she wished to remain a nonmember agency fee payer. (ER 193.) Barrett so notified the Union, and on May 16, the Union sent a letter to Barrett reacknowledging her status as a nonmember/agency-fee objector. (ER 8; 205.) The Union's letter to Barrett reiterated that, as a nonmember/agency-fee objector, her agency fee was \$31.50 per month. (ER 205.)

As stated above, Barrett had previously requested the Union to provide her with verified financial information relating to the calculation of the agency fee amount. (ER 8; ER 191.) She had not received any verified information, however, and continued to have concerns about the matter. (ER 206.) On May 29, she sent the Union a letter in which she reiterated that she was a *Beck* objector. (ER 8; ER 79, 206.) She further stated that, although the Union had acknowledged that she was an agency fee payer, she had not been "provided with any information that explains or justifies the calculation of this high agency fee." (ER 5, 8; ER 79, 206.) She again asked the Union to provide her with a verified financial disclosure explaining the basis for its calculation of the agency fee. (ER 5, 8; ER 206.) She noted that, even though the Union had not provided her with an "adequate financial

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(D.C. Cir. 2000). The parent organization, however, still has to provide "verified supporting expenditure information" justifying its chargeable and nonchargeable expenses. *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474, 477 n.15 (1999). In this case, there is no dispute that the Union chose not to use the "local presumption" and, instead, required *Beck* objectors to pay the higher agency fee based on its actual local expenditures.

disclosure” supporting the agency fee, she would nonetheless tender her agency fee each month under protest in order to protect her livelihood. (ER 206.)

The Union responded to Barrett in a letter dated June 15. (ER 8; ER 208.) With respect to Barrett’s statement that the Union had not provided her with a verified financial explanation of the agency fee, the Union stated that it was a “small” local, and that it did not have “a lot” of nonchargeable expenses. (ER 8; ER 208.) The Union also referred Barrett to the expenditure information that it had enclosed in its May 11 letter. (ER 8; 208.) That information, as described above, consisted of the Union’s nonverified one-page financial statement (as well as the International Union’s audited financial statement). (ER 8; ER 208.) The Union reasserted that Barrett’s agency fee would be \$31.50 per month. (ER 208.)

**C. The Union Belatedly Provides Barrett with an Accountant’s Report Regarding the Union’s 2006 Expenditure Statement; the Report, which Was Not an Audit, Was Based Solely on the Union’s Representations, and Did Not Verify that the Expenses Had Actually Been Made**

On December 14, the Union—in an apparent attempt to settle this case—offered Barrett a reimbursement check for the difference between the agency fee she had paid from May to December based on the Union’s 95-percent chargeable expense rate (\$31.50, according to the Union), and the amount she would have paid during that period if her dues had been calculated using the International

Union's 85-percent chargeable expense rate (under \$28.00). (ER 8-9; ER 209, 221-22) Barrett declined the offer. (ER 12-13.)

In a letter accompanying the proffered reimbursement check, the Union acknowledged that when it provided its expenditure statement to Barrett on May 11, it did not include a "2006 financial report" showing that the figures in the statement were reviewed by an accountant. (ER 9; ER 221). The Union thus provided Barrett—for the first time—with this document, which was entitled "Independent Accountant's Report" and was dated February 19, 2007. (ER 9; ER 221.) The "Independent Accountant's Report" stated that an accountant had reviewed the Union's statement of support, expenses, and changes in net assets, but that all information included in the financial statement was based solely on the representations of the Union's management. (ER 9-10; ER 211-20.) The report emphasized that it was "substantially less in scope than an audit in accordance with generally accepted auditing standards[,]” and that the accountant expressed no opinion regarding the financial statements as a whole. (ER 9-10; ER 213.)

The report contained no verification that the expenditures on the Union's expenditure statement had actually been made. (ER 9-10; ER 213.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman), reversing the administrative law judge, found that the Union unlawfully failed to provide Pamela Barrett, a *Beck* objector, with sufficiently verified expenditure information, consistent with its obligations under settled Board law.

Board law requires that expenditure information given to a *Beck* objector by a union must be audited by an auditor who independently verifies that the expenditures claimed were actually made, and who does not merely accept the representations of the union. (ER 9.) The Board found that the Union failed to fulfill these requirements, because the Union's accountant only reviewed the one-page expenditure statement given to Barrett on May 11. The Board found that there was no evidence that the accountant did more than rely on the Union's representations in preparing the report. The Board also found no evidence that the accountant independently verified that the expenses claimed were actually made. (ER 5 n.4, 8-10.) Having found that the Union failed to provide Barrett with sufficiently verified expenditure information, the Board accordingly found that the Union breached its duty of fair representation and therefore violated the Act. (ER 10.)

The Board's Order requires the Union to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with,

restraining or coercing its employees in the exercise of their statutory rights.

Affirmatively, the Order requires the Union to, for all accounting periods covered by the complaint, provide Barrett with information concerning expenditures by the Union (or in the event the Union relies on a local presumption, expenditures by its parent union) that has been verified by an independent auditor. The Order further states that, if Barrett, with reasonable promptness after receiving this information, challenges the dues-reduction calculations for any accounting period, the Union must process such challenge as it would otherwise have done, in accordance with the principles of *California Saw & Knife*, 320 NLRB 224 (1995), *enforced sub. nom. Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). The Order also directs the Union to post a remedial notice, and provides the Safeway store with the option of posting the remedial notice at its workplace in Whitefish, Montana. (ER 10, 6.)

### **SUMMARY OF ARGUMENT**

1. The Union's contention that the Board's Order was not issued by a quorum of the Board must be rejected. Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section

3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and administrative-law and common-law principles. In contrast, the Union's argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

2. With respect to the merits of the Board's decision, the Board reasonably found that the Union failed to provide Pamela Barrett, a *Beck* objector, with sufficiently verified expenditure information supporting its calculation of her agency fee. Board law is clear that a union that does not calculate its agency fee by using the so-called "local presumption" (see note 5, above) must provide a *Beck* objector with audited expenditures, within the generally accepted meaning of the term audit, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepting the representations of the Union. The Board reasonably found that the "review" that the Union provided to Barrett fell short of this mark, because it contained no independent verification that the expenses claimed were actually made.

Notably, the Union does not dispute that its "review" of the expenditure information was not as complete as an audit. Instead, it argues that its "review" was something more than a "mere compilation," and therefore should have been

enough. The Union, however, fails to recognize that the Board has made clear that what is required is an audit, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepting the representations of the Union. Further, the Union's discussion of accounting terminology cannot obscure the fact that—whatever it wants to call its accountant's report—it failed to meet the Board's independent-verification requirements.

The remainder of the Union's challenges to the Board's findings are equally unpersuasive. Although the Union claims that, by May 29, Barrett had moved past the objector stage and had decided to pursue a "challenge," wherein she would challenge the Union's *allocation* of its chargeable and nonchargeable expenses, this argument is first wrong as a factual matter. Barrett was clearly seeking the verified expenditure information to which she was entitled. And, in any event, even if she had decided to pursue a challenge, it makes no difference because the Union must still provide the *Beck* objector with verified expenditure information that can be used in the challenge and that can allow the objector to make an informed judgment about the likelihood of success of any such challenge. Finally, there is no merit to the Union's argument that the Board should accept a document utilized by the Department of Labor, called the "LM-2," for the requirement that an audit be performed. It does not appear, and the Union does not represent, that the

LM-2 form contains independent verification that the claimed local expenditures were ever made.

## ARGUMENT

### I. CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN ACTED WITH THE FULL POWERS OF THE BOARD IN ISSUING THE BOARD'S ORDER IN THIS CASE

Chairman Schaumber and Member Liebman,<sup>6</sup> as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order in this case. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009) (“*New Process*”), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (“*Northeastern*”), *reh'g denied* (May 20, 2009); *Snell Island SNF LLC v. NLRB*,

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<sup>6</sup> On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

568 F.3d 410 (2d Cir. 2009) (“*Snell Island*”).<sup>7</sup> *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) (“*Laurel Baye*”), *petition for reh’g denied* (July 1, 2009), Nos. 08-1162, 08-1214 (discussed below).

As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is supported by Section 3(b)’s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. The Union’s contrary argument (Br 10) must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

### **A. Background**

The Act provides that the Board’s five members will be appointed by the President with the advice and consent of the Senate, and will serve staggered terms of 5 years. *See* Section 3(a) of the Act, 29 U.S.C. § 153(a). The

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<sup>7</sup> The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291 on June 9, 2009. This issue has also been fully briefed in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035, and *NLRB v. St. George Warehouse, Inc.*, Nos. 08-4875, 09-1269; in the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280, and *McElroy Coal Company v. NLRB*, Nos. 09-1332, 09-1427; the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; and the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

delegation, vacancy, and quorum provisions that govern the Board are contained in Section 3(b) of the Act, which provides in pertinent part as follows:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. . . . [29 U.S.C. § 153(b).]

Pursuant to this provision, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members, Member Liebman, Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired,<sup>8</sup> the two remaining members, Members Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that a vacancy shall not impair the powers of the remaining members and that "two members shall constitute a quorum" of any group of three members to which the Board had delegated its powers. Since January 1, 2008, this two-member quorum

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<sup>8</sup> Member Walsh's recess appointment also expired on December 31, 2007.

has issued over 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.<sup>9</sup>

**B. Section 3(b) of the Act, By Its Terms, Provides That a Two-Member Quorum May Exercise the Board's Powers**

In determining whether Section 3(b) of the Act expresses Congress' clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly delegated, three-member group, the Court should apply "traditional principles of statutory construction." *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984). This process begins with looking to the plain meaning of the statutory terms. *United States v. \$493,850 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008). The meaning of a term, however, "cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); see *Patenaude v. Equitable Life Assurance Soc'y*, 290 F.3d 1020, 1025 (9th Cir. 2002). Moreover, "a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v.*

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<sup>9</sup> On May 4, 2009, it was reported that the two-member Board quorum had issued approximately 400 decisions, published and unpublished. See BNA, *Daily Labor Report*, No. 83, at p. AA-1 (May 4, 2009). The published decisions include all decisions in Volume 352 NLRB (146 decisions), Volume 353 NLRB (132 decisions), and Volume 354 NLRB (42 decisions as of July 9, 2009).

*Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); see *Taylor Constr. v. ABT Service Corp.*, 163 F.3d 1119, 1122 (9th Cir. 1998).

Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate “all of the powers which it may itself exercise” to a group of three or more members; (2) a statement that vacancies shall not impair the authority of the remaining members of the Board to operate; and (3) a quorum provision stating that three members shall constitute a quorum, with an express *exception* stating that two members shall constitute a quorum of any three-member group established pursuant to the Board’s delegation authority.

As both the Seventh Circuit and the First Circuit have concluded, the plain meaning of the statute’s text authorizes a two-member quorum of a properly constituted three-member group to issue decisions, even when, as here, the Board has only two sitting members. See *New Process*, 564 F.3d at 845 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text.”); *Northeastern*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)”). As those decisions recognize, the three provisions of Section 3(b), in combination, authorized the Board’s action here. The Board first delegated all

of its powers to a group of three members, as authorized by the delegation provision. As provided by the vacancy provision, the departure of Member Kirsanow after his recess appointment expired on December 31 did not impair the authority of the remaining Board members to continue to exercise the full powers of the Board which they held jointly with Member Kirsanow pursuant to the delegation. And because of the express exception to the three-member quorum requirement when the Board has delegated its powers to a group of three members, the two remaining members constituted a quorum—the minimum number legally necessary to exercise the Board’s powers.

Moreover, the Seventh Circuit (*New Process*, 564 F.3d at 846) and the First Circuit (*Northeastern*, 560 F.3d at 41-42), both noted that two persuasive authorities provide additional support for this reading of Section 3(b)’s plain text. First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), where the Board had four sitting members, this Court held that Section 3(b)’s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. The *Photo-Sonics* Court held that it was not legally determinative whether the resigning Board member participated in the decision, because “the decision would nonetheless be valid because a ‘quorum’ of two panel members supported the decision.” *Id.* at 123. Second, the United States Department of Justice’s Office of Legal Counsel (“OLC”), in a formal

opinion, concluded that the Board possessed the authority to issue decisions with only two of its five seats filled, where the two remaining members constituted a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

The Union (Br 10) relies entirely on the D.C. Circuit's decision in *Laurel Baye* to support its argument that "a two person Board does not constitute a quorum." The D.C. Circuit's conclusion, however, is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. In *Laurel Baye*, 564 F.3d at 472-73, the D.C. Circuit held that Section 3(b)'s provision—that "three members of the Board shall, *at all times*, constitute a quorum of the Board" (29 U.S.C. § 153(b), emphasis added)—prohibits the Board from acting in any capacity when it has fewer than three sitting members, despite Section 3(b)'s express exception that provides for a quorum of two members when the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision that applies to a three-member "group" is not in fact an exception to the three-member quorum requirement for the "Board," because the former applies to a "group" and the latter applies to the "Board." *See id.* at 473. The court stated that Congress' use of the two different object nouns indicates that each quorum

provision is independent from the other, and thus the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present “at all times.” *Id.*

The D.C. Circuit’s interpretation fails to give the critical terms of Section 3(b) their ordinary and usual meaning, thereby violating the cardinal canon of statutory construction “that courts must presume a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine the meaning of a statute). The ordinary meaning of the word “except” is “with the exclusion or exception of.” *Webster’s New World College Dictionary* (4th ed. 2008). Thus, in ordinary English usage, the statement in Section 3(b)—that “three members of the Board shall, at all times, constitute a quorum of the Board, *except* that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof” (emphasis added)—denotes that the two-member quorum rule that applies when the Board has delegated its powers to a three-member group is an *exception* to the requirement of a three-member quorum “at all times.”

*Laurel Baye’s* refusal to give full effect to this express exception is based on an assumption that it would be anomalous for Congress to have used the statutory rubric “at all times . . . except” if Congress intended that there be some

times when the general requirement of a three-member quorum would not apply. That assumption is erroneous. *Laurel Baye* ignores that, in other statutes, as in Section 3(b), Congress has used that same statutory rubric to state a true exception to a general rule. *See, e.g.*, 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except that* the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).

*Laurel Baye* also fails to give the word “quorum” its ordinary meaning. “Quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.” *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (“*Yardmasters*”) (quoting ROBERT’S RULES OF ORDER 16 (rev. ed. 1981)). Under the court’s construction of Section 3(b), however, the actual presence of a two-member quorum, possessed of all the Board’s powers by a valid delegation, is *never* a sufficient number to transact business *unless* there is also a third sitting Board member.

The *Laurel Baye* court correctly states that Congress intended that “each quorum provision is independent from the other” (564 F.3d at 473), but then flouts that clear intent by denying Section 3(b)’s two-member quorum provision *any*

truly independent role. Rather, under the court’s construction, whether a two-member quorum is ever a legally sufficient number to decide a case is wholly *dependent* on the presence of a three-member quorum.<sup>10</sup> In so holding, the court violated a cardinal principle of statutory construction that “‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

*Laurel Baye* also fails to read the words “except” and “quorum” in the context of Section 3(b)’s textually interrelated provisions authorizing three or more Board members to delegate “any or all” of the Board’s powers to a three-member group, two members of which “shall constitute a quorum.” The court mistakenly distinguishes “the Board” and “any group” so that no “group” can continue to act if the membership of “the Board” falls below three. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that where, as here, the Board has delegated all its powers to a three-member group, that group, possessing all the Board’s powers, cannot logically be distinguished from the Board itself. *See Northeastern*, 560 F.3d at 41 (upholding “the Board’s delegation of *its*

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<sup>10</sup> *See New Process*, 564 F.3d at 846 n.2 (“[The employer’s] reading, on the other hand, appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.”).

*institutional power* to a panel that ultimately consisted of a two-member quorum” (emphasis added)).

### **C. Section 3(b)’s History Also Supports the Authority of a Two Member Quorum To Issue Board Decisions and Orders**

As shown, the meaning of statutory language cannot be determined by isolating particular terms, but must take into account the intent and design of the entire statute. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995); *United States v. \$493,850 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008); *City of Los Angeles v. U.S. Dep’t of Commerce*, 307 F.3d 859, 871-72 (9th Cir. 2002). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. *Gustafson*, 513 U.S. at 578.

A brief history of the Board’s operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the power to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), in its entirety, provided: “A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of the Board shall, at all times, constitute a quorum.”<sup>11</sup> Pursuant to

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<sup>11</sup> *See* Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter “*Leg. Hist. 1935*”), at 3272 (1935).

that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued 464 published decisions with only two of its three seats filled.<sup>12</sup> See, e.g., *NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.<sup>13</sup> In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.<sup>14</sup>

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<sup>12</sup> The Board had only two members during three separate periods between 1935 and 1947: from August 31 until September 23, 1936; from August 27 until November 26, 1940; and from August 27 until October 11, 1941. See *2d Annual Report, NLRB*, at 7; *6th Annual Report*, at 7 n.1; *7th Annual Report*, at 8 n.1. Those two-member Boards issued 224 published decisions (reported at 35 NLRB 24-1360 and 36 NLRB 1-45) in 1941; 237 published decisions (including all decisions reported in 27 NLRB and those decisions reported at 28 NLRB 1-115) in 1940; and 3 published decisions (reported at 2 NLRB 198-240) in 1936.

<sup>13</sup> See James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981); Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950).

<sup>14</sup> See H.R. 3020, 80th Cong. § 3 (1947), reprinted in *1 NLRB, Legislative History of the Labor Management Relations Act, 1947* (hereinafter "*Leg. Hist. 1947*"), at 171-72 (1948); H.R. Rep. No. 80-3020, at 6, *1 Leg. Hist. 1947*, at 297.

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's authority to exercise its powers through a two-member quorum. Thus, the Senate bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers "to any group of three or more members," two of whom would be a quorum.<sup>15</sup> The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.<sup>16</sup> Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage."<sup>17</sup> Senator Taft similarly stated that the Senate bill was designed to "increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much."<sup>18</sup> *See Snell Island*, 2009 WL 1676116, at \*9

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<sup>15</sup> S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

<sup>16</sup> Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

<sup>17</sup> S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

(Congress added Section 3(b)'s delegation provision “to enable the Board to handle an increasing caseload more efficiently”) (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981)). The Conference Committee accepted, without change, the Senate bill's delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.<sup>19</sup> Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues<sup>20</sup> reported to Congress the following year:

Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such members. Acting under this authority, the Board in January 1948,

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<sup>18</sup> Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), 2 *Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“the ICC”) and the Federal Communications Commission (“the FCC”). Both the FCC and ICC statutes identically provided that “[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . .” 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. See *Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

<sup>19</sup> 61 Stat. 136, 139 (1947), 1 *Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), 1 *Leg. Hist. 1947*, at 540-41.

<sup>20</sup> See 61 Stat. at 160, 1 *Leg. Hist. 1947*, at 27-28.

established panels for consideration of cases. Each of the Board members acts as chairman of one panel, and serves on two additional panels. Decisions in complaint cases arising under the Taft-Hartley law, and in representation matters involving novel or complicated issues, are still made by the full Board. A large majority of the cases, however, are being determined by the three-member panels.

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).<sup>21</sup> In this way, the Board was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.<sup>22</sup>

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. As the Seventh Circuit concluded in rejecting the contention that Section 3(b) prohibits the Board from acting unless it has three members:

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<sup>21</sup> See also *Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that “[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board members” and that the panel system “has added greatly to the Board’s productivity”).

<sup>22</sup> The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. See *Thirteenth Annual Report of the NLRB (1948)*, at 8-9; *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov’t Operations*, 100th Cong. 45-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman James M. Stephens’ statement).

To the extent that the legislative history points either way . . . , it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently. Forbidding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the act, not further it.

*New Process*, 564 F.3d at 847.

In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-member Board had done, *i.e.*, to issue decisions and orders with only two seats filled. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have changed or eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act. Instead, Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it had previously exercised its delegation authority. That clear expression of legislative intent controls the meaning of Section 3(b).

**D. Well-Established Administrative-Law and Common-Law Principles Support the Authority of the Two-Member Quorum to Exercise All the Powers Delegated to the Three-Member Group**

The conclusion that the two remaining members of a three-member group can continue to exercise the powers of the Board that were properly delegated to that three-member group is consistent with established principles of both administrative law and the common law of public entities.

As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S.179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id.* at 183-86 (also identifying “the ICC”).<sup>23</sup>

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at \*5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at \*16 (W.Va. 1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (see *Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), even where that majority represented only a minority of the full board. *See, e.g., People v. Wright*, 30 Colo. 439, 442-43, 71 P. 365 (1902) (where city council was composed of 8

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<sup>23</sup> In *Flotill*, the Supreme Court held that where only three commissioners of the five-member Federal Trade Commission participated in a decision, a 2-1 decision of those three commissioners was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84.

aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members).<sup>24</sup>

The D.C. Circuit recognized the relevance of these common-law quorum principles in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), when it observed that the common-law rule likely permits “a quorum made up of a majority of those members of a body *in office* at the time.” *Id.* at 582 n.2 (emphasis in original). With that common-law principle as a backdrop, the court held that, in the absence of any countermanding provision in its authorizing statute, the Securities and Exchange Commission (“the SEC”) lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions and orders when only two of its five authorized seats were filled.

The common-law principles applied in *Falcon Trading* apply as well in interpreting the quorum provisions Congress enacted in the NLRA. Consistent with those principles, Section 3(b) authorizes the Board, when it has a quorum

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<sup>24</sup> Cases which, at first, may appear to run counter to the common-law rules are easily reconciled when it is recognized that their holdings are instead controlled by a specific quorum rule dictated by statute or ordinance. *See, e.g., Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “[t]he ordinance under which the meeting was held provided that a quorum shall consist of four members”); *Glass v. Hopkinsville*, 225 Ky. 428, 9 S.W.2d 117 (1928) (state statute required that a school board quorum was a majority of the full board, so five of nine members were needed for a quorum).

of at least three members, to delegate all its powers to a three-member group, two members of which “shall constitute a quorum.” The statutory mechanism Congress provided for the NLRB differs from the mechanism afforded the SEC, but the result—that two members of a properly-delegated three-member group constitute a quorum that can issue agency decisions—is equally valid. *See New Process*, 564 F.3d at 848 (*Falcon Trading* supports the Board’s authority to issue decisions pursuant to Section 3(b)’s two-member quorum provision). The *Laurel Baye* court incorrectly ignored those principles in deeming *Falcon Trading* inapplicable. 564 F.3d at 474-75.

The common-law quorum rule imbedded in Section 3(b)’s express exception for Board groups is also similar to the quorum rule upheld in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983). There, the court recognized that the ICC’s enabling statute not only permitted that 11-member agency to “carry out its duties in [d]ivisions consisting of three [c]ommissioners,” but also provided that “a majority of a [d]ivision is a quorum for the transaction of business.” *Id.* at 367 n.7. Based on that provision, the court held that an ICC decision participated in and issued by only two of the three division members was valid. *Id.* Section 3(b) is directly analogous to the ICC statute and similarly allows the Board to delegate its powers to groups, two members of which constitute a quorum.

The Seventh Circuit's decision in *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980), similarly recognizes the principle of minority decision-making. There, the court held that when only 6 of the 11 seats on the ICC were filled, a majority of the commissioners in office constituted a quorum and could issue decisions. Similarly, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279.

In *Laurel Baye*, the D.C. Circuit not only failed to interpret Section 3(b) in light of applicable common-law quorum principles, it erroneously cited “basic tenets of agency and corporation law” to hold that “the moment the Board’s membership dropped below its quorum requirement of three” all authority previously delegated by the Board to the group ceased. *Laurel Baye*, 564 F.3d at 473 (citing various legal treatises). In thus giving controlling weight to “basic tenets of agency and corporation law,” the *Laurel Baye* court failed to heed the warning of the treatises upon which it relied that governmental bodies are often subject to special rules not applicable to private bodies.<sup>25</sup>

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<sup>25</sup> See FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (2008) (distinguishing between private and municipal corporations, stating that “the law of municipal corporations [is] its own unique topic,” and concluding that

Specifically, the court erroneously concluded that the three-member group to which a Board quorum delegated all of the Board's powers was an "agent" of the Board. *See id.* (citing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006) for the proposition that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended"). "Agency" is defined as "the fiduciary relationship that arises when one person ("the principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests consent or otherwise consents so to act." *Id.*, § 1.01. The delegation of institutional powers to the three-member group authorized by Section 3(b) does not create any kind of "fiduciary" relationship and does not involve the three-member group acting on "behalf" of the Board or under its "control." Instead, the Board members in the group have been jointly delegated all of the Board's institutional powers, and thus are fully empowered to exercise them, not as Board agents, but as the Board itself.

*Laurel Baye's* misapprehension concerning the governing common-law principles also led it unwarrantedly to disregard the teaching of its *Yardmasters* decision. There, the D.C. Circuit properly rejected reliance on the principles of

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"[a]ccordingly, this treatise does not cover municipal corporations."). Similarly, RESTATEMENT (THIRD) OF AGENCY (2006), in its introduction, states that it "deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government."

agency and private corporation law it erroneously invoked in *Laurel Baye*. The court in *Yardmasters* discerned that the delegation and vacancies provisions of the federal statute at issue there demonstrated that Congress intended that certain operations of a public agency should continue to function in circumstances where a private body might be disabled. 721 F.2d at 1343 n.30. Similarly, in this case, the plain meaning of Section 3(b)'s delegation, vacancy, and quorum provisions manifests Congress' intent that three or more members of the Board should have the option to delegate the Board's powers to a three-member group, knowing that an imminent vacancy "shall not impair the right of the remaining members to exercise all the powers of the Board" and that "two members shall constitute a quorum of any group" so designated. As the Office of Legal Counsel properly concluded, construing Section 3(b)'s plain language to permit the two-member quorum to continue to exercise the Board's powers that were properly delegated to the three-member group "would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum." 2003 WL 24166831, at \*3.<sup>26</sup>

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<sup>26</sup> Although, as *Laurel Baye* noted (564 F.3d at 474), *Yardmasters* is distinguishable, the critical distinction actually points directly to the greater strength of the Board's case. In *Yardmasters*, the D.C. Circuit was faced with the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. See 721 F.2d at 1341-42. By contrast, here, the statutory requirements for adjudication are satisfied because Section 3(b) expressly provides

### **E. The Two-Member Quorum Has Authority To Decide All Cases Before The Board**

Nor is the two-member quorum provision of Section 3(b) limited to situations where a case was originally assigned to a panel consisting of three members. Under the express terms of Section 3(b), the Board may delegate “any or all of the powers which it may itself exercise” to a group of three members, who accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (see 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (*see* 29 U.S.C. § 156). Thus, a delegation of “all the Board’s powers” to a three-member group means that all cases that are pending or may come before the Board are before the group, and the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.

Section 3(b)’s broad authority permitting the Board to delegate all of its powers to a group contrasts with statutes governing appellate judicial panels, which

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that two members of a properly constituted, three-member group is a quorum. Therefore, the presence of the Board quorum that adjudicated this case “is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting ROBERT’S RULES OF ORDER 3, p. 16 (1970)).

require the assignment of at least three judges in every case. The primary judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring “the hearing and determination of cases and controversies by separate panels, each consisting of three judges”). *See also Murray v. Nat’l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (relying on legislative history to find that Congress intended 28 U.S.C. § 46(b) to require that, “in the first instance, all cases would be assigned to [a] panel of at least three judges”) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

The Supreme Court’s decision in *Nguyen v. United States*, 539 U.S. 69 (2003), illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. *See New Process*, 564 F.3d at 847-48. In that case, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. The three-member group of Board members to which the Board delegated all of its powers, however, *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen*

opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. *See Snell Island* 2009 WL 1676116, at \*7 (three-member panel that took effect on December 28, 2007, was properly constituted). Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if the original panel had been properly created . . . .” 539 U.S. at 83.<sup>27</sup>

*KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), involves a very different kind of delegation. In *KFC*, the Second Circuit held that the Board members responsible for deciding whether a representation election had been conducted fairly were required to make that decision themselves and could not, under the NLRA, delegate that responsibility to Board staff. As the court stated: “In view of the rather clear congressional distrust of staff assistants—who are, of course, neither appointed by the President nor approved by the Senate, as are Board members, 29 U.S.C. § 153(a)—we cannot say that Congress intended, or would have approved, the general proxies issued [to Board staff] here.” 497 F.2d at 303. Thus, *KFC* involved an improper delegation of authority to NLRB staff employees who did not have adjudicatory authority under the Act. In contrast,

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<sup>27</sup> *See also Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, 138, 144 (1947) (Urgent Deficiencies Act “require[d] strict adherence to the [statutory] command” that a case brought to enjoin an ICC order “shall be heard and determined by three judges,” where there was “no provision for a quorum of less than three judges.”).

here, Section 3(b) expressly authorizes the Board to delegate its powers to a group of three Board members, all of whom are authorized by the Act to adjudicate cases.

**II. THE BOARD REASONABLY FOUND THAT THE UNION UNLAWFULLY FAILED TO PROVIDE PAMELA BARRETT, A *BECK* OBJECTOR, WITH SUFFICIENTLY VERIFIED EXPENDITURE INFORMATION TO SUPPORT THE CALCULATION OF ITS AGENCY FEE**

**A. Union-Security Agreements under the Act**

Section 7 of the Act (29 U.S.C. § 157) affords employees the right to engage in a broad range of concerted activities, including joining labor organizations, for the purpose of collective bargaining or other mutual aid or protection. That section also grants employees “the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [S]ection 8(a)(3) . . . .” In turn, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) specifies that collective-bargaining agreements may contain union-security provisions requiring employees to become members of the union as a condition of employment.

Thus, an employee may be discharged for failing to satisfy union-membership requirements. *See Radio Officers’ Union v. NLRB*, 347 U.S. 17, 41 (1941). The form of union security permitted under the Act reflects a compromise between the desire to “insulate employees’ jobs from their organizational rights,”

and Congressional recognition that, absent any union-security agreements, “many” employees would receive the benefits of union representation but refuse to contribute financial support to the union through payment of dues. *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 40-41. *See also* S. Rep. No. 105, 80th Cong., 1st Sess. (1947).

Union-security provisions are not without limitation, however. Although the Act specifies that a union-security provision may require union membership, the Supreme Court has long interpreted the *actual* membership requirement as obligating employees only to pay union fees and dues. Thus, membership, as a condition of employment, “is whittled down to its financial core.” *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). *Accord Communication Workers of America v. Beck*, 487 U.S. 735, 745 (1988) (“*Beck*”); *NLRB v. Studio Transp. Drivers Local 399*, 525 F.3d 898, 902 (9th Cir. 2008). Simply put, so long as employees pay the dues and fees that lawfully may be required, they are “protected from discharge” even if they refuse to join the union. *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083, 1084, 1086-87 (9th Cir. 1975). *Accord Local Union No. 749, Int’l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO v. NLRB*, 466 F.2d 343, 344 n. 1 (D.C. Cir. 1972).

In *Beck*, the Supreme Court refined the “financial core” obligations of employees working under union-security agreements. The Court held that the

financial core membership that may be required under Section 8(a)(3) of the Act does not include “the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.” *Beck*, 487 U.S. at 745. Thus, all that objecting nonmember employees (who are typically referred to as “*Beck* objectors”) covered by a union-security clause may be required to pay “is an ‘agency fee’ representing the portion of the dues that the union expends in its collective bargaining activities.” *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). *Accord Studio Transp. Drivers Local 399*, 525 F.3d at 902.

### **B. The Duty of Fair Representation**

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice for a union to “restrain or coerce . . . employees in the exercise of the rights guaranteed in [Section 7 of the Act].” That section imposes a duty of fair representation on a union in its role as the exclusive representative of employees for collective-bargaining purposes. The judicially created duty of fair representation reflects the principle that a union's status as the exclusive representative “includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Thus, a union breaches the duty of fair representation

when its “conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” *Id.* at 190. *Accord International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994).

A union’s *Beck* obligations arise pursuant to its duty of fair representation. *See Beck*, 487 U.S. at 745; *see also California Saw & Knife Works*, 320 NLRB 224, 228-30 (discussing the duty of fair representation in the *Beck* context), *enforced sub. nom. Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (the union is “required to represent all the members of the unit equally, whether or not they are union members”). Thus, when a union fails to implement its *Beck* obligations, it breaches its duty of fair representation and violates Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)).

**C. The Union Breaches Its Duty of Fair Representation and Therefore Violates the Act when It Fails to Provide a *Beck* Objector with Sufficiently Verified Expenditure Information**

The exact parameters of a union’s obligations under *Beck* were left to the Board’s discretion. *See United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 772 (9th Cir. 2002)(“*UFCW*”) (en banc); *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000). In *California Saw & Knife Works*, 320 NLRB at 233, 239, the Board’s first comprehensive decision addressing *Beck*, the Board

established a two-step process available to the employee who objects to paying dues for nonrepresentational purposes. In the first step, the union must apprise the objector of the percentage that their dues will be reduced because they pay only their portion of the union's chargeable, representational-related expenditures. The union also must demonstrate how it made that calculation. In the second step, an objector can file a challenge, where a determination is made whether the union properly allocated its expenditures between chargeable expenses and nonchargeable expenses. *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474, 477 (1999). In a challenge procedure, the union bears the burden of proving that the expenditures are chargeable to the degree asserted. *Id.* at 478.

The financial information that the objector has been supplied in the first step enables the objector to determine whether to challenge the dues-reduction calculations, and to determine the likelihood of success of such a challenge. Without knowing what expenditures were actually made, an objector would have only incomplete information on which to base the decision whether to proceed to a challenge. *See Ferriso v. NLRB*, 125 F.3d 865, 869-70 (D.C. Cir. 1997).

In *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474 (1999), the Board held, with respect to the first step, that, in order to provide *Beck* objectors with a reliable basis for calculating the fees they must pay, the union's local expenditures must be audited. The audit must "*independently verif[y]* that the

expenditures claimed *were actually made;*” the audit cannot be based on representations made by the union. *Id.* at 477 (emphasis added). *Accord Ferriso*, 125 F.3d at 868. The auditor does not necessarily review the correctness of the *allocation* of the expenditures into chargeable or nonchargeable categories; that is left for the second-step, challenge stage. *Television Artists AFTRA (KGW Radio)*, 327 NLRB at 477.

The Board’s requirement in *Television Artists AFTRA (KGW Radio)*, 327 NLRB at 477, that an objector be provided an audit of the local union’s expenditures to ensure that the expenditures were actually made, is an example of where the Board has “craft[ed] the rules for translating the generalities of . . . the statute as authoritatively construed in *Beck* . . . into a workable system for determining and collecting agency fees.” *United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 772 (9th Cir. 2002)(“*UFCW*”) (*en banc*) (quoting *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998)). As this *en banc* Court in *UFCW* emphasized, “[i]t is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction,” than the crafting of such rules. *Id.* (quoting *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998)). Accordingly, the Board’s audit requirement is entitled to the highest degree of judicial deference. The Union’s

brief nowhere mentions this Court's decision in *UFCW*, nor does it acknowledge this deferential standard of review.

**D. The Board Reasonably Found that the Union Failed to Provide Barrett with Sufficiently Verified Expenditure Information**

In this case, the Union did not provide Barrett with an audit of its expenditures. (ER 9-10.) Instead, as the Board explained (ER 10), the Union's accountant merely reviewed the one-page expenditure statement given to Barrett on May 11, and his report specifically emphasized that all the information was based on the representations of the Union's management. (ER 10.) There was "no evidence" of any independent verification that the expenses claimed were in fact made. (ER 10.) The Union does not dispute these findings. Accordingly, the Union does not dispute the Board's finding that it did not perform the kind of audit that the Board required in *Television Artists AFTRA (KGW Radio)*, 327 NLRB at 477.

**E. The Union's Contentions Are Without Merit**

The Union acknowledges (Br 13) that, although its review of its expenditure information was "not as complete as an audit[,]” it was something more "than a mere compilation[,]” and therefore should have been enough. The Union's argument, however, fails to recognize that, in *Television Artists AFTRA (KGW Radio)*, 327 NLRB at 477, the Board made clear that a union's supplying

something more than a mere compilation was not enough. The union was required to perform an audit “within the generally accepted meaning of the term, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepts the representations of the Union.” *Id.*

The Union’s effort (Br 17-18) to conflate an audit with a “review,” of the sort it provided in the present case, overlooks the fact that its “review” contained no independent verification that the expenses it claimed were *actually made*. (ER 10.) And the Union’s discussion of accounting terminology cannot obscure the fact that—whatever it wants to call its accountant’s report—it failed to meet the independent-verification requirements of *Television Artists AFTRA (KGW Radio)*. (ER 10.) The Union has pointed to no “evidence that the accountant did anything more than rely on the [Union’s] representations in preparing the report, such as independently verifying that the expenses claimed were in fact made.” (ER 10.)<sup>28</sup>

The Union also claims that Barrett’s May 29 letter to the Union demonstrated that she had “come to the conclusion that [the Union’s] chargeable expenditures” were “too high.” (Br 28.) The Union argues that this means that

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<sup>28</sup> The Union argues (Br 19-26) that the Board should accept a document utilized by the Department of Labor, called the “LM-2,” in fulfillment of the requirement that an audit be performed. The Board reasonably rejected that argument. (ER 5 n.4, ER 10 n.8.) Indeed, it does not appear, and the Union does not represent, that the LM-2 form (which it never even sent Barrett (ER 122)) contains independent verification that the claimed local expenditures were actually made.

Barrett had moved past being a *Beck* objector and had decided to pursue a challenge. Under these circumstances, the Union argues, it should be relieved of its first-step obligation to provide Barrett with the results of an audit.

First, as a factual matter, Barrett's May 29 letter to the Union never said the agency fee was "too" high, and she never referred to a "challenge" or "allocation" of chargeable expenses, the kind of dispute that is resolved in the challenge procedure. Instead, and as shown above, Barrett's May 29 letter reaffirmed that she was a *Beck* objector. She also reiterated that she had not been "provided with any information that explains or justifies the calculation of this high agency fee." (ER 9; ER 206.) Given that she had not received this information, she requested that the Union provide her with a verified financial disclosure explaining the basis for the calculation of the "agency fee." (ER 9; ER 206.) The Union never provided her with such information. (ER 9-10.)

In any event, as a legal matter, it is of no moment whether a *Beck* objector announces, at the time of her objection, an intention to file a challenge to the allocation of expenditures. The Union must still provide the objector with verified expenditure information in order to supply her with the verified information that will be used in the challenge and to allow her to make an informed judgment about the likelihood of success of any such challenge. As the Board stated (ER 3 n.4), because the Union had not provided Barrett with sufficiently verified information

on May 29, “her recourse was to have the [Union] provide her such verified information, and not, as the [Union] asserts . . . to proceed to internal union procedures . . . .”

Finally, the Union’s discussion of the May 4 “welcome letter” (or “initial letter,” as the Union refers to it) sent to new unit employees does not help its cause. According to the Union, the “initial letter” provided “the specific basis upon which the [Union] calculated its chargeable and non-chargeable expenses.” (Br 28). The “initial letter” did nothing of the sort (ER 233-35.). The Union’s argument is misplaced: the instant case does not involve the legal adequacy of the initial notice, wherein the Union was required to notify new unit employees of their *Beck* rights. The Union misconprehends the timeline of events and the obligations it owes at the *objection* stage. In any event, the initial notice provided no expenditure information whatsoever.<sup>29</sup>

When Barrett notified the Union of her objection on May 9, the Union had a simple task: provide her with sufficiently verified expenditure information of the

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<sup>29</sup> The Union goes too far in contending that Barrett “false[ly]” (Br 20) claimed she never received the initial letter. The judge did not say anything of the sort. He simply inferred that, because a union witness testified that she routinely sent out hundreds of such letters to groups of new unit employees (ER 134), Barrett must have received one too. In any event, this makes no difference. The Union’s initial letter contained no verified expenditure information—or any expenditure information at all, for that matter. What matters is what the Union failed to provide Barrett with after she informed it of her *Beck* objector status.

local's expenditures or invoke its right to use the "local presumption." *See* note 5, above; *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474 (1999). It did neither.<sup>30</sup>

In conclusion, the Union's contentions provide no basis for disturbing the Board's finding that it violated the Act.

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<sup>30</sup> The Union's discussion (Br 28-29) of its internal procedure for challenging the allocation of chargeable and nonchargeable expenses is all well and good, but this has no relevance to the present case.

Further, there is no merit to the Union's novel claim (Br 30) that Barrett's reference to a "certified public accountant" in her May 29 letter meant that the Union could "rightfully" ignore her request for verified information. A certified public accountant may, obviously, serve as an auditor.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's order in full.

**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28.-2.6, Board counsel are unaware of any related cases pending in this Circuit.

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NATIONAL LABOR RELATIONS BOARD  
July 2009

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	:
	:
Petitioner	:
	:
	: No. 09-70922
v.	:
	:
UNITED FOOD AND COMMERICAL	:
WORKERS UNION, LOCAL 4, AFFILIATED	:
WITH UNITED FOOD AND COMMERICAL	:
WORKERS UNION	:
	:
Respondent	:
	:

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,687 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Office Word 2003.

/s Linda Dreeben

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Dated at Washington, DC  
this 13th day of July, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 13, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s Daniel A. Blitz

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Dated at Washington, DC  
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