

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCELSIOR GOLDEN LIVING CENTER

and

SERVICE EMPLOYEES INTERNATIONAL UNION  
HEALTHCARE MINNESOTA (LOCAL 113)

Case 18-CA-081449

GGNSC ST. PAUL RIDGE LLC, d/b/a GOLDEN LIVING  
CENTER – LAKE RIDGE HEALTH CARE CENTER

and

SERVICE EMPLOYEES INTERNATIONAL UNION  
HEALTHCARE MINNESOTA (LOCAL 113)

Case 18-CA-081459

**MOTION FOR SUMMARY JUDGMENT**

The Acting General Counsel hereby moves that the Board, in order to effectuate the purposes of the Act and to avoid unnecessary delay, exercise its power under Section 102.50 of the Board's Rules and Regulations, Series 8, as amended, and transfer this proceeding to the Board for final determination on the basis of the pleadings heretofore filed.

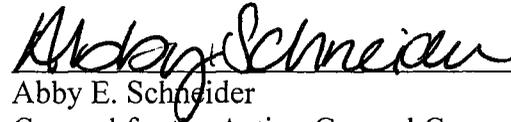
The Acting General Counsel further moves that, upon transfer of this proceeding to the Board, the Board issue an appropriate Order to Show Cause why a Summary Judgment should not be entered against Respondent and fix a time for the filing of briefs by all parties to this

proceeding, the brief of the Acting General Counsel being submitted herewith. As shown by the attached Table of Exhibits, copies of the charges, complaint, answer, and the amended answer in Cases 18-CA-081449 and 18-CA-081459 are attached to this Motion as exhibits and incorporated herein by reference.

In support of this Motion, the Acting General Counsel alleges that the only issues raised by the complaint and amended answer are legal in nature and that there is no issue of disputed fact warranting or requiring a hearing in this matter.

Dated at Minneapolis, Minnesota, this 13th day of July, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Abby E. Schneider", is written over a horizontal line.

Abby E. Schneider  
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**ACTING GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

On May 21, 2012, Service Employees International Union, Healthcare Minnesota (Local 113) (the Union) filed charges (Exhibits 1 and 2) against Excelsior Golden Living Center (Respondent Excelsior) and GGNSC St. Paul Ridge LLC, d/b/a Golden Living Center – Lake Ridge Health Care Center (Respondent Lake Ridge), alleging that Respondents unilaterally changed a term and condition of employment and discontinued voluntary dues checkoff without the Union's consent or a bona fide impasse. Based on the charges, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on June 13, 2012 (Exhibit 3),

alleging that Respondents violated Section 8(a)(5) and (1) of the Act. The Acting General Counsel submits that the pleadings in this matter, together with the exhibits, including Respondents' Amended Answer (Exhibit 5), demonstrate that there are no issues of fact requiring a hearing to be held and that the case should be determined on the basis of the pleadings.

## **I. UNDISPUTED ALLEGATIONS OF THE COMPLAINT**

Exhibits attached to the Motion for Summary Judgment establish the following undisputed facts:

- (1) The charges were filed and served. Exhibits 1 and 2; Exhibit 3, paragraph 1; Exhibit 5, paragraph 1;
- (2) Respondent Excelsior is engaged in commerce within the meaning of the Act. Exhibit 3, paragraph 2; Exhibit 5, paragraph 2;
- (3) Respondent Lake Ridge is engaged in commerce within the meaning of the Act. Exhibit 3, paragraph 3; Exhibit 5, paragraph 3;
- (4) The Union is a labor organization within the meaning of Section 2(5) of the Act. Exhibit 3, paragraph 4; Exhibit 5, paragraph 4;
- (5) At all material times, Scott Norton, Vice President of Labor & Employment, has been an agent of Respondents within the meaning of Section 2(13) of the Act. Exhibit 3, paragraph 5; Exhibit 5, paragraph 5;
- (6) The following employees of Respondent Excelsior (the Excelsior Nurses Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses and licensed practical nurses employed by Respondent Excelsior at its Excelsior, Minnesota facility; excluding managerial employees, office clerical employees, all other employees, temporary and casual employees, guards and supervisors as defined in the Act, and specifically excluding the resident care coordinator. Exhibit 3, paragraph 6(a); Exhibit 5, paragraph 6;
- (7) The following employees of Respondent Excelsior (the Excelsior Non-Professional Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All non-professional employees employed by Respondent Excelsior at its Excelsior, Minnesota facility; excluding registered nurses, licensed practical nurses, managerial employees, office/clerical employees, temporary employees, guards and supervisors as defined in the NLRA. Exhibit 3, paragraph 6(b); Exhibit 5, paragraph 6;

- (8) The following employees of Respondent Lake Ridge (the Lake Ridge Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time and casual non-professional employees employed by Respondent Lake Ridge at its Roseville, Minnesota facility, including certified nursing assistants, trained medication aides, housekeeping aides, kitchen aides, maintenance, cooks, activity assistants, activity aides, laundry aides, adult day program aides, transport aides, therapeutic recreation specialists, music therapists, and store clerks; excluding, managerial employees, office clerical employees, all other employees, guards and supervisors as defined in the National Labor Relations Act. Exhibit 3, paragraph 6(c); Exhibit 5, paragraph 6;

- (9) At all material times, Respondent Excelsior has recognized the Union as the exclusive collective-bargaining representative of the Excelsior Nurses Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from December 1, 2009 through November 30, 2011, thereafter extended through January 31, 2012, by a Letter of Understanding between the Union and Respondent Excelsior. Exhibit 3, paragraph 6(d); Exhibit 5, paragraph 6;
- (10) At all material times, Respondent Excelsior has recognized the Union as the exclusive collective-bargaining representative of the Excelsior Non-Professional Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from December 1, 2009 through November 30, 2011, thereafter extended through January 31, 2012, by a Letter of Understanding between the Union and Respondent Excelsior. Exhibit 3, paragraph 6(e), Exhibit 5, paragraph 6;
- (11) At all material times, Respondent Lake Ridge has recognized the Union as the exclusive collective-bargaining representative of the Lake Ridge Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from September 1, 2010 through October 1, 2011, thereafter extended through January 31, 2012, by a Letter of Understanding between the Union and Respondent Lake Ridge. Exhibit 3, paragraph 6(f); Exhibit 5, paragraph 6;
- (12) At all times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the three Units described above in paragraphs (6) through (8). Exhibit 3, paragraph 6(g); Exhibit 5, paragraph 6;

- (13) Each of the collective-bargaining agreements described above in paragraphs (9) through (11) includes identical language regarding Respondents' obligations to deduct Union dues from the wages of employees in the Units described above in paragraphs (6) through (8). The relevant language is as follows:

The Employer agrees to deduct Union dues and initiation fees, or comparable enrollment and service fees for employees electing not to become Union members, from the wages of employees who voluntarily provide the Employer with a written authorization to make such deductions. The written authorization shall not be irrevocable for a period of more than one (1) year or beyond the termination date of this Agreement, whichever occurs sooner. Deductions shall be made from the wages of employees in the first (1st) pay period of the month in which the payment is due. Withheld amounts will be forwarded to the Union by the tenth (10th) day of the month following the actual withholding, together with a record for the amount, social security number, and name of those for who such deductions have been made. Exhibit 3, paragraph 7; Exhibit 5, paragraph 7;

- (14) By letter dated March 14, 2012, Respondents notified the Union that they would cease deducting Union dues after March 2012 for the three Units described above in paragraphs (6) through (8). Exhibit 3, paragraph 8(a); Exhibit 5, paragraph 8;
- (15) Effective about April 2012, Respondents ceased deducting Union dues from the pay of the employees in the three Units described above in paragraphs (6) through (8). Exhibit 3, paragraph 8(b); Exhibit 5, paragraph 8; and
- (16) Respondents engaged in the conduct described above in paragraphs (14) and (15) without affording the Union an opportunity to bargain with Respondents with respect to this conduct. Exhibit 3, paragraph 8(d); Exhibit 5, paragraph 8.

## II. DISPUTED ALLEGATIONS OF THE COMPLAINT

Respondents' amended answer (Exhibit 5) denies paragraph 8(c) of the consolidated complaint (Exhibit 3), alleging that the discontinuation of dues checkoff is a mandatory subject for the purposes of collective bargaining. (Exhibit 5, paragraph 8). More specifically, while Respondents admit that they did not bargain with the Union over the dues checkoff, they argue that they were at no time under any duty to afford the Union an opportunity to bargain regarding dues checkoff post expiration of the collective-bargaining agreements. Thus, the amended

answer also denies paragraph 9 of the consolidated complaint, alleging that Respondents have failed and refused to bargain collectively with the exclusive collective-bargaining representative of the employees, in violation of Section 8(a)(5) and (1) of the Act, and paragraph 10 of the consolidated complaint, alleging that the unfair labor practices as described within the consolidated complaint affect commerce within the meaning of Section 2(6) and (7) of the Act. (Exhibit 3, paragraphs 9 and 10; Exhibit 5, paragraphs 9 and 10).

Although Respondents deny paragraphs 8, 9, and 10 of the consolidated complaint, these denials do not raise any disputed issues of fact. Rather, the denials are pure questions of law that do not warrant a hearing. Based on the foregoing, the Acting General Counsel contends that the sole issue in this case is whether discontinuance of dues checkoff post expiration of the collective-bargaining agreement demands notice and the opportunity to bargain.

### III. ARGUMENT

The Acting General Counsel concedes that, under existing case law, discontinuation of dues checkoff after the expiration of the relevant collective-bargaining agreement is not a mandatory subject of bargaining. However, it is Counsel's argument that this term and condition *should* be a mandatory subject of bargaining.

#### **A. The Board should overrule *Bethlehem Steel* to the extent it holds that dues checkoff does not survive contract expiration.**

In *Bethlehem Steel Co. (Shipbuilding Div.)*, 136 NLRB 1500, 1502 (1962), enf. denied on other grounds 320 F.2d 615 (3d. Cir. 1963), cert. denied 375 U.S. 984 (1964), the Board held that union-security and dues-checkoff arrangements, unlike most terms and conditions of employment, do not survive expiration of a collective-bargaining agreement. The Board reasoned that unilateral cessation of union security after contract expiration was not only lawful,

but mandatory, because union membership cannot be made a condition of employment except under a “*contract* which conforms to the proviso to Section 8(a)(3).” *Id.* (Emphasis added). The Board found that “similar considerations” applied to dues-checkoff provisions, because they “implemented the union-security provisions.” *Id.* The Board also relied upon a subsidiary rationale for exempting checkoff from the unilateral change doctrine in the absence of an agreement: that the language of the contract (“so long as this Agreement remains in effect”) linked the checkoff obligation with the duration of the contract. *Id.* In a later decision, the Board also based the checkoff exception from the unilateral change rule upon Section 302(c)(4), which permits checkoff only if “the employer has received from each employee, on whose account such deductions are made, 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[.]” See *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981) (adopting ALJ decision without comment). See also *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) (“[I]t is the Board’s view” that checkoff does not survive contract expiration “because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement,” including Section 302(c)(4)).

The Ninth Circuit has twice vacated and remanded Board decisions in *Hacienda Resort Hotel & Casino* (*Hacienda I* and *Hacienda II*) on the ground that the Board had not articulated a comprehensible rationale for excluding dues checkoff from the unilateral change doctrine in a right-to-work state. *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 584-85 (9th Cir. 2002), vacating and remanding 331 NLRB 665 (2000); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.2d 1072, 1082 (9th Cir. 2008), vacating and remanding 351 NLRB 504 (2007). On remand in *Hacienda III*, 355 NLRB No. 154 (2010), the four members of the

Board eligible to participate deadlocked, reaching different conclusions reflected in their separate opinions. Chairman Liebman and Member Pearce in their opinion observed that “the Board has never provided an adequate statutory or policy justification for the holding in *Bethlehem Steel* excluding duescheckoff from the unilateral change doctrine articulated in *NLRB v. Katz*.” 355 NLRB No. 154, slip op. at 2. The Acting General Counsel agrees with that observation, but also affirmatively argues that no principled rationale exists for excluding checkoff from the unilateral change rule. Thus, subsequent to *NLRB v. Katz*, 369 U.S. 736 (1962), it has become clear that parties are not free to unilaterally change a term or condition of employment at contract expiration without bargaining to impasse unless its inclusion in a bargaining agreement is clearly required by statutory language or it involves the surrender, via collective bargaining, of a statutorily guaranteed right. As will be demonstrated below, checkoff does not satisfy those criteria. Section 8(a)(3) concerns union security, not checkoff, and cases subsequent to *Bethlehem Steel* contradict its finding that checkoff merely implements union security. Further, Section 302(c)(4) does not preclude checkoff arrangements following contract expiration. Also, the Board’s subsidiary rationale in *Bethlehem Steel* – that contract language linked the checkoff obligation only to the duration of the contract – is inconsistent with more recent Board precedent. Therefore, the Board should overrule *Bethlehem Steel* to the extent it holds that dues-checkoff arrangements do not survive contract expiration.

**B. The *Katz* unilateral change doctrine is fundamental to the statutory duty to bargain in good faith.**

The duty to bargain collectively is defined by Section 8(d) as the duty to “meet...and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” Therefore, once a term or condition of employment has been established, it cannot be unilaterally changed absent waiver or a bargaining impasse. A unilateral change is

tantamount to a flat refusal to bargain, and thus violates Section 8(a)(5) without an independent inquiry into the employer's subjective good faith. *NLRB v. Katz*, 369 U.S. at 743, 747 (a unilateral change "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal"). Indeed, unilateral changes deny employees and their representatives their statutorily guaranteed right of joint participation in the formulation of terms and conditions of employment, frustrate the ability of the parties to reach agreement on a contract by narrowing the range of possible compromises, and undermine the union by signaling to employees that the union makes no difference. See *Id.* at 747 (unilateral changes "must of necessity obstruct bargaining, contrary to congressional policy"); *The Little Rock Downtowner, Inc.*, 168 NLRB 107, 108 (1967) (there is "no clearer or more effective way to erode" a union's ability to bargain than for an employer to make unilateral changes), *enfd.* 414 F.2d 1084 (8th Cir. 1969); *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002) (unilateral changes send the message to the employees that their union is "ineffectual, impotent, and unable to effectively represent them").

Even before the Supreme Court's decision in *Katz*, the Board and the majority of circuits had recognized that unilateral changes to terms and conditions of employment were a fundamental failure of the duty to bargain in good faith. See, e.g., *Bonham Cotton Mills, Inc.*, 121 NLRB 1235, 1236, 1259-1260 & n. 38 (1958), *enfd.* 289 F.2d 903 (5th Cir. 1961) (agreeing with trial examiner that unilateral changes independently violated Section 8(a)(5), where the trial examiner described such changes as "patently violative," and referenced a "long decisional line which holds that good-faith bargaining requires that an employer first consult with and give opportunity to the [union] to negotiate changes before altering rates of pay or conditions of employment"); *Armstrong-Cork Co. v. NLRB*, 211 F.2d 843, 847 (5th Cir. 1954) (finding that

employer violated Section 8(a)(5) by unilaterally cancelling planned wage increase and granting merit increases, as this “naturally tended to undermine the [union’s] authority,” and “[g]ood faith compliance with Section 8(a)(5)... presupposes that an employer will not alter existing ‘conditions of employment’ without first consulting with the [union]..., and granting it an opportunity to negotiate on any proposed changes”). See also Board’s Brief to the Supreme Court in *NLRB v. Katz*, 1962 WL 115568, at \*\*33-35.

Moreover, although *Katz* itself involved unilateral changes during bargaining for an initial contract, the unilateral change doctrine also applies to unilateral changes committed after the expiration of a collective-bargaining agreement. See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n. 6 (1988). When the contract expires, the terms and conditions established therein continue by operation of the Act. In other words, they become “terms imposed by law, at least so far as there is no unilateral right to change them.” *Litton Financial Printing Div. v. NLRB*, 501 U.S. at 206-07.

**C. No statutory basis exists for excluding dues checkoff from the unilateral change rule following contract expiration.**

There is no statutory basis for the Board’s holding in *Bethlehem Steel* that a checkoff arrangement does not survive contract expiration. Neither the Section 8(a)(3) proviso nor Section 302(c)(4) supports excepting dues checkoff from the unilateral change rule.<sup>1</sup>

**1. The Section 8(a)(3) proviso does not warrant excepting checkoff from the unilateral change rule.**

The Board’s primary rationale in *Bethlehem Steel* for exempting checkoff from the unilateral change rule after contract expiration was that checkoff merely implements a union security agreement. Therefore, the Board reasoned, the Section 8(a)(3) proviso’s “agreement”

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<sup>1</sup> See generally Joseph R. Weeks, “Continuing Liability Under Expired Collective Bargaining Agreements: Part 1,” 15 Okla. City U. L. Rev. 1, 38-39 & n.108 (1990) (no “coherent rationale” for excluding dues-checkoff arrangements from the unilateral change rule after contract expiration).

requirement for union security applies with equal force to checkoff. However, the plain language and legislative history of Section 8(a)(3), as well as subsequent case law indicating that union security and checkoff are not mutually dependent, demonstrate that the Board's primary rationale in *Bethlehem Steel* was incorrect.

Initially, the Section 8(a)(3) proviso does not reference dues checkoff or any other means by which dues owed pursuant to a union security requirement may be transmitted to a union. It references only agreements between employers and labor organizations that "require as a condition of employment membership therein," i.e., union security. Nor did the legislative history of the Section 8(a)(3) proviso relate to checkoff; the debate focused on the merits of outlawing the "closed shop." Indeed, the original House Bill would have made a checkoff that did not meet certain requirements an unfair labor practice under Section 8(a)(2), although that provision was eliminated in conference and from the Bill as finally enacted. *Frito-Lay*, 243 NLRB 137, 138 (1979), quoting *Salant & Salant, Inc.*, 88 NLRB 816, 817-18 (1950).

In addition, contrary to the Board's rationale in *Bethlehem Steel*, checkoff does not merely implement union security. In subsequent decades, the Board and courts have indicated that although union security and checkoff often go hand in hand, they are markedly different kinds of obligations that should not necessarily be treated as legally inseparable. See, e.g., *Shen-Mar Food Products*, 221 NLRB 1329, 1330 (1976), enfd. as modified 557 F.2d 396 (4th Cir. 1977) (checkoff authorizations could not properly be viewed as union-security devices, which the state was permitted to prohibit under Section 14(b), because they did not "impose membership or support as a condition required for continued employment"); *NLRB v. Atlanta Printing Specialties & Paper Products Union 527 (Mead Corp.)*, 523 F.2d 783, 786 (5th Cir. 1975) (union security clauses are "governed by a section of the Act totally removed from the

section governing dues checkoff, and which have a totally different purpose and rationale”); *American Nurses’ Assn.*, 250 NLRB 1324, 1324 n. 1 (1980) (resignation from union ordinarily does not revoke checkoff authorization; “union security and dues checkoff are distinct and separate matters”).

Unlike union security agreements, for example, a checkoff authorization gives rise to an independent wage assignment contract between the employee and employer: the employee assigns to the union a designated part of future wages to be received from the employer. *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 327 (1991) (referencing Restatement (Second) of Contracts §§ 317, 321, and 326 (1981)); *Frito-Lay*, 243 NLRB at 137. Of course, an individual employee’s checkoff authorization is separate and legally distinct from a checkoff clause, which is a provision in a contract between a union and an employer setting forth the employer’s agreement to honor checkoff authorizations executed by employees. Thus, if a contract contains a union-security provision and a checkoff clause, but an employee does not authorize checkoff, the employee simply must make other arrangements to satisfy his or her dues obligation. The Board has held that such wage assignments survive the expiration of the collective-bargaining agreement when the employee’s authorization so intends. See *Lowell Corrugated Container Corp.*, 177 NLRB 169, 172-73 (1969), *enfd.* 431 F.2d 1196 (1st Cir. 1970) (employer did not violate Section 8(a)(2) and (3) by continuing to honor unrevoked checkoffs after expiration of the collective-bargaining agreement). And while the purpose of union security is to stabilize the collective-bargaining relationship by securing the union’s ability to fund its representational activities, the purpose of dues checkoff is “administrative convenience in the collection of union dues.” *NLRB v. Atlanta Printing Specialties & Paper Products Union 527 (Mead Corp.)*, 523 F.2d at 786. Finally, checkoff

provisions have often appeared in collective-bargaining agreements that have no union security provision.<sup>2</sup>

**2. Section 302(c)(4) does not warrant excluding checkoff from the unilateral change rule.**

Section 302(c)(4) does not limit checkoff to situations where a contract is in effect. Section 302 generally makes it a crime for an employer to willfully “pay, lend, or deliver” money to a labor organization or for a labor organization to “request, demand, receive, or accept” such payments, except in certain limited circumstances that further legitimate ends. *Frito-Lay*, 243 NLRB at 138. Section 302’s general proscription was intended to deal with labor racketeering. *Id.* One of those exceptions, Section 302(c)(4), permits dues-checkoff payments so long as the affected employee makes 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.” In other words, checkoff is lawful if the employee has the option to revoke the checkoff authorization at least once per year and at contract expiration. Significantly, the fact that a checkoff authorization must be *revocable* by the employee when the contract terminates indicates that it is *not* automatically revoked. Thus, Section 302(c)(4) clearly contemplates dues checkoff continuing after contract expiration. *Tribune Publishing Co. v. NLRB*, 564 F.3d 1330, 1335 (D.C. Cir. 2009) (“Section 302 does not require a written collective bargaining agreement. In order for payroll deduction of union dues to be lawful, Section 302 requires merely that employees give written consent that is revocable after a year”). Indeed,

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<sup>2</sup> In a 1995 review of collective-bargaining agreements, 95 percent were found to contain dues-checkoff provisions, while 82 percent contained union-security provisions. Bureau of National Affairs, *Basic Patterns in Union Contracts* 97 (14th ed. 1995). A 1981-82 study of collective-bargaining agreements covering 1,000 or more employees found that 86 percent contained dues-checkoff provisions, while 83 percent contained union-security provisions. U.S. Department of Labor Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions* (Bulletin 1425-21, May 1982). And a 1961 review of collective-bargaining agreements found that 82 percent contained dues-checkoff provisions, while 76 percent contained union-security provisions. Bureau of National Affairs, *Basic Patterns in Union Contracts* 87:5 (5th ed. 1961).

Senator Taft, speaking in favor of enacting the Section 302(c)(4) checkoff exception, stated that checkoff authorizations under that provision “may continue indefinitely until revoked” by the employee.<sup>3</sup>

This interpretation of Section 302(c)(4) is bolstered by Section 302(c)(5)’s exception for employer contributions to union trust funds. Section 302(c)(5) permits such contributions only if the “detailed basis on which such payments are to be made is specified in a written *agreement* with the employer....” (Emphasis added.) Thus, Congress included language requiring an “agreement” in Section 302(c)(5) but made no mention of such a requirement in Section 302(c)(4). Moreover, notwithstanding the explicit “written agreement” requirement, the Board and courts have found that an employer’s obligation to make payments into union benefit funds survives contract expiration. *Concord Metal*, 298 NLRB 1096, 1096 (1990) (expired contract is sufficient to satisfy the “written agreement” requirement of Section 302(c)(5)); *Hinson v. NLRB*, 428 F.2d 133, 138-39 (8th Cir. 1970) (trust fund agreements satisfy “written agreement” requirement); *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981) (trust fund agreements and expired contract satisfy “written agreement” requirement). Accordingly, finding that Section 302(c)(4) precludes dues checkoff after contract expiration would be anomalous, considering that it contains no “agreement” requirement, whereas the next subsection specifically requires a “written agreement” for employers to contribute to union trust funds, yet there is no question that such payments survive contract expiration.

A few courts have misconstrued Section 302(c)(4) to prohibit checkoff in the absence of a current agreement between the employer and union. See *Sullivan Brothers Printers, Inc. v. NLRB*, 99 F.3d 1217, 1232 (1st Cir. 1996); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 254-55 (D.C. Cir.

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<sup>3</sup> II Leg. Hist. 1311 (LMRA 1947).

1991); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). But those decisions do not provide any reasoned explanation for that interpretation. Moreover, the two D.C. Circuit decisions are inconsistent with that court’s subsequent finding in *Tribune Publishing Co. v. NLRB*, above, that Section 302(c)(4) “does not require a written collective bargaining agreement.” 564 F.3d at 1335. I also note that the Supreme Court has merely observed the “Board’s view” that Section 302(c)(4) precludes checkoff absent a collective-bargaining agreement, but has not endorsed that view. *Litton Financial Printing Div. v. NLRB*, 501 U.S. at 199.

**D. All exceptions to the unilateral change rule other than checkoff are creatures of contract due to a statutory mandate or the contractual surrender of a statutory right.**

Considering the unilateral change rule’s essential role in giving effect to the *statutory* bargaining obligation following contract expiration, any exceptions to that rule should have a statutory basis. Indeed, as shown below, all of the recognized exceptions to the unilateral change rule – other than dues checkoff – are “statutorily dependent upon an existing collective-bargaining agreement” or stem from the surrender, in a collective-bargaining agreement, of a “statutorily guaranteed right.” *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1113-1114 (rejecting employer’s contention that the reason some terms and conditions of employment do not survive contract expiration is that they concern the institutional “employer-union” relationship in addition to the “employer-employee” relationship, and finding that hiring hall provision survives expiration of contract). See also *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d at 584-85 (reviewing potential statutory bases for excluding dues checkoff from the unilateral change doctrine in concluding that the Board has not articulated a cogent rationale).

**1. Union security: statute requires an “agreement.”**

Union security requirements do not survive contract expiration because Section 8(a)(3) permits an employer to discriminate against employees who fail to pay union dues only if it has a union-security “agreement” with the union. *Bethlehem Steel Co. (Shipbuilding Div.)*, 136 NLRB at 1502. See also *Litton Financial Printing Div. v. NLRB*, 501 U.S. at 199-200. Indeed, an employer that continues to enforce a union-security requirement after contract expiration would violate Section 8(a)(3). Therefore, union-security requirements are exempted from the unilateral change rule after contract expiration because they are statutorily dependent upon an existing agreement between the union and the employer.

**2. Arbitration: surrender of parties’ statutory right to make final determination regarding terms and conditions of employment and to use economic weaponry**

Final and binding arbitration constitutes a surrender of the statutory right of parties to make their own final determination as to which terms and conditions of employment they will accept, and how to interpret already agreed-upon terms. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57-58 (1987). See also Section 8(d) (duty to bargain “does not compel either party to agree to a proposal or require the making of a concession”). As the Board observed in *Indiana & Michigan Electric Co.*, Congress ultimately rejected a version of Section 8(d) that would have included in the definition of “to bargain collectively” language requiring compulsory arbitration over the interpretation or application of the contract. Under Section 8(d) as finally enacted, each party to the bargaining relationship is the “final arbiter of its own best interest,” absent mutual consent to the contrary. *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970). An arbitration agreement also typically represents the parties’ mutual consent to relinquish economic weapons to resolve disputes, such as strikes and lockouts, which are otherwise available under the Act. *Indiana & Michigan Electric Co.*, 284 NLRB at 58. Therefore, arbitration is a creature

of contract, and parties can unilaterally refuse to arbitrate a dispute arising after the expiration of a contract containing an arbitration provision. *Litton Financial Printing Div. v. NLRB*, 501 U.S. at 206.

### **3. No-strike provisions: surrender of the statutory right to strike**

Because a no-strike provision represents the surrender of the statutory right to strike,<sup>4</sup> parties to a bargaining relationship are not required to abandon that right when there is no agreement to waive it in effect.<sup>5</sup> See also *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1114; *Litton Financial Printing Div. v. NLRB*, 501 U.S. at 199. As mentioned above, the Supreme Court has observed that no-strike provisions are generally coterminous with an obligation to arbitrate. *Gateway Co. v. United Mine Workers*, 414 U.S. at 382.

### **4. Waiver: mutual renunciation of union's statutory right to bargain.**

Similarly, a waiver by a union of its statutory right to bargain over mandatory subjects does not survive contract expiration. *Ironton Publications*, 321 NLRB 1048, 1048 (1996) (provision granting employer sole discretion to award merit increases did not survive contract expiration). The rule that a contractual waiver must be “clear and unmistakable” to be effective is based on the proposition that the bargaining obligation continues even when a contract is in effect. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). A contractual waiver reflects the “mutual intention” of the parties to permit unilateral employer action with respect to a particular employment term, notwithstanding the continuing statutory duty to bargain during the contract that would otherwise apply. *Id.* Because a contractual waiver represents the parties’ agreement that the union will relinquish its statutory bargaining rights regarding a particular

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<sup>4</sup> Section 8(d); Section 13. See also *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1114; *Litton Financial Printing Div. v. NLRB*, 501 U.S. at 199.

<sup>5</sup> Section 8(d); Section 13.

subject, the waiver does not survive contract expiration absent evidence of the parties' intent to the contrary. *Ironton Publications*, 321 NLRB at 1048.

**5. Checkoff: no contractual surrender of a statutorily guaranteed right.**

Unlike arbitration, no-strike commitments, and contractual waivers, checkoff arrangements do not involve the surrender by a party to the bargaining relationship of any statutorily guaranteed right. A checkoff arrangement in a collective-bargaining agreement simply reflects the parties' agreement to honor checkoff authorizations voluntarily executed by individual employees. The fact that an employee's checkoff assignment is a "contract" with his or her employer has no bearing on whether the separate and legally distinct checkoff arrangement between the union and employer is subject to the statutory bargaining obligation after the contract has expired. Furthermore, to the extent that the periodic irrevocability of dues checkoff implicates the Section 7 right to "refrain from" assisting a union, Section 302(c)(4) already ensures employees' right to revoke checkoff authorizations after contract expiration.

**E. The subsidiary contract-language rationale in *Bethlehem Steel* should also be overruled.**

The Board's subsidiary rationale in *Bethlehem Steel* – that contract language linked the checkoff obligation only to the duration of the contract – is inconsistent with more recent Board precedent. Thus, regardless of such limiting terminology in an agreement, an employer ordinarily has a statutory duty to bargain with the employees' collective-bargaining representative before making changes in terms and conditions of employment. All terms and conditions of employment set forth in a collective-bargaining agreement are linked to the agreement's term by virtue of the duration clause; nonetheless, these terms survive the contract's expiration. *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 131-32 (D.C. Cir. 2001) (general durational clause, without more, does not defeat unilateral change doctrine). Moreover, the

language of the *Bethlehem Steel* checkoff provision (“so long as this Agreement remains in effect”) would not satisfy the Board’s current “clear and unmistakable” standard for finding a contractual waiver of the right to bargain over a mandatory subject following contract expiration. See *Natico, Inc.*, 302 NLRB 668, 685 (1991) (language stating that pension fund provision will “remain in effect for the term of this agreement” not clear and unmistakable waiver); *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 366 (1987) (language requiring that employer contributions to pension fund be “in accordance with” a pension agreement did not specifically state that employer’s obligation to contribute to pension fund ended at contract expiration); *KMBS, Inc.*, 278 NLRB 826, 849 (1986) (language requiring contributions to be made “as long as a Producer is so obligated pursuant to said collective bargaining agreements” insufficient because language did not “deal with the *termination* of the employer’s obligation to contribute to the funds”).

If a union and employer want to negotiate a contract that provides for checkoff to cease after contract expiration, the Board’s post-*Bethlehem Steel* precedent provides ample guidance. See *Cauthorne Trucking*, 256 NLRB 721, 722 (1981) (contractual language stating that “at the expiration” of the contract the pension trust agreement “shall terminate” constituted a clear and unmistakable waiver of the union’s right to bargain regarding an employer’s cessation of payments into a pension trust fund after the contract expires). The Board should therefore confirm that its current contract-waiver standards apply to checkoff.

## **F. Summary**

The *Katz* unilateral change rule, which precludes parties to a bargaining relationship from unilaterally changing terms and conditions of employment without first bargaining to impasse, is fundamental to implementing the statutory duty to bargain in good faith. All exceptions to the

unilateral change rule following the expiration of a collective-bargaining agreement, other than dues-checkoff arrangements, are statutorily dependent upon an existing collective-bargaining agreement or stem from the surrender, in a collective-bargaining agreement, of a statutorily guaranteed right. No statutory basis exists, however, for excluding dues checkoff. Indeed, neither the proviso to Section 8(a)(3) nor Section 302(c)(4) supports excluding dues-checkoff arrangements from the unilateral change rule. Moreover, contract language that merely links a checkoff obligation to the duration of the contract does not waive a union's right to bargain, post-expiration, over changes to the parties' checkoff arrangement. Although checkoff has been excluded from the unilateral change rule for nearly 50 years, the Board has never provided a principled rationale for doing so.

#### **G. Application of the foregoing to the checkoff provisions in this case**

The checkoff provision in the terminated contracts between Respondents and the Union in the instant case states:

The Employer agrees to deduct Union dues and initiation fees, or comparable enrollment and service fees for employees electing not to become Union members, from the wages of employees who voluntarily provide the Employer with a written authorization to make such deductions. The written authorization shall not be irrevocable for a period of more than one (1) year or beyond the termination date of this Agreement, whichever occurs sooner. Deductions shall be made from the wages of employees in the first (1st) pay period of the month in which the payment is due. Withheld amounts will be forwarded to the Union by the tenth (10th) day of the month following the actual withholding, together with a record for the amount, social security number, and name of those for who such deductions have been made.

For the reasons explained in detail above, there is no statutory basis for concluding that this provision is exempt from the *Katz* unilateral change rule. Further, since the provision lacks the *Bethlehem Steel* language linking checkoff to the duration of the contract ("so long as this

Agreement remains in effect”), the subsidiary rationale of that case is inapplicable. In any event, as also explained in detail above, the Board should overrule the subsidiary rationale of *Bethlehem Steel*. Finally, since the duration language in *Bethlehem Steel* is insufficient to meet the Board’s “clear and unmistakable waiver” standard, a provision, as here, that lacks duration language altogether also does not meet that standard.

#### IV. CONCLUSION

Respondents have violated Section 8(a)(5) and (1) of the Act as alleged in the consolidated complaint. Therefore, the Acting General Counsel respectfully requests that the Board enter an appropriate remedial order, including that Respondents bargain, on request, in good faith with the Union; and reimburse the Union with interest for any dues they failed to withhold and transmit to the Union, where employees have individually signed valid checkoff authorizations.

Dated at Minneapolis, Minnesota, this 13th day of July, 2012.

Respectfully submitted,

  
Abby E. Schneider  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 18  
330 South Second Avenue, Suite 790  
Minneapolis, Minnesota 55401

## **TABLE OF EXHIBITS**

1. Charge filed May 21, 2012 in Case 18-CA-081449
2. Charge filed May 21, 2012 in Case 18-CA-081459
3. Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, issued June 13, 2012
4. Respondents' Answer to the consolidated complaint of the NLRB, filed June 25, 2012
5. Respondents' Amended Answer to the consolidated complaint of the NLRB, filed June 28, 2012

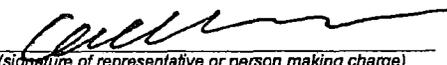
INTERNET  
FORM NLRB-501  
(2-08)

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

| DO NOT WRITE IN THIS SPACE |                            |
|----------------------------|----------------------------|
| Case<br>18-CA-081449       | Date Filed<br>May 21, 2012 |

**INSTRUCTIONS:**

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

|   |   |
|---|---|
| <b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>   |   |
| a. Name of Employer<br>Excelsior Golden Living Center   | b. Tel. No. 330-980-5388                                      |
|   | c. Cell No. 479-201-0642                                      |
|   | f. Fax No.  |
| d. Address (Street, city, state, and ZIP code)<br>515 Division Street<br>Excelsior, MN 55331  | e. Employer Representative<br>Scott Norton VPHR               |
|   | g. e-Mail<br>scott.norton@goldenliving.co                     |
|   | h. Number of workers employed                                 |
| i. Type of Establishment (factory, mine, wholesaler, etc.)<br>Nursing Home  | j. Identify principal product or service<br>Health Care       |
| k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) <u>5</u> of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act. |   |
| 2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)<br>Since approximately April, 2012 the Employer has unilaterally changed a term and condition of employment without the union's consent or a bona fide impasse by discontinuing voluntary dues check off.   |   |
| 3. Full name of party filing charge (if labor organization, give full name, including local name and number)<br>Service Employees International Union Healthcare Minnesota (Local 113)  |   |
| 4a. Address (Street and number, city, state, and ZIP code)<br>345 Randolph Ave. Suite 100<br>St. Paul, MN 55102   | 4b. Tel. No. 651-294-8122                                     |
|   | 4c. Cell No.  |
|   | 4d. Fax No. 651-284-8200                                      |
|   | 4e. e-Mail<br>jgulle@seiu113.com                              |
| 5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)<br>Service Employees International Union  |   |
| <b>6. DECLARATION</b>   |   |
| I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.  |   |
| By <br>(signature of representative or person making charge)   | Adam D. Case<br>(Print/type name and title or office, if any) |
| 120 South Sixth St. Suite 2400 Minneapolis, MN 55402<br>Address   | 05/21/12<br>(date)  |
|   | Tel. No. 612-333-5831   |
|   | Office, if any, Cell No.                                      |
|   | Fax No. 612-342-2613  |
|   | e-Mail<br>acase@m-o-c-law.com                                 |

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is for the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are published in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

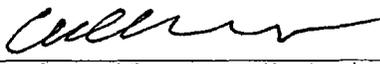
Exhibit 1

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

| DO NOT WRITE IN THIS SPACE |                            |
|----------------------------|----------------------------|
| Case<br>18-CA-081459       | Date Filed<br>May 21, 2012 |

**INSTRUCTIONS:**

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

|   |   |
|---|---|
| <b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>   |   |
| a. Name of Employer<br>Lake Ridge Golden Living Center Nursing Home   | b. Tel. No. 330-980-5388<br>c. Cell No. 479-201-0642<br>f. Fax No.  |
| d. Address (Street, city, state, and ZIP code)<br>2727 North Victoria St.<br>Roseville, MN 55113  | e. Employer Representative<br>Scott Norton VPHR<br>g. e-Mail<br>scott.norton@goldenliving.co<br>h. Number of workers employed<br>Around 130 |
| i. Type of Establishment (factory, mine, wholesaler, etc.)<br>Nursing Home  | j. Identify principal product or service<br>Health Care   |
| k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) <u>5</u> of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act. |   |
| 2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)<br>Since approximately April, 2012 the Employer has unilaterally changed a term and condition of employment without the union's consent or a bona fide impasse by discontinuing voluntary dues check off.   |   |
| 3. Full name of party filing charge (if labor organization, give full name, including local name and number)<br>Service Employees International Union Healthcare Minnesota (Local 113)  |   |
| 4a. Address (Street and number, city, state, and ZIP code)<br>345 Randolph Ave. Suite 100<br>St. Paul, MN 55102   | 4b. Tel. No. 651-294-8122<br>4c. Cell No.<br>4d. Fax No. 651-284-8200<br>4e. e-Mail<br>jgulley@seiu113.com                                  |
| 5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)<br>Service Employees International Union  |   |
| 6. DECLARATION<br>I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.<br><br>By  Adam D. Case<br>(signature of representative or person making charge) (Print/type name and title or office, if any)  | Tel. No. 612-333-5831<br>Office, if any, Cell No.<br>Fax No. 612-342-2613<br>e-Mail<br>acase@m-o-c-law.com                                  |
| Address 120 South Sixth St. Suite 2400 Minneapolis, MN 55402  | 05/21/12<br>(date)  |

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are published in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 2

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION EIGHTEEN

EXCELSIOR GOLDEN LIVING CENTER

and

Case 18-CA-081449

SERVICE EMPLOYEES INTERNATIONAL UNION  
HEALTHCARE MINNESOTA (LOCAL 113)

GGNSC ST. PAUL RIDGE LLC, d/b/a GOLDEN LIVING  
CENTER – LAKE RIDGE HEALTH CARE CENTER

and

Case 18-CA-081459

SERVICE EMPLOYEES INTERNATIONAL UNION  
HEALTHCARE MINNESOTA (LOCAL 113)

**ORDER CONSOLIDATING CASES,  
CONSOLIDATED COMPLAINT AND NOTICE OF HEARING**

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board), and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 18-CA-081449, which is based on a charge filed by Service Employees International Union Healthcare Minnesota (Local 113) a/k/a SEIU Healthcare Minnesota, herein called the Union, against Excelsior Golden Living Center (Respondent Excelsior), and Case 18-CA-081459, which is based on a charge filed by the Union against Lake Ridge Golden Living Center Nursing Home, herein described by

Exhibit 3

its correct name GGNSC St. Paul Ridge LLC, d/b/a Golden Living Center – Lake Ridge Health Care Center and hereinafter called Respondent Lake Ridge, (collectively, Respondents), are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act) and Section 102.15 of the Board's Rules and Regulations and alleges Respondents have violated the Act by engaging in the following unfair labor practices:

1.(a) The charge in Case 18-CA-081449 was filed by the Union on May 21, 2012, and a copy was served by regular mail on Respondent Excelsior on about that same date.

(b) The charge in Case 18-CA-081459 was filed by the Union on May 21, 2012, and a copy was served by regular mail on Respondent Lake Ridge on about that same date.

2.(a) At all material times, Respondent Excelsior has been a corporation with an office and place of business in Excelsior, Minnesota, and has been engaged in the operation of a nursing home.

(b) In conducting its operations described above in subparagraph (a), during the calendar year ending December 31, 2011, Respondent Excelsior derived gross revenues in excess of \$100,000.

(c) In conducting its operations described above in subparagraph (a), during the calendar year ending December 31, 2011, Respondent Excelsior purchased and

received at its Excelsior, Minnesota facility products, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of Minnesota.

(d) At all material times, Respondent Excelsior has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3.(a) At all material times, Respondent Lake Ridge has been a corporation with an office and place of business in Roseville, Minnesota, and has been engaged in the operation of a nursing home.

(b) In conducting its operations described above in subparagraph (a), during the calendar year ending December 31, 2011, Respondent Lake Ridge derived gross revenues in excess of \$100,000.

(c) In conducting its operations described above in subparagraph (a), during the calendar year ending December 31, 2011, Respondent Lake Ridge purchased and received at its Roseville, Minnesota facility products, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of Minnesota.

(d) At all material times, Respondent Lake Ridge has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, Scott Norton, Vice President of Labor & Employment has been an agent of Respondents within the meaning of Section 2(13) of the Act.

6.(a) The following employees of Respondent Excelsior (the Excelsior Nurses Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses and licensed practical nurses employed by Respondent Excelsior at its Excelsior, Minnesota facility; excluding managerial employees, office clerical employees, all other employees, temporary and casual employees, guards and supervisors as defined in the Act, and specifically excluding the resident care coordinator.

(b) The following employees of Respondent Excelsior (the Excelsior Non-Professional Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All non-professional employees employed by Respondent Excelsior at its Excelsior, Minnesota facility; excluding registered nurses, licensed practical nurses, managerial employees, office/clerical employees, temporary employees, guards and supervisors as defined in the NLRA.

(c) The following employees of Respondent Lake Ridge (the Lake Ridge Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time and casual non-professional employees employed by Respondent Lake Ridge at its Roseville, Minnesota facility, including certified nursing assistants, trained medication aides, housekeeping aides, kitchen aides, maintenance, cooks, activity assistants, activity aides, laundry aides, adult day program aides, transport aides, therapeutic recreation specialists, music therapists, and store clerks; excluding, managerial employees, office clerical employees, all other employees, guards and supervisors as defined in the National Labor Relations Act.

(d) At all material times, Respondent Excelsior has recognized the Union as the exclusive collective-bargaining representative of the Excelsior Nurses Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from December 1, 2009 through November 30, 2011, thereafter extended through January 31, 2012 by a Letter of Understanding between the Union and Respondent Excelsior.

(e) At all material times, Respondent Excelsior has recognized the Union as the exclusive collective-bargaining representative of the Excelsior Non-Professional Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from December 1, 2009 through November 30, 2011, thereafter extended through January 31, 2012 by a Letter of Understanding between the Union and Respondent Excelsior.

(f) At all material times, Respondent Lake Ridge has recognized the Union as the exclusive collective-bargaining representative of the Lake Ridge Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from September 1, 2010 through October 1, 2011, thereafter extended through January 31, 2012 by a Letter of Understanding between the Union and Respondent Lake Ridge.

(g) At all times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the three Units described above in subparagraphs (a) through (c).

7. Each of the collective bargaining agreements described above in subparagraphs (d) through (f) of paragraph 6 includes identical language regarding Respondents' obligations to deduct Union dues from the wages of employees in the Units described above in subparagraphs (a) through (c). The relevant language is as follows:

The Employer agrees to deduct Union dues and initiation fees, or comparable enrollment and service fees for employees electing not to become Union members, from the wages of employees who voluntarily provide the Employer with a written authorization to make such deductions. The written authorization shall not be irrevocable for a period of more than one (1) year or beyond the termination date of this

Agreement, whichever occurs sooner. Deductions shall be made from the wages of employees in the first (1<sup>st</sup>) pay period of the month in which the payment is due. Withheld amounts will be forwarded to the Union by the tenth (10<sup>th</sup>) day of the month following the actual withholding, together with a record for the amount, social security number, and name of those for who such deductions have been made.

8.(a) By letter dated March 14, 2012, Respondents notified the Union that they would cease deducting Union dues after March 2012 for the three Units described above in subparagraphs (a) through (c) of paragraph 6.

(b) Effective about April, 2012, Respondents ceased deducting Union dues from the pay of the employees in the three Units described above in subparagraphs (a) through (c) of paragraph 6.

(c) The subject set forth above in subparagraphs (a) and (b) relates to wages, hours, and other terms and conditions of employment of the employees in the three Units described above in subparagraphs (a) through (c) of paragraph 6 and is a mandatory subject for the purposes of collective bargaining.

(d) Respondents engaged in the conduct described above in subparagraphs (a) and (b) without affording the Union an opportunity to bargain with Respondents with respect to this conduct.

9. By the conduct described above in paragraph 8, Respondents have been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in the Units described above in subparagraphs (a) through (c) of paragraph 6, in violation of Section 8(a)(1) and (5) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above in paragraphs 8 and 9, the Acting General Counsel seeks an Order requiring that Respondents retroactively give effect to the dues check off provision quoted above in paragraph 7 and contained in the collective bargaining agreements described above in subparagraphs (d) through (f) of paragraph 6, and to reimburse the Union for any and all monies lost by the Union because of Respondents' conduct described above in paragraph 8. In addition, the Acting General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before June 27, 2012, or postmarked on or before June 26, 2012.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to [www.nlr.gov](http://www.nlr.gov), click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or

unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

### **NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT on **August 2, 2012, at 1:00 p.m., in the NLRB Hearing Room, 330 South 2<sup>nd</sup> Avenue, Suite 790, Minneapolis, Minnesota**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Minneapolis, Minnesota, this 13th day of June, 2012.

/s/ Marlin O. Osthus

Marlin O. Osthus, Regional Director  
Region 18  
National Labor Relations Board  
330 South Second Avenue, Suite 790  
Minneapolis, Minnesota 55401

Attachments

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION EIGHTEEN

|  |  |
|--|--|
| <p>EXCELSIOR GOLDEN LIVING CENTER</p> <p>And</p> <p>SERVICE EMPLOYEES INTERNATIONAL UNION<br/>HEALTHCARE MINNESOTA (LOCAL 113)</p>   | <p>CONSOLIDATED CASES</p> <p>Case 18-CA-081449<br/>Case 18-CA-081459</p>   |
| <p>GGNSC ST. PAUL RIDGE LLC, d/b/a GOLDEN LIVING<br/>CENTER – LAKE RIDGE HEALTH CARE CENTER</p> <p>And</p> <p>SERVICE EMPLOYEES INTERNATIONAL UNION<br/>HEALTHCARE MINNESOTA (LOCAL 113)</p> | <p><b>ANSWER OF RESPONDENTS<br/>GGNSC ST. PAUL RIDGE,<br/>LLC, d/b/a GOLDEN LIVING<br/>CENTER – LAKE RIDGE<br/>HEALTH CARE CENTER TO<br/>THE COMPLAINT</b></p> |

For its Answer to the Complaint of the NLRB in the above-captioned matter, Respondents GGNSC St. Paul ridge LLC, d/b/a Golden Living Center – Lake Ridge Health Care Center and GGNSC Excelsior LLC, d/b/a Golden Living Center – Excelsior (hereinafter “Respondents”), state as follows:

**FIRST DEFENSE**

1. Respondents admit the allegations contained in paragraphs 1(a) and (b) of the Complaint.
2. Respondents admit the allegations contained in paragraphs 2(a) and (b) of the Complaint.
3. Respondents admit the allegations contained in paragraphs 3(a) – (d) of the Complaint.
4. Respondents admit the allegations contained in paragraph 4 of the Complaint.
5. Respondents admit the allegations contained in paragraph 5 of the Complaint.

Exhibit 4

6. Respondents admit the allegations contained in paragraph 6(a) – (g) of the Complaint. .

7. Respondents admit the allegations contained in paragraph 7 of the Complaint.

8. Respondents admit the allegations contained in paragraph 8(a) – (c) of the Complaint.

9. Respondents deny the allegations contained in paragraph 8(d) of the Complaint.

10. Respondents admit the allegations contained in paragraph 9 of the Complaint.

11. Respondents deny each and every allegation of the Complaint not specifically and expressly admitted herein.

#### **SECOND DEFENSE**

12. The actions taken by Respondents are lawful under the National Labor Relations Act and controlling legal precedent.

#### **THIRD DEFENSE**

13. Some or all of the allegations in the Complaint are impermissibly vague and must be dismissed as a matter of law.

#### **FOURTH DEFENSE**

14. Respondents give notice that they intend to rely upon and utilize any other defenses which may become available or apparent during the course of this action, and hereby reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Complaint, Respondents GGNSC St. Paul Ridge LLC, d/b/a Golden Living Center – Lake Ridge Health Care Center and GGNSC Excelsior LLC, d/b/a Golden Living Center – Excelsior, respectfully request that the Complaint be dismissed and that Respondents be awarded their costs and attorneys' fees.

/s/ R. Scott Summers  
R. Scott Summers  
Laura B. Grubbs  
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Scott.summers@dinsmore.com  
Laura.grubbs@dinsmore.com  
*Counsel for Respondents*

**CERTIFICATE OF SERVICE**

I hereby certify that the original of the foregoing Answer of Respondents was filed electronically on the NLRB website on the 25th day of June, 2012, directed to:

Marlin O. Osthus, Regional Director  
Region 18  
National Labor Relations Board  
330 South Second Avenue, Suite 790  
Minneapolis, Minnesota 55401

and a copy was also served, via electronic mail on the 25th day of June, 2012, on:

Service Employees International Union  
Healthcare Local Minnesota, Local 113  
345 Randolph Ave., Ste 100  
Saint Paul, MN 55102-3610

Adam D. Case, Attorney  
Miller O'Brien Cummins PLLP  
One Financial Plaza, Ste 2400  
120 South 6<sup>th</sup> Street  
Minneapolis, MN 55402-1809

/s/ R. Scott Summers  
*Counsel for Respondents*

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION EIGHTEEN

|   |   |
|---|---|
| EXCELSIOR GOLDEN LIVING CENTER<br><br>And<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION<br>HEALTHCARE MINNESOTA (LOCAL 113)  | CONSOLIDATED CASES<br><br>Case 18-CA-081449<br>Case 18-CA-081459  |
| GGNSC ST. PAUL RIDGE LLC, d/b/a GOLDEN LIVING<br>CENTER – LAKE RIDGE HEALTH CARE CENTER<br><br>And<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION<br>HEALTHCARE MINNESOTA (LOCAL 113) | <b>AMENDED ANSWER OF<br/>RESPONDENTS GGNSC ST.<br/>PAUL RIDGE, LLC, d/b/a<br/>GOLDEN LIVING CENTER –<br/>LAKE RIDGE HEALTH<br/>CARE CENTER TO THE<br/>COMPLAINT</b> |

For its Amended Answer to the Complaint of the NLRB in the above-captioned matter, Respondents GGNSC St. Paul Ridge LLC, d/b/a Golden Living Center – Lake Ridge Health Care Center and GGNSC Excelsior LLC, d/b/a Golden Living Center – Excelsior (hereinafter “Respondents”), state as follows:

**FIRST DEFENSE**

1. Respondents admit the allegations contained in paragraphs 1(a) and (b) of the Complaint.
2. Respondents admit the allegations contained in paragraphs 2(a),(b),(c) and (d) of the Complaint.
3. Respondents admit the allegations contained in paragraphs 3(a) – (d) of the Complaint.
4. Respondents admit the allegations contained in paragraph 4 of the Complaint.
5. Respondents admit the allegations contained in paragraph 5 of the Complaint.

Exhibit 5

6. Respondents admit the allegations contained in paragraph 6(a) – (g) of the Complaint.

7. Respondents admit the allegations contained in paragraph 7 of the Complaint.

8. Respondents admit the allegations contained in paragraph 8(a) (b) and (d) of the Complaint but affirmatively state that it was at no time under any duty to afford the Union an opportunity to bargain regarding dues check-off post expiration of the collective bargaining agreements. Respondents deny the allegation contained in paragraph 8(c) of the Complaint as it constitutes a legal conclusion.

9. Respondents deny the allegations contained in paragraph 9 of the Complaint.

10. Respondents deny that they have committed unfair labor practices so therefore deny the allegations contained in paragraph 10 of the Complaint.

11. Respondents deny each and every allegation of the Complaint not specifically and expressly admitted herein.

#### **SECOND DEFENSE**

12. The actions taken by Respondents are lawful under the National Labor Relations Act and controlling legal precedent.

#### **THIRD DEFENSE**

13. Some or all of the allegations in the Complaint are impermissibly vague and must be dismissed as a matter of law.

#### **FOURTH DEFENSE**

14. Respondents give notice that they intend to rely upon and utilize any other defenses which may become available or apparent during the course of this action, and hereby reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Complaint, Respondents GGNSC St. Paul Ridge LLC, d/b/a Golden Living Center – Lake Ridge Health Care Center and GGNSC Excelsior LLC, d/b/a Golden Living Center – Excelsior, respectfully request that the Complaint be dismissed and that Respondents be awarded their costs and attorneys’ fees.

/s/ R. Scott Summers

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*Counsel for Respondents*



**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2012, copies of the Acting General Counsel's Motion for Summary Judgment, Acting General Counsel's Brief in Support of Motion for Summary Judgment, and Acting General Counsel's Exhibits 1 through 5 were served on the following by electronic mail:

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\_\_\_\_\_  
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