IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CLARKE, *Appellant*, Vs. SERVICE EMPLOYEES INTERNATIONAL UNION ("SEIU"); SEIU LOCAL 1107 AKA SEIU NEVADA; *Respondents*.	)	No. 80520

Appendix II

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Giving these individuals special treatment – or creating the impression that they receive special treatment – is inconsistent with our principles of stewardship and accountability and with our duty to responsibly conduct the business of SEIU. The provisions of this part are designed to ensure that family or personal relationships do not influence professional interactions between the employees involved and other officers, employees and third parties.

Definitions

Section 12. Definitions. For purposes of this part:

(a) "Relative" means parent, spouse, spousal equivalent, daughter, son, grandparent, grandchild, brother, sister, aunt, uncle, niece, nephew, first or second cousin, corresponding in-law, "step" relation, foster parent, foster child, and any member of the employee's household. Domestic partner relatives are covered to the same extent as spousal relatives.

(b) "Personal relationship" means an ongoing romantic or intimate personal relationship that can include, but is not limited to, dating, living together or being a partner or significant other. This definition applies regardless of gender, gender identification, or sexual orientation of the individuals in the relationship. This restriction does not extend to friends, acquaintances or former colleagues who are not otherwise encompassed in the scope of "personal relationships."

Prohibited conduct

Section 13. Prohibited Conduct. The following general principles will apply:

Application process

(a) Applications for employment by relatives and those who have a personal relationship with a covered individual will be evaluated on the same qualification standards used to assess other applicants. Transmission to the appropriate hiring authority of applications on behalf of individuals who have a family or personal relationship shall not in itself constitute an attempt to influence hiring decisions. Further input into the application process, however, may be deemed improper.

Hiring decisions

(b) Covered individuals will not make hiring decisions about their relatives or persons with whom they have a personal relationship, or attempt to influence hiring decisions made by others.

Supervisory relationship prohibited

(c) Supervisory employees shall not directly supervise a relative or a person with whom they have a personal relationship. In the absence of a direct reporting or supervisor-to-subordinate relationship, relatives or employees who have a family or personal relationship generally are permitted to work in the same department, provided that there are no particular operational difficulties.

Involvement in work-related decisions

(d) Covered individuals shall not make work-related decisions, or participate in or provide input into work-related decisions made by others, involving relatives or employees with whom

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they have a personal relationship, even if they do not directly supervise that individual. Prohibited decisions include, but are not limited to, decisions about hiring, wages, hours, benefits, assignments, evaluations, training, discipline, promotions, and transfers.

Disclosure

(e) To ensure compliance with this Section, all covered individuals must disclose to the Ethics Ombudsperson or the Affiliate Ethics Liaison, as appropriate, any relationships covered by this Section in accordance with Section 3(b) of this Code.

PART F: ENFORCEMENT

Enforcement

Ethics Officer

Section 14. Ethics Officer. The office of the Ethics Officer is established to provide independent assistance to SEIU in the implementation and enforcement of the Code. The Ethics Officer shall be an individual of unimpeachable integrity and reputation, preferably with experience in ethics, law enforcement and the workings of the labor movement. The Ethics Officer shall provide his or her services under contract and shall not be an employee of the International Union or any of its Affiliates. The Ethics Officer shall be appointed by the International President and confirmed by the International Executive Board. The International President, the International Secretary-Treasurer, and the SEIU International Executive Board may refer matters concerning the Code to the Ethics Officer for review and/or advice, consistent with Sections 22 and 23.

Review and advice

Ethics Ombudsperson

Section 15. Ethics Ombudsperson. The office of SEIU Ethics Ombudsperson is established to oversee implementation and enforcement of the Code and ongoing efforts to strengthen the ethical culture throughout the Union. The Ethics Ombudsperson is responsible for providing assistance to the International Union and Affiliates on questions and concerns relating to the Code and ethical culture; directing the training of SEIU and Affiliate officers and staff concerning the Code and ethical culture; responding to ethics concerns and complaints consistent with Sections 17-23; receiving and resolving disclosures of conflicts of interest; assisting the Ethics Officer; and providing other support as necessary to the overall SEIU ethics program. The Ethics Ombudsperson, in consultation with the Ethics Officer, shall issue a report to the SEIU International Executive Board annually, summarizing compliance, training, enforcement, culture building and related activities, and making recommendations for modifications to the ethics program that he or she believes would enhance the program's effectiveness. The Ethics Ombudsperson may also conduct periodic reviews for the purposes of monitoring compliance with this Code and determining whether partnerships, joint ventures, and arrangements with management organizations conform to this Code, are properly recorded, reflect reasonable investment or payment for goods and services, further SEIU's tax-exempt purposes, and do not result in inurement, impermissible private benefit, or excess benefit transactions. The Ethics Ombudsperson shall be employed in the SEIU Legal Department.

Annual report

Periodic reviews

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Ethics Liaison

Section 16. Affiliate Ethics Liaison. Each Affiliate shall appoint an Ethics Liaison who will be available for ethics advice or guidance, will serve as an Affiliate's key contact with the International's Ethics Ombudsperson, will assist in enforcement of the Code, will oversee the delivery of ethics-related training, will assist the Affiliate in strengthening its ethical culture, and will serve as an ethical leader in the Affiliate.

Eligibility

(a) Presidents, chief executive officers, secretary-treasurers, chief financial officers, chiefs of staff, and the equivalent of any of the foregoing are not eligible to serve as Ethics Liaisons.

Rotation

(b) Affiliates are encouraged to consider rotating the Ethics Liaison position periodically, barring operational difficulties, to develop ethical leadership broadly in the Affiliate. Affiliates shall advise the SEIU Ethics Ombudsperson as soon as practicable of the appointment of Ethics Liaisons and of any vacancy that occurs in the position.

Training

(c) Ethics Liaisons will regularly receive training from the International Union specific to the role. Affiliates should make every effort to ensure the participation of their Ethics Liaisons.

Complaints

Section 17. Complaints.

Process for submission

(a) Any covered individual or member may file a written complaint concerning alleged violations of the Code. Oral concerns and complaints shall be reduced to writing for further processing as a complaint. Complaints should be signed or contain the name of the complainant(s), and shall be kept confidential pursuant to Section 24. Complaints alleging violation of the Code shall not be enforced under SEIU or Affiliate constitutions and bylaws unless they also allege violations of the constitutions and bylaws.

Enforcement under Constitution

Contact information

(b) The International Union shall post contact information for submission of ethics complaints on the SEIU website and shall provide that information on request.

(c) Each Affiliate shall provide its staff and membership with contact information for its Ethics Liaison.

Handling of complaints, International

Section 18. Complaints Handled by the International Union. Complaints alleging violation of the Code that are submitted to the International Union or the Ethics Officer shall be referred initially to the SEIU Ethics Ombudsperson. The Ethics Ombudsperson shall review ethics complaints submitted to the International Union and shall respond to them in his or her discretion, including but not limited to providing advice or guidance, resolving them informally, directing them to resources outside the ethics office, and referring them to the Ethics Officer or Affiliate for further processing. The individual submitting the complaint shall be notified of the status of the complaint as appropriate in the discretion of the Ethics Ombudsperson but in all events upon its conclusion.

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Handling of complaints, Affiliate

Section 19. Complaints Handled by Affiliate; Notice to Ethics Ombudsperson. Ethics complaints that are raised with or referred to an Affiliate shall be investigated by the affected Affiliate and, where appropriate, may form the basis of employee discipline or formal internal union charges to be processed before a trial body in accordance with the requirements set forth in the Affiliate's constitution and bylaws and/or the SEIU Constitution and Bylaws. The Ethics Ombudsperson may advise an Affiliate concerning matters related to the investigation and processing of complaints and charges alleging violation of the Code. Where a complaint involves an Affiliate's president, chief executive officer, chief of staff, secretary-treasurer, chief financial officer, or the equivalent, the Affiliate shall notify the Ethics Ombudsperson as soon as practicable. The Ethics Ombudsperson may consult with the Ethics Officer concerning any question referred by an Affiliate.

Notice to Ombudsperson

Failure to cooperate

Section 20. Failure to Cooperate; Bad Faith Complaints. Unreasonable failure by a covered individual to fully cooperate with a proceeding or investigation involving an ethics complaint or alleged violation of this Code shall constitute an independent violation of this Code. SEIU reserves the right, subject to notice, investigation and due process, to discipline persons who make bad faith, knowingly false, harassing or malicious complaints, reports or inquiries.

Bad faith

Original Jurisdiction

Section 21. Original Jurisdiction.

Request by affiliate

(a) Requests for Original Jurisdiction. If an Affiliate or an Affiliate executive board member, officer, or member believes that formal internal union charges against a covered individual that also allege violations of this Code involve a situation which may seriously jeopardize the interests of the Affiliate or the International Union, or that the hearing procedure of the Affiliate will not completely protect the interests of the Affiliate, an officer or member, that individual may request that the International President assume original jurisdiction under Article XVII, Section 2(f) of the SEIU Constitution and Bylaws.

Assumption of jurisdiction

(b) Assumption of Original Jurisdiction by International President. In accordance with Article XVII, Section 2(f) of the SEIU Constitution and Bylaws, the International President may in his or her discretion assume original jurisdiction of formal internal union charges also alleging violation of this Code if as a result of an investigation he or she believes that the charges filed against a covered individual involve a situation which may seriously jeopardize the interests of the Affiliate or the International Union. In his or her discretion, the International President may refer the matter to the Ethics Officer for a recommendation concerning the possible assumption of original jurisdiction.

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Referral to Ethics Officer

Section 22. Referral of Formal Charges to Ethics Officer. If formal internal union charges filed with the International Union under Article XVII, Section 3 of the SEIU Constitution and Bylaws also allege violation of the Code by an officer or executive board member of the International Union or an Affiliate, such charges may be referred to the Ethics Officer for review and recommendations.

Review by Ethics Officer

Section 23. Review of Claims by Ethics Officer.

(a) If after review of the allegations of violations of the Code in a complaint or formal charge, the Ethics Officer finds that the allegations have merit and/or warrant further investigation, he shall recommend a response or course of action for the International Union to respond to the complaint or changes, including but not limited to the following:

Possible recommendations

(1) Further investigation by SEIU personnel and/or outside investigator(s);

(2) Filing of formal charges under Article XVII of the SEIU Constitution and Bylaws;

(3) Assumption of original jurisdiction by International President pursuant to Article XVII, Section 2(f) of the SEIU Constitution and Bylaws;

(4) Appointment of an outside hearing officer to conduct a trial under Article XVII, Section 3 of the SEIU Constitution and Bylaws;

(5) Discipline of covered employees;

(6) Sanction of covered officers or members accused in formal proceedings, and

(7) Other action deemed appropriate in the discretion of the Ethics Officer.

No merit

(b) If the Ethics Officer concludes, after review of allegations of violations of the Code, that the allegations are without merit or that further investigation is not necessary, he or she shall advise the International Union of his or her findings.

Whistleblowers

PART G: PROTECTION OF WHISTLEBLOWERS

Confidentiality

Section 24. Confidentiality. SEIU will make all reasonable efforts to keep confidential the identity of any person(s) raising an ethics concern, inquiry, report or complaint under the Code unless disclosure is authorized by the complainant or is required for SEIU to carry out its fiduciary or legal duties. SEIU will also treat communications concerning ethics complaints or concerns with as much confidentiality and discretion as possible, provided that it remains able to conduct a complete and fair investigation, carry out its fiduciary and legal duties, and review its operations as necessary.

Section 25. No Retaliation. SEIU encourages all officers and

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employees to bring ethics concerns and complaints that the Code has been violated to the attention of the Union, as set forth more fully in Part F above.

Retaliation prohibited

(a) SEIU expressly prohibits retaliation against covered individuals and members for:

(1) Making good faith complaints, reports or inquiries pursuant to this Code;

(2) Opposing any practice prohibited by the Code;

(3) Providing evidence, testimony or information relative to, or otherwise cooperating with, any investigation or enforcement process of the Code; and

(4) Otherwise participating in the enforcement process set forth in PART F above.

Against Ethics Liaisons

(b) In particular, SEIU will not tolerate any form of retaliation against Affiliate Ethics Liaisons for performing their responsibilities.

Reporting

(c) Any act of alleged retaliation should be reported to the SEIU Ethics Ombudsperson or the Affiliate Ethics Liaison immediately and will be responded to promptly.

APPENDIX D: MANUAL OF COMMON PROCEDURE

INITIATION RITUAL

PRESIDENT: "It is my duty to inform you that the Service Employees International Union requires perfect freedom of inclination in every candidate for membership. An obligation of fidelity is required; but let me assure you that in this obligation there is nothing contrary to your civil or religious duties. With this understanding are you willing to take an obligation?"

(Answer.)

PRESIDENT: "You will now, each of you, raise your right hand and recite the following obligation:

MEMBERSHIP OBLIGATION:

"I, (name) _____ , pledge upon my honor that I will faithfully observe the Constitution and Bylaws of this Union and of the Service Employees International Union.

"I agree to educate myself and other members in the history of the labor movement and to defend to the best of my ability the principles of trade unionism, and I will not knowingly wrong a member or see a member wronged if it is in my power to prevent it.

"As an SEIU member, I will take responsibility for helping to achieve

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the Union's vision for a just society where all workers are valued and people respected, where all families and communities thrive, and where we leave a better and more equal world for generations to come."

PRESIDENT: "You are now members of the Service Employees International Union."

OFFICERS' INSTALLATION OBLIGATION

"I, (name) _____, accept my responsibility as an elected officer of the Service Employees International Union and I pledge that I will faithfully observe SEIU's Constitution and Bylaws. I will work tirelessly to unite working people to achieve our members' vision for a just society. I have carefully read and signed the Officers' Installation Obligation, and I hereby commit to abide by it."

Officers' Installation Obligation:

I accept my responsibility as an elected officer of the Service Employees International Union and I pledge that I will faithfully observe the Constitution and Bylaws of the Service Employees International Union.

I pledge that I will provide ethical, responsible leadership, representing our members and organizing new workers to build power to win for all.

I pledge to make the growing gap between the rich and everyone else the problem of our time, to inspire and support workers everywhere who are ready to take collective action to lift wages and create family-sustaining jobs, to elect political leaders on the side of the 99%, and to hold them accountable when they support policies that benefit the 1%.

I agree to defend the principles of trade unionism.

I will not knowingly wrong a member or see a member wronged if it is in my power to prevent it.

I pledge to exercise leadership based on the SEIU standards of:

- Shared unity of purpose;
- Openness to questions and willingness to learn;
- Acting with the courage of our convictions;
- Working together with accountability; and
- Commitment to inclusion.

I believe in and will fight for the SEIU vision of a just society where all workers are valued and people respected, where all families and communities thrive, and where we leave a better and more equal world for generations to come.

I will work to dismantle structural anti-Black racism as part of my

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leadership commitments, which is necessary for building a fair and just economy for our members, their families and communities and for all working people. We can only achieve economic justice for working people when we achieve racial equality and justice for all.

I commit to the highest level of ethical behavior in exercising leadership decisions on our members' behalf.

I hereby certify that I have read and signed the Officers' Installation Obligation and I hereby commit to abide by it.

Signature of Officer: _____

DEBATE

The following rules shall be used to govern debate unless the Local Union has adopted its own rules or regulations:

Rule 1. The regular order of business may be suspended by a vote of the meeting at any time to dispose of urgent business.

Rule 2. All motions (if required by the chair) or resignations must be submitted in writing.

Rule 3. Any conversation, by whispering or otherwise, or any other activity which is calculated to disturb or may have the effect of disturbing a member while speaking or disturb the conduct of the meeting or hinder the transaction of business shall be deemed a violation of order.

Rule 4. Sectarian discussion shall not be permitted in the meetings.

Rule 5. A motion to be entertained by the presiding officer must be seconded, and the mover as well as seconder must rise and be recognized by the chair.

Rule 6. Any member having made a motion can withdraw it with consent of the seconder, but a motion once debated cannot be withdrawn except by a majority vote.

Rule 7. A motion to amend an amendment shall be in order, but no motion to amend an amendment to an amendment shall be permitted.

Rule 8. A motion shall not be subject to debate until it has been stated by the chair.

Rule 9. A member wishing to speak shall rise and respectfully address the chair, and if recognized by the chair, he or she shall be entitled to proceed.

Rule 10. If two or more members rise to speak, the chair shall decide which is entitled to the floor.

Rule 11. Any member speaking shall be confined to the question under debate and avoid all personal, indecorous or sarcastic language.

Rule 12. Attending meetings under the influence of liquor or any

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controlled substance not lawfully prescribed is basis for removal.

Rule 13. No member shall interrupt another while speaking, except to a point of order, and the member shall definitely state the point, and the chair shall decide the same without debate.

Rule 14. Any member who is called to order while speaking shall be seated until the point of order is decided,after which, if decided in order, such member may proceed.

Rule 15. Any member who feels personally aggrieved by a decision of the chair may appeal such decision to the body.

Rule 16. When an appeal is made from the decision of the chair, the Vice President shall act as chairperson; the appeal shall be stated by the chair to the meeting in these words: "Shall the decision of the chair be sustained as the decision of this Union?" The member will then have the right to state the grounds of appeal and the chair will give reasons for its decision; thereupon the members will proceed to vote on the appeal without further debate, and it shall require a majority vote to overrule the chair.

Rule 17. No member shall speak more than once on the same subject until all who wish to speak have spoken, nor more than twice without unanimous consent, nor more than five minutes at any one time without consent of a two-thirds vote of all members present.

Rule 18. The presiding officer shall not speak on any subject unless such officer retires from the chair, except on a point of order or to make an official report or give such advice and counsel as the interests of the organization warrant. In case of a tie the presiding officer shall have the deciding vote.

Rule 19. When a question is before the meeting, no motion shall be in order except:

1. To adjourn;
2. To lay the question on the table;
3. For the previous question;
4. To postpone to a given time;
5. To refer or commit;
6. To amend.

These motions shall have precedence in the above order. The first three of these motions are not debatable.

Rule 20. If a question has been amended, the question on the amendment shall be put first; if more than one amendment has been offered, the question shall be put as follows:

1. Amendment to the amendment.
2. Amendment.
3. Original proposition.

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Rule 21. When a question is postponed indefinitely, it shall not come up again except by a two-thirds vote.

Rule 22. A motion to adjourn shall always be in order, except:

1. When a member has the floor;
2. When members are voting.

Rule 23. Before putting a question to vote, the presiding officer shall ask, "Are you ready for the question?" Then it shall be open for debate. If no member rises to speak or the debate is concluded, the presiding officer shall then put the question in this form: "All in favor of this motion say `aye'"; and after the affirmative vote is expressed, "Those of the contrary opinion, say `no'." After the vote is taken, the presiding officer shall announce the result in this manner: "It is carried [or lost] and so ordered."

Rule 24. Before the presiding officer declares the vote on a question, any member may ask for a division of the house. The chair is required to comply with this request. A standing vote shall thereupon be taken.

Rule 25. When a question has been decided it can be reconsidered only by two-thirds vote of those present.

Rule 26. A motion to reconsider must be made and seconded by two members who voted with the majority.

Rule 27. A member ordered to be seated three times by the chair without complying shall be debarred from participating in any further business at that session.

Rule 28. All questions, unless otherwise provided, shall be decided by a majority vote.

Rule 29. The presiding officer of the meeting shall enforce these rules and regulations and may direct that members be removed from the meeting for violation of these rules.

ORDER OF BUSINESS

1. Opening.
2. Roll call of officers.
3. Reading of minutes of the previous meeting.
4. Applications for membership.
5. Initiation of new members.
6. Communications and bills.
7. Reports of officers, executive board and committees.
8. Unfinished business.
9. New business.
10. Good and welfare.
11. Adjournment.

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MARY KAY HENRY
International President

GERRY HUDSON
International Secretary-Treasurer

NEAL BISNO
International Executive Vice President

LUISA BLUE
International Executive Vice President

HEATHER CONROY
International Executive Vice President

SCOTT COURTNEY
International Executive Vice President

LESLIE FRANE
International Executive Vice President

VALARIE LONG
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and ROBERT CLARKE, an individual,

Plaintiffs,

vs.

SERVICE EMPLOYEES INTERNATIONAL UNION. a nonprofit cooperative corporation; LUISA BLUE, in her official capacity as Trustee of Local 1107; MARTIN MANTECA, in his official capacity as Deputy Trustee of Local 1107; MARY K. HENRY, in her official capacity as Union President; SHARON KISLING, individually; CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107, a non-profit cooperative corporation; DOES 1-20; and ROE CORPORATIONS 1-20, inclusive,

Defendants.

Case No.: A-17-764942-C

DEPT. XXVI

DECLARATION OF DEIRDRE FITZPATRICK IN SUPPORT OF SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER MOTION FOR SUMMARY JUDGMENT

I, Deirdre Fitzpatrick, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration, except where as indicated otherwise, and would competently testify in a court of law.

2. I am Chief of Staff of the Service Employees International Union ("SEIU") and have served in that position since May 1, 2018. Prior to that, I was Deputy Chief of Staff beginning in December of 2015. Before that, I served as the Deputy to the SEIU Secretary-Treasurer for Governance, and between 2006 and 2014, I served as an Associate General Counsel in the SEIU Legal Department. As part of my duties as Deputy Chief of Staff I oversaw internal governance matters for SEIU. I provide this affidavit in support of SEIU's and Mary Kay Henry's opposition to the motion for partial summary judgment on liability filed by plaintiffs Dana Gentry and Robert Clarke ("Plaintiffs") on September 26, 2018, and SEIU's and Henry's counter-motion for summary judgment.

3. SEIU is an international labor union with its headquarters in Washington D.C. SEIU is an unincorporated not-for-profit membership association representing about 2.2 million workers. Attached hereto as Exhibit A and incorporated by reference herein is a true and correct copy of the 2016 SEIU International Constitution and Bylaws, which have been in effect since 2016. Defendant Henry is the President of SEIU.

4. All SEIU members belong to a local union affiliate, each of which represents SEIU members in a particular geographic region or particular industry or job classification. Each local union has its own constitution and bylaws.

5. Defendant SEIU Local 1107 is a local union affiliated with SEIU in Nevada. SEIU Local 1107 is located at 2250 S. Rancho Drive, Suite 165, Las Vegas, Nevada. SEIU Local 1107 represents public sector and private sector workers in Nevada. SEIU Local 1107 was governed

by the SEIU Local 1107 Constitution and Bylaws until April 28, 2017, when SEIU placed SEIU Local 1107 into trusteeship and suspended its Constitution and Bylaws. Attached hereto as Exhibit B is and incorporated by reference herein is a true and correct copy of the former SEIU Local 1107 Constitution and Bylaws.

6. Prior to imposition of the trusteeship on April 28, 2017, SEIU Local 1107's members elected their own officers. Such officers had the authority to hire, discipline, and discharge employees, and were responsible for the day-to-day operations of the union.

7. SEIU is not now, nor has it ever been, responsible for the day-to-day operations of SEIU Local 1107. SEIU is not now, nor has it ever been, responsible for hiring, training or supervising or disciplining Local 1107 employees.

8. Upon SEIU's imposition of a trusteeship over SEIU Local 1107 on April 28, 2017, SEIU President Henry appointed Defendant Luisa Blue as a Trustee of SEIU Local 1107, and Defendant Martin Manteca as Deputy Trustee of SEIU Local 1107. Article VIII, Section 7(b) of the SEIU Constitution and Bylaws provides that "[t]he Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union or affiliated body and its related benefit funds, to remove any of its employees, agents and/or trustees of any funds selected by the Local Union or affiliated body and appoint such agents, employees or fund trustees during his or her trusteeship, and to take such other action as in his or her judgment is necessary for the preservation of the Local Union or affiliated body and for the protection of the interests of the membership. The Trustee shall report on the affairs/transactions of the Local Union or affiliated body to the International President. The Trustee and all of the acts of the Trustee shall be subject to the supervision and direction of the International President."

/ / /

/ / /

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on October 12, 2018, at Washington, D.C.

By _____
DEIRDRE FITZPATRICK

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT CLARKE, ET AL., Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, ET AL., Defendants.	CASE#: A-17-764942-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE

TUESDAY, DECEMBER 3, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

For the Plaintiffs:	MICHAEL J. MCAVOYAMAYA, ESQ.
For the Defendants Local 1107, Martin Manteca, Luisa Blue:	JAMES L. EVANS, ESQ.
For Defendants Service Employees International Union, Mary K. Henry:	JONATHAN COHEN, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, December 3, 2019

[Case called at 10:20 a.m.]

MR. COHEN: Good morning, Your Honor.

THE COURT: Appearances.

MR. MCAVOYAMAYA: Michael Mcavoyamaya for the Plaintiffs.

MR. COHEN: Jonathan Cohen of Rothner Segall and Greenstone for Defendants Service Employees International Union and Mary K. Henry.

MR. JAMES: Evan James on behalf of Local 1107, Martin Manteca and Luisa Blue.

THE COURT: Okay. We have a number of motions on. We have essentially countermotions. We have Plaintiffs' motion for partial summary judgment, We have SEIU International and Mary K. Henry's motion for summary judgment, And we also have another motion from the Local for summary judgment.

So I don't know how -- the easiest way to argue these would be. Do we want to just argue all of them? Start with the Plaintiffs, the oppositions can then do their opposition and their countermotion, and then come back around, or do we want to do each one separately? If you think -- because the issues are a little different as between the SEIU and the International. So, I mean they are slightly different issues, and so I just didn't know if it made more sense to argue them one at a time as opposed to all in one, because the issues are a little different between

the SEIU and the International.

MR. MCAVOYAMAYA: I'm fine with that.

MR. COHEN: Whatever the Court's preference is, Your Honor.

THE COURT: Okay. All right. Let's start then with the International's motion. It was the first one filed. So we'll take SEIU's and Mary K. Henry's motion first.

MR. COHEN: Thank you, Your Honor. I want to start with some basic undisputed facts. There is no contract of employment between SEIU and the Plaintiffs or Mary K. Henry and the Plaintiffs. And all of the Plaintiffs' claims are -- fall into basically two camps, contract base and wrongful termination.

So with respect to the contract base claims, in the absence of a contract, their claims obviously fail, and it's a shame that it's taken this long in the case for the Court to have an opportunity to rule on that, because I think really it's a fundamental flaw in the Plaintiffs' case, but here we are.

THE COURT: By Nevada law they're allowed to do discovery. No discovery, in your view, has turned up anything that would give rise to any argument that the contract was -- although I think there's going to be a little bit of an alter ego argument, the contract was assumed or --

MR. COHEN: Zero, Your Honor.

THE COURT: -- it was somehow verbally entered into, or?

MR. COHEN: Zero. And we took the Plaintiffs' depositions, and the Plaintiffs' admitted, you know, there's two signatures on the

contract. It's the former president of 1107, Cherie Mancini, and the Plaintiffs.

THE COURT: Uh-huh.

MR. COHEN: I asked the Plaintiffs when you entered into this contract were you informed that 1107 was entering into this contract on behalf of any other entity? No. Well, did you understand that the contract was between you and any other entity? No. I mean, it's obvious that the contract was between the Local and the Plaintiffs. And it's equally obvious that SEIU and Mary K. Henry never employed the Plaintiffs.

The sole argument they have and which they've raised for the first time in opposition to our motion for summary judgment is that the International and Mary K. Henry were alter egos of the Local.

THE COURT: Uh-huh.

MR. COHEN: Now it's not in the complaint, it's not in the first amended complaint, and we think that the case law is quite clear that that alter ego argument has been waived. We couldn't find a Nevada case, but we found a number of federal cases on that specific point. It is correct that when they brought a motion to amend in support of their first amended complaint, in their reply in support of that motion they raised an alter ego argument, but that motion was denied with respect to SEIU and Mary K. Henry.

So as far as we're concerned, it's just -- it's plainly too late to raise that argument. It's not in the pleadings, and it's just patently unfair to SEIU and Mary K. Henry for them to raise it at the eleventh hour.

Nonetheless, I could address the factors -- the alter ego factors if the --

THE COURT: Right.

MR. COHEN: -- Court wishes. So -- and I just want to add one more point Your Honor.

In the latest motion the Plaintiffs filed they cite this case *Gardner v. Eighth Judicial District*, 133 Nev. 730, as support for the argument that they can raise an alter ego claim for the first time in opposition to summary judgment, but I want to point out in that case the issue on appeal was whether the Plaintiffs should have been allowed to amend their complaint to add alter ego allegations. That was the issue on appeal. They tried to amend their complaint to add alter ego allegations, specifically, and the trial court said, no, you can't do that, that's really a post-trial motion. And the Supreme Court said, no, of course you can. Of course you can do that. But how does that help them. They never moved to amend their complaint to add those allegations. So it doesn't help them.

The actual alter ego factors. The corporation must be influenced and governed by the person asserted to be the alter ego. That's the first factor. There's two points the Plaintiffs make. First is, well, the International appointed trustees, so of course the trustees are subject to the control of the International. And under the SEIU constitution, the actions of the trustees are subject to the direction and control of the International. So, therefore, of course says the Plaintiffs, they're subject to the influence and control.

Our response to that is plain, and it's based on a black letter

principle of federal law, which is that the trustees act on the behalf of the Local Union and not the appointing entity, and we've cited, I think, six or five federal court cases, all in different contexts, all based on that same premise. The trustees act for the benefit of the Local Union, not the appointing entity. So, therefore, they're not -- just because they're trustees and appointed by the International, acting on behalf of the International, quite the opposite, they're required to act on behalf of Local Union.

The fact that the International constitution reserves to the president the ability to control the actions of the trustees, we cited the *Hernan* case. It's a Ninth Circuit case, but it addresses both federal law and Nevada State law. And what it says is that that fact that a constitution reserves to the national president the right to control the act of the trustee is not sufficient to establish that a Local and an International are single employers. Now that's different from alter ego. It's a different test. But we think it's as close as we're going to find to, you know, authority direct on our point. And it's gets cited by the Ninth Circuit cases.

So we think that the mere fact that the trustees were appointed by the International to take over the affairs of the Local is not sufficient to establish the first alter ego factor.

Plaintiffs also rely on emails. There are emails between the trustee several days after the Plaintiffs were terminated and the then deputy chief of staff, Leslie Aiyou [phonetic], and the President of SEIU Mary K. Henry. Now what those emails show, in our view, is that after

the trustees terminated the Plaintiffs, the trustee reported that fact to the deputy chief of staff, among other facts. But we cite cases to Your Honor to the effect that, well, in the alter ego context, a corporate always has some measure of monitoring of a subsidiary and a subsidiary always reports to a corporate parent. That doesn't make them alter egos.

So the mere fact that the trustees, after they took the action to terminate the Plaintiffs, reported that fact to the International, in our view, hardly suffices to establish that the International influences or governs the local union.

THE COURT: And so what? I mean if the International had said you can't fire them, you have to rehire them, the Local wouldn't have had to do it. They have no control. So I'm just trying to --

MR. COHEN: Say that --

THE COURT: -- figure out what's --

THE COURT: Sorry, say that one more time.

THE COURT: I said who cares? I mean, the mere fact of reporting something, this is what's happened here locally --

MR. COHEN: Yeah.

THE COURT: -- because we're under --

MR. COHEN: Yeah, trusteeship.

THE COURT: -- trusteeship, we just had to fire some employees. So is there any indication that the International ever said -- overruled any decision of these trustees? Any decision that they made --

MR. COHEN: No.

THE COURT: -- because they were reporting up what they

were doing, because they were under trusteeship.

MR. COHEN: Zero evidence, Your Honor. Zero. The Plaintiffs have developed zero evidence of any data it had control of the Local Union by the International Union.

THE COURT: Okay.

MR. COHEN: They mustered these two emails that show a discussion, indeed, about the termination of the Plaintiffs. And, you know, there's a discussion in there that, you know, the trustee is on the program to document staff. She's on the program to get rid of staff. You know, Plaintiffs' counsel asked the then deputy chief of staff, now chief of staff, is there a program to get rid of staff when a trustee is imposed, and her answer was no. And there's no evidence to the contrary. And --

THE COURT: And that's at the International level?

MR. COHEN: Yes. The chief of staff of the International's deposition we submitted, Your Honor, just says over, and over, and over again, we don't control the actions of trustees. We don't monitor the day to day affairs. It's the trustees who make the decisions about staffing and so on.

Now is there some -- obviously, there's a relationship between the International Union and the Local Union. I mean, of course, they're affiliated entities. And that relationship continues after a trusteeship. The trustees are appointed by the International Union.

THE COURT: Well, it would be different if they had said we're here.

MR. COHEN: Fire them.

THE COURT: We would like to get rid of a bunch of employees, is that okay with you, International?

MR. COHEN: That's right.

THE COURT: And the International says, sure fine. That might be different --

MR. COHEN: That might be.

THE COURT: -- reporting after the fact.

MR. COHEN: That might be, but there's no evidence of that, and I'm not even so sure that would be enough because let's just pivot to the -- that's the first factor.

THE COURT: Right. Right. Okay.

MR. COHEN: That's just the first factor, there's two other ones. The second factor is that there's such a unity of interest in ownership that one is inseparable from the other. Now there's zero evidence of that. There's zero.

The traditional alter ego factors, Your Honor, would be intermingling of funds, they would be, you know, undercapitalization. They are the sort of things that you would typically see when you pierce the corporate veil. There is zero evidence of that. Again, all they do is they point to the fact that the trustees were appointed by the International Union and that the Local Union's officers were removed. The constitutional bylaws were suspended. That's what happens during a trusteeship.

And if it was the case that every time the International Union

placed a local union under trusteeship they were alter egos that would be a title shift in both, you know, federal and state case law. It's just not that. It's just -- there's not a single case that comes close to that principle. And, again, the mere fact that the trustees were appointed by the International Union, under federal law they have to act on behalf of the Local.

And just the last factor, there must be such -- facts must be such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice. Plaintiffs sole argument is, well, it would be unjust to make the local membership pay damages when it's the International who is really the mover and shaker. And we would submit, Your Honor, that that's just plainly insufficient.

In fact, it's more unjust to make all of SEIU's membership nationwide pay for the actions of the trustees, then it would be to have Local 1107's membership pay. And there's zero evidence that 1107 is incapable of satisfying a judgment. They didn't develop any evidence. They presented no evidence. And frankly, we think the argument was waived. So, you know, I'm sorry we had to burden the Court with so much argument about something that was never pled, but here we are.

Before I turn to federal preemption, that's the major issue that really is briefed and that both parties share, I want to turn to interference with contract, which is a claim against SEIU and Mary K. Henry. Again, just to refresh the Court's recollection, the factors -- the elements of that claim, a valid and existing contract. We don't dispute

there was a contract between the parties. I mean, I assume that there was such a contract. Defendants knowledge of the contract, I don't think they developed any evidence of that, but let's just assume that the International knew, for the sake of argument, they have to show intentional acts intended or designed to disrupt that contractual relationship. There is --

THE COURT: Is there any evidence throughout the course of dealing with the SEIU -- the Local before it was taken over that they reported up the chain to the International, here's everybody we've got under contract?

MR. COHEN: No. Not that I'm aware of. I mean, I think there may be evidence in the record that shows -- you know, raises the inference that the International may have known about the existence of the contracts, but I --

THE COURT: I mean they don't have to make like annual reports. So I'm just trying to -- I don't know anything about how this union operates.

MR. COHEN: No. About the existence of employment contracts, no.

THE COURT: Yeah.

MR. COHEN: But the fact is that intentional acts designed -- intended or designed to disrupt the contractual relationship, the International Union imposed a trusteeship. And just so Your Honor, you know, has the full context we just finished summary judgment proceedings in federal court on the lawfulness of the trusteeship. There

was two lawsuits brought by Plaintiffs' counsel on behalf of a number of members and a former officer challenging the lawfulness of the trusteeship under federal law and a number of state torts challenging the manner in which the trusteeship was imposed. And we cited the case to the Court in our papers, the District Court rule that was imposed consistent with federal law.

THE COURT: Uh-huh.

MR. COHEN: And not only that, but it was an emergency trusteeship because things were in such disarray. And, you know, if you read Judge Gordon's decision in that case, you'll see that the state of affairs of the Local, you know, a trusteeship couldn't have been imposed a moment, you know, too soon. In fact, the executive board of the Local Union voted in favor of the trusteeship and that's what prompted its imposition.

But going back to this claim of intentional interference of contract, there's just no evidence that the International did anything to disrupt those contracts. They appointed a trustee and that's where the causation ends because the declarations before Your Honor of Martin Manteca and Luisa Blue, the two trustees, make it clear that they made the decision to terminate the Plaintiffs, because they wanted to manage the affairs of the Local themselves. At least until they could get it on its feet.

And no surprise, this is a local who had just had an emergency trusteeship imposed because of the wholesale disarray and factualism at the Local. Of course they wanted to terminate the directors

of the Local who had managed that state of disarray. I mean that's -- you know, you would expect nothing less. But that hardly shows acts by the International Union that were intended or designed to disrupt those employment contracts.

THE COURT: No evidence that their marching instructions were to get in there, clean house, fire everybody who got us into this state?

MR. COHEN: No. No. There's not. Again they point those emails, Your Honor, which is the report up the chain from the trustee, I think, the day after the trustee blew -- I think one or two days after they were terminated, and she reports the terminations, and the deputy chief of staff and the International President Mary K. Henry, themselves, not with the trustee, the two of them had an internal conversation that says, yeah, it looks like the trustee is on the program to get rid of staff.

She's documenting it and the Deputy Chief of Staff Fitzpatrick says, yeah, you know, we think it's good. She's documenting. You know, she's getting rid of managers that aren't a right fit for the Local. You know, it's an internal conversation about what their views are and what the trustee is doing, but there's no evidence that they directed or gave the trustees those marching orders.

You know, there's that --

THE COURT: But more importantly that they sent the trustee there with directions --

MR. COHEN: For that purpose.

THE COURT: -- to do it.

MR. COHEN: No, there's no evidence. There's another email that the Plaintiffs point to that is between the trustee and the then Deputy Chief of Staff Fitzpatrick. And what it says is that if the trustees are going to ask other Locals for assistance in staffing the trusteeship that it run through the executive office. And what the Deputy Chief of Staff Fitzpatrick said is, well, yeah, when the trustees are going to go out to other Locals and say, hey, can you help us staff this trusteeship, it may pull on priorities of those Locals. It may pull on staff that are engaged in, you know, collective bargaining or political campaigns, and we want to know about it in case it pulls off a priority of the International in its efforts with these other Locals. But again, that's not having -- that has nothing to do with the Plaintiffs' employment. It's just far too attenuated.

And, you know, we've submitted the deposition testimony of Fitzpatrick in which she explains what she meant, and we think it's just far afield from an alter ego allegation, and it's nowhere near the evidence that you would expect to see to go to trial on intentional interference with a contract claim.

THE COURT: Okay.

MR. COHEN: Unless the Court has any questions, I do want to move to preemption.

THE COURT: Uh-huh. Yes.

MR. COHEN: Unfortunately, given the amount of briefing I think it's -- as though it's a complicated issue, but I don't think it is, and here's why.

All the courts that have looked at this, and granted there's no Nevada case, but we've pointed the Court to California, Ohio, Michigan, Montana, New Jersey, those are the courts that have looked at this and have adopted it, that we're aware of. There may be more.

So the judicial consensus is that conflict preemption applies in this context if you have a policy making or confidential staff person. That is the basic rule. It's not a confusing rule. It's a straightforward one. These aren't even terms of art. I think the Court, you know, can understand what policy making or confidential is. There's not -- there's no statutory definition of those terms. They're basically terms that are used in a footnote by the U.S. Supreme Court in the *Finnegan v. Leu* decision, which is the kind of original case from which all this conflict preemption case law originates.

And what the Court says is, yeah, let the leaders have a right to select their own staff. The LMRDA, you know, promotes that and that's its key legislative purpose. And in the footnote what they say is well, we're not going to weigh in on whether that same rule would apply to non-policy making or non-confidential personnel. And from that grows this entire body of case law on conflict preemption where former policy making confidential staff of a union sues for breach of contract and wrongful termination, some cases defamation. A number of, you know, different torts across the board. And what these courts say is if you're confidential or policy making, you don't have a right to sue. And there's good reason for it.

You know, my co-counsel, Mr. James, the last time we were

here arguing this point, Your Honor, made the point, could you imagine if President Trump was saddled with Obama's cabinet secretaries, couldn't get rid of them to implement his policies, that would be silly. The same thing with Obama. You know, why would he be saddled with the former president's cabinet secretaries. The same basic principle applies here. Why would an elected official of a union be saddled with managers who he or she was not confident would implement his or her policies?

Now here's their biggest criticisms or their biggest attacks. One, all of this case law was wrong. It's all wrong. And I'm not going to weigh in on that, Your Honor. You know, I credit Plaintiff for making the argument. It's a creative one. But the bottom line is that the judicial consensus among the courts that have looked at this is that, yes, conflict preemption applies.

The second argument they make is, well, but these are not elected officials, they're appointed. The trustees weren't elected. That's not disputed. But there's a few points that are essential to understand. One is that the elected executive board at Local 1107 voted for a trusteeship, by a majority. That vote was upheld in federal district court as, you know, not tortious. The Court said it was fine. So they voted for this, okay. The International President also elected -- appoints the trustees. The trustees make the determination to terminate.

So there is an element here of democratic support for their decision, but even if there wasn't, Your Honor, we cited three cases, all of which hold that the *Finnegan* rule applies to appointed leaders of

unions. That's the *English* case, which has to do with SEIU, and it's imposition of a trusteeship, directly on point that says, yeah, it applies just the same. It's not a preemption case, but it applies the *Finnegan* rule. And then the *Vought* case, which it relies on, it's an Eighth Circuit case, has the same thing, the Finnegan rule applies. And then there's the *Dean* case, it's a district court case.

All of them hold that this rule applies in the case of unelected leaders, and with good reason. Could you imagine the trustees step into the shoes of the elected leaders that they replaced, why wouldn't they have the same authority as those elected leaders? It would make no sense. It would upend the premise of a trusteeship.

Two, this is a union that was beset by factualism. It was a mess. There was constant arguing on the executive board. That's what the district court found in the -- the United States District Court for the District of Nevada in the trusteeship case found. There was severe factionalism and fighting, calling cops on one another, temporary protective orders. It was a mess.

Could you imagine if the trustees had to come in and yet given that state of affairs, manage the affairs of the Local with the director level staff that had been in place during that entire mess? That would be ludicrous.

There's two other points I want to make on this. There's no dispute, we think, that the Plaintiffs exhibited significant disloyalty to the trustees. I don't know if the Court had an opportunity to look at Plaintiff Clarke's text messages in the days after the trusteeship. They were only

employed after the trusteeship for a few days, I think. Maybe, you know, seven or eight days. But that was enough time for Clarke to rattle off a series just utterly hostile text messages where he impugns the trusteeship, the trustees. He calls the trustee a bully and a tyrant. He says, I don't think the trusteeship is legitimate. He's the Director of Finance and Human Resources for the Local, and the trustees are going to -- how could they possibly carry on the affairs and trust him to carry out that high level decision making when he's that utterly disloyal?

And then a number of days after the trusteeship, they get together, both Plaintiffs, and they issue a national press release that the Court can read that is just blistering, and it's criticism of the trustees and the trusteeship. So, you know, there's a good reason for this case law. Can you have director level staff of a union utterly hostile to its program and policies running your affairs? That's ludicrous.

And the last point is are these policy making and confidential employees that are subject to this case law? Well, one, they've both admitted they were managers. What is a manager? It's a policy making person. Two, Plaintiff Gentry was responsible for all of the strategic communications of the Local. She was the public spokesperson for the Local on radio, on TV, and in print. She advised the Local on its legislative affairs. She wrote talking points and speeches for the elected leaders. She advised the executive board of the elected leaders about their communication strategy. Of course she's policy making.

THE COURT: So what's the relief that you're looking for?

MR. COHEN: Dismissal of all the -- dismissal of SEIU and

Henry, Your Honor.

THE COURT: Okay. And so you've talked about why there's no -- the contract causes of action have to fail and the wrongful termination would be they don't have any control over what --

MR. COHEN: There's no --

THE COURT: -- the trustees do.

MR. COHEN: There's no employment relationship, Your Honor.

THE COURT: And there's no tortious discharge because they didn't fire these people.

MR. COHEN: Employ them.

THE COURT: And negligence.

MR. COHEN: It wasn't implied against us.

THE COURT: So --

MR. COHEN: And intentional interference of the contract, which was -- there's just no evidence of it.

THE COURT: Okay.

MR. COHEN: Thank you, Your Honor.

THE COURT: Thank you. So, Mr. Mcavoyamaya.

MR. MCAVOYAMAYA: Yes, Your Honor.

THE COURT: With respect to the International.

MR. MCAVOYAMAYA: How are you doing this morning?

Okay. So against the -- so the International's motion. I wanted to discuss the evidence and the alter ego liability.

THE COURT: Uh-huh.

MR. MCAVOYAMAYA: The Defendants misrepresents the evidence that was presented in support of this opposition that the Defense were alter egos. The Fitzpatrick email, and this is a direct quote, states -- it's an email between Henry and the SEIU International Chief of Staff, and it states that Luisa Blue, the trustee was -- this is Henry, the President of SEIU International. This is not a low level International employee. This is the two highest employees of the International governing body. Henry sends an email to her Chief of Staff that Luisa Blue, the trustee over Local 1107 is on the program to get rid of staff quickly.

Plaintiffs did question Ms. Fitzpatrick about what Henry meant by this email. Her answer was not that there was no program, her answer was that she didn't know what Henry meant by the program. Well, the evidence is the email. There's a program of the International to get rid of staff quickly when a trusteeship is imposed. The next sentence is she is documenting the staff.

So there is clearly a report from the International Trustee to the International President that the trustee is on the program to terminate staff quickly and was documenting staff for that purpose.

After that Fitzpatrick responds: Yes, they were getting rid of staff -- of the managers who are not fit with the new direction of the Local. They need to temper themselves on the rest for a variety of reasons, documenting is good.

This is a conversation between the two top people in the International Union that the trustees are on the program of getting rid of

staff quickly and that they should be documenting the staff for that purpose. The notion that the International was not being reported to and not involved in the staffing issues is just a farce.

There is another email after this that expressly states -- it's a discussion about staffing the Local with new directors, staffing the Local with other employees to fill positions after they terminated staff. Fitzpatrick sends an email directly to the trustees stating that Mary K. Henry's policy is that staffing issues needs -- that she needs to know when we are suggesting asking other Locals to support a trustee local, just so it's aligned with the other moving parts between her and SEIU Locals. In general, it's a good way to fill gaps. The process should move for the executive office.

The process of staffing the trusteeship was moving through the executive office, and yet the Defendants argue that the International was not involved in directing the trusteeship. After that, in that same email, Fitzpatrick states, the separation conversation with Dana was uneventful and Rich -- and Roberts -- so they Richards, but it's really Roberts, I believe, anyway, was more dramatic and ultimately okay. Hopefully, things get smoother from there.

And then with relation to the other director that was terminated, Peter Nguyen, you may want to think about doing his meeting offsite and either bringing him his personal things or telling him that they will be delivered to his house the same day or shortly thereafter. He will no doubt be disruptive when you meet. Then Fitzpatrick recommends to the SEIU International Trustees that they hire

arrangements for professional staff through temporary employment agencies.

The SEIU International -- the highest level of any SEIU International staff was directly involved in administering this trusteeship. The trustees reported directly to the International President and the Deputy Chief of Staff. The Defendants have not disputed that the International constitution makes Mary K. Henry the direct supervisor of the trustees' conduct. They have not disputed that the SEIU International Trustees were indeed reporting on the trusteeship to the SEIU International President.

Defendants excuse for disregarding this evidence is simply that the SEIU International organization as the parent organization, has a normal supervisory -- general supervisory role over its subsidiaries. But this is not a general circumstance. This is not SEIU International and Local 1107 with its independent executive board, its president, and governing body, and its own constitution. No. This is a trusteeship. A receivership that the International posed over the Local Union. It invalidated the Local's constitution. It invalidated the Local's governing board. They removed the two top executive officers of the Local Union and appointed International employees to govern the day to day operations of Local 1107, under the express direction of SEIU International President Henry and the executive office of SEIU International.

The evidence is clear here.

THE COURT: Okay. And so --

MR. MCAVOYAMAYA: The stuff was going through the International Union. Now --

THE COURT: Okay. Federal preemption.

MR. MCAVOYAMAYA: I would like just a few more things. Let me just check if I got everything here.

[Pause]

MR. MCAVOYAMAYA: There's also evidence that the SEIU International Defendants knew of the contracts. The hearing that was held prior to that resulted in the imposition of the trusteeship, the internal needs hearing, which was -- the report was adopted by SEIU International President Henry. The contracts were presented to the International at that hearing. They knew about the contracts. They knew it was a breach of contract to terminate the managers. And you can find that in the urban investigative report contracts that was presented as an exhibit at that hearing.

And, like I said, the emails between Fitzpatrick and Henry, the emails between Fitzpatrick and the trustees clearly evidence that there were marching orders given by SEIU International to the trustees on how to administer the trusteeship. It's clear from those emails.

So moving on to -- should we do preemption or should I just do the merits of the --

THE COURT: Preemption.

MR. MCAVOYAMAYA: Do preemption. Okay, we'll go to preemption.

The Defendants request that this Court apply the California

Supreme Court's LMRDA preemption doctrine. They cite to the California Supreme Court case because there is no federal court cases that have created a preemption doctrine under the LMRDA with one minor exception. There is an expressed preemption provision in the LMRDA, in the election section. I believe it is Title 4 of the LMRDA. 29 U.S.C. 486, I believe, preempts all post-election challenges to union elections to the Secretary of Labor. Aside from that, there is no case that the Defendant has cited, federal case, that has concluded that there is an LMRDA preemption doctrine with the exception of federal district court sitting in California, which are bound by the *Screen Extras Guild* decision because of the ruling on state law.

Before we reach this issue though, on whether or not the Supreme Court of Nevada would actually adopt the *Screen Extras Guild* preemption doctrine as a defense here in Nevada, it is important to note a glaring omission from the Defendants' moving papers. That omission is Nevada's existing law on preemption. And there is a significant amount of Nevada preemption law.

Now I would like to go over the -- I would like to go over the *Screen Extras Guild* court or case, to demonstrate the similarity between Nevada's analysis of federal preemption and the analysis that the *Screen Extras Guild* court went into when crafting its preemption doctrine. If I can approach, I can give you a copy of the case.

THE COURT: Sure.

MR. MCAVOYAMAYA: If you take a look on the first page of the discussion is where the preemption discussion begins. The *Screen*

Extras Guild court cited to numerous preemption cases, none of them LMRDA preemption cases when crafting its preemption doctrine, because there is no LMRDA preemption doctrine under federal law.

The first case cited is *Brown v. Hotel & Restaurant Employees & Bartenders International Union*. There the Supreme Court dealt with claims of LMRDA preemption, NLRA preemption, and ERISA preemption.

THE COURT: Well, I'll just cut to the chase. Nevada has identified two types of preemption -- federal preemption. When the law does not expressly state it intends to preempt state law, preemption may be implied under the doctrines of field preemption or conflict preemption.

MR. MCAVOYAMAYA: Yes.

THE COURT: So --

MR. MCAVOYAMAYA: You want me to get on that.

THE COURT: -- let's talk about that.

MR. MCAVOYAMAYA: Straight to the point. Let's talk on that.

Okay. So the Nevada Supreme Court has relied on federal case law similar to the *Screen Extras Guild* case, analyzing the general framework of preemption and has created Nevada's only framework for analyzing preemption. The Nevada Supreme Court has expressly directed district courts that preemption should not be lightly inferred.

This is the *W. Cab Company v. Eighth Judicial District Court*. It is an NLRA and ERISA preemption case. The Supreme Court has noted

that when there is no expressed preemption clause, the Court should rely on the doctrines of implied preemption recognized by the United States Supreme Court. Again, there is no recognized LMRDA preemption doctrine recognized by the federal supreme court or the federal circuit courts. There just is none. It doesn't exist. The only preemption -- LMRDA preemption doctrine that exists is the California Supreme Court's unilateral crafting of that doctrine.

And the Nevada Supreme has also -- and this is a direct quote. The case is *Cervantes v. Health Plan of Nevada*. I have a copy of the case if you would like to look at it, Your Honor.

THE COURT: No.

MR. MCAVOYAMAYA: This is a direct quote from that case. "The Nevada Supreme Court has emphasized that the intent of Congress is the touchstone to preemption analysis and that absent clear and manifest intent of Congress there is a presumption that federal laws do not preempt the application of state or local laws regulating matters, which fall within the traditional police powers of the state." That is a 2011 case dealing with preemption.

The *W. Cab Company* case, that is a 2017 case. It expressly holds -- the Nevada Supreme Court expressly concluded that the -- and this is a direct quote -- "the establishment of labor standards falls within the traditional police power of the state."

In *Nanopierce Tech, Incorporated. v Depository Transit [sic] & Clearing Corporation*, it's a 2007 case, the citation is 123 Nev. 362. "When a conflict exists between federal and state law, Nevada federal

law overrides, i.e., preempts an otherwise valid state law. Whether a federal act preempts state law is fundamentally a question of congressional intent. Did Congress expressly or impliedly intend to preempt state law? Even when implied, Congress' intent to preempt state law in light of the strong presumption that areas historically regulated by the states generally are not superseded by the subsequent federal law must be clear and manifest."

So at the outset of this analysis, this Court is bound by the Nevada Supreme Court's holdings that there is a presumption against -- a strong presumption against preemption. That is Nevada's law on applying federal preemption to a case.

THE COURT: Okay. Anything else?

MR. MCAVOYAMAYA: So moving on to the LMRDA preemption. There is no dispute that there is no LMRDA -- express LMRDA preemption provision. There is no dispute that this is not a field preemption case. This is a conflict preemption case. Defendants must therefore rebut this presumption -- this strong presumption. Congress has expressly disclaimed preemption in six separate statutes within the LMRDA itself. They are 29 U.S.C. 413, 29 U.S.C. 466, 29 U.S.C. 501, 29 U.S.C. 523, 524(a), 501. Each of those statutes expressly disclaims an intent by Congress to displace state law.

Now the Defendants have cited to *Bloom*. They have cited to *Bloom* because the *Screen Extras Guild* court has cited to *Bloom.* And in that case, the Ninth Circuit Court expressly stated and noted that while -- that even when one of these non-preemption provisions do not directly

save a plaintiff's case, they imply that the state claim can proceed. Now *Bloom* never ruled on preemption -- on LMRDA preemption. Instead, it just addressed *Tyra*. And the Ninth Circuit Court has no jurisdiction to overrule a California Appellate Court case or a Supreme Court case. So it just referenced the doctrine from *Tyra,* but made no indication that it was adopting the LMRDA preemption doctrine. No circuit court has ever adopted it. The United States Supreme Court has not adopted it.

And so the Defendants are thus -- they are relegated to the California Supreme Court's preemption doctrine and the Federal District Court sitting in the State of California that are bound by it.

THE COURT: Thank you. Anything else?

MR. MCAVOYAMAYA: Yes. The next issue is the elected union official issue. Now Defendants argue --

THE COURT: Now we're going to move on. Okay. Thanks. Anything else?

MR. MCAVOYAMAYA: I mean I do need to get to the --

THE COURT: No. Okay. All right. We have to move on.

MR. MCAVOYAMAYA: Okay.

THE COURT: Anything in response?

MR. COHEN: Your Honor, just a few points. It's not just California. Just to reiterate, the highest courts of Michigan -- well, I'm not sure if it's appellate courts or supreme courts, but Michigan, Ohio, New Jersey -- I'm sorry, Your Honor, it's in our papers. New Jersey, Michigan, Ohio, and Montana have all adopted the same conflict preemption test.

And, you know, Plaintiffs' cite the *Nanopierce* case. That is indeed a conflict preemption case, and I think if the Court looks at it, it will see that it's a traditional conflict preemption analysis, much the same as the California Supreme Court.

THE COURT: They just call them -- they just term them slightly differently, but --

MR. COHEN: It's the --

THE COURT: -- it's the same test.

MR. COHEN: -- it's the same rubric, Your Honor.

The two emails, I would just encourage the Court, if it's so inclined to read them, I think Plaintiff misread them slightly and skipped over portions of them, but the bottom line is --

THE COURT: Yeah. And thank you very much for the CD of all the exhibits, because they were voluminous. Thank you.

MR. COHEN: Thank you.

THE COURT: So now with respect to the Local's motion. As I said, slightly different. The preemption is pretty much the same, but the other causes of action are --

MR. JAMES: Sure. I'm not going to replow the field on the preemption argument. I do want to provide an overview of the preemption idea.

In my moving papers, I started with *Finnegan v. Leu* from the United States Supreme Court as the starting point. The reason why it's a starting point is because it, as a case, is where all the preemption cases stem from. And there are really two types of preemption cases that exist

in the United States.

One case is where you -- or one side of this is the *Dean* case and the *Pate* case. Those cases were decided because the constitution of the International Union allowed for the removal of employees by the new leader, and that's what we have in our case. The constitution of the International Union allows for the removal of employees. And so we clearly fall under that line of cases.

The second line of cases actually is preemption from the LMRDA itself. Those cases are really what you've been hearing the argument on. Those are the *Screen Extras Guild* case, for example. But those cases actually can be divided into two separate type of cases. There's some bleed over in the language, but when you take a look at those cases you have the *Screen Extras Guild* case, which generally argues the elected union official idea for democracy, but then you also have the *English* case and the *Vought* case, V-O-U-G-H-T. Those cases talk about effective union governance.

So it's not just an elected issue, it's the ability to govern the union. And the reason why we have to govern the union is because the union is governed for the benefit of the members. And so that's just a general way of how I see these preemption cases coming into play.

The other thing I need to point out for the Court is preemption is not a substantive element of one of the claims. It's a vehicle by which we get federal law to overrule any conflicting state law in this particular -- as in our case that's what we're dealing with.

And so the one thing that the Plaintiffs never do is they never

really go into a succinct analysis of the state's interest. They never show us what Nevada State interests are. The only thing they say is we have an interest in contracts, we have an interest in the idea of tortious interference with employment. Well, those are the same issues that came up in all of the *Screen Extras Guild* cases. So all of the judges who have looked at those issues say, that's not a sufficient reason for overruling federal law or allowing this conflict to exist.

Now there is a reason, okay. One reason that exists is expressly in the LMRDA and that's, for example, a criminal statute. And so some of the states -- some of the cases with regard to the conflict preemption say if you're pursuing a criminal statute, that is the type of state interest that is compelling. And not only is it compelling, it actually serves the same purposes as the LMRDA, which is to root out corruption within the union, and also it protects the member's rights.

So if you have any questions with regard to that, I will leave that there.

THE COURT: With respect to the LMRDA --

MR. JAMES: Uh-huh.

THE COURT: -- issues that the concept of the preemption is that LMRDA provides the remedies, which are --

MR. JAMES: Well, it's --

THE COURT: -- because the union --

MR. JAMES: -- it's an important question, and I think I understand. Let me give an answer, and I hope it's the answer.

Okay. So the LMRDA only applies to union members.

THE COURT: Correct.

MR. JAMES: These are the Plaintiffs who are union members. So when they argue that there's these express saving clauses for the LMRDA, they can't rely on them. The case law makes that clear. They can't rely on those savings clauses with, perhaps, one exception, and that would be the criminal savings clause, because if they would have alleged that they were terminated for some criminal activity or reporting something, that might be enough to get past this preemption issue.

THE COURT: And so we don't need to get into the merits --

MR. JAMES: Sure.

THE COURT: -- of this whole issue of what Ms. Gentry was terminated for, or -- that's not -- we don't have to get into it. Because that's really, I think, a big part of their claim is the defamation and the --

MR. JAMES: Sure.

THE COURT: -- alleged, you know -- you know, what was said about Ms. Gentry and those kinds of things.

MR. JAMES: Sure. We don't need to get into that. And so it's just -- it's clearly a conflict preemption where they're trying to basically thwart federal labor law in their claims.

Now let's be frank, Your Honor. If I was in their situation, I might be kind of disappointed, because I have these contracts, okay. I can understand disappointment, but that doesn't make their disappointment the law. It really doesn't. The law is -- and it's clear in the preemption cases -- that Congress really isn't concerned about the

impacts that might occur in situations like we have here. What Congress was concerned about was effective union governance, so that we have coherent labor law throughout the United States.

THE COURT: And so that gets into your point about the contracts -- it gets us -- before I said the Local was a little different, because you do have these issues with respect to the contracts themselves.

MR. JAMES: Sure. Exactly. They do exist.

Now there's some problems with their tort claims. I won't go through each of those problems unless you want me to. They are clearly set out succinctly and briefly in the briefs. I did that on purpose. I wanted to actually have less pages, but I did the best I could.

The next thing that I really want to jump into is the defamation issue. So federal preemption actually applies to defamation claims when the defamation claim is asserted in such a way that it interferes with the internal workings of the union. That's well established precedent by federal courts. There is one exception. That exception is if the Plaintiffs can show malice occurred, all right.

So they have to show that there was intentionally a misrepresentation or a reckless disregard for the truth. So they had to show knowledge of falsity or reckless disregard. And there is absolutely no facts in the record of that existing. In fact there are two claims of defamatory statements being made. I don't think they're defamatory, but for argument sake we'll say that they are. But I'm not conceding that point. I want that on the record.

The basis of the claims were: 1) the use of credit cards by individual employees who also had car allowances. If you have car allowance, and you also have a credit card, you shouldn't be filling up the gas tank of the car. That would be a double dipping situation. Ms. Marzan testified that that was the genesis of Ms. Kisling's report to the executive board. The administration, former President Mancini, her deputies, her directors, they weren't managing the union, effectively, so they take this issue to the executive board, because they're not getting the documentation to support what they're seeing on the credit card statements.

That's not malice, Your Honor. That's effective union governance. And, in fact, under 29 U.S.C. 501, Ms. Marzan, Ms. Kisling had a legal duty to actually govern the finances of the Local effectively. So there's no malice there.

The second issue is an allegation that Ms. Gentry says she was called -- these are my words. I'm going to -- she was called a drunk. Well that's not true. She really wasn't called a drunk. In her own deposition testimony, she testified to this. Ms. Kisling was reporting to the executive board that two employees had reported to her that she smelled like alcohol. That's the only evidence with regard to this drinking claim, all right. Ms. Kisling -- excuse me, Ms. Gentry herself testified to that matter and that testimony was supported by Ms. Marzan as well.

So under 29 U.S.C. 501, as well as the *Teamsters* case that I've cited to the Court, executives in the union and union governors, they

have an obligation, a fiduciary duty to manage the union effectively. How are they going to manage the union effectively if they take these issues to the executive board for an investigation, and they're charged with defamation? It's going to water down the idea of, look I have to effectively govern the union. And to be honest with you, that would really kind of go against Nevada's policy, because what if there is criminal activity going on. All right. Nevada would want to know about that as well.

And so with regard to the preemption issue when it comes to defamation, the facts clearly establish that there are no malice -- excuse me, there is no malice, and there's no facts developed by the Plaintiffs to show malice.

There are three privileges I pointed out to the Court that apply. One of those is internal business communication, another is the common interest privilege. Both of those can be overcome by malice as well. So malice applies to those. One case that doesn't -- or one privilege that does not rely on malice is a required communication.

A required communication, when it's reported to somebody with proper authority for a proper purpose, Nevada case law, it's the *Kookinati* [phonetic] case, I believe, makes clear that that type of report is without question privileged, and it's absolute there's no definition.

Do you have any questions with regard to those issues?

THE COURT: Well, with respect to then the outcome, the ruling that you're seeking, the preemption would apply not only to the contract claims to the tortious discharge claims, but your view would

also extend to the defamation cause of action that -- those tort claims as well?

MR. JAMES: Yes, they do. But I want to be clear about this. And, you know, my duty to the Court is to help you make the decision.

So with regard LMRDA preemption of a tort claim of defamation, the tort claim should, according to the case law, the way I read it, also include -- be based upon the action for the dismissal. So if the tort was involved with the action of dismissal, then the LMRDA preemption would apply. The preemption that I just talked to you about, that's separate than the LMRDA preemption. That's general labor law preemption. So there's a little bit of a distinction there. Did I make that clear?

THE COURT: No.

MR. JAMES: All right. So in *Screen Extras Guild*, let's take that for example.

THE COURT: Uh-huh. Right.

MR. JAMES: In that particular case, the Court ruled that the Plaintiff's defamation case or claim was preempted, because it was just a repackaging of her wrongful termination. All right. They were related. They happened together.

In our particular case, what we have is we have a defamation claim that according to the Plaintiffs, and he's going to raise this, so I'll address it now, happened months before her termination. Now in some of their briefing, they do argue that the defamation claim was the source of her termination. If that's the case, then *Screen Extras Guild* applies,

all right. But even if it's not the case, as I just argued a few minutes ago, federal labor law requires defamation claims to be preempted if they deal with the internal workings of the Union.

THE COURT: Okay.

MR. JAMES: So there's these two separate theories out there. Did that clarify it for you?

THE COURT: Yes. Thank you.

MR. JAMES: Okay. Anything else?

THE COURT: So the relief being sought is that with -- and, as you said, you've got your defenses to the actual contract causes of action, breach of conduct, all those kinds of things in here, and I just wanted to clarify that under either the state law or the federal preemption concept, your view is the entire case would be dismissed?

MR. JAMES: Yeah. I don't see a claim that could move forward on the facts and the law.

THE COURT: All right. Thanks.

MR. MCAVOYAMAYA: Again, Your Honor, the Defendant continue -- the Defendants continue to cite to federal labor law -- preemption law for the -- under the LMRDA. And again, there just is none that exists. It's just not existent. No federal, circuit, or supreme court case has ever held that the LMRDA preempts state wrongful termination cases or defamation cases. It's just non-existent.

The Defendants rely on the *Screen Extras Guild* -- if there were, if there were a federal case that said the LMRDA preempts state wrongful termination cases for breach of a for cause contract or state

defamation cases, I assure you they would have cited it. They do not --

THE COURT: Well, are there cases that say that it doesn't?

MR. MCAVOYAMAYA: There are -- I mean, no federal court has ever -- and there -- yeah, absolutely. There are numerous cases that say that the LMRDA does not preempt anything.

THE COURT: Okay.

MR. MCAVOYAMAYA: I mean that *Brown* case that is actually cited by the *Screen Extras Guild* court actually states, you know, Congress expressly disclaimed preemption. You know, and the dissent in *Screen Extras Guild* notes it as well. And that dissent is extremely thorough. There is just no indication in federal law that the LMRDA preempts anything. And when you're conducting the preemption analysis it's congressional intent that is at issue.

And the Defendants have cited to nothing in the congressional record or in the statutes of the LMRDA that indicates that it was intended to preempt state law. Plaintiffs have cited six separate statutes --

THE COURT: Uh-huh.

MR. MCAVOYAMAYA: -- in the LMRDA that disclaimed preemption. That is the congressional intent.

Further, the Defense have really done nothing to explain how enforcing Plaintiffs' contracts would actually conflict with the LMRDA. The *Screen Extras Guild* holding is about union democracy and the right of an elected union official after they have been elected -- and this goes to Defendant's argument about the Obama administration. When an

incumbent elected union official comes in after an election to effectuate the mandate of the election, you know, they get to appoint all their appointees. You know, that is what the *Screen Extras Guild* case held. And every single case applying that doctrine, every single one, all the cases in California, all the cases in the other states that have applied it, every single time determination is by an elected union official.

All the State Supreme Court cases involved high level union business agents in that -- whose positions were defined by the union's constitution. None of them had for cause contracts and all of them were just simply bringing their action under the state wrongful termination law. But that's the interplay there. You know, the -- those employees' employment was expressly governed by the documents of the union. The business agent position was defined, who could appoint the position was defined, and the fact that the position was at will is defined in the governing documents, and that that -- those contracts could not be superseded by an outside contract.

Plaintiffs' employment was not governed by either the local limit of constitution or the international constitution. It's just not in there. The closest they come to is the trusteeship provision of the international constitution, but the fact is if that applied why is it that the staff union of Local 1107's collective bargaining agreement is still enforceable. The NRLB has concluded it's enforceable. The Federal District Court of Nevada has concluded it's enforceable.

If the trustees could terminate any employee, why is that contract under federal law enforceable, but the state contract would not

be enforceable. It's just -- it makes no sense. I mean, and if they're going to argue that the international constitution allows them to terminate any employee, why is it that they have collective bargaining agreements with staffing unions all over the United States and that those contracts are consistently held enforceable under the Federal Labor Law? It's just -- it's not sensible.

And, again, they still have not --

THE COURT: Well, they're very different.

MR. MCAVOYAMAYA: Huh?

THE COURT: The contract -- a negotiated union contract, that's what the LMRDA is about. I mean, you protect negotiated unions -- the whole purpose is to have a union to represent you, so you protect those contracts. The question on these is whether employees who have an individual --

MR. MCAVOYAMAYA: Yes. Well, the thing is --

THE COURT: -- claim.

MR. MCAVOYAMAYA: But if they can --

THE COURT: If that's also --

MR. MCAVOYAMAYA: -- if they can determine -- that -- the -- what I'm explaining right here relates to their argument that Plaintiffs' employment was governed by the international constitution and that trustee provision, which states that the trustee can terminate any employee. Any employee means any employee. So if it doesn't apply to the staff union, why would it apply to the other union members who have an independent contract? It just doesn't make any sense. That's

where I was going with that.

THE COURT: Okay.

MR. MCAVOYAMAYA: It's not about the -- you know, the differences in the federal law.

THE COURT: Okay.

MR. MCAVOYAMAYA: It has to do with the -- whether or not Plaintiffs' employment was governed by the constitution of the international local union, it absolutely is not. And further, the Local 1107 constitution expressly contemplates individual contracts.

So I would like to move on then to the -- and again, the elected union officials, I mean that -- the elected union official issue, I mean that is the framework of that state LMRDA preemption law. Every single case it emphasizes the right of an elected union official to hire its own administrators. No elected union official was at Local 1107 at the time of Plaintiffs terminations. Plaintiffs were not terminated by an elected union official. There was no election that was held after -- you know, where an elected union official has a mandate of the election. None of that is at issue.

The cases -- and when Plaintiffs pointed out that consistency among the state law that they asked to be applied here, the Defendants revert to federal law on the LMRDA. And all of that federal law, the only thing that it concludes is that a plaintiff does not have an LMRDA cause of action under Title 1 of the LMRDA, because Title 1 of the LMRDA protects membership rights. It does not protect the right of continued union employment by union -- appointed or elected union employees --

by union member employees.

So a union member -- all of that case law, *Finnegan*, *Bloom*, *Lynn*, *Dean*, *Pate*, all of those cases deal with the LMRDA. They deal with a union member employee in an appointed or elected position suing under the LMRDA under Title 1, and it simply just does not apply. And no federal court case has applied that principle to a state cause of action.

THE COURT: Okay.

MR. MCAVOYAMAYA: The *English* case -- and then they turn to *Vought* and *English*. And *English* actually undermines their argument. I mean, *English* was -- the LMRDA claim was the same LMRDA claim in all the federal case law. A union officer -- former union officer that was demoted after imposition of the trusteeship, but appointed to a position at the local by the trustee, brought the LMRDA claim after he was terminated by the SEIU International trustees, and the Court held that the LMRDA, Title 1, does not protect the right to continued appointed union employment.

Plaintiffs were not appointed employees. They were hired via application. They were salaried employees hired by Mancini. They're simply not appointed employees, they're not elected employees, and like that doctrine just doesn't apply to them.

Moving on to the defamation issue to address a few things. The defamation claim arised [sic] well before determinations. It arose back in August. And that was the entire point of the International's opposition to being subject to that claim, that they were third-party and

prior to -- and the claim arose prior to the imposition of the trusteeship. So the notion that it is somehow preempted when the conduct was before the imposition of the trusteeship and before the termination by the trustees is just -- it doesn't -- it's a nonsensical argument.

The malice is also clear. The Defense ignore the timeline of when this report by Kisling was presented to the board. On August 17th, 2016, Kisling shows up -- and this is all in the internal needs and the internal charges hearing report, which the Defendants have submitted as evidence. The SEIU International Defendants submitted it as evidence in their motion for summary judgment. Kisling showed up at the union hall, began screaming, was irate, assaulted one of Mancini's directors.

Afterwards, she sought guidance from the attorney on the authority of her to terminate local staff while Mancini was on vacation. When the attorney told them that the only way that she could get that authority is by the executive board giving her the authorization, she then writes that report, calls the emergency board meeting, and makes the defamation against Dana Gentry and argues for the terminations of Peter Nguyen, Robert Clarke, and Dana.

THE COURT: I'm going to let him say a few words in conclusion, and then we'll get to your motion.

MR. MCAVOYAMAYA: Okay.

THE COURT: Okay. So, counsel, anything --

MR. COHEN: Go ahead, your --

THE COURT: It was his motion.

MR. JAMES: Okay. Just a couple of quick points. The idea

that the Plaintiffs are not union employees, so the preemption can't apply to them, the *Screen Extras Guild* Plaintiff was not -- excuse me, not union members. The Plaintiffs were not union members. The *Screen Extras Guild* Plaintiff was not a union member. But the argument is specious because if you could sidestep the intent of Congress as established in *Finnegan* of effective union governance by employing non-union members you would effectively sidestep the LMRDA altogether.

And so, the preemption has to apply to union employment contracts, whether you're a union member or not, and all the case law bears that out. The *English* case, the plaintiffs were actually part of the staff union. A collective bargaining agreement did apply there, so I think I pointed that out in the papers.

And then the idea of malice. What he's talking about Ms. Kisling's trouble with another employee, and he's trying to impute that to Ms. Gentry, the employee he's talking about is Peter Nguyen. Peter Nguyen has brought his own lawsuit. We have a motion to coordinate that case on calendar already. All right.

So what he's basically saying is because Ms. Kisling didn't like Peter Nguyen, therefore that shows malice towards Ms. Gentry. If somebody can explain that to me I would be happy, because I don't see the connection.

THE COURT: Thank you. All right. So then we have the Plaintiffs' motion for summary judgment. And, again, we've gone over all of these issues, so yours was a partial.

MR. MCAVOYAMAYA: Yeah. Well, it's just for the -- you know, because we seek a hearing to prove up the damages. But the bottom line here is, Your Honor, the Defendants really do not dispute the merits of this case at all. They do not dispute that Plaintiffs had for cause contracts, that those contracts included a clause that had to go through a panel of the executive board for hearing to determine the factual basis for the for cause termination.

There's no dispute as to that. You know, the contracts are there. So absent preemption, you know, the case -- the contracts are enforceable. The closest thing that they come to arguing the merits of the breach of contract case is the legitimate organizational purposes of defense. It's found in their opposition to my motion for summary judgment, on page 11. They devote less than one page to this defense. And likely because, like the preemption defense they seem to apply here, they're asking to apply law outside the State of Nevada, when Nevada has established law on the legal issue, like the preemption issue.

The main Supreme Court case is distinguishable from this case, because it involved evidence presented by the defendant employer that it could not afford to continue to employ the employee. The for cause term was not defined and did not rule out a legitimate business purpose like that where the employer can't afford the employee.

That's not at issue here. You know, there is no -- you know, and the Defendants -- another thing I would note, and I think maybe you remember, maybe you don't. When I filed the initial motion for summary judgment, the Defendants argument was, oh, well, we have an

after acquired evidence defense. And then I pointed out that the act to require evidence in Nevada and everywhere else is a mitigation of damages defense, it is not a defense of the merits.

And the Defendants now try to bootstrap that argument by citing to evidence that Plaintiffs had some kind of animosity towards the trusteeship, that the trustees did not know about when the termination occurred. They didn't have Plaintiffs' text messages. They didn't have Plaintiffs' testimony. And they admitted in discovery, in the request for admission that they had no reason to believe that Plaintiffs were opposed to the trusteeship.

And so because of that, they cannot rely on this after acquired evidence to support a legitimate business, you know, organizational purpose defense. And it's also not the law of Nevada.

THE COURT: Okay.

MR. MCAVOYAMAYA: The case that they -- the Nevada cases they do cite, undermines their argument. It's *Vargas*, 111 Nev. 1064. The Nevada Supreme Court concluded that a discharge for just or good cause is one which is not for an arbitrary, capricious, or a legal reason, and which is one based on the facts supported by substantial evidence and reasonably believed by the employer.

The Defendants have presented no evidence that they reasonably believe that Plaintiffs were against the trusteeship or any other legitimate for cause basis. They just have identified none. The termination letters themselves indicate no legitimate for cause basis. They just stated they were going to hire other people, because -- that we

are confident that can carry out the new policies and programs of the union.

Now --

THE COURT: Okay. But didn't -- I forget what his first name is -- Robert sent out an email saying they shouldn't vote for the trusteeship? Wasn't he opposed to it from beginning?

MR. MCAVOYAMAYA: No. And that -- there is no email from him that occurred before the terminations. And it was the -- I believe it was afterwards there was a discovered -- there are emails and other stuff between the Plaintiffs --

THE COURT: Okay.

MR. MCAVOYAMAYA: -- after the termination, like the article that they did. But that's after the termination. That isn't even after acquired evidence. That is not admissible at all because -- obviously, they had animosity towards the trusteeship after they were terminated by the trustees. You know, there's absolutely no reason that they can rely on that evidence.

THE COURT: Okay.

MR. MCAVOYAMAYA: So the only evidence they could rely on is Mr. Clarke's text message, as after acquired evidence, but they didn't know of it at the time. They hadn't had the text messages at the time.

And so because after acquired evidence is a damages defense, they can't now use that as some argument that there is a legitimate business organizational purpose. And again, that's just simply

not the --

THE COURT: Okay.

MR. MCAVOYAMAYA: -- not Nevada's law. And *Vargas* -- in *Vargas*, the employer, you know, was dealing with an employee who had been accused by five different people of sexual assault, and they conducted an investigation, got statements from people, and then after counsel recommended that he be terminated, they terminated his employment. That was considered reasonable belief. And that's happened here.

THE COURT: And so your request for relief here is that -- when you said partial summary judgment, summary judgment on liability as to --

MR. MCAVOYAMAYA: As to the breach of contract. So the existence of the for cause contract and the duties thereunder, the breach of the contract, and proximate cause, and then we'll just deal with damages afterwards.

THE COURT: Okay.

MR. MCAVOYAMAYA: And so --

THE COURT: So with respect to contracts, there's no punitive damages for contracts, so you're just looking to prove up like actual damages?

MR. MCAVOYAMAYA: Actual damages, yes.

THE COURT: Okay. Uh-huh. Okay.

MR. MCAVOYAMAYA: The Defense also cite to the trusteeship order for the basis of their argument that the staff was an

issue --

THE COURT: Uh-huh.

MR. MCAVOYAMAYA: -- at the Local and that's why they terminated Plaintiffs.

Now if you look at that document -- and actually I have it here if you would like to look at it yourself. I can bring it up to you if you want. But the trusteeship order itself makes two -- there's two paragraphs that mention the staff.

The first one is the communication breakdown in the Local impeded staff oversight, leaving local staff without clear direction on the work they are required to perform, to whom they should report, and for whom they will receive feedback. The confusion impedes the proper and efficient functioning of the Local and distracts the staff from expending resources and energy towards serving the membership.

The second paragraph is a paragraph about Kisling terminating the staff while Mancini was on vacation. Obviously, that paragraph is not relevant. The paragraph above it relates directly to the internal needs report and recommendation by Carol Neeters [phonetic]. The SEIU International Defendants cite -- include it as Exhibit E, I believe, to their -- to the Fitzpatrick declaration.

There is an entire section about the communication breakdown in that document, and the communication breakdown that was at issue in that document and in the trusteeship order was the communication between the Executive Vice President and the President on the authority to direct the staff.

THE COURT: Okay.

MR. MCAVOYAMAYA: It had nothing to do with Plaintiffs as directors.

THE COURT: All right. Thank you. All right. So, opposition.

MR. JAMES: Sure. A couple of quick points. Sure the trusteeship order in the case that there was a communications breakdown problem, also a financial problem. Who was in charge of finances? Robert Clarke, the Plaintiff. Who was in charge of communications? Dana Gentry, a Plaintiff.

The argument he just read to you sure, that fits. That's a legitimate business purpose under Nevada law that would allow us to terminate it because as Mr. Cohen has pointed out, as the federal court has found, the union was in disarray. And to allow continued appointed department heads that overseeing part of the problem to continue to function, I think that would have been potential liability for the trustees under 29 U.S.C. 501.

So one other point, when he refers to the contract. Paragraph 6 of the contract, if you're interested, I'm looking at my appendix that I filed, it's on page 39, indicates that these individuals can be terminated by the president, an appeal right to the executive board. The president is gone, the executive board's gone. They had a federal right --

THE COURT: Uh-huh.

MR. JAMES: -- to impose the trusteeship. The trustees have a right to make these employment determinations based upon the

information they perceive at the time.

One additional fact, Your Honor. Within a matter of days of arriving here, the trustees convened the employees. They had them fill out questionnaires of what their duties are. The questionnaires filled out by the Plaintiffs track their job responsibilities. They're high level individuals. There's no indication as the Plaintiffs had implied that the trustees -- or we're not relying upon the trusteeship order and what it actually says in the order with regard to the problem of communications, with regard to the problem of finances.

So the facts that they're trying to raise here, it's a little bit of a red herring. Any questions?

THE COURT: Thank you. I guess I do have -- I guess I do have one question, which is the distinction we have here and what Mr. Mcavoyamaya was talking about was in ordinary circumstances, normal circumstances, if we hadn't had this trusteeship imposed we would be talking about a different situation. If it was just the president decided -- had decided that when this alleged, you know, drinking thing came up, to just fire her then and didn't go through this process, it would be a different situation.

What makes this situation unique and what falls under the concept of this federal preemption under *Leu* that follows and in this California Supreme Court case, which we defer to California on a great deal of things, is where you have this change in leadership.

MR. JAMES: Yeah, this is critical.

THE COURT: I mean, it's unfortunate that this -- they are part

of the whole turmoil that happened at the time that the trusteeship was imposed. Okay. Okay. I'm done.

I'm granting summary judgment with respect to both the Defendants. I believe this case is preempted. This falls directly under the *Screen Extras Guild* case. Nevada does look to California for guidance when we don't have on-point Nevada law. That is -- their analysis of federal preemption is the same. They use different terminology, but it tracks the same. The exact same concepts of preemption follow.

And as I said, it's unfortunate if we weren't in the middle of this whole meltdown of the SEIU, and if it had just been a termination of your client, they fired her on the day that somebody said something about her, we would be talking about something entirely different, because then your clients would have a case, but they didn't.

This was done under this concept of taking over the union through the trusteeship, which this *Leu* case makes very clear, whatever it is when there's a change of union leadership, they're entitled to make changes. It's unfortunate that your clients --

MR. MCAVOYAMAYA: Which case?

THE COURT: The federal case where they talked about, you know, you can make changes in federal --

MR. MCAVOYAMAYA: With *Finnegan*?

THE COURT: *Finnegan*. Yeah, *Finnegan v. Leu* or whatever it was. Yeah, *Finnegan v. Leu*, L-E-U.

MR. MCAVOYAMAYA: Yeah, Leu.

THE COURT: *Finnegan v. Leu*. I mean that starts this whole chain --

MR. MCAVOYAMAYA: So you're --

THE COURT: -- of case law.

MR. MCAVOYAMAYA: So I just -- I would like -- I would ask two things --

THE COURT: Sure.

MR. MCAVOYAMAYA: -- if you would address it in the order. Number one, address Nevada's strong presumption against preemption of state law. I would ask that you at least address that, because California does not address -- the California Supreme Court --

THE COURT: Uh-huh.

MR. MCAVOYAMAYA: -- does not address that. So Nevada law is that there's a strong presumption against it. And then I would ask that you analyze why the Defendants have rebutted that strong presumption.

THE COURT: I'm not doing this order. They're doing the order.

MR. MCAVOYAMAYA: Okay.

THE COURT: So put that in there and please show it to Mr. Mcavoyamaya before submitting it.

I'm granting -- I'm not even getting to these other issues about whether there was a contract. I mean I think the International is out, no matter what, because I don't think they have a contract. But I don't think we can get there, because I think this is -- as I said this is just

unfortunate timing for the Plaintiffs.

MR. MCAVOYAMAYA: Okay. Yeah, I will be filing my --

THE COURT: As I said entirely --

MR. MCAVOYAMAYA: -- notes of appeal immediately.

THE COURT: I don't doubt you will.

MR. MCAVOYAMAYA: Also, that's why I'm glad I put the congressional record in the --

THE COURT: Yeah. It's all in there. It's --

MR. MCAVOYAMAYA: It's all in.

THE COURT: -- hugely well documented. We've got thousands and thousands of pages.

MR. MCAVOYAMAYA: Yeah.

THE COURT: The whole case is dismissed on the basis of federal preemption.

As I said Nevada law favors letting people try to prove their cases. I don't see anything in here that changes that, and that federal preemption is a matter of law. So --

MR. COHEN: Your Honor, can we with respect -- you said that you believe the International is out, because it doesn't have a contract. Are you --

THE COURT: It would be either way, yeah.

MR. COHEN: All right. Can we include in the order a separate basis --

THE COURT: Yeah, the International would be out no matter what. I'm not even going to bother going into all the causes of action

over -- with respect to the other Defendant.

MR. COHEN: And --

THE COURT: I have problems with pretty much all of the causes of action, but I just don't think we can even get into analyzing them all because it's preempted, so why bother.

MR. COHEN: And alter ego, Your Honor, should we address that at all?

THE COURT: No.

MR. COHEN: Okay.

THE COURT: I'm just -- no.

MR. COHEN: Okay.

THE COURT: I mean that's fine. Whatever you put -- no. I mean, I don't care, but, no. I'm not going to make any findings on that.

MR. COHEN: Okay.

THE COURT: There's no contract. They are not -- they are not -- it's not their contract, they aren't the alter ego. No, it's done. The International would be out no matter what.

MR. COHEN: Okay.

THE COURT: I'm just not getting into this whole issue of analyzing each and every one of these causes of action that the Plaintiffs raised against the Local, because it's just preempted, and I'm not going to bother. So we're done.

MR. MCAVOYAMAYA: Can I ask for one more thing?

THE COURT: Yeah.

MR. MCAVOYAMAYA: So there was a motion to relate the

two cases. Can you please rule on the relating of the two cases first, so that the order of preemption applies to both, so that I may now appeal both cases to the Nevada Supreme Court on the issue instead of having to go through other work on the matter to -- in both cases and waste more time?

THE COURT: We have the motion to coordinate, which was filed for January 7, 2020.

MR. MCAVOYAMAYA: No opposition.

THE COURT: I haven't even looked at it.

MR. JAMES: It's based upon a stipulation.

MR. MCAVOYAMAYA: There's a stipulation.

THE COURT: Okay.

MR. MCAVOYAMAYA: And I do not oppose, and I would like to coordinate it, so that the order can say that both cases are dismissed --

THE COURT: So send over --

MR. MCAVOYAMAYA: -- so that I may now --

THE COURT: Appeal both.

MR. MCAVOYAMAYA: -- appeal both.

THE COURT: Okay. So send over the order coordinating the two cases. I mean, technically, in order for them to go up together they have to be consolidated.

MR. MCAVOYAMAYA: So, yeah, I -- make the oral motion or I'll make it.

THE COURT: So coordination, I'm not sure that the Supreme Court would accept an appeal.

MR. MCAVOYAMAYA: We move to consolidate. I move to consolidate. You guys okay with that?

MR. COHEN: Well, I mean, one other option, Your Honor, would be to stay the Nguyen case pending an appeal. And just for context, Your Honor --

MR. MCAVOYAMAYA: We could do that, yeah.

MR. COHEN: -- there are three directors.

THE COURT: Uh-huh.

MR. COHEN: Plaintiffs Gentry and Clarke are two, Plaintiff Nguyen is the third director, and he was terminated around the same time. It's the same exact context. We have the same defenses. And so we're assuming that if Your Honor rules in favor of LMRDA preemption here, Your Honor would rule in favor LMRDA preemption in that other case, Nguyen. And I guess Plaintiffs concern is how do I get them all up.

MR. MCAVOYAMAYA: Yeah.

MR. COHEN: What's the most --

THE COURT: Right.

MR. MCAVOYAMAYA: The most efficient way --

MR. COHEN: Yeah.

MR. MCAVOYAMAYA: -- so we're not wasting both parties time.

THE COURT: So, yeah, I'm looking to see if I've got even the other case number. Yeah, and this is why we send it back when there is a stipulation on it because, technically -- you know, coordination is a very specific thing under our Local Rules, and I don't think it's what you want.

I think what you want is consolidation.

MR. MCAVOYAMAYA: Yeah, that would be great.

THE COURT: And the other case is 794662. So --

MR. COHEN: But, Your Honor, we don't want to reopen discovery. I mean, we don't want consolidation to affect the Gentry and Clarke case at all or --

MR. JAMES: Your Honor, if I may.

THE COURT: Right. So that's the question. Whether you want to instead go back to the judge who's got that one and ask to stay it.

MR. JAMES: If I may. I'm dealing with this in another case. My office is, personally I'm not.

THE COURT: Uh-huh.

MR. JAMES: Where multiple issue, multiple parties come into play. I think an order coordinating the cases with a stipulation to stay the Nguyen case pending the resolution of an appeal in the Gentry case would be the most efficient way to handle this, because it appears to me, and I don't want to put words in Mr. Mcavoyamaya's mouth --

THE COURT: Uh-huh.

MR. JAMES: -- but it appears to me that he's agreeing on the record here that this ruling by you affects the Nguyen case. And so if that's the situation and the Nevada Supreme Court agrees with the ruling, then Nguyen would have to be dismissed. If that's the stipulation we have here, I think that would be the most efficient way of dealing with the issue.

THE COURT: Well, that -- asking him to agree on the merits when nothing has been done, coordinating the cases -- again, coordinating it's nothing -- that's a federal concept. We consolidate. Coordination is when you've got like 95 HOA cases, and they're all going to be doing discovery at one time, under one set of facts. That's coordination under rules. We consolidate cases.

So here if the issue is that the Nguyen case has not been fully litigated, and he thinks there might be some other facts, you know, I'll leave it to you. As I said, stipulation for coordination is not something we can do. If you're going to consolidate them, and then agree to stay Nguyen while we go up on the other one, and that way he's not committing to anything with respect to the facts of this other case, which I don't know anything about --

MR. JAMES: Under the context of consolidation --

THE COURT: Okay.

MR. JAMES: -- they maintain their independent cases. It's just you're consolidating them for --

THE COURT: Correct.

MR. JAMES: -- objection purposes.

MR. MCAVOYAMAYA: Yeah. I would be fine with that as well. Either way. What do you guys want to do?

THE COURT: So give it some thought. Send over whichever agreement you have, and then we'll --

MR. JAMES: All right. Thank you, that's a good idea.

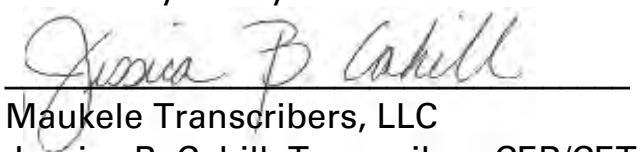
THE COURT: -- finalize it. Okay.

MR. COHEN: And thank you for your time this morning, Your Honor.

THE COURT: Thanks. I appreciate it. Thanks.

[Proceedings concluded at 11:49 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



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EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

* * * *

DANA GENTRY, an individual; and ROBERT CLARKE, an individual,

Plaintiffs,

vs.

SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; LUISA BLUE, in her official capacity as Trustee of Local 1107; MARTIN MANTECA, in his official capacity as Deputy Trustee of Local 1107; MARY K. HENRY, in her official capacity as Union President; SHARON KISLING, individually; CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION dba NEVADA SERVICE EMPLOYEES UNION aka SEIU 1107, a non-profit cooperative corporation; DOES 1-20; and ROE CORPORATIONS 1-20, inclusive,

Defendants.

CASE NO.: A-17-764942-C

DEPT. NO.: 26

FIRST AMENDED COMPLAINT

(JURY TRIAL DEMANDED)

COME NOW, Plaintiffs DANA GENTRY and ROBERT CLARKE, by and through their attorney of record MICHAEL J. MCAVOYAMAYA, ESQ., and hereby complain and allege as follows:

I. PARTIES

1. Plaintiff Dana Gentry is and was at all times relevant herein a resident of Clark County, Nevada.

2. Plaintiff Robert Clarke is and was at all times relevant herein a resident of Clark County, Nevada.

3. Defendant Service Employees International Union (hereinafter referred to as "SEIU") is and was at all times relevant herein a nonprofit corporation with headquarters in Washington D.C. with sufficient contacts with Local 1107 in Clark County, Nevada to confer personal jurisdiction.

4. Defendant Luisa Blue (hereinafter the "Trustee"), at all times relevant herein was present in Clark County, Nevada to confer personal jurisdiction.

5. Defendant Martin Manteca (hereinafter the "Deputy Trustee") at all times relevant herein was present in Clark County, Nevada to confer personal jurisdiction.

6. Defendant Mary Kay Henry (hereinafter "President Henry") on information and belief is a resident of Washington D.C., and at all times relevant herein had sufficient contact with Local 1107 in Clark County, Nevada to confer personal jurisdiction.

7. Defendant Clark County Public Employees Association, dba Nevada Service Employees Union aka SEIU 1107 (hereinafter "Local 1107"), is and was at all times relevant herein a domestic non-profit cooperative corporation, having its main and principal office in Clark County, Nevada.

8. Sharon Kisling, at all times relevant herein was present in Clark County, Nevada to confer personal jurisdiction.

9. The true names of DOES 1 through 20, their citizenship and capacities, whether individual, corporate, associate, partnership or otherwise, are unknown to Plaintiffs who therefore sue these Defendants by such fictitious names. Plaintiffs are informed and believe, and therefore allege, that each of the Defendants, designated as DOES 1 through 20, are or may be legally responsible for the events referred to in this action, and caused damages to the Plaintiffs, as herein alleged, and Plaintiffs will ask leave of this Court to amend the Complaint to insert the true names and capacities of such Defendants, when the same have been ascertained, and to join them in this action, together with the proper charges and allegations.

10. That the true names and capacities of Defendants named herein as DOE AGENCIES 1 through 20 and ROE CORPORATIONS 1 through 20, inclusive, are unknown to the Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the Defendants designated herein as a DOE AGENCIES and/or ROE CORPORATION Defendant is responsible for the events and happenings referred to and proximately caused damages to the Plaintiffs as alleged herein. Plaintiffs will ask leave of the Court to amend the Complaint to insert the true names and capacities of DOE AGENCIES 1 through 20 and ROE CORPORATIONS 1 through 20, inclusive, when the same have been ascertained, and to join such Defendants in this action.

II. JURISDICTION AND VENUE

11. This Court has personal jurisdiction over the Defendants and claims as set forth herein pursuant to NRS 14.065, that such jurisdiction is not inconsistent with the Nevada Constitution or the United States Constitution.

12. Venue is proper in this Court pursuant NRS 13.010 *et seq*. because, among other reasons, Local 1107 operates its principal place of business in Clark County, Nevada. Furthermore, this action arises out of the Contract between the Plaintiffs, Local 1107 and SEIU, which was entered into and performed in Clark County, Nevada.

III. ALLEGATIONS COMMON TO ALL CLAIMS

13. On April 18, 2016, Local 1107 entered into a contract of employment with Plaintiff Dana Gentry (hereinafter the "Gentry Contract"). The Gentry Contract was executed by then Local 1107 President Cherie Mancini and Plaintiff Dana Gentry. The position held by Plaintiff Gentry was Communications Director.

14. On August 23, 2016, Local 1107 extended an offer of employment to Plaintiff Robert Clarke. Plaintiff Robert Clarke accepted the offer of employment with Local 1107 on or about September 6, 2016 (hereinafter the "Clarke Contract"). The Clarke Contract was

executed by then Local 1107 President Cherie Mancini and Plaintiff Robert Clarke. The position held by Plaintiff Clarke was Director of Finance and Human Resources.

15. Both the Gentry Contract and the Clarke Contract contain the same termination clause, which states: "Termination of this employment agreement may be initiated by the SEIU Nevada President *for cause* and is appealable to the local's Executive Board, which shall conduct a full and fair hearing before reaching a final determination regarding your employment status."

16. On April 28, 2017, Defendant SEIU President Mary Kay Henry placed Local 1107 under trusteeship and appointed Defendants Luisa Blue and Martin Manteca as Trustee and Deputy Trustee, respectively.

17. On April 28, 2017, the managing staff of Local 1107 were told to stay home.

18. On May 4, 2017, Defendant Deputy Trustee Martin Manteca delivered a letter to Plaintiff Robert Clarke informing Clarke that his employment with Local 1107 was terminated effective immediately.

19. On May 4, 2017, Defendant Deputy Trustee Martin Manteca delivered a letter to Plaintiff Dana Gentry informing Gentry that her employment with Local 1107 was terminated effective immediately.

20. Both the letter to Clarke and the letter to Gentry contained the same language regarding their termination: "the Trustees will fill management and other positions at the Local with individuals they are confident can and will carry out the Local's new program and policies. In the interim, the Trustees will largely be managing the Local themselves with input from member leaders. For these reasons, the Trustees have decided to terminate your employment with Local 1107, effective immediately."

21. Plaintiff Robert Clarke could not appeal the termination decision to Local 1107's Executive Board because the Board had been disbanded by SEIU, and Deputy Trustee

Manteca and Trustee Luisa Blue have exclusive control over Local 1107 since the Trusteeship was imposed.

22. Plaintiff Dana Gentry could not appeal the termination decision to Local 1107's Executive Board because the Board had been disbanded by SEIU, and Deputy Trustee Manteca and Trustee Luisa Blue have exclusive control over Local 1107 since the Trusteeship was imposed.

FIRST CAUSE OF ACTION
Breach of Contract – Dana Gentry

23. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

24. That Local 1107 entered into a valid and binding Employment Contract with Dana Gentry.

25. That said Employment Contract contained a clause specifying that termination of Plaintiff's employment could only be initiated for cause.

26. That Deputy Trustee Manteca and Trustee Blue are the interim managers of Local 1107 while it is under Trusteeship, and the Executive Board is disbanded, leaving Plaintiff no avenue to appeal the termination decision.

27. That Deputy Trustee Manteca and Trustee Blue as the managers of Local 1107 breached the Employment Contract by terminating Plaintiff Dana Gentry without cause.

28. That Plaintiff Dana Gentry has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

SECOND CAUSE OF ACTION
Breach of Contract – Robert Clarke

29. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

30. That Local 1107 entered into a valid and binding Employment Contract with Robert Clarke.

31. That said Employment Contract contained a clause specifying that termination of Plaintiff's employment could only be initiated for cause.

32. That Deputy Trustee Manteca and Trustee Blue are the interim managers of Local 1107 while it is under Trusteeship, and the Executive Board is disbanded, leaving Plaintiff no avenue to appeal the termination decision.

33. That Deputy Trustee Manteca and Trustee Blue as the managers of Local 1107 breached the Employment Contract by terminating Plaintiff Robert Clarke without cause.

34. That Plaintiff Robert Clarke has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

THIRD CAUSE OF ACTION
Breach of Implied Covenant of Good Faith and Fair Dealing – Contractual Breach
Dana Gentry

35. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

36. Plaintiff Gentry entered into a valid and binding Employment Contract with Local 1107.

37. That Defendant Local 1107, their parent union SEIU, and the Deputy Trustee Manteca and Trustee Blue owed a duty of good faith to Plaintiff Gentry to perform under the employment agreement, which could only be terminated for cause.

38. That Defendants breached their duty of good faith by terminating the Employment Contract between Local 1107 and Plaintiff Gentry in order to fill Gentry's position with individuals the Trustees would choose, which was unfaithful to the purpose of the Gentry Contract that specified employment could only be terminated for cause.

39. That Plaintiff Gentry had the justified expectation that her employment could only be terminated for cause.

40. That Defendants' breach denied Plaintiff Gentry her justified expectation that she could only be terminated for cause.

41. That Plaintiff Dana Gentry has sustained damages as a result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

FOURTH CAUSE OF ACTION
Breach of Implied Covenant of Good Faith and Fair Dealing – Contractual Breach
Robert Clarke

42. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

43. Plaintiff Clarke entered into a valid and binding Employment Contract with Local 1107.

44. That Defendant Local 1107, their parent union SEIU, and the Deputy Trustee Manteca and Trustee Blue owed a duty of good faith to Plaintiff Clarke to perform under the employment agreement, which could only be terminated for cause.

45. That Defendants breached their duty of good faith by terminating the Employment Contract between Local 1107 and Plaintiff Clarke in order to fill Clarke's position with individuals the Trustees would choose, which was unfaithful to the purpose of the Clarke Contract that specified employment could only be terminated for cause.

46. That Plaintiff Clarke had the justified expectation that his employment could only be terminated for cause.

47. That Defendants' breach denied Plaintiff Clarke his justified expectation that he could only be terminated for cause.

48. That Plaintiff Robert Clarke has sustained damages as a the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

FIFTH CAUSE OF ACTION
Breach of Covenant of Good Faith and Fair Dealing – Tortious Breach
Dana Gentry

49. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

50. That Plaintiff Gentry entered into an employment contract with Local 1107.

51. That Defendant Local 1107, their affiliate parent union SEIU, and the Deputy Trustee Manteca and Trustee Blue owed a duty of good faith to Plaintiff Gentry to perform under the employment agreement, which could only be terminated for cause.

52. That a special element of reliance or fiduciary duty existed between Plaintiff Gentry and Defendants Local 1107, SEIU, SEIU President Henry, Deputy Trustee Manteca and Trustee Blue where Defendants were in a superior or entrusted position as Plaintiff's employer.

53. That Defendants collectively breached that duty by terminating the employment agreement between Local 1107 and Plaintiff Gentry in order to fill Gentry's position with individuals the Trustees would choose, which was unfaithful to the "for cause" purpose of the Gentry Contract and amounts to engaging in misconduct under the Gentry Contract.

54. That Plaintiff Dana Gentry has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

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SIXTH CAUSE OF ACTION
Breach of Covenant of Good Faith and Fair Dealing – Tortious Breach
Robert Clarke

55. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

56. That Plaintiff Clarke entered into an employment contract with Local 1107.

57. That Defendant Local 1107, their parent union SEIU, and the Deputy Trustee Manteca and Trustee Blue owed a duty of good faith to Plaintiff Clarke to perform under the employment agreement, which could only be terminated for cause.

58. That a special element of reliance or fiduciary duty existed between Plaintiff Clarke and Defendants Local 1107, SEIU, SEIU President Henry, Deputy Trustee Manteca and Trustee Blue where Defendants were in a superior or entrusted position as Plaintiff's employer.

59. That Defendants collectively breached that duty by terminating the employment agreement between Local 1107 and Plaintiff Clarke in order to fill Clarke's position with individuals the Trustees would choose, which was unfaithful to the "for cause" purpose of the Clarke Contract and amounts to engaging in misconduct under the Clarke Contract.

60. That Plaintiff Robert Clarke has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

SEVENTH CAUSE OF ACTION
Intentional Interference with Contractual Relations – All Plaintiffs against Defendants SEIU, Henry, Blue and Manteca

61. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

62. That there exist two valid contracts between Plaintiff Gentry and Local 1107 and Plaintiff Clarke and Local 1107 containing the for cause termination provision.

63. That Defendant Manteca, Defendant Blue, and Defendant Henry are third parties who took control of Local 1107 and knew of the existence of these contracts.

64. That Defendants Manteca, Blue and Henry committed intentional acts in the form of terminating the for cause contracts between Plaintiffs Clarke and Gentry and Local 1107.

65. That terminating the Plaintiffs' for cause contracts caused an actual disruption of Plaintiffs' valid employment contracts with Local 1107.

66. That Plaintiff Robert Clarke has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

67. That Plaintiff Dana Gentry has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

EIGHTH CAUSE OF ACTION
Wrongful Termination – Breach of Continued Employment Contract
Dana Gentry

68. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

69. That Defendant Local 1107 and Plaintiff Gentry entered into an employment contract on April 18, 2016.

70. That Defendant Local 1107 expressly agreed with Plaintiff that employment was to be for an indefinite term and could be terminated only for cause.

71. That Defendant Local 1107 and Defendants Manteca and Blue breached the Employment Contract by terminating Plaintiff Gentry without cause.

72. That Plaintiff Dana Gentry has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

NINTH CAUSE OF ACTION
Wrongful Termination – Breach of Continued Employment Contract
Robert Clarke

73. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

74. That Defendant Local 1107 and Plaintiff Clarke entered into an employment contract on September 6, 2016.

75. That Defendant Local 1107 expressly agreed with Plaintiff that employment was to be for an indefinite term and could be terminated only for cause.

76. That Defendant Local 1107 and Defendants Manteca and Blue breached the Employment Contract by terminating Plaintiff without cause.

77. That Plaintiff Robert Clarke has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

TENTH CAUSE OF ACTION
Wrongful Termination – Bad Faith Discharge
Dana Gentry

78. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

79. That Defendant SEIU 1107 and Plaintiff Gentry entered into an employment contract on April 18, 2016.

80. That Plaintiff established contractual rights of continued employment and developed a relationship of trust, reliance and dependency with Defendant Local 1107 by performing her employment duties for Local 1107 through April 2017.

81. That Defendant Local 1107 and Defendants Manteca, Blue and Henry, acting in bad faith, breached the employment contract by discharging Plaintiff Gentry without cause.

82. That Plaintiff Dana Gentry has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

ELEVENTH CAUSE OF ACTION
Wrongful Termination – Bad Faith Discharge
Robert Clarke

83. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

84. That Defendant Local 1107 and Plaintiff Clarke entered into an employment contract on September 6, 2016.

85. That Plaintiff established contractual rights of continued employment and developed a relationship of trust, reliance and dependency with Defendant Local 1107 by performing his employment duties for Local 1107 through April 2017.

86. That Defendant Local 1107 and Defendants Manteca, Blue and Henry, acting in bad faith, breached the employment contract by discharging Plaintiff Clarke without cause.

87. That Plaintiff Robert Clarke has sustained damages in the result of said breach in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiff's reasonable attorneys' fees and costs.

TWELFTH CAUSE OF ACTION
Tortious Discharge - Dana Gentry

88. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

89. That Defendant Local 1107, at the direction of and through the actions of Defendants SEIU, Manteca, Blue and Henry improperly dismissed Plaintiff Gentry in order to

fill Plaintiff's position with individuals who would carry out SEIU's new program and policies at Local 1107, which violates public policy upholding "for cause termination" provisions in employment contracts.

90. That as a result, Plaintiff has sustained damages in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiffs' reasonable attorneys' fees and costs.

THIRTEENTH CAUSE OF ACTION
Tortious Discharge - Robert Clarke

91. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

92. That Defendant Local 1107, at the direction of and through the actions of Defendants SEIU, Manteca, Blue and Henry improperly dismissed Plaintiff Clarke in order to fill Plaintiff's position with individuals who would carry out SEIU's new program and policies at Local 1107, which violates public policy upholding "for cause termination" provisions in employment contracts.

93. That as a result, Plaintiff has sustained damages in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiffs' reasonable attorneys' fees and costs.

FOURTEENTH CAUSE OF ACTION
Negligence

94. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

95. That Defendant Local 1107 owed a duty of care to Plaintiffs as Plaintiffs' employer to ensure that Plaintiffs would only be terminated for cause.

96. That Defendants Manteca and Blue owed a duty of care to Plaintiffs as the acting managers of Local 1107, which employed Plaintiffs, to ensure that Plaintiffs would only be terminated for cause.

97. That Defendants Local 1107, Manteca and Blue breached that duty by terminating Plaintiffs without cause.

98. That Defendants Manteca and Blue further breached the duty of care by failing to inspect the Plaintiffs' contracts for employment before terminating Plaintiffs.

99. That Defendants' breach of the duty of care caused Plaintiffs to be terminated without cause, in violation of their employment contracts.

100. That as a result of said breach, Plaintiffs have sustained damages in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiffs' reasonable attorneys' fees and costs.

FIFTEENTH CAUSE OF ACTION
Defamation – Dana Gentry Against Sharon Kisling and SEIU Local 1107

101. Plaintiffs restate and reallege all preceding and subsequent allegations as though fully set forth herein.

102. That Defendant Sharon Kisling made a false a defamatory statement alleging that Plaintiff Dana Gentry was drinking during performance of her employment and using the union's credit card for personal expenses without authorization.

103. That an unprivileged publication of this statement was made to third persons when Defendant Kisling sent a memo containing the unfounded allegations to the Local 1107 Executive Board.

104. That the statement included an allegation that Plaintiff Gentry committed a crime, to wit: Plaintiff was stealing money from her employer for personal use constituting defamation per se.

105. That the statement also included an allegation that affected Plaintiff Gentry's business reputation, to wit: that Plaintiff Gentry was drinking alcohol while working for Local 1107 constituting defamation per se.

106. That Plaintiff Gentry requested that Kisling retract the defamatory statement and she refused.

107. That Plaintiff Gentry subsequently request that the Local 1107 Executive Board conduct and investigation and direct Ms. Kisling, the Vice President of Local 1107, to retract the knowingly false defamatory statement.

108. That Plaintiff Gentry informed numerous officials from SEIU International, Local 1107's parent organization, of the defamatory statements made against her by Local 1107's Vice President, Sharon Kisling.

109. That Defendants knew the statements were false.

110. That Defendants were at least negligent in making, and refusing to retract the statements because Defendants knew that the statement was false and were published without regard to the damages it caused Plaintiff Gentry in her employment with the Local Union.

111. That Plaintiff Gentry was subsequently terminated by Defendants without Defendants retracting the defamatory statements.

112. That Plaintiff Gentry has sustained actual or presumed damages as a result of the statement because it damaged her reputation as an employee.

113. That Plaintiff Gentry has sustained damages in an amount in excess of $15,000.00, and the costs and expenses associated in filing this action, including Plaintiffs' reasonable attorneys' fees and costs.

IV. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for Judgment in their favor as follows:

1. Damages in excess of $15,000.00 for each Plaintiff;

2. Compensatory and consequential damages resulting from the injuries caused to Plaintiffs by the breach of the employment contracts with Local 1107;

3. The reasonable attorney's fees and costs to bring this suit and post-judgment interest;

4. Punitive damages for Defendants intentional and malicious conduct and as allowed by law;

5. Such other and further relief as this court deems proper.

Dated this 25th day of March, 2019.

/s/ Michael J. Mcavaoyamaya

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Local Counsel for SEIU International

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; LUISA BLUE, in her official capacity as Trustee of Local 1107; MARTIN MANTECA, in his official capacity as Deputy Trustee of Local 1107; MARY K. HENRY, in her official capacity as Union President; SHARON KISLING, individually; CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107, a non-profit cooperative corporation; DOES 1-20; and ROE CORPORATIONS 1-20, inclusive, Defendants.	CASE NO.: A-17-764942-C DEPT. No. 26 **ANSWER TO AMENDED COMPLAINT**

CHRISTENSEN JAMES & MARTIN, CHTD.
7440 WEST SAHARA AVE., LAS VEGAS, NEVADA 89117
PH: (702) 255-1718 § FAX: (702) 255-0871

NEVADA SERVICE EMPLOYEES UNION ("Local 1107"), misnamed as "CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107" hereby answers Plaintiff Dana Gentry's Amended Complaint as follows:

1. Local 1107 admits the allegations of Paragraphs 7, 16, 17, 18, 19.

2. Local 1107 admits the allegation of Paragraph 20 relating to the language of the employment termination letters to the extent that the allegation accurately reflects the language contained in the letters. The remaining allegations of Paragraph 20 are denied.

3. Defendants deny the allegations of Paragraphs 3-4, 11-15, 21-113,

4. Defendants lack sufficient knowledge and information to form a belief and therefore deny the allegations of Paragraphs 1, 2, 5, 6, 8, 9, and 10.

5. Any allegation not specifically admitted or denied is hereby generally denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim upon which relief can be granted.

2. Denials set forth above are herein incorporated as affirmative defenses.

3. Plaintiffs' claims are preempted by federal law, including but not limited to the Labor Management Reporting and Disclosure Act and the National Labor Relations Act, by which the Plaintiffs could be removed as employees and / or Defendants' speech is protected.

4. Plaintiffs lack standing to assert claims, including but not limited to claims relating to fiduciary duties.

5. Defendants did not publish the alleged statement to a third-party.

6. The conduct alleged was done within the course of employment for which privileges apply.

7. The alleged statements were true.

8. The alleged statements were authorized and / or required as the alleged declarant was an employee of a labor organization.

9. The alleged statements were retracted.

10. The alleged statements are subject to absolute privilege, being made as part of a judicial or quasi-judicial proceeding.

11. The alleged statements are subject to an absolute privilege, being made between union / corporate officers and / or authorized personnel as part of an internal union / corporate communication concerning the business of the company.

12. The alleged statements are subject to an absolute privilege, being made by a union officer to a qualified person as part of a legal and / or fiduciary duty.

13. The alleged statements are subject to a qualified privilege, being made between authorized union / corporate personnel in good faith and upon a common interest.

14. Plaintiff was a limited-purpose public figure and / or public figure for which free speech rights apply and to which defamatory damages to not apply as the matter involved a public concern.

15. Plaintiff cannot establish that the alleged statements were made with malice.

16. Plaintiff self-published the alleged statements.

17. The alleged statements were a matter of opinion.

18. Plaintiff suffered no harm from the alleged statements.

19. Applicable statutes of limitations bar Plaintiffs' causes of action.

20. Plaintiffs' claims are barred by failure to exhaust remedies.

21. Plaintiffs' claims are barred by the doctrine of unclean hands.

22. Defendants acted properly for the purpose of protecting Local 1107's interests, including but not limited to correcting corruption, financial misfeasance, mismanagement, failing union solidarity, failing morale and for the purposes of protecting union certification and collective bargaining agreement negotiations and performance.

23. Plaintiffs have failed to plead causes of action with required specificity.

24. Plaintiffs' claims are reduced, modified and/or barred by the doctrine of waiver.

25. Plaintiffs' claims are reduced, modified and/or barred by the doctrine of estoppel.

26. Plaintiffs' claims are reduced, modified and/or barred by the doctrine of laches.

27. Defendants fully performed contract obligations.

28. The alleged contracts, or portions thereof, are too indefinite to be enforced.

29. Plaintiffs fraudulently induced Local 1107 to hire them by misrepresenting their education and work history and by failing to disclose prior bad acts that would have disqualified them from employment.

30. The alleged contracts expired.

31. Any damages suffered in connection with Plaintiffs' claims are limited by the economic loss doctrine.

32. Plaintiffs are not entitled to relief due to the failure of a condition precedent.

33. Defendants had or acquired for-cause reasons for terminating the alleged contracts.

34. Plaintiffs' claims are barred, in whole or in part, by the doctrines of mistake, excuse and/or nonperformance.

35. Plaintiffs failed to mitigate damages.

36. Plaintiffs suffered no damages.

37. Punitive damage recovery is limited by statute.

38. Plaintiffs' claims are barred, in whole or in part, by the doctrine of novation.

39. Plaintiffs' claims resulted from the actions of a third party over which the Defendants had no control.

40. The liability, if any, of Defendants must be reduced by the percentage of fault of others, including Plaintiff.

41. The liability, if any, of Defendants is several and not joint and based upon their own acts and not the acts of others.

42. Defendants actions were lawful.

43. Pursuant to NRCP 11, all possible affirmative defenses may not have been alleged herein, insofar as sufficient facts were not available after reasonable inquiry upon filing of this Answer, therefore, the answering Defendants reserve the right to amend their Answer to add affirmative defenses should the necessity arise.

NOW, WHEREFORE, the Local 1107 prays as follows:

1. That Plaintiffs take nothing by way of the Complaint,

2. For an award of attorneys fees and costs incurred in this suit herein, and

3. For other and such further relief as the Court deems just and proper.

DATED this 4th day of April, 2019.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*

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Attorneys for Local 1107, Luisa Blue and Martin Manteca

CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served in the following manner on the date it was filed with the Court:

✓ ELECTRONIC SERVICE: Pursuant to Rule 8.05 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, the document was electronically served on all parties registered in the case through the E-Filing System.

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Jonathan Cohen: jcohen@rsglabor.com

__ UNITED STATES MAIL: By depositing a true and correct copy of the above-referenced document into the United States Mail with prepaid first-class postage, addressed as follows:

__ FACSIMILE: By sending the above-referenced document via facsimile as follows:

__ EMAIL: By sending the above-referenced document to the following:

CHRISTENSEN JAMES & MARTIN

By: */s/ Natalie Saville*
Natalie Saville

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Attorneys for Service Employees International Union and Mary Kay Henry

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and ROBERT CLARKE, an individual,

Plaintiffs,

vs.

SERVICE EMPLOYEES INTERNATIONAL UNION. a nonprofit cooperative corporation; LUISA BLUE, in her official capacity as Trustee of Local 1107; MARTIN MANTECA, in his official capacity as Deputy Trustee of Local 1107; MARY K. HENRY, in her official capacity as Union President; SHARON KISLING, individually; CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107, a non-profit cooperative corporation; DOES 1-20; and ROE CORPORATIONS 1-20, inclusive,

Defendants.

Case No.: A-17-764942-C

DEPT. XXVI

DEFENDANTS SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S ANSWER TO FIRST AMENDED COMPLAINT

Service Employees International Union ("SEIU") and Mary Kay Henry ("Henry") (collectively, "Defendants") hereby answer Plaintiffs' first amended complaint as follows:

1. Defendants admit the allegations in paragraphs 7, 16 and 17.
2. Answering paragraph 3, Defendants admit that SEIU has headquarters in Washington D.C., but otherwise deny the allegations.
3. Answering paragraph 6, Defendants admit that Henry is a resident of Washington D.C., but otherwise deny the allegations.
4. Answering paragraph 21, Defendants admit that the Service Employees International Union, Local 1107 Executive Board was suspended following the April 28, 2017 trusteeship, but otherwise deny allegations.
5. Answering paragraph 22, Defendants admit that the Service Employees International Union, Local 1107 Executive Board was suspended following the April 28, 2017 trusteeship, but otherwise deny allegations.
6. Defendants deny the allegations in paragraphs 11-12, and 23-113.
7. Defendants have insufficient knowledge or information to admit or deny the allegations in paragraphs 1-2, 4-5, 8-10, 13-15, 18-20, and therefore deny the allegations.
8. Defendants generally deny any allegation that is not specifically admitted or denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim upon which relief can be granted.
2. Defendants' denials, as set forth above, are herein incorporated as affirmative defenses.
3. Plaintiffs' claims are preempted by federal law, including the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq*.
4. Plaintiffs lack standing to assert claims for breach of fiduciary duty.
5. Defendants are not liable for alleged breach of employment contracts to which they were not parties.
6. Defendants are not liable for alleged tortious conduct related to breach of employment contracts to which they were not parties.
7. The conduct alleged was done within the course and scope of employment for which privileges apply.
8. The alleged defamatory statements were true.

9. The alleged defamatory statements were statements of opinion.
10. The alleged defamatory statements were subject to absolute and/or qualified privilege.
11. Defendants did not publish the alleged defamatory statements to a third party.
12. Plaintiffs cannot establish that the alleged statements were knowingly false and/or made with reckless disregard for their truth or falsity.
13. The alleged defamatory statements were not made with malice.
14. Plaintiffs' claims are barred by applicable statutes of limitations.
15. Plaintiffs' claims are barred by the doctrine of unclean hands.
16. Plaintiffs have failed to plead causes of action with required specificity.
17. Plaintiffs' claims are reduced, modified and/or barred by the doctrine of waiver.
18. Plaintiffs' claims are reduced, modified and/or barred by the doctrine of estoppel.
19. Plaintiffs' claims are reduced, modified and/or barred by the doctrine of laches.
20. Plaintiffs' claims are reduced, modified and/or barred by the doctrine of after-acquired evidence.
21. Defendants fully performed any alleged contract obligations.
22. The alleged contracts, or portions thereof, are too indefinite to be enforced.
23. The alleged contracts expired.
24. Plaintiffs' claims are limited by the economic loss doctrine.
25. Plaintiffs are not entitled to relief due to the failure of a condition precedent.
26. Defendants had cause to terminate the alleged contracts.
27. Plaintiffs' claims are barred, in whole or in part, by the doctrines of mistake, excuse and/or nonperformance.
28. Plaintiffs failed to mitigate damages.
29. Plaintiffs suffered no damages.
30. Punitive damages are limited by statute.
31. Plaintiffs' claims are barred, in whole or in part, by the doctrine of novation.
32. Plaintiffs' claims resulted from the actions of a third party over which the Defendants had no control.

33. The liability, if any, of Defendants must be reduced by the percentage of fault of others, including Plaintiffs.

34. The liability, if any, of Defendants is several and not joint and based upon their own acts and not the acts of others.

35. Defendants' actions were lawful.

36. Pursuant to NRCP 11, all possible affirmative defenses may not have been alleged herein, insofar as sufficient facts were not available after reasonable inquiry upon filing of this Answer. Therefore, the answering Defendants reserve the right to amend their Answer to add affirmative defenses should the necessity arise.

DATED: April 11, 2019

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

By *Evan L. James*
EVAN L. JAMES
JONATHAN COHEN
Attorneys for Service Employees International Union and Mary Kay Henry

CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served in the following manner on the date it was filed with the Court:

✓ ELECTRONIC SERVICE: Pursuant to Rule 8.05 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, the document was electronically served on all parties registered in the case through the E-Filing System.

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Jonathan Cohen: jcohen@rsglabor.com

__ UNITED STATES MAIL: By depositing a true and correct copy of the above-referenced document into the United States Mail with prepaid first-class postage, addressed as follows:

__ FACSIMILE: By sending the above-referenced document via facsimile as follows:

__ EMAIL: By sending the above-referenced document to the following:

CHRISTENSEN JAMES & MARTIN

By: */s/ Natalie Saville*
Natalie Saville

NEOJ
CHRISTENSEN JAMES & MARTIN
EVAN L. JAMES, ESQ. (7760)
7440 W. Sahara Avenue
Las Vegas, Nevada 89117
Telephone: (702) 255-1718
Facsimile: (702) 255-0871
Email: elj@cjmlv.com,
Attorneys for Local 1107, Luisa Blue and Martin Manteca

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and ROBERT CLARKE, an individual,

Plaintiffs,

vs.

SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; LUISA BLUE, in her official capacity as Trustee of Local 1107; MARTIN MANTECA, in his official capacity as Deputy Trustee of Local 1107; MARY K. HENRY, in her official capacity as Union President; SHARON KISLING, individually; CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107, a non-profit cooperative corporation; DOES 1-20; and ROE CORPORATIONS 1-20, inclusive,

Defendants.

CASE NO.: A-17-764942-C

DEPT. No. XXVI

NOTICE OF ENTRY OF ORDER

Please take notice that the attached Order Granting Summary Judgment in Favor of Defendants was entered on January 3, 2020.

DATED this 3rd day of January 2020.

CHRISTENSEN JAMES & MARTIN

By:*/s/ Evan L. James*
Evan L. James, Esq. (7760)
Attorneys for Local 1107, Luisa Blue and Martin Manteca

CHRISTENSEN JAMES & MARTIN, CHTD.
7440 WEST SAHARA AVE., LAS VEGAS, NEVADA 89117
PH: (702) 255-1718 § FAX: (702) 255-0871

CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served on January 3, 2020 upon the following:

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Jonathan Cohen: jcohen@rsglabor.com

Glenn Rothner: grothner@rsglabor.com

Evan L. James: elj@cjmlv.com

CHRISTENSEN JAMES & MARTIN

By: */s/ Natalie Saville*
Natalie Saville

NOA

MICHAEL J. MCAVOYAMAYA, ESQ.
Nevada Bar No.: 014082
4539 Paseo Del Ray
Las Vegas, Nevada 89121
Telephone: (702) 685-0879
Mmcavoyamayalaw@gmail.com
Attorney for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, *et al*. Defendants.	CASE NO.: A-17-764942-C DEPT. NO.: 26 **NOTICE OF APPEAL**

Notice is hereby given that Plaintiff Robert Clarke hereby appeals to the Nevada Supreme Court from the final judgment of the District Court finding Plaintiffs' claims pursuant to Nevada's wrongful termination law preempted by the Labor-Management Reporting and Disclosure Act ("LMRDA") entered in this action on the 3rd day of January, 2020.

DATED this 29th day of January, 2020.

/s/ Michael J. Mcavaoyamaya

_____

MICHAEL J. MCAVOYAMAYA, ESQ.
Nevada Bar No.: 014082
4539 Paseo Del Ray
Las Vegas, Nevada 89121
Telephone: (702) 299-5083
Mmcavoyamayalaw@gmail.com
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of January 2020, the undersigned served the foregoing **NOTICE OF APPEAL** on all counsel in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

CHRISTENSEN JAMES & MARTIN
EVAN L. JAMES, ESQ. (7760)
7440 W. Sahara Avenue
Las Vegas, Nevada 89117
Telephone: (702) 255-1718
Facsimile: (702) 255-0871
Email: elj@cjmlv.com,
kba@cjmlv.com
Attorneys for Local 1107 Defendants

ROTHNER, SEGALL &
GREENSTONE
GLENN ROTHER (PRO HAC VICE)
JONATHAN COHEN (10551)
510 South Marengo Avenue
Pasadena, CA 91101-3115
Tel: (626) 796-7555
Facsimile: (626) 577-0214
Email: grothner@rsglabor.com,
jcohen@rsglabor.com
Attorneys for SEIU International
Defendants

Dated this 29th day of January, 2020.

/s/ Michael J. Mcavoyamaya

MICHAEL MCAVOYAMAYA, ESQ.
Nevada Bar No.: 014082
4539 Paseo Del Ray
Las Vegas, NV, 89121
Telephone: (702) 299-5083
Mmcavoyamayalaw@gmail.com
Attorney for Plaintiffs

Electronically Issued
12/14/2017 2:53 PM

SUMM

Electronically Filed
3/13/2018 11:42 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

DANA GENTRY, ROBERT CLARKE, Plaintiffs,	)	Case No. A-17-764942-C
	)	Dept. No. 26
vs.	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Defendants.	)	**SUMMONS - CIVIL**

NOTICE! YOU HAVE BEEN SUED, THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO DEFENDANT: SHARON KISLING

A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

.

Submitted by:

/s/ Michael Mcavoyamaya
Michael J. Mcavoyamaya, Esq.
4539 Paseo Del Ray
Las Vegas, NV 89121
(702) 299-5083
Attorney for Plaintiffs

Steven D. Grierson, CLERK OF THE COURT

By: Josefina San Juan 12/14/2017
Deputy Clerk Date

Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

Case Number: A-17-764942-C

PSER
MICHAEL J. MCAVOYAMAYA, ESQ.
4539 Paseo del Ray Dr
Las Vegas, NV 891215423
(702) 685-0879
Attorney for PLAINTIFF

DISTRICT COURT, CLARK COUNTY, NEVADA

DANA GENTRY, AN INDIVIDUAL, ET AL.,
Plaintiff,

VS.

SERVICE EMPLOYEES INTERNATIONAL UNION, A NONPROFIT COOPERATIVE CORPORATION, ET AL., Defendant,

PROOF OF SERVICE
Case Number: **A-17-764942-C**
Dept/Div: **26**

STATE OF NEVADA
ss.
COUNTY OF CLARK

ANDREA HANDFUSS, being duly sworn deposes and says: that at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the state of Nevada under license # 389, and not a party to or interested in the proceeding in which this affidavit is made.

The affiant received on February 22, 2018 a copy of the: SUMMONS; COMPLAINT

I served the same on 2/24/2018 at 4:18 PM by serving DEFENDANT SHARON KISLING, INDIVIDUALLY

by leaving a copy of the documents with: GIDEON GARBUTT, BROTHER, CO-RESIDENT, pursuant to NRCP 4(D)(6), a person of suitable age and discretion who co-resides with the DEFENDANT at 4650 Ranch House Rd Unit 120, North Las Vegas, NV 89031.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of NEVADA that the foregoing is true and correct.

Andrea Handfuss
ANDREA HANDFUSS
Reg No. R-089927
Legal Wings, Inc. PILB # 389
1118 Fremont St.
Las Vegas, NV 89101
(702) 384-0015

2/26/2018
Executed On:

CONTROL # 6843

LegalWings Inc.
PILB LIC #389

-PROCESS DEPT-
1118 Fremont St
Las Vegas, NV 89101
PHONE (702) 384-0015
FAX (702) 384-8638
www.LegalWings.com

Invoice No.: **6843**

Type of Service: **STANDARD**

Assigned to: **ANDREA HANDFUSS**

CUST #: 6850879
MICHAEL J. MCAVOYAMAYA, ESQ.
4539 Paseo del Ray Dr
Las Vegas NV, 89121-5423
ATTENTION: Michael Mcavoyamaya
Email: mmcavoyamayalaw@gmail.com
Phone: (702) 685-0879

ORDER DATE: 2/22/2018

DUE DATE #: 3/4/2018

COURT / DESTINATION:
DISTRICT COURT, CLARK COUNTY, NEVADA
200 Lewis Ave.
Las Vegas, NV 89155
CASE# A-17-764942-C
Plaintiff: DANA GENTRY, AN INDIVIDUAL, ET A
Defendant: SERVICE EMPLOYEES INTERNATIONAL
BILLING / FILE #:

HEARING DATE: - **DEPT. 26**

Servee: **SHARON KISLING, INDIVIDUALLY**

Home Address: **4650 Ranch House Rd Unit 120, North Las Vegas, NV 89031-4615**

Documents: SUMMONS; COMPLAINT

INSTRUCTIONS: **(2/22 - LA) OK TO SUB 14 YRS. STAT EXP 3/20. ***PREPAID $54*****

Gideon Garbutt

DATE	TIME	SERVER #	NOTES FROM SERVER(S)	
2/24/18	4:13p	GA	gated arrived 3:58p - NO answer, gate dark.	Service Area
				Turn In
				Stake Out
				Wait Time
				Reimburse
				Addt'l Add
				Early AM / Late PM

Physical Description:
Age: 26-30 Height: 5'6-6'0 Skin: BLK Hair: BRN
Sex: M Weight: 160-180 Eyes: BRN Marks:

[ ] Personal Service
[ ] Substituted Service
[ ] Posted

Date served: 2/24/18 Time served 4:18 AM/PM

Served To: Gideon Garbutt Title/Rel: Brother - co-resident

RECEIVED BY SIGNATURE:_____ Please write 'Refused to sign' if refused.

Signing the page is not an admission of guilt. You are acknowledging that you have received the above listed documents for the person or entity above.

Neighbor Contact: Yes NO (Circle one) 2/27-Uploaded. AB

Address:_____ Results:_____

Vehicles in drive: Yes No (Circle one) Make_____ Model_____ Tag#_____

Additional vehicle info: Make_____ Model_____ Tag#_____

order #: 6843/WORKP

Electronically Issued
12/14/2017 2:50 PM

SUMM

Electronically Filed
3/13/2018 4:35 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

DANA GENTRY, ROBERT CLARKE, Plaintiffs,	)	Case No. A-17-764942-C
	)	Dept. No. 26
vs.	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Defendants.	)	**SUMMONS - CIVIL**

NOTICE! YOU HAVE BEEN SUED, THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO DEFENDANT: MARY K. HENRY

A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

.

Submitted by:

/s/ Michael Mcavoyamaya
Michael J. Mcavoyamaya, Esq.
4539 Paseo del Ray
Las Vegas, NV 891021
(702) 299-5083
Attorney for Plaintiffs

Steven D. Grierson, CLERK OF THE COURT

By: _____ 12/14/2017
Deputy Clerk Sthacey Alvarez Date

Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

Case Number: A-17-764942-C

DISTRICT COURT FOR CLARK COUNTY, NEVADA

Dana Gentry, an individual, et al.

Plaintiff

vs. **Case No: A-17-7694942-C**

Service Employees International Union, a nonprofit cooperative cooperation, et al.

Defendant

AFFIDAVIT OF SERVICE

I, Mark A. Russell, Jr., a Private Process Server, being duly sworn, depose and say:

That I have been duly authorized to make service of the Summons and Complaint in the above entitled case.

That I am over the age of eighteen years and not a party to or otherwise interested in this action.

That on 02/27/2018 at 12:28 PM, I served Mary K. Henry, President, Service Employees International Union with the Summons and Complaint at 1800 Massachusetts Avenue, NW, Washington, DC 20036 by serving Kim Gibbs, Legal Operations Manager, authorized to accept service.

Kim Gibbs is described herein as:

Gender: Female Race/Skin: White Age: 45 Weight: 165 Height: 5'6" Hair: Blonde Glasses: No

I do solemnly declare and affirm under penalty of perjury that I have read the foregoing information set forth herein is correct to the best of my knowledge, information, and belief.

Sworn to before me on 03/01/18

Angela H. Croson

Angela H. Croson
Notary Public District of Columbia
My Commission Expires: March 31, 2019

Mark A. Russell, Jr.

Client Ref Number:N/A
Job #: 1540876

SUMM

DISTRICT COURT
CLARK COUNTY, NEVADA

DANA GENTRY, ROBERT CLARKE, Plaintiffs,	)	Case No. A-17-764942-C
	)	Dept. No. 26
vs.	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Defendants.	)	**SUMMONS - CIVIL**

NOTICE! YOU HAVE BEEN SUED, THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO DEFENDANT: SERVICE EMPLOYEES INTERNATIONAL UNION

A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

.

Submitted by:

/s/ Michael Mcavoyamaya
Michael J. Mcavoyamaya, Esq.
4539 Paseo Del Ray
Las Vegas, NV 89121
(702) 299-5083
Attorney for Plaintiffs

Steven D. Grierson, CLERK OF THE COURT

By: Josefina San Juan 12/14/2017
Deputy Clerk Date

Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

DISTRICT COURT FOR CLARK COUNTY, NEVADA

Dana Gentry, an individual, et al.

Plaintiff

vs. **Case No: A-17-7694942-C**

Service Employees International Union, a nonprofit cooperative cooperation, et al.

Defendant

AFFIDAVIT OF SERVICE

I, Mark A. Russell, Jr., a Private Process Server, being duly sworn, depose and say:

That I have been duly authorized to make service of the Summons and Complaint in the above entitled case.

That I am over the age of eighteen years and not a party to or otherwise interested in this action.

That on 02/27/2018 at 12:25 PM, I served Service Employees International Union with the Summons and Complaint at 1800 Massachusetts Avenue, NW, Washington, DC 20036 by serving Kim Gibbs, Legal Operations Manager, authorized to accept service.

Kim Gibbs is described herein as:

Gender: Female Race/Skin: White Age: 45 Weight: 165 Height: 5'6" Hair: Blonde Glasses: No

I do solemnly declare and affirm under penalty of perjury that I have read the foregoing information set forth herein is correct to the best of my knowledge, information, and belief.

Sworn to before me on 03/01/18

Angela H. Croson

Angela H. Croson
Notary Public District of Columbia
My Commission Expires: March 31, 2019

Mark A. Russell, Jr.

Client Ref Number:N/A
Job #: 1540879

SUMM

DISTRICT COURT
CLARK COUNTY, NEVADA

DANA GENTRY, ROBERT CLARKE, Plaintiffs,	)	Case No. A-17-764942-C
	)	Dept. No. 26
vs.	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Defendants.	)	**SUMMONS - CIVIL**

NOTICE! YOU HAVE BEEN SUED, THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO DEFENDANT: CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, dba NEVADA SERVICE EMPLOYEES UNION, aka LOCAL 1107

A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

.

Submitted by:

/s/ Michael Mcavoyamaya
Michael J. Mcavoyamaya, Esq.
4539 Paseo Del Ray
Las Vegas, NV 89121
(702) 299-5083
Attorney for Plaintiffs

Steven D. Grierson, CLERK OF THE COURT

By: _____ 12/14/2017
Deputy Clerk Sthacey Alvarez Date

Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

STATE OF NEVADA)
) ss:
COUNTY OF _____)

AFFIDAVIT OF SERVICE

Gary W. Flint Jr, being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received _____ copy(ies) of the Summons and Complaint on the 15 day of Dec, 2017, and served the same on the 15 day of Dec, 2017, by:

1. Delivering and leaving a copy with the defendant _____ at (state address) _____.

2. Serving the defendant _____ by personally delivering and leaving a copy with _____, a person of suitable age and discretion residing at the defendant's usual place of abode located at: (state address) _____

(Use paragraph 3 for service upon agent, complete A of B)

3. Serving the defendant SEIU Local 1107 by personally delivering and leaving a copy at (state address) 2250 So Rancho Dr. #165.

a. With Martin Montoya as trustee Local 1107, an agent lawfully designated by statute to accept service of process;

b. With _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (check appropriate method):

___ ordinary mail
___ certified mail, return receipt requested
___ registered mail, return receipt requested

addressed to the defendant _____ at the defendant's last known address which is (state address) _____

COMPLETE ONE OF THE FOLLOWING:

(a) If executed in this state, "I declare under penalty of perjury that the foregoing is true and correct."

_____
Signature of person making service

(b) If executed outside of this state: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

_____
Signature of person making service

SUMM

DISTRICT COURT
CLARK COUNTY, NEVADA

DANA GENTRY, ROBERT CLARKE, Plaintiffs,	)	Case No. A-17-764942-C
	)	Dept. No. 26
vs.	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Defendants.	)	**SUMMONS - CIVIL**

NOTICE! YOU HAVE BEEN SUED, THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO DEFENDANT: LUISA BLUE

A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

.

Submitted by:

/s/ Michael Mcavoyamaya
Michael J. Mcavoyamaya, Esq.
4539 Paseo Del Ray
Las Vegas, NV 89121
(702) 299-5083
Attorney for Plaintiff

Steven D. Grierson, CLERK OF THE COURT

By: sthacey 12/14/2017
Deputy Clerk Sthacey Alvarez Date

Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

STATE OF NEVADA)
) ss:
COUNTY OF _____)

AFFIDAVIT OF SERVICE

Gary W Flint Jr., being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received _____ copy(ies) of the Summons and Complaint on the 15 day of Dec., 2017, and served the same on the 15 day of Dec, 2017, by:

1. Delivering and leaving a copy with the defendant _____ at (state address) _____.

2. Serving the defendant Luisa Blue by personally delivering and leaving a copy with _____, a person of suitable age and discretion residing at the defendant's usual place of abode located at: (state address)_____

(Use paragraph 3 for service upon agent, complete A of B)

3. Serving the defendant Luisa Blue by personally delivering and leaving a copy at (state address) 2250 So Rancho Dr. #165.

   a. With Martin Montoya as trustee Local 1107, an agent lawfully designated by statute to accept service of process;

   b. With _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (check appropriate method):

   ____ ordinary mail
   ____ certified mail, return receipt requested
   ____ registered mail, return receipt requested

addressed to the defendant _____ at the defendant's last known address which is (state address) _____

COMPLETE ONE OF THE FOLLOWING:

(a) If executed in this state, "I declare under penalty of perjury that the foregoing is true and correct."

_____
Signature of person making service

(b) If executed outside of this state: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

_____
Signature of person making service

SUMM

DISTRICT COURT
CLARK COUNTY, NEVADA

DANA GENTRY, ROBERT CLARKE, Plaintiffs,	)	Case No. A-17-764942-C
	)	Dept. No. 26
vs.	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Defendants.	)	**SUMMONS - CIVIL**

NOTICE! YOU HAVE BEEN SUED, THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO DEFENDANT: MARTIN MANTECA

A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

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Submitted by:

/s/ Michael Mcavoyamaya
Michael J. Mcavoyamaya, Esq.
4539 Paseo Del Ray
Las Vegas, NV 89121
(702) 299-5083
Attorney for Plaintiff

Steven D. Grierson, CLERK OF THE COURT

By: _____ 12/14/2017
Deputy Clerk Sthacey Alvarez Date

Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

STATE OF NEVADA)
) ss:
COUNTY OF _____)

AFFIDAVIT OF SERVICE

Gary W. Flint, Jr., being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received _____ copy(ies) of the Summons and Complaint on the 15 day of December, 2017, and served the same on the 15 day of December, 2017, by:

1. Delivering and leaving a copy with the defendant Martin Mantecca at (state address) 2250 So Rancho Dr. #165.

2. Serving the defendant Martin Mantecca by personally delivering and leaving a copy with Martin Mantecca, a person of suitable age and discretion residing at the defendant's usual place of abode located at: (state address)_____

(Use paragraph 3 for service upon agent, complete A of B)

3. Serving the defendant _____ by personally delivering and leaving a copy at (state address) _____.

   a. With _____ as _____, an agent lawfully designated by statute to accept service of process;

   b. With _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (check appropriate method):

   ___ ordinary mail
   ___ certified mail, return receipt requested
   ___ registered mail, return receipt requested

addressed to the defendant _____ at the defendant's last known address which is (state address) _____

COMPLETE ONE OF THE FOLLOWING:

(a) If executed in this state, "I declare under penalty of perjury that the foregoing is true and correct."

_____
Signature of person making service

(b) If executed outside of this state: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

_____
Signature of person making service

MPSJ
MICHAEL J. MCAVOYAMAYA, ESQ.
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Mmcavoyamayalaw@gmail.com
Attorney for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

* * * *

DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; *et al.* Defendants.	CASE NO.: A-17-764942-C DEPT. NO.: 26 **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** **(HEARING REQUESTED)**

COME NOW, Plaintiffs DANA GENTRY and ROBERT CLARKE, by and through their attorney of record MICHAEL J. MCAVOYAMAYA, ESQ., hereby move the Court for summary judgment.

This Motion is made based upon the pleadings and papers on file herein, the Points and Authorities that follow, and any oral argument that may be heard at the hearing of this matter.

DATED this 30th day October, 2019.

MICHAEL J. MCAVOYAMAYA
/s/ Michael J. Mcavoyamaya
MICHAEL J. MCAVOYAMAYA, ESQ.
Nevada Bar No.: 14082
4539 Paseo Del Ray
Las Vegas, Nevada 89121
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Mmcavoyamayalaw@gmail.com
Attorney for Plaintiffs

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT** for hearing on the ____ day of _____, 2018, at the hour of _____, or as soon as thereafter as counsel may be heard in Department XXVI.

DATED this 30th day of October, 2019.

MICHAEL J. MCAVOYAMAYA

/s/ Michael J. Mcavoyamaya
MICHAEL J. MCAVOYAMAYA, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF INDISPUTABLE FACTS.

The facts of this case, for the purposes of this Motion for Partial Summary Judgment are clear, and are indisputable. On April 18, 2016, the Service Employees International Union ("SEIU") Local 1107 entered into an express, valid and binding "for cause" contract for indefinite employment with Dana Gentry. *See* Gentry Employment Contract, attached as **Exhibit "1,"** at Local – 003. Specifically, Local 1107 and Gentry expressly agreed that "Effective April 18, 2016, you will commence employment with Local 1107, the annual salary for your position will be $70,000," that employment could only be terminated by the Local 1107 "President for cause," and any termination was appealable to the Local 1107 Executive Board. *Id.* Similarly, on August 23, 2016, Local 1107 entered into an express, valid and binding contract for indefinite employment with Robert Clarke that states "Effective September 6, 2016**,** you will commence employment with Local1107. The annual salary for your position will be $80,000." *See* Clark Employment Contract, attached as **Exhibit "2,"** at Local – 026. Plaintiff Clarke's contract also stated that the Local 1107 President could only terminate his employment "for cause," which was appealable to the Local 1107 Executive Board. *Id.*

During the course of Plaintiff Gentry's employment with Local 1107, the Local 1107 Executive Vice President, Sharon Kisling, was hostile towards the Local 1107 staff that the former Local 1107 President, Cherie Mancini, had chosen to hire including Plaintiffs Robert Clarke and Dana Gentry, and their colleague, Local 1107 Organizing Director Peter Nguyen. This hostility towards these Local 1107 employees came to head on August 17, 2016, when Sharon Kisling in a fit of rage attacked Peter Nguyen and attempted to terminate his employment with Local 1107 while President Mancini was on vacation. *See* SEIU Internal Charges Report, attached as **Exhibit "3,"** at 20. The SEIU International Defendants held a hearing in part to address Sharon Kisling's attempt to terminate Peter Nguyen's employment in breach of his for cause contract with Local 1107 while President Mancini was on vacation and issued a decision regarding the facts that cannot now be disputed because they are being sued for wrongful termination and defamation.

After this incident, on August 18, 2016, "with Sister Mancini still on vacation, Sister Kisling called an 'emergency meeting' of the Executive Board for August 20," 2016 while Mancini was on vacation to ask the Local 1107 Executive Board to grant her permission to terminate Peter Nguyen, and Plaintiffs Dana Gentry and Robert Clarke. *Id.* The meeting was called after Kisling received a legal opinion from Local 1107's attorney, Michael Urban's office regarding an interpretation of the Local 1107 Constitution. *See* Urban Email RE: Termination of Staff by EVP, attached as **Exhibit "4,"** at SEIU2025-27. Local 1107 Attorney Sean McDonald, from Michael Urban's office, responded to the inquiry from Kisling concluding that President Mancini being on vacation was not an absence that permitted Kisling to exercise Presidential powers, that "Article 15 of the Local11 07 Constitution vests authority over the day-to-day affairs of the Local Union in President and *any* staff hired under the authority of the local Union," that it was the President's duty and "authority to hire or fire staff," but that such authority could be limited by the Local 1107 Executive Board. *Id.* at SEIU2025-26. After Urban issued the opinion, Kisling called the emergency board meeting. *Id.*

According to the SEIU International hearing officer, "Sister Kisling's actions in attempting to terminate Peter Nguyen amount to an abuse of her position and a blatant attempt to aggrandize to herself the authority of Sister Mancini long enough to rid herself of an individual staff member who had long been a thorn in her side." *See* **Ex. 3,** at 22. Local 1107 President Brenda Marzan testified at deposition that nothing occurred at the emergency board meeting on August 20, 2016, and the Board did not permit Kisling the authority she requested to terminate the Local 1107 staff. *See* Marzan Depo Trans., attached as **Exhibit "5,"** at 14:3-15:25. Ms. Marzan testified that Defendant Kisling passed out a report at this meeting outlining the basis for the meeting, which were handed out at the emergency board meeting, and she received later at the August 31, 2016 Local 1107 Executive Board meeting. *Id.* The Kisling Report, which was later presented to the Local 1107 Executive Board a second time at the August 31, 2016 official Executive Board meeting discusses all three of the Local 1107 Directors: Peter Nguyen, Robert Clarke, and Dana Gentry. *See* Kisling Report, attached as **Exhibit "6,"** at Local – 678-79. Kisling accused Plaintiff Gentry of "Excessive spending, concerns of alcohol use while at work, and $3000. Credit limit on

business AmEx while others have $1500." *Id.* at Local – 679. Kisling accused the Directors of "using credit card for in town gas when they receive monthly car allowance; lunch being put on business cards in town and when out of town although they receive a daily stipend for meals." *Id.* Kisling also expressly requested that the Board "Rescind offer of employment for HR/Finance Director as selected by President Mancini," Plaintiff Clarke, and requested the Board "Terminate employment of staff – Peter Nguyen." *Id.* at Local – 682. Again, the elected officers of Local 1107 refused to terminate Plaintiffs employment.

This meeting was recorded via audio, and Plaintiffs are submitting that audio recording of the August 31, 2016 meeting to the Court for its review in consideration of Plaintiffs Motion for Partial Summary Judgment. In this recording, Kisling can clearly be heard stating that the concerns in her report were "facts" "its not my opinion its facts an I have the documentation" to prove the allegations in her report. *See* Audio Recording, 8/31/16 Meeting, sent to the Court via mail, at 1:32.00-1:33.20. After the August 31, 2016 Local 1107 Executive Board meeting when the Local 1107 Executive Board refused to terminate Plaintiffs employment as Kisling had requested, several of the Local 1107 Executive Board officers that did not get their way at the meeting, including Kisling, requested that Local 1107 attorney Michael Urban, Esq., conduct an investigation into the Kisling report "After speaking with our representative, from International, Mary Grillo." *See* Urban Invest. Emails, attached as **Exhibit "7,"** at Local – 667. As is clear from the emails numerous Local 1107 Executive Board officers considered Kisling Report to contain "allegations" of misconduct. *Id.* at Local – 668-70. Further, President Mancini emailed the Board to notify them that "the allegations that were provided to the board in private session were allowed to be taken from the Union Hall so there is no way of telling where they will be or have been circulated." *Id.* The Local 1107 staff obtained a copy of the Kisling Report, as Plaintiff Gentry clearly states in her email the next day, and one member forwarded the "This email along with other documents discussed in an EBOARD closed session are being forward to the appropriate governing authority for SEIU Local." *Id.*

Urban eventually ended up conducting the investigation into the allegations contained in the Kisling Report and issued his own report on the allegations. *See* Urban Report, attached as

Exhibit "8," at Local – 683-86. According to Urban, "the SEIU Local II 07 Constitution does provide for the President to sign all contracts and agreements of the Local." *Id.* at Local – 684. However, Urban apparently "did not receive any information on Executive Board approval of several staff and independent contractor agreements, terms and conditions. None of these contracts were submitted to our firm for review." *Id.* at Local – 684. What was submitted were Plaintiff Gentry's and Peter Nguyen's for cause contracts. *Id.* at Local – 684, 697-89. According to Urban, there was "No specific information on "rigged interviews" and alleged minority discrimination was made available." *Id.* at Local – 685. There was also "No evidence of alcohol use at work was provided other than hearsay statements. Some questions were raised on spending by staff, Dana Gentry and Peter Nguyen and use of union credit cards for gas by staff with a vehicle allowance. No evidence of staff complaints was provided." *Id.* According to Urban, there were "Questionable charges by Ms. Gentry and Mr. Nguyen were identified from credit card and financial records," but there was no explanation of why the charges were "questionable." *Id.* at Local – 686. Despite Urban failing to conclude that Plaintiff Gentry or Peter Nguyen had misused funds, Kisling proceeded to present to the SEIU International Hearing officer that the Directors of Local 1107 were misusing funds anyway. *See* Internal Charges Hearing Transc., attached as **Exhibit "9,"** at SEIU0356-66. Kisling again argued that Plaintiff Clarke should be terminated, and that her report presented to the board accused the directors of misusing the Local 1107 credit cards and were "double-dipping." *Id.* at SEIU363-64.

The SEIU International hearing officer addressed the "[a]lleged…financial malpractice" Kisling accused the staff hired by Mancini of in her Internal Charges Report. *See* **Ex. 3,** at 11. According to the SEIU International hearing officer "A charge of financial malpractice is a very serious allegation that warrants specific and probative evidence. The evidence produced by the Charging Parties does not meet that standard." *Id.* The SEIU International hearing officer concluded that it was not:

> clear how Sister Grain's contention that some staff members might be "double dipping" is chargeable to Sister Mancini. Sister Grain could only say that two or three people had raised the issue of staff possibly getting double reimbursement but admitted that she had not yet "researched" the question.

Id.

The testimony of "Sister Grain" was directly referencing the questioning by Defendant Kisling about her report that Plaintiff Gentry was double dipping with the union credit card, which neither Kisling, nor Grain actually attempted to investigate. *Id. see also* **Ex. 9,** at SEIU0356-66. In fact, according to the current Local 1107 President, Marzan, the Local 1107 "finance committee brought up the concerns" that the "directors were misusing the credit card" and that Dana Gentry was drinking on the job, but conducted no investigation into either allegation by Kisling despite having access to the records. *Id. see also* **Ex. 5,** at 55:7-11, 71:9-17, 78:9-80:6. The Kisling Report was disseminated to the Local 1107 staff, including Plaintiffs Gentry and Clarke, Peter Nguyen, and other lower level staff members, individuals who should not have been provided the information because "closed session is confidential. It should not have been given out to anybody." *See* **Ex. 5,** at 160:20-161:5.

On April 28, 2017, after Ms. Gentry had been employed with Local 1107 for over a year, and Mr. Clarke had been employed for just over nine (9) months, SEIU International imposed an emergency trusteeship over Local 1107 removing its President and Executive Board from office and appointing SEIU International Executive Vice President ("EVP") Luisa Blue as Trustee, and SEIU International Representative Martin Manteca as Deputy Trustee. *See* Trusteeship Order, attached as **Exhibit "10,"** at 1-4.

Less than a week after SEIU International imposed the emergency trusteeship over Local 1107, the Local 1107 Trustees terminated Ms. Gentry and Mr. Clarke's employment without cause because they would be managing the local themselves, and would be filling management positions with people they wanted. *See* Termination Letters, attached as **Exhibit "11,"** at 1-2. None of the stated basis for Ms. Gentry and Mr. Clarke's terminations were based on the actions of Plaintiffs or their failure to conduct work duties, or any other reason that could be considered as a "for cause" basis for their terminations. Further, Plaintiffs were not permitted to appeal their terminations pursuant to the contracts. Rather, the SEIU International Trustees simply wanted to hire different people to do Ms. Gentry and Mr. Clarke's jobs, and did not give either an opportunity to demonstrate whether or not they could implement the new policies and programs being implemented by the Local 1107 Trustees.

On May 5, 2017, one day after Plaintiffs termination letters were sent out, SEIU International Chief of Staff Dee Dee Fitzpatrick wrote Trustee Luisa Blue about staffing Local 1107. *See* Fitzpatrick Email RE: Staffing Local 1107, attached as **Exhibit "12,"** at SEIU0075, 204-205. Fitzpatrick wrote about Local 1107 staffing issues, and made express recommendations about Plaintiffs' terminations, and the SEIU International program of terminating staff when trusteeships are imposed. *Id.* SEIU International was aware of Plaintiffs for cause contracts, as they had received a copy of the Urban Report at the Internal Charges Hearing. *See* **Ex. 9,** at 13:14-20. Despite knowing that Plaintiffs had for cause contracts with Local 1107, they recommended that the Trustees terminate Plaintiffs contracts. *See* **Ex. 12,** at SEIU0075, 204-05.

During the course of discovery in this case, Local 1107 has admitted that the contracts attached to this Motion as Exhibits 1 and 2 are genuine and authentic copies of the employment contracts entered into between Defendant Local 1107 and Plaintiffs Dana Gentry and Robert Clarke. *See* L1107 Defs' Resp. 1st RFA, attached as **Exhibit "13,"** at 1-3. Local 1107 has also admitted that it is not disputing "that an employment contract between Local 1107 and Dana Gentry [and Robert Clarke] existed." *See* L1107 Defs' Resp. 2nd RFA, attached as **Exhibit "14,"** at 3:16-4:11. These admissions prove that Local 1107 entered into contracts of employment with Plaintiffs, and that the contracts included with this Motion are those contracts. *Id.* There was, therefore, an offer of employment based on specific for cause terms that included a termination process entitling Plaintiffs to appeal their for cause terminations. *See* **Ex. 1,** at Local - 003; *see also* **Ex. 2,** at Local - 026. There was an acceptance, demonstrated by the signatures of both parties to the for cause contracts for indefinite employment by Plaintiffs and then Local 1107 President Cherie Mancini. *Id.* There was consideration, as Plaintiffs performed their obligations under the contracts by working for Local 1107, and Local 1107 provided them the compensation, benefits and other terms of the contract for nearly a year before the SEIU International trustees terminated their employment contracts without cause. *Id.* As such, it cannot be disputed that the parties entered into a valid and binding contract for indefinite employment with Local 1107 that could only be terminated for cause, and after following the appeal procedure outlined in the contracts.

II. ARGUMENT

A. Standard of Review for Summary Judgment.

A moving party is entitled to summary judgment when there are no genuine issues of material fact. Fed. R. Civ. P. 56(a). When a motion for summary judgment is properly made and supported, an opposing party must set out facts showing a genuine issue for trial. FRCP 56(c)(1)(A)-(B). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505 (1986). The substantive law defines which facts are fundamental. *Id.* at 248. The party opposing summary judgment has the burden to come forward with specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986) (quoting FRCP 56(e)). There must be something more than some "metaphysical doubt" as to the material facts for it to be a genuine issue. *Id.* at 587. If the factual context makes the non-moving party's claim or defense is implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Uncorroborated and self-serving testimony, without more, will not create a genuine issue of material fact precluding summary judgment. *Villiarimo v. Aloha Island Air Inc.*, 281 F.3d 1054 1061 (9th Cir. 2002).

B. Plaintiffs Are Entitled To Summary Judgment On The Defendants' Preemption Defense.

Defendants only argument for why they should not be held liable for knowingly and intentionally breaching Plaintiffs' for-cause contracts is that this Court should apply a preemption doctrine adopted by the California Supreme Court, which is the only state to apply such a restricted doctrine to union staff employment contracts. *See* L1107 Defs' Opp. Cntr MSJ, at 9:1-10:2; *see also* SEIU Defs' Opp. Ctr MSJ, at 12:3-15:23; *see also* L1107 MSJ, 10/20/19, at 11:11-21:7. Though the reasons this doctrine should not be applied to this case are numerous, Plaintiffs will argue two basis for the Court to refuse to do so in this case, and address the remaining basis in their response to the Defendants' Motions for Summary Judgment. First, the democracy concerns the California LMRDA preemption doctrine is intended to address are not at issue here. Second, applying the doctrine to this case would be arbitrary and capricious. Each will be discussed in detail below.

1. Plaintiffs Were Not Terminated By An Elected Union Official, Therefore, The Democracy Concerns The California Supreme Court's LMRDA Preemption Doctrine Is Intended To Protect Are Not At Issue.

Defendants' preemption defense is advanced pursuant to *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990). The *Screen Extras Guild* Court analyzed numerous United States Supreme Court Cases interpreting the Labor-Management Reporting and Disclosure Act ("LMRDA"), none of which involved local union non-member managerial staff to conclude that the union democracy concerns of the LMRDA warranted permitting duly elected union presidents to terminate staff at will, irrespective of existing for cause contracts, in order to advance the new policy of the union. *Id.* Specifically, the *Screen Extras Guild* Court held that the LMRDA protects union democracy and validity of fair union elections, and concluded that "**[e]lected union officials** must necessarily rely on their appointed representatives to carry out their programs and policies. As a result, **courts have recognized that the ability of elected union officials** to select their own administrators is an integral part of ensuring that union administrations are responsive to the will of union members." *Id.* at 51 Cal. 3d at 1024-25 (emphasis added).

Putting the flaws in the California Supreme Court's analysis of the LMRDA and preemption aside, even if the *Screen Extras Guild* preemption defense was actually the law of Nevada, it still would not apply to this case because Plaintiffs were not terminated by any "[e]lected union officials" who were elected by the Local 1107 membership in via a lawful secret ballot election to effectuate the mandate of an election. *Id.* There are two indisputable factual circumstances that are present in every single case the Defendants have cited for this preemption defense: (1) a union staff employee was hired or appointed to a staff position with the union; and (2) a duly elected union official(s) terminated the union staff employee. *Id. see also Thurderburk v. United Food & Commercial Workers' Union, Local 3234*, 92 Cal. App. 4th 1332 (2001) (LMRDA preempted suit for wrongful discharge by former union secretary because "policymaking and confidential staff are in a position to thwart the implementation of policies and programs advanced **by elected union officials** and thus frustrate **the ability of the elected officials** to carry out **the mandate of their election**." (emphasis added)); *Hansen v. Aerospace Defense Related Indus. District Lodge 725*, 90 Cal. App. 4th 977, 983 (2001) (LMRDA preempted claims

for wrongful discharge of former business agent because the official terminating the employee, "Calvin Duncan became the president of the new district, and pursuant to its new bylaws, appointed Hansen as its business representative" and Hansen's subsequent termination was preempted by the LMRDA because "Duncan had the right to have an appointed business agent who supported his agenda."); *Ramirez v. Butcher*, 2006 WL2337661 *1, *24(Cal. Ct. App. 2006) (LMRDA preempted claims for breach of contract, implied covenant of good faith and fair dealing, defamation and contract interference by former union field representative because the "the union…and its principals Julie Butcher (the union's general manager) and Joaquin Avalos (**a member of the union's executive board**)" terminated her employment) (this case is not citable because it is unpublished); *Burell v. Cal. Teamsters, Public Professional and Medical Employees Union, Local 911*, 2004 WL 2163421 (Cal. Ct. App. 2004) (LMRDA preempted claims for breach of implied contract, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and defamation by former union office manager and bookkeeper because "Whitmer was elected secretary-treasurer in 1994…retained Burrell as office manager and bookkeeper" and then terminated his employment) (this case is not citable because it is unpublished); *See, e.g., Hurley v. Teamsters Union Local No. 856*, Case No. C-94-3750 MHP, 1995 WL 274349 (N.D Cal. May 1, 1995) (the Court applied California's LMRDA preemption defense to the wrongful termination and other claims because "plaintiff was discharged from his position as an appointed business agent because **the newly elected union management** wanted to 'go in a new direction.'" and "**Newly elected union management** would be unable to implement the electorate's will if the management was burdened with the policies and personnel of the prior administration."); *Womack v. United Service Employees Union Local 616*, Case No. No. C-98-0507 MJJ, 1999 WL 219738 *15 (N.D. Cal. 1999) (LMRDA preempted claims for breach of contract and implied contract and covenant of good faith and fair dealing, interference with economic advantage, infliction of emotional distress and defamation by former union executive director because the duly elected Board of the union terminated Smith's employment).

Here, it is undisputed that the effect of SEIU International's imposition of the trusteeship over Local 1107 resulted in the suspending of "Local 1107's Constitution and Bylaws" and the

removal of the elected Local 1107 officers. *See* SEIU Defs' Opp. Ctr MSJ, at 3:15-21. The Trusteeship Order states this expressly: "Local 1107's Constitution and Bylaws are suspended for the period of the trusteeship…Further,…**I hereby remove all Local 1107 officers, Executive Board Members, trustees and representatives from their positions as such**, and all trustees of trust funds over which the Local Union has the power of appointment." *See* **Ex. 10,** at 4 (emphasis added).

Indeed, the SEIU International Chief of Staff, Dee Dee Fitzpatrick's own sworn declaration makes abundantly clear that "Prior to imposition of the trusteeship on April 28, 2017, **SEIU Local 1107's members elected their own officers**…**[who] had the authority to hire, discipline, and discharge employees, and were responsible for the day-to-day operations of the union.**" *see also* Fitzpatrick Decl., at ¶ 5, attached to SEIU Intl Opp. Ctr MSJ. However, "Upon SEIU's imposition of a trusteeship over SEIU Local 1107 on April 28, 2017, SEIU President Henry appointed Defendant Luisa Blue as a Trustee of SEIU Local 1107, and Defendant Martin Manteca as Deputy Trustee of SEIU Local 1107" suspending its elected officers and permitting the trustees "to take full charge of the affairs of the Local Union." *Id.* at ¶ 8. The Notice of Emergency Trusteeship is dated April 28, 2017. *Id.* Plaintiffs' employment with Local 1107 was terminated by the Trustee and Deputy Trustee six (6) days later on May 4, 2017. *See* **Ex. 11,** at 1-2. On May 4, 2017, there were no elected union officials at Local 1107 to terminate Plaintiffs' employment for "thwart[ing] implementation of union policies and programs **advanced by elected union officials** and thus frustrate[ing] the ability of elected officials to carry out the mandate of the union members" because there were no elected union officials at Local 1107. *Thunderburk*, 92 Cal. App. 4th at 1339 (emphasis added).

Plaintiffs acknowledge that there is a dearth of case law on the particular circumstances of this case. However, there is one federal case that is directly on point. *Sowell v. Int'l Bhd. of Teamsters*, No. H-09-1739, 2009 U.S. Dist. LEXIS 110339, at *11-13 (S.D. Tex. Nov. 24, 2009). In *Sowell*, an international union imposed a trusteeship over its Texas local affiliate, removed its duly elected officials, and appointed an unelected trustee to run the day to day affairs of the local union and administer the trusteeship. *Id.* The trustee then terminated the local union's "Executive

Administrator and General Counsel." *Id.* at *2. The plaintiff had a for cause employment contract with the local union. *Id.* The international union defendant asserted preemption under the LMRDA. *Id.* at 11. In rejecting the LMRDA preemption argument, the federal court noted that "Plaintiff here seeks no postelection relief but rather, recovery of damages on a simple common law claim for breach of his employment contract. Defendants have pointed to no statutory language in LMRDA or its subchapter on Trusteeships, 29 U.S.C. § 461-466, which suggests that Congress intended complete preemption of Plaintiff's contract claim." *Id.*

Here, like in *Sowell*, there was no election at issue and there were no elected union officials effectuating the policy of the membership of the local union, therefore, there is no union democracy concern at issue. Unless the Defendants can point to some provision in the LMRDA that indicates that Congress intended to preempt breach of employment contract claims brought by union employees terminated by an unelected international union trustee or deputy trustee after imposition of a trusteeship, their preemption argument cannot withstand scrutiny and Plaintiffs are entitled to summary judgment on their preemption defense. The LMRDA's trusteeship section itself includes an anti-preemption provision that indicates that the section was not intended by Congress to preempt state law. *See* 29 U.S.C. § 466.

Defendants are fully aware of the fact that the California LMRDA preemption doctrine requires termination by an elected union official, as their responses to Plaintiffs written discovery requests indicate. Plaintiffs requested that the Local 1107 Defendants "Admit that the trusteeship imposed over Local 1107 by SEIU International was not imposed because the members of Local 1107 voted in a secret ballot election to allow SEIU International impose a trusteeship over Local 1107." *See* L1107's Resp. 3rd RFA, attached as **Exhibit "15,"** at 2:18-3:2; *see also* SEIU Resp. 3rd RFA, attached as **Exhibit "16,"** at 3:1-5:1. The Local 1107 Defendants' response is telling: "**Local 1107 provides the following qualified admission**. Local 1107's Executive Board was duly elected by membership to act in behalf of the membership, so **it is admitted that a secret ballot vote did not occur**." *Id.* (emphasis added). Plaintiffs requested that the Defendants "Admit that Luisa Blue [and Martin Manteca] was not democratically elected to the position of Local 1107 Trustee [and Deputy Trustee] by the members of Local 1107." *Id.* at 3:4-14. The Local 1107

Defendants responded asserting that "Local 1107's [sic] denies the request because its democratically elected Executive Board voted for the imposition of the trusteeship." *Id.* Plaintiffs requested that the Defendants admit that Robert Clarke and "Dana Gentry [were] not terminated from employment with Local 1107 by an elected officer of Local 1107 elected by the Local 1107 membership." *Id.* at 3:15-4:6. The Local 1107 Defendants responded that "Local 1107 denies the request because SEIU President Mary Kay Henry, who was elected to the position of SEIU President, appointed Martin Manteca to the position of Deputy Trustee following the vote of the elected Local 1107 Executive Board allowing for the appointment of a trustee **but admits that Mr. Manteca was not directly elected by Local 1107's entire membership body**." *Id.*

However, the fact that the Local 1107 Executive Board voted to permit SEIU International to impose a trusteeship over Local 1107 after SEIU International had removed the Local 1107 President and Vice President from their officer positions does not make the SEIU International Trustee and Deputy Trustee appointed to oversee the trusteeship elected union officials. In fact, the removal of said officers cuts against any argument that the trustees were facilitating the will of the membership expressed in an election as their removal from office is in direct defiance of the will of the membership expressed in the 2016 Local 1107 election. Similarly, the fact that Mary Kay Henry was elected to the position of SIEU International President, which Local 1107 members did not vote in, does not make the SEIU trustees elected union officials of Local 1107.

The Defendants knew that this was a critical element of their preemption defense, which is why they refused to answer the request when Plaintiffs propounded their requests for admission. It cannot be disputed that Luisa Blue and Martin Manteca were "not democratically elected to the position of Local 1107 Trustee [and Deputy Trustee] by the members of Local 1107." *Id.* As such, the Defendants have failed to answer these requests, instead responding with facts that were not responsive to the questions presented. "When a party fails to timely respond to requests for admission, 'matters contained therein are deemed admitted.'" *Kiley Ranch Cmtys. v. Branch Banking & Tr. Co.*, No. 57108, 2012 Nev. Unpub. LEXIS 1343, at *3 (Oct. 1, 2012) *quoting Smith v. Emery*, 109 Nev. 737, 741, 856 P.2d 1386, 1389 (1993). Plaintiffs requests were clear, related

to factual issues only, and the Defendants failed to actually respond to the requests as they were posed. As such, Plaintiffs move this Court to deem these requests admitted by Defendants.

The fact that Plaintiffs were not terminated by any elected union official is also abundantly clear from the sworn testimony of Defendant Luisa Blue at the National Labor Relations Board trial held in February of 2019, in relation to another Local 1107 employee whom the trustees unlawfully terminated. *See* NLRB Testimony of L. Blue, attached as **Exhibit "17,"** at 521:9-25. Defendant Blue testified clearly and credibly that upon imposition of a trusteeship the Local's executive board no longer functions, the former officers are no longer in office, and they become regular members. *Id.*

The Defendants may try to argue that SEIU International President Mary Kay Henry was an elected official, and her appointment of the trustees who terminated Plaintiffs employment somehow means that they were terminated by an elected union official as they argued in their responses to Plaintiffs' Third Requests for Admissions. *See* **Ex. 15,** at 3:15-4:6. However, the SEIU International Chief of Staff has expressly disclaimed that SEIU International President Henry, or SEIU International generally had any personal involvement in Plaintiffs terminations, or the day to day operations of Local 1107: "SEIU is not now, nor has it ever been, responsible for the day-to-day operations of SEIU Local 1107. SEIU is not now, nor has it ever been, responsible for hiring, training or supervising or disciplining Local 1107 employees." *See* Fitzpatrick Decl., attached to SEIU Opp. Ctr MSJ, at 3:10-12. If SEIU International has not ever been responsible for hiring, training, supervising or disciplining Local 1107 employees or the day to day operations of Local 1107, then Henry certainly cannot be used as an "elected union official" in order to support their preemption defense.

There is, therefore, no disputable issue of material fact that Plaintiffs were not terminated by elected union officials effectuating the mandate of the Local 1107 membership expressed via secret ballot election. Without this critical element of the *Screen Extras Guild* preemption doctrine, the LMRDA's democracy concerns that the doctrine was intended to protect are not at issue in this case, and it cannot be applied even if the doctrine were adopted in the state of Nevada. Defendants have cited a litany of California cases where plaintiffs' claims were considered preempted because

they were confidential, policy making, or policy implementing employees and subject to the *Screen Extras Guild* preemption doctrine. Every single one of those cases involved a termination of the employee by an elected union official implementing the mandate of the union membership expressed in an election, and each of those cases expressly emphasized the necessity that an elected union official terminate the employee for the doctrine to apply. Here, it is undisputed that there were no elected union officials at Local 1107 at the time Plaintiffs were terminated. Plaintiffs are, therefore, entitled to Summary Judgment on the Defendants' preemption defense pursuant to *Screen Extras Guild.*

2. The Application Of Screen Extras Guild To This Case Would Be Arbitrary And Capricious.

Finally, the application of the preemption doctrine to this case would be arbitrary and capricious as there are several other cases involving identical or similar contracts that are enforceable despite the doctrine. The SEIU International Defendants have argued that "The LMRDA's Anti-Preemption Provisions Have No Application Here" because Plaintiffs were not union members. *See* SEIU Reply In Supp. Counter-MSJ, at 6:15-7:16. However, applying this reasoning would result in contradictory conclusions of law based on an arbitrary notion of union membership. This is because, while Plaintiffs Gentry and Clarke were not members of SEIU or Local 1107, Local 1107 did offer local union staff associate membership in Local 1107: "Union staff, former or prospective members, who are not employed In Bargaining Units represented by this Local Unlon may become Associate Members by signing, completing and submitting to the Local Union a membership application and dues deduction agreement card and by timely payment of the appropriate and correct amount of dues, which shall be the same as the dues of regular members, maintaining a member in good standing status." *See* Local 1107 Constitution, attached as **Exhibit "18,"** at SEIU0927.

While Plaintiffs Gentry and Clarke did not take advantage of their ability to obtain associate member status, one of their colleagues, Peter Nguyen, did take advantage and was an associate member of Local 1107 up until his wrongful termination. Peter Nguyen also had an identical "for cause" contract with Local 1107, and is currently pursuing his wrongful termination claim against Local 1107 at this very moment. *See Nguyen v. SEIU et al.*, A-19-794662-C. This is

especially true now, given that Local 1107 amended its constitution making all staff union members automatically. *See* New Local 1107 Constitution, attached as **Exhibit "19,"** at SEIU 13446. Because Mr. Nguyen's membership with SEIU and Local 1107 was tied to his employment with the union, his termination from employment with Local 1107 also eliminated his membership with the union, the *Finnegan* rule would not apply as his termination also affects his membership rights.

Indeed, the *Finnegan* Court held that "discharge from union employment does not impinge upon the incidents of union membership, and affects union members only to the extent that they also happen to be union employees," thus "removal from appointive union employment is not within the scope of the union sanctions explicitly prohibited by § 609." *Finnegan*, 456 U.S. at 432. Similarly, in *Bloom*, the Court held that "Sections 413 and 523(a), however, save causes of action enjoyed by union *members*, and, as discussed above, Bloom is not bringing this action as a union member but as a union employee." *See Bloom*, 783 F.2d at 1360. The *Screen Extras Guild* Court, citing *Bloom*, asserted that the savings provision "save only causes of action enjoyed by union members." *Screen Extras Guild*, 51 Cal. 3d at 1030 n.10. Plaintiff Nguyen was an associate member of Local 1107, his membership with Local 1107 was directly tied to his status as a union employee, and upon his termination with Local 1107, his membership with Local 1107 was also terminated. Thus, under the Defendants' own analysis, Plaintiff Nguyen, who has an identical contract to Plaintiffs, is permitted pursuant to *Screen Extras Guild* to take shelter under the anti-preemption provisions of the LMRDA as preserving his claims. *See* **Ex. 8,** at Local – 688. Thus, applying *Screen Extras Guild* to this case is not protecting union democracy, but rather, penalizing Plaintiffs for not exercising their right to associate membership under the Local 1107 Constitution.

Further, the Defendants admit that other staff of Local 1107 were covered by a collective bargaining agreement ("CBA"), witch both the NLRB and the federal courts have ruled to be enforceable, which included union organizers. *See* Local 1107 Reply Ctr. MSJ, at 7:9-19. Defendants attempt to differentiate the NSEUSU CBA with Plaintiffs contracts, by arguing that "NSEUSU is a union that bargains with the management of Local 1107 as the employer. NSEUSU therefore has *no* political or managerial rights in Local 1107, which eliminates policy concerns

that the NSEUSU may interfere with Local 1107 governance." *Id.* This position is also reflected in their responses to Plaintiffs' Second Requests for Interrogatories. *See* L1107 Resp. 2nd ROGS, attached as **Exhibit "20,"** at 4:5-5:22. Plaintiffs requested that the Defendants "identify all 'policy making employees' and/or 'confidential employees' that worked for Local 1107 on the date of imposition of the trusteeship." *Id.* Defendants gave a longwinded response citing to a number of cases that apply the *Screen Extras Guild* ruling, or the *Finnegan* ruling.

The cases cited by the Defendants demonstrate the arbitrariness of the *Screen Extras Guild* preemption doctrine. In *Hodge v. Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees*, the employee was not a manager, but rather, was a union secretary. 707 F.2d 961 (7th Cir. 1983). The employee in *Packowski v. United Food and Commercial Workers Local 951*, was a union organizer. 796 N.W. 2d 94, 104 (Ct. App. Mich. 2010). Even *Screen Extras Guild* itself has been extended to lower level union employees like "union organizers." *Smith v. Int'l Bhd. of Elec. Workers*, 109 Cal. App. 4th 1637, 1642, 1 Cal. Rptr. 3d 374, 376 (2003). Yet, in response to Plaintiffs interrogatory, the only employees the Defendants cited as being confidential or policy making/implementing employees were "Robert Clarke, Dana Gentry and Peter Nguyen." *See* **Ex. 20,** at 5:20-22. This is obviously because they wish to differentiate the employees covered by the staff union CBA, and Plaintiffs. *See* Local 1107 Reply Ctr. MSJ, at 7:9-19. However, what the Defendants cannot dispute is the fact that secretaries and union organizers, like Javier Cabrera, were covered by staff union CBA, and the NLRB and the United States District Court for the District of Nevada have already found these contracts to be enforceable under federal law. *See* NLRB Order, attached as **Exhibit "21,"** at 2-3; *see also* Hearing Transc., 2:18-cv-304, attached as **Exhibit "22,"** at 9:10-25.

There are presently classes of employees that, without question, fall within the scope of the *Screen Extras Guild* preemption doctrine (union organizers) who are covered by a CBA governed by federal law whose contracts have already been held to be enforceable under federal law regardless of the union democracy concerns in the LMRDA. It cannot be disputed that there was no law preventing Plaintiffs from forming a union of the managers of Local 1107 and negotiating their identical contracts with identical terms collectively. Had they done so, this case would have

been removed to federal court and enforceable pursuant to 29 U.S.C. § 185. Thus, application of the *Screen Extras Guild* rule here would not be protecting union democracy, but rather, penalizing Plaintiffs for not negotiating their contracts pursuant to federal law instead of state law.

It seems remarkably arbitrary that Plaintiffs Gentry and Clarke would not be permitted to pursue their breach of contract claims against the Defendants because of preemption, but Peter Nguyen will be able to enforce his identical contract because he decided to pay union dues for associate membership to Local 1107 as a staff member simply because his termination extinguished both his employment with Local 1107 and his associate membership with the union as well. It also seems remarkably arbitrary that Javier Cabrera, a union organizer, in a position found to be within the scope of employees covered by the *Screen Extras Guild* preemption doctrine is able to enforce his just cause employment contract simply because it was bargained collectively and is thus only enforceable in federal court or before the NLRB. These facts cut against any finding of preemption of these state law claims because doing so requires this Court to conclude that Congress intended elected union officials to be able to terminate non-union member lower level managers and employees without limitation to implement the mandate of the union membership expressed in an election, despite not expressly stating so in the LMRDA, while expressly stating the LMRDA was not intended to preempt state law by including six different savings provisions in the body of the act, and identical contracts would, without question, be enforceable had Plaintiffs chose to negotiate them collectively under federal law rather than individually under state law or had chosen to pay dues to Local 1107.

The *Screen Extras Guild* doctrine relies on conflict preemption. *Screen Extras Guild*, 51 Cal. 3d at 1024, 1033. Surprisingly, however, the *Screen Extras Guild* Court appears to distort the types of federal preemption when making its holding to fit the decision concluding that there are two types of preemption: "substantive or jurisdictional." *Screen Extras Guild*, 51 Cal. 3d at 1022. Plaintiffs are entirely unclear where the California Supreme Court got the notion that preemption cases are either substantive or jurisdictional, as the overwhelming amount of case law on the issue does not characterize preemption this way. In fact, the syllabus of the United States Supreme Court case the *Screen Extras Guild* Court cited for this proposition does not include the terms

"substantive," "jurisdictional." *See generally Bhd. of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 371, 89 S. Ct. 1109, 1111 (1969). The case also includes only a single reference to preemption in the background section discussion the lower court's ruling that "that the state court's jurisdiction over the litigation was not preempted by the National Labor Relations Act." *Id. Bhd. of R. Trainmen* is hardly an instructive case on federal preemption, including almost no discussion of the matter.

It is indisputable that all matters of preemption are matters of Congressional intent. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1908 (2019); *see also Screen Extras Guild*, 51 Cal. 3d at 1022. It is also indisputable that there two recognized categories of preemption: defensive and complete preemption. *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 948 (9th Cir. 2014). "In general, there are **three forms of defensive preemption**: express preemption, field preemption, and conflict preemption." *Id.* There is also the rare case of complete preemption, which has only been held to apply to three statutes, none of which are at issue here. *Ross v. Haw. Nurses' Ass'n Office & Prof'l Emples. Int'l Union Local 50*, 290 F. Supp. 3d 1136, 1144-45 (D. Haw. 2018); *see also Retail Prop. Tr.*, 768 F.3d at 948 n.5 *citing* 29 U.S.C. § 185, 29 U. S.C. § 1132, and 12 U.S.C. § 85, 86. Express preemption is also not at issue, as the *Screen Extras Guild* Court conceded that the LMRDA does not expressly preempt state-law suits for wrongful discharge by a union employee. *Screen Extras Guild*, 51 Cal. 3d at 1024, 1033. Field preemption is also not at issue because Congress expressly included five anti-preemption savings provisions in the LMRDA demonstrating a clear intent not to occupy the field of law as it pertains to internal union relations. *See* 29 U.S.C. § 413, 466, 501, 523, 524, 524(a). Thus, the only type of preemption at issue in regards to the *Screen Extras Guild* doctrine is conflict preemption, which the Court appears to apply in *Screen Extras Guild*, 51 Cal. 3d at 1024.

"Conflict preemption can bar a state-law claim 'even if the elements of the state cause of action [do] not precisely duplicate the elements of an [federal] claim,' ...**but a state-law claim is not preempted if it reflects an 'attempt to remedy [a] violation of a legal duty independent of [the federal claim**]'" *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 667 (9th Cir. 2019). "State-law claims 'are based on 'other independent legal duties' **when they 'are in no way**

based on an obligation under" of the federal claim and "'would exist whether or not" the federal claim exists. *Id. quoting Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 950 (9th Cir. 2009). "Conflict preemption is narrower than field preemption." *Knox v. Brnovich*, 907 F.3d 1167, 1175 (9th Cir. 2018). Under conflict preemption principles, "state law is pre-empted to the extent that **it actually conflicts with federal law**." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). "Courts have found conflict preemption in two situations: [1] "where compliance with both state and federal law is impossible, or [2] where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Knox*, 907 F.3d at 1175. (internal quotation marks omitted). "A state law may stand as 'an obstacle to the regulatory system Congress chose' **if Congress chooses a specific method of enforcement to achieve federal goals, and a state law adopts a different enforcement method that interferes with 'the careful balance struck by Congress**.'" *Id.* However, "[i]f Congress has not adopted a comprehensive regulatory program in a specific area" states may regulate.

The "Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, *see, e. g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *See also Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). It is hard to imagine how the *Screen Extras Guild* Court found conflict preemption of non-employee-member wrongful termination cases when the LMRDA does not include a single mention of union staff employees, nor impose any duties or liabilities relating to non-union member employees.

What the *Screen Extras Guild* Court did is apply the narrower doctrine of conflict preemption to the LMRDA based on the general Congressional concern with union democracy, not a specific regulatory scheme to impose duties and obligations on unions as employers. The *Screen Extras Guild* Court relied on three primary cases to come to its conclusion about preemption: (1) *Finnegan v. Leu*, 456 U.S. 431, 72 L. Ed. 2d 239, 102 S. Ct. 1867 (1982); (2)

Bloom v. Gen. Truck Drivers Union, Local 952, 783 F.2d 1356, 1357 (9th Cir. 1986); and (3) *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989).

In *Bloom*, the administrator at issue was member of the union and an appointed Business Agent. 783 F.2d at 1357. The Court noted that "Business agents have significant policymaking responsibility in the negotiation of contracts and in processing and resolving grievances," and was a position expressly provided for in the Local's bylaws. *Id.* The Ninth Circuit Court was addressing the "federal interest in promoting union democracy and the rights of union members," which it held "includes an interest in allowing union leaders to discharge incumbent administrators" after a new elected union leader takes office. *Id.* at 1361-62. However, the *Bloom* Court expressly declined to rule on "whether allowing a state cause of action for wrongful discharge would generally undermine this federal interest and rob the union leader of discretion needed to serve the wishes of the membership and thus the purposes of the Act." *Id. citing Tyra v. Kearney*, 153 Cal. App. 3d 921, 926-27, 200 Cal. Rptr. 716, 719-20 (1984) (the case *Screen Extras Guild* is based on). Instead, the Court held that the wrongful termination claim could proceed because it implicated a public policy concern, the termination of Bloom for expressing concerns of illegal conduct. *Id.* Thus, the *Bloom* Court avoided ruling on the preemption issue, instead concluding that the wrongful termination claim at issue did not implicate the LMRDA at all.

The *Finnegan* case is no more helpful in finding preemption because "*Finnegan* v. *Leu* (1982) 456 U.S. 431 [72 L. Ed. 2d 239, 102 S. Ct. 1867] (hereafter *Finnegan*), **is not a preemption case**." *Screen Extras Guild*, 51 Cal. 3d at 1034 (Judge Eagleson dissenting). Indeed, *Finnegan* contains no mention of preemption at all. *Finnegan*, 456 U.S. at 102. Rather, the *Finnegan* Court held that a newly elected President could fire appointed business agents who, as members of the union, had campaigned for the incumbent. *Finnegan*, 456 U.S. at 440-41. The *Finnegan* Court held that the LMRDA's protection of members from improper discipline did not apply to a member's discharge from union employment. *Id.* What the *Finnegan* Court did not hold was that state law was preempted by the LMRDA. *Id.* Similarly, like *Finnigan*, *Lynn*, was also not a preemption case, dealing only with an employee-member's rights and remedies under the LMRDA for discharge from union employment. 488 U.S. 347 (1989). Both cases held that only when an

employee-member's membership rights are affected by the termination from union employment is a cause of action under Title I of the LMRDA actionable. *Lynn*, 488 U.S. at 354; *Finnegan*, 456 U.S. at 440. None of these three cases *Screen Extras Guild* relied on actually ruled on the preemption issue the *Screen Extras Guild* Court ultimately did. Thus, the Court should not apply *Screen Extras Guild* without its own analysis of the LMRDA and its Congressional intent.

Turns out, Congress expressly provided for both business agents, key union administration personnel and department heads in the act itself. *See* 29 U.S.C.S. § 402(q). Congress defined the term "'Officer, agent, shop steward, or other representative,' when used with respect to a labor organization, **includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority**), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel." *Id.* The catchall savings provision of the LMRDA, which applies to the entire act, expressly states that "**Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization**, or of any trust in which a labor organization is interested, **under any other Federal law or under the laws of any State**, and except as explicitly provided to the contrary, **and** except as explicitly provided to the contrary, **nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State**." 29 U.S.C.S. § 523; *Posner v. Util. Workers Union of Am.*, 47 Cal. App. 3d 970, 973, 121 Cal. Rptr. 423, 425 (1975). This statute is a two way savings clause. It disclaims preemption to the extent it would "reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization…under any other Federal law or under the laws of any State." *Id.* It also disclaims preemption to the extent it would limit any rights or remedies members of a labor organization have under federal or state law. *Id.*

The term "officer, agent, shop steward, or other representative" shows up in only four other LMRDA statutes, all dealing with the liability of a union for violating the law. *See* 29 U.S.C. §§ 433, 501, 502, 529. 29 U.S.C. § 433 requires unions to report payments or loans to any "officer,

agent, shop steward, or other representative." 29 U.S.C. § 501 imposes fiduciary responsibilities on union "officers, agents, shop stewards, or other representatives," imposing civil and criminal liability on them for mishandling union funds. 29 U.S.C. § 502 requires "[e]very **officer, agent, shop steward, or other representative** or employee of any labor organization" who handles union funds to be bonded. 29 U.S.C. § 529 makes it "unlawful for any labor organization, or any **officer, agent, shop steward, or other representative** of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act."

Where the term "officer, agent, shop steward, or other representative" is not found is in the sections on union elections and the union member bill of rights, Titles I and IV of the LMRDA, which are the sections focused on preserving union democracy. *See* 29 U.S.C. §§ 411, 412, 413, 414, 415, 481, 482, 483. Indeed, when the *Bloom*, *Finnegan*, and *Lynn* Courts issued their rulings on the union democracy concerns of the LMRDA, they each cited to Title I of the LMRDA, 29 U.S.C. §§ 411-414. *See Bloom*, 783 F.2d at 1361; *Lynn*, 488 U.S. at 350; *Finnegan*, 456 U.S. at 440. The three cases cited by *Screen Extras Guild* cited Title I of the LMRDA, which discusses rights related to union elections, as does Title IV. The sections of the LMRDA that include the definition of union staff like Plaintiffs, expressly states that the act does not limit the responsibilities of unions or their staff under state law.

Plaintiffs for cause contracts, like the CBA with the staff union, is a duty/responsibility Local 1107 contracted to take on under state law and its enforcement is expressly saved from preemption based on the plain language of the savings clause and the definitions section of the LMRDA. *Id. see also* 29 U.S.C. § 402(q). Plaintiffs were not terminated by any elected union official. Their contracts are expressly preserved from preemption by 29 U.S.C. § 523. Identical contracts under state and federal law would be enforceable under the *Screen Extras Guild* rule for arbitrary reasons unrelated to union democracy. For these reasons, this Court should grant Plaintiffs summary judgment on the preemption defense.

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C. <u>It Is Undisputed That Defendants Terminated Plaintiffs Employment Without Cause In Breach Of Their For Cause Contracts.</u>

In Nevada, there is a presumption that employment with a Nevada employer is "at-will." *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 926, 899 P.2d 551, 553 (1995). "At the heart of the doctrine is the general rule that at-will employment can be terminated without liability by either the employer or the employee at any time and for any reason or no reason." *Id.* There are very limited exceptions to this general rule, most "emanating from strong public policy." *Id. citing Hansen v. Harrah's*, 100 Nev 60, 675 P.2d 394 (1984) (at-will doctrine subject to strong public policy exceptions); *K Mart v. Ponsock*, 103 Nev. 39, 47, 732 P.2d 1364, 1369 (1987) (employer has absolute right to terminate at-will employee at-will or at-whim unless offends public policy). However, "employers and employees r**<u>emain free to contractually modify an employee's at-will status, orally or in writing</u>**." *Id. citing American Bank Stationery v. Farmer*, 106 Nev. 698, 703, 799 P.2d 1100, 1102 (1990).

While Nevada employees are presumed to be at-will employees, "[t]his presumption may be rebutted by proving, by a preponderance of the evidence, that there was an express or implied contract between the employer and the employee which indicates that the employer would only terminate the employee for cause." *Id.* There are thus four elements to a wrongful termination claim in Nevada that an employee plaintiff must prove by preponderance of the evidence: (1) that the employer and the employee entered into an employment contract; (2) that the employment contract entered into between the employer and employee either explicitly states that "employment is to be for an indefinite term and may be terminated only for cause or only in accordance with established policies or procedures," or such a contract can be "implied from the circumstances of the employment;" (3) that the employer breach the contract by terminating the employee without cause, or not in accordance with established policies or procedures; and (4) that the employee plaintiff suffered damages. *D'Angelo v. Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 211 (1991); *see also Elements of Nevada Legal Theories*. Author, Steven J. Klearman. Edition, 4. Publisher, Nevada Legal Guides, 2010, at 300.

The Local 1107 Defendants only defense to Plaintiffs breach of contract claims is their preemption defense. *See generally* L1107 MSJ, 10/29/19, at 11:11-21:7. The Local 1107

Defendants do not attempt to dispute Plaintiffs' wrongful termination in breach of for cause contract claims in their Motion for Summary Judgment. *Id.* This is because the Local 1107 Defendants have no other defense to the breach of contract claim, and if it does not apply, Plaintiffs are entitled to summary judgment on those claims. *Id.*

1. It Cannot Be Disputed Plaintiffs Had "For Cause" Contracts Of Employment With Local 1107 That Could Only Be Terminated By Following Established Procedures..

It cannot be disputed that Local 1107 entered into a valid and binding "for cause" contracts for indefinite employment with Dana Gentry and Robert Clarke. The two employment contracts are nearly identical in their terms. *See* **Ex. 1,** at Local – 003; *see also* **Ex. 2,** at Local – 026. On the effective date of the offer of employment, both Ms. Gentry and Mr. Clarke were to "commence employment with Local 1107." *Id.* There is no time limitation on the term of the employment contracts. Both contracts expressly state that "[t]ermination of this employment agreement may be initiated by the SEIU Nevada President **for cause**." *Id.* (emphasis added). Both contracts outline an established and agreed upon policy and procedure for termination, that the termination decision "is appealable to the local's Executive Board, which shall conduct a full and fair hearing before reaching a final determination regarding your employment status." *Id.* The Local 1107 Defendants have admitted that the contracts included as Exhibits 1 and 2 are authentic copies of the contracts between Local 1107 and Plaintiffs. *See* **Ex. 13,** at 3:1-9. The Local 1107 Defendants further admitted that both Plaintiffs had employment contracts with Local 1107. *See* **Ex. "14,"** at 3:16-4:11.

Defendants denied that "the contract could only be terminated for cause" and "that any such termination was appealable to the Local 1107 Executive Board." *Id.* However, this denial is contradicted by the plain, clear and unambiguous language of the contracts themselves, which the Local 1107 Defendants have admitted are authentic. *See* **Ex. 13,** at 3:1-10. At best, the Defendants denial that these contracts could be terminated for cause relies on an argument of ambiguity regarding the term "for cause." "In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" *Anvui, Ltd. Liab. Co. v. G.L. Dragon, Ltd. Liab. Co.*, 123 Nev. 213, 215-16, 163 P.3d 405, 407 (2007); *see also Moroni Corp. Invs. Int'l, Inc. v. Edgemon*, No. 57407, 2012

Nev. Unpub. LEXIS 1475, at *10-11 (Oct. 31, 2012). "A contract is ambiguous when it is subject to more than one reasonable interpretation. Any ambiguity, moreover, **should be construed against the drafter**." *Id.* "The parties' intentions regarding a contractual provision present a question of fact." *Id.* Local 1107 was the offeror and drafter of both contracts as both contracts are addressed from Local 1107 and the Local 1107 President, Cherie Mancini, to Plaintiffs. *See* **Ex. 1,** at Local – 003; *see also* **Ex. 2,** at Local – 026.

It is clear from the plain language of the contract itself that the parties intended Plaintiffs' employment with Local 1107 to be only terminable "for cause" relating to failure to perform duties of the position or misconduct during employment, and any such determination would be appealable to the Local 1107 Executive Board. *See* **Ex. 1,** at Local – 003; *see also* **Ex. 2,** at Local – 026. The intent of the parties is clear from the plain language of the documents themselves, and the Defendants subsequent self-serving interpretation that Plaintiffs contracts, which say termination can only be "for cause" does not mean their employment could only be terminated for cause should be disregarded. Defendants cannot dispute that Plaintiffs' contracts have the words "for cause" in them, nor that the contracts state that such termination is appealable to the Local 1107 Executive Board, and any ambiguity if the Court should conclude any exists is charged against the Local 1107 Defendants as the drafters of the contracts.

Ms. Gentry had been employed with Local 1107 for just over one year under this contract before her employment was terminated. *See* **Ex. 11,** at 1. Mr. Clarke had been employed with Local 1107 just over nine (9) months before his employment was terminated. *Id.* at 2. The explicit language of Plaintiffs' employment contracts with Local 1107 establish the first two elements of a Nevada wrongful termination claim: (1) the existence of an employment contract; and (2) the employment contract expressly or impliedly agreed to was for an indefinite term and could only be terminated for cause and in accordance with established procedures. There is no issue of material fact regarding the existence of an indefinite, for cause employment contract. As such, Plaintiffs are entitled to judgment as a matter of law on the first two elements of Plaintiffs' Nevada wrongful termination claims.

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2. It Cannot Be Disputed That Defendants Breached The Plaintiffs For Cause Contracts.

Plaintiffs indefinite, for cause employment contracts with Local 1107 also established a procedure for terminating Plaintiffs. "Termination of this employment agreement may be initiated by the SEIU Nevada President for cause and is appealable to the local's Executive Board, which shall conduct a full and fair hearing before reaching a final determination regarding your employment status." *See* **Ex. 1,** at Local – 003; *see also* **Ex. 2,** at Local – 026. Before terminating Ms. Gentry and Mr. Clarke, Local 1107 was required to provide them notice of the for cause basis for their termination, and provide for a "full and fair hearing" before the Local 1107 Executive Board before reaching a final determination on Plaintiffs termination. *Id.*

SEIU International imposed the emergency trusteeship over Local 1107 on April 28, 2017, and appointed two Trustees over Local 1107 "**for the purposes of preventing disruption of contracts**, assuring that the Local Union performs its duties as collective bargaining representative, restoring democratic procedure, protecting the interests of Local 1107 and its membership, and otherwise carrying out the legitimate objects of the International Union." *See* **Ex. 10,** at 3. The SEIU International Trustees were tasked with preventing disruption of contracts. Local 1107 had valid and binding contracts with Plaintiffs for continued employment that could only be terminated for cause. *Id.*. On May 4, 2017, one week after imposition of the emergency trusteeship, and before Ms. Gentry and Mr. Clarke had an opportunity to demonstrate that they could "carry out the Local's new program and policies," the SEIU International Trustees over Local 1107 terminated Ms. Gentry and Mr. Clarke's employment with Local 1107 without cause, and without according them a full and fair hearing pursuant to the express terms of their employment contracts. *See* **Ex. 11,** at 1-2.

During discovery in this case, Plaintiffs propounded written discovery including requests for admissions and interrogatories. Plaintiffs propounded the following interrogatory on the Local 1107 Defendants: "Identify the 'for cause reasons' for terminating Plaintiff Clarke's employment with Local 1107." *See* L1107 Resp. Clarke 1st ROGS, attached as **Exhibit "23,"** at 7:22-8:15 *citing See* L1107 Opp. Ctr MSJ, 10/15/18, at 10:3-19; Local 1107 Answer, 4/8/19, at 4:4 (Affirmative Defense 33); *see also* L1107 Resp. Gentry 1st ROGS, attached as **Exhibit "24,"** at

8:1-9:3. The Local 1107 Defendants gave a long winded answer to these interrogatories which can be summarized as follows: "From Local 1107's position, for cause termination is not limited to employee misconduct or failure" of the employee, that Plaintiffs "had been hired by the removed President Mancini…[and] had participated in the management of Local 1107 during a substantial part of Mancini's tenure and during a time of significant discord within Local 1107," and the trustees "intended to "fill management and other positions at the Local with individuals they are confident can and will carry out the Local's new program and policies,'" and that Plaintiffs "played a central role in a conspiracy to overthrow and/or impede the trusteeship and Local 1107." *Id.* This response demonstrates several things. First, Plaintiffs were not terminated because of any "misconduct or failure" on their part during their employment with Local 1107. *Id.* Plaintiffs being hired by the removed President Mancini does not establish for cause reasons for their terminations, nor does it justify the Defendants' refusal to follow the appeal procedure in the contracts. *Id.*

The only part of this response to could possibly be seen as a "for cause" basis for Plaintiffs termination was their supposed involvement in trying to overthrow the trusteeship. However, the Local 1107 Defendants have admitted that Plaintiffs were "not terminated from employment from Local 1107 because the SEIU International trustees became aware that [they] expressed opposition to the trusteeship prior to [their] termination." *See* **Ex. 15,** at 4:7-18. Plaintiffs' involvement with the members' attempt to overturn the trusteeship occurred after Plaintiffs were terminated from employment with Local 1107, and, therefore, cannot be used as a basis for their actual terminations. Therefore, because there is no issue of material fact regarding Defendants breach of Plaintiffs express contracts for continued employment, Plaintiffs are entitled to judgment as a matter of law on the element of breach. Because the first three elements of Plaintiffs wrongful termination claim have been met and the only remaining element to be proven at trial is damages, Plaintiffs are entitled to partial Summary Judgment on the issue of Defendants liability.

D. <u>Plaintiff Gentry Is Entitled To Summary Judgment On The First Three Elements Of Her Defamation Claim.</u>

"In order to establish a prima facie case of defamation, a plaintiff must prove: (1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication

to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Simpson v. Mars Inc.*, 929 P.2d 966, 967, 113 Nev. 188, 190 (1997).

The overwhelming evidence produced in discovery in this case, as well as the Local 1107 Defendants' own Motion for Summary Judgment indicates, without question, that the statements Kisling made about Plaintiff Gentry drinking alcohol at work and misusing the Local 1107 credit card were false. In fact, the SEIU International hearing officer even noted that it was quite concerning that the allegations of "double dipping" were made despite the fact that neither Kisling, nor Grian had "researched" the issue. *See* **Ex. 3,** at 11. The Urban investigation report stated that "questions were raised on spending by staff, Dana Gentry and Peter Nguyen," and supposedly identified "questionable transactions," but did not conclude Plaintiff Gentry had misused funds, nor elaborate on what was questionable about the charges. *See* **Ex. 8,** at Local – 685. In fact, the Local 1107 Defendants do not even dispute that the statements were false and defamatory in their Motion for Summary Judgment. Rather, the Local 1107 Defendants' defense is that the communications were protected by privilege. *See* Local 1107 MSJ, 10/29/19, at 18:12-21:7. In fact, when Plaintiff Gentry propounded her First set of Interrogatories on the Local 1107 Defendants she requested that the Local 1107 Defendants "Identify what 'alleged statements were true' as referenced in Local 1107's Affirmative Defense 7. *See* Local 1107 Answer, 4/8/19, at 2:16." *See* **Ex. 24,** at 9:15-25. The Local 1107 Defendants objected asserting that "certain information may only be in the possession of Plaintiffs and other parties and not yet available to Local 1107," but ultimately confirmed that "the affirmative defense of truth was made to avoid waiving the defense" and that "identifying the alleged statements were true has not been confirmed." *Id.* Discovery is now closed, and the Local 1107 Defendants have not supplemented their responses.

The Local 1107 Defendants do not have any evidence to dispute that Kisling's allegations that Plaintiff Gentry was drinking on the job and mishandling funds were false. *Id.* There being no issue of material fact regarding whether Kisling's statements were false, Plaintiffs are entitled on summary judgment on the first element of the defamation claim that "a false and defamatory statement by defendant concerning the plaintiff" was made.

Plaintiff Gentry is also entitled to summary judgment on the element of publication to a third party. Local 1107 argues that "Internal corporate communications regarding personnel matters are privileged." *See* L1107 MSJ, 10/29/19, at 20:8-19 *citing Jones v. Golden Spike Corp.*, 623 P.2d 970, 971, 97 Nev. 24, 27 (1981) (adopting the rule that internal business communications do not constitute defamation). Local 1107 also argues that the communications are protected by "common interest privilege." *Id.* at 20:20-21:7. The crux of the Local 1107 Defendants argument is that the defamatory statements by Defendant Kisling about Plaintiff Gentry qualify for the privilege because "1) the statements were internal 2) to Local 1107's Executive Board 3) who convened an independent investigation and 4) never adopted the statements or issued discipline against Gentry. The internal communication privilege is therefore established as a defense, making summary judgment against Gentry on the matter proper." *Id.* at 20:15-19. However, the statements were not kept internal, and did not stay within Local 1107 Executive Board. Rather, Kisling's report and statements were published to SEIU International employees Mary Grillo and Steve Ury as evidenced by Grillo's email to Ury, and accidentally sent to the entire Local 1107 Executive Board on September 2, 2016, regarding the Kisling report. *See* **Ex. 7,** at Local – 665-66. It is clear that Kisling went to Grillo, presented Grillo with her report and concerns, and Grillo told "Sharon that Urban should handle internal issues, as he represents the local," but that she did "not believe that **all these issues** warrant investigation," and "that these issues **should not be discussed outside of the eboard**, but more discussion is a good idea before taking any actions. I would recommend some outside help to clarify the roles and responsibilities of the Eboard." *Id.* (emphasis added).

Local 1107 President Brenda Marzan testified credibly, when presented with this very email, that Grillo is "Mary Kay's personal representative." *See* **Ex. 5,** at 136:8-24. When SEIU International Representative Mary Grillo was deposed, she also testified credibly that Sharon Kisling "called [her] up" to "discuss the matters of concern in her report," including "issues regarding staff." *See* Grillo Deposition Transc., attached as **Exhibit "25,"** at 99:9-23. Grillo testified that she recommended taking Kisling's concerns to Urban "**[b]ecause it wasn't International business; it was internal union business**." *Id.* (emphasis added). Indeed, Grillo clearly stated dealing with Kisling's concerns was "not my role, and it wasn't --they were not

matters for the International to investigate." *Id.* at 102:13-19. When Plaintiff Gentry brought this claim against Local 1107 and SEIU International, SEIU argued that they should not be held liable because "Plaintiffs fail to cite any statute, case, or other authority establishing that a defendant may be liable for defamation for failing to retract a *third party's* allegedly defamatory statement about a plaintiff." *See* SEIU Opp. Pltfs Mot Amend, at 8:3-7. The SEIU International Defendants argued that they could not be held liable as Kisling and Local 1107 are third parties. Because Grillo is not a Local 1107 employee or member, Kisling's publication of her report and concerns to Grillo constitutes a publication outside of the Local 1107 as an organization, otherwise known as publication to a third party.

This information was also forwarded to Steve Ury, who is also an employee of SEIU International Legal Department, not Local 1107. *See* Ury Declaration, attached as **Exhibit "26,"** at 1-3. Ury was also present at the Local 1107 Executive Board meeting over the phone when Kisling presented her report to the Board. *See* August 31, 2016 Minutes, attached as **Exhibit "27,"** at SEIU6018. Further, after the meeting, the report allowed to be taken from the hall and other Local 1107 staff obtained copies of the report. *See* **Ex. 7,** at Local – 670-71. Because it cannot be disputed that Local 1107 published the defamatory statements about Plaintiff Gentry to individuals outside of the Local 1107 and the Executive Board, the publication element is met. This publication outside of Local 1107 also disentitles Local 1107 from taking shelter under the "internal business communications" and "common interest" privileges. *See* L1107 MSJ, 10/29/19, at 20:3-21:7. Finally, the SEIU International Internal Charges Report demonstrates rather clearly that Kisling's defamation of Plaintiff Gentry amounts, at the very least, to negligence, as neither she, nor anyone on the Local 1107 finance committed investigated the issue before the allegations were made. *See* **Ex. 3,** at 11. As such, there being no issue of material fact regarding the first three elements of Plaintiff Gentry's defamation claim, Plaintiff is entitled to summary judgment as a matter of law.

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III. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully requests this Court **GRANT** their Motion for Partial Summary Judgment.

Dated this 30th day of October, 2019.

Respectfully submitted,

MICHAEL J. MCAVOYAMAYA

/s/ Michael J. Mcavoyamaya

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on September 26, 2018, I caused the foregoing document entitled **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; LUISA BLUE, in her official capacity as Trustee of Local 1107; MARTIN MANTECA, in his official capacity as Deputy Trustee of Local 1107; MARY K. HENRY, in her official capacity as Union President; SHARON KISLING, individually; CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107, a non-profit cooperative corporation; DOES 1-20; and ROE CORPORATIONS 1-20, inclusive, Defendants.	CASE NO.: A-17-764942-C DEPT. No. XXVI **MOTION FOR SUMMARY JUDGMENT** HEARING REQUESTED

CHRISTENSEN JAMES & MARTIN, CHTD.
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LUISA BLUE ("Blue"), MARTIN MANTECA ("Manteca"), and NEVADA SERVICE EMPLOYEES UNION ("Local 1107"), misnamed as "CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107" (Luisa, Martin, and Local 1107 are collectively referred to as "Local 1107 Defendants"), by and through the law firm Christensen James & Martin, hereby move for summary judgment.

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DATED this 29th day of October 2019.

CHRISTENSEN JAMES & MARTIN

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MEMORANDUM OF POINTS AND AUTHORITIES

I

SUMMARY

Summary judgment in favor of Local 1107 is proper because the Labor Management Reporting and Disclosure Act ("LMRDA") preempts all Plaintiff claims. LMRDA preemption applies to the contract related claims because Plaintiffs were management employees subject to removal without contract consideration. Gentry's defamation claim is also preempted by federal labor law because Local 1107 was legally required to receive the concerns alleged to be defamatory. Even without preemption, the no facts exists supportive of Plaintiffs' contract related claims and the alleged defamatory statements were privileged.

II

UNDISPUTED FACTS[1]

1. General Facts.

Local 1107's former President, Cherie Mancini, hired the Plaintiffs as part of her management team. Mancini hired Gentry to direct Local 1107's communications as Communications Director. See Exhibit A, Gentry Depo., 24:17-25 (App. 009), Ex. 1

[1] To make locating cited facts easier, exhibits are contained in an Appendix pursuant to Local Rule 2.27(b) and have been marked with Bates stamp numbers of "Appendix 001" through "Appendix 248". Citations to the documents in the Appendix include 1) the document, 2) the location in that document and 3) the Appendix Bates number.

(App. 039). Mancini hired Clarke to direct Local 1107's finances and human resources as Director of Finance and Human Resources. See Exhibit B, Clark Depo., 14, 15:1-15 (App. 070-71), Ex. 25 (App. 093). Mancini, Gentry and Clark held weekly management meetings to plan and coordinate the management of Local 1107. Gentry Depo., 176:7-25 (App. 023).

Service Employees International Union ("SEIU") President Mary K. Henry removed Mancini as Local 1107's President on April 28, 2018 pursuant to a trusteeship order ("Trusteeship Order"). See Exhibit C, Blue Decl., 2:¶¶3-4 (App. 127), Ex. A (App. 130). She also removed Defendant Sharon Kisling as Local 1107's Executive Vice President. Id. Mancini sued Local 1107 claiming that the Trusteeship Order was improper. The Ninth Circuit Court of Appeals and the United States District Court for the District of Nevada both found the Trusteeship Order valid and enforceable. See Exhibit D, Ninth Circuit Memorandum Decision, 2:¶1 (App. 136).[2]

The Trusteeship Order states, among other things, the following:

> Pursuant to my authority under Article VIII, Sections 7(a) and7(f), of the SEIU Constitution and Bylaws, I have determined that an emergency situation exists within SEIU Local 1107, CtW, CLC (hereinafter "Local 1107," "Local Union" or "Local"), and that the interests of Local 1107 and the membership require the immediate appointment of a Trustee and Deputy Trustee to preserve the Local Union's status as collective bargaining representative and the performance of its representational duties and functions, restore democratic procedures at the Local, protect the interests of the Local and its members, and otherwise carry out the legitimate objects of the International Union.

Blue Decl., Ex. A (App. 130).

Local 1107 became subject to the International's Constitution upon imposition of the trusteeship. Id. (App. 132). That Constitution allowed removal of Gentry and Clark: "The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union … and … remove any of its employees, agents and/or trustees …." See Ex.

[2] The Court is requested to take judicial notice of the rulings pursuant to NRS 47.130 through NRS 47.170.

E, Brian Shepherd Declaration, Ex. C, International Constitution, Art. 8, Section 7(a) (App. 167).

2. Undisputed Duties of Gentry and Clarke.

Plaintiffs held confidential, policy making, management positions as Local 1107 directors. Plaintiffs reported directly their President, Cheri Mancini. Gentry Depo., 154:1-4 (App. 013); Clarke Depo., 29:2-15 (App. 072).

A. Gentry's Duties.

Gentry became the spokesperson of Mancini's presidency. Gentry Depo., 28:2-12 (App. 010), Ex. 7 (App. 040-41) ("spokeswoman Dana Gentry"). She governed communications for 19,000 workers and 9,500 Local 1107 members. Id., 131:12-14 (App. 012). Gentry confirmed her key advisor and strategic planning role while testifying about her job description.[3]

> Q. The -- under Key duties and responsibilities, it says, The communication director serves as a key adviser to Local 1107 leadership in a variety of internal and external communications, develops short-term and long-term campaigns strategies, and plans for increasing the size, strength, activism, and savvy of our union membership.
>
> Is that an accurate description of your key duties and responsibilities when you were the communications director?
>
> A. Yes, I suppose it is.

Gentry Depo. 157:19-25, 158:1-5 (App. 015-16). Gentry shared an example of her important managerial role as Communications Director:

> Q. And I guess more generally, the development of short-term and long-term campaign strategies was, for your part, determining the best message to achieve the union's goal; is that fair?
>
> A. Right. And, for instance, when the ACA [Affordable Care Act] was under attack, you know, I would advise to go out and lobby -- not lobby, but protest

[3] See Gentry Depo Ex. 13 (App. 048-49) (authenticated job description).

> outside Heller's office and get our partners to come out and that sort of thing, but nothing revolutionary, I'm sure.

Id. 161:20-25, 162:1-3 (App. 017-18).

Indeed, Gentry's governance role at Local 1107 was extensive. She was Local 1107's sole manager in charge of strategic communications for the entire union. "Q. Was there anybody at the local at that time also engaged in strategic communications? A. At the local? No…." Id. 162:4-6 (App. 018). She developed "strategic communication plans" (Id. 162:9-20), produced communications material and drafted President Mancini's speeches (Id. 165:1-25) (App. 019), developed media campaigns (Id. 170:16-24) (App. 020), was solely responsible for getting press coverage for Local 1107 organizing campaigns (Id. 172:13-16) (App. 022), and "solely responsible for cultivating those relationships with the press" (Id. 172:10-12) (App. 022). Gentry's influence was so broad that President Mancini used her to influence policy and membership through "interpreting court rulings and sending the court rulings out to members…" and the media in an effort "get them interested in the story you thought was important." Id. 170:21-25 (App. 020), 171:1-14 (App. 021).

Gentry confirmed her confidential role promptly after the imposition of the trusteeship. She met with the appointed Trustees and completed a questionnaire[4] where she identified an employment duty to "[r]esearch and produce investigative reports to augment campaigns and influence members of the public and decision-makers." Id. 184:22-24 (App. 025). Gentry worked to influence members and decision makers during a unionizing campaign of the Elko Hospital Nurses in Elko Nevada. Id. 185:1-22 (App. 026). She testified about her policy making role of providing "opposition research" for the purposes of influencing the public on health care issues (Id. 186:1-19) (App. 027) and that she was responsible for syncing Local 1107 messaging with organizing campaigns.

[4] See Gentry Depo Ex. 14 (App. 050-59)(authenticated copy of the questionnaire).

Id. 187:1-15 (App. 028). Gentry even advised President Mancini on the cultivating the best political relationships. Id. 190:4-8 (App. 030).

B. Clarke's Duties.

Clarke confirmed his key advisor and strategic planning role as a President Mancini confidant while testifying about his job description.[5] Clarke served in a senior level managerial positon for President Mancini (Clarke Depo, 36:20-25, 37:1-3) (App. 073-74) with governance of Local 1107's confidential financial records. Id. 36:15-19 (App. 073). He described his financial management responsibilities as follows: "I mean, it means taking care of finances in terms of budgeting, spending, you know, income coming in, projections, making sure that the money is being spent where it should be and approved to be spent, that type of stuff." Id. 37:10-14 (App. 074). Clarke's financial responsibilities were so extensive that he oversaw the union's cash flow management (Id. 40:21-25, 41:1-8) (App. 040-41) and prepared and presented financial statements to the Board of Directors for consideration when making financial decisions. Id., 39:7-11 (App. 076). Clarke even managed union operations for President Mancini:

> I think that just deals with just the general ongoing operations of the office, making sure things are staffed, that the administrative folks that need to be in the office are there, that they're doing -- that they're actually carrying out their duties that need to be done for the ongoing daily operations.

Id. 37:17-23 (App. 074). As President Mancini's chief of operations, he had oversight and management responsibility for all Local 1107's confidential records, employees and information technology. Id. 38:1-18 (App. 075). President Mancini trusted Clarke so much that she placed him in charge of Local 1107's legal compliance. Id. 38:19-25 (App. 075).

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[5] See Clarke Depo, Ex. 26 (App. 094-95) (authenticated job description).

C. Loyalty to Mancini and Trustee Hatred.

Plaintiffs left a trail of evidence of their Mancini loyalty and trustee distain. Plaintiffs actively sought to have their President Mancini reinstated at the expense of the Trustees: As Gentry testified, "they were trying to get the trusteeship overturned or Cheri reinstated or something like that, and they needed help with a news release. So I said, I'm happy to help in any way I can." Gentry Depo., 233:2-10 (App. 037). That press release praised Mancini and criticized Blue and Manteca:

> The International Trustee's actions in removing a duly elected officer are repugnant and holy [sic] unjustified. In fact, President Mancini acted in response to members' requests and demands to protect interests. International's own investigative findings confirm that President Mancini's actions were in the best interest of members.

See Gentry Depo., Ex. 18 (App. 061-62). Plaintiffs' loyalty to the removed President Mancini and dislike of the Trustees is on display elsewhere. Clark was critical of the trusteeship, believing it likely illegitimate. Clarke Depo., 65:10-67:25 (App. 079); 70:21-24 (App. 080). He considered Trustee Manteca to be a "tyrant" and "bully," (Id. 71:4-9) (App. 081), forming and maintaining an immediate "negative" impression of him through his employment termination. Id. 72:12-73:23 (App. 082). To wit:

> A. I wouldn't want to work with -- like what we discussed, that, I mean, I wouldn't want to work under somebody who seems to be like a tyrant or a bully, so –
>
> Q. Right. And you never changed your opinion about him between the time you met him and the time you were terminated, right?
>
> A. No.

Id. 83:9-19 (App. 083).

Clarke's text messages display Plaintiffs' trusteeship hostility in shocking detail. He derided Local 1107's Executive Board's vote in favor of a trusteeship as a "self inflicted" injury, asserting that an Executive Board members had to be "a fucking idiot to vote to trustee." Clark Depo, 95:13-25, 96:1-19 (App. 084-85), Ex. 30 (App. 103-4).

Indeed, Mr. Clarke was totally against the removal of President Manini: "I didn't think that they were really – you know, from what I could tell at that time, I didn't believe there were any grounds for the trusteeship." Id. 96:22-25 (App. 085).

In a text to then-Local 1107 Director of Organizing Peter Nguyen, Clarke championed Nguyen's anticipated lawsuit against SEIU and Local 1107, stating, "Peter Inc. – doing what Wall Street does, but with a personal touch. Taking money from stupid assholes." Clark Depo. 100-102 (App. 087-89), Ex. 30 (App. 109). The "stupid assholes" Clarke referred to were SEIU and Local 1107. Id. 101:25, 102:1-13 (App. 088-89).

Clarke (the person responsible for Local 1107's legal compliance) instructed his colleagues, including Gentry, to destroy evidence of their trusteeship disproval and plans to run a shadow Local 1107 government. The following text message exchange occurred between Clarke and Nguyen on April 30, 2017:

> Clarke: Be careful – Dana [Gentry] is using union phone to text – I spoke with her so don't text her about it.
>
> Clarke: She transferred her personal phone to the union phone.
>
> …
>
> Clarke: If they get ahold of Dana [Gentry's] texts then probably all of us on the texts are OUT.
>
> Nguyen: Tell her to delete them!
>
> Nguyen: She probably needs to do a clean reset.
>
> Clarke: I told her – she doesn't seem to quite understand…thinks that she hasn't said anything bad.

Clarke Depo. 119-121:1-5 (App. 089-91). Plaintiffs even included former President Mancini in their mutinous behavior. See Clarke Depo. 121:19-25 (App. 091).

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D. Employment Terminations.

The Trustees terminated Gentry and Clarke's employment on May 4, 2018.

> [T]he Trustees will fill management and other positions at the Local with individuals they are confident can and will carry out the Local's new program and policies. In the interim, the Trustees will largely be managing the Local themselves with input from member leaders. For these reasons, the Trustees have decided to terminate your employment with Local 1107, effective immediately.

See Gentry Dep. 224-226 (App. 031-33), Ex. 17 (App. 060); Clarke Depo. 126:7-24 (App. 092), Ex. 33 (App. 124).

3. Defamation Related Facts.

Kisling did not make nor did Local 1107 adopt allegations that Gentry is a drunk and a thief. The Trusteeship over Local 1107 resulted from its management being in disarray. As noted in the Trusteeship Order, union finances and communications were failing, but certain leaders were still trying to govern the union.

On August 31, 2016, nine months before the imposition of the Trusteeship and nine months before Gentry's employment termination, Vice President Sharon Kisling presented a list of concerns to the Executive Board in a *closed* meeting. See Marzan Depo. Ex. 2., executive Vice President Report (App. 240-44). Those concerns included two *potential* issues pertaining to Plaintiff Gentry. As a director, Gentry was one of the Local 1107 employees who received a car allowance for use of her personal vehicle. Id. Ex. 8, ¶6, Urban Report (App. 247). She also had a Local 1107 credit card for expenses. Id. Local 1107's Finance Committee, in conducting its financial oversight of credit card use by employees, had requested financial expenditure information from Finance Director Robert Clarke. Marzan Depo., 79:11-24 (App. 233). When that information was not provided the matter was forwarded to the Executive Board. "So again, there was no allegation. There was information that we saw on reports that we had concerns about and asked for additional information. When that wasn't provided, then it was moved forward

as a concern." Id., 80:18-22 (App. 234). Kisling reported the matter to the Executive Board as a concern. Id., 80:18-22, 81:11-17, 126:9-11 (App. 234-35, 236, 240-44).

A second concern related to Gentry was a report received from interns that she smelled like alcohol. As Gentry explained in her deposition, "They were actual like part-time staff people that she was trying to get jobs for, and they had told her allegedly that I smelled of alcohol…. Q. So she had taken reports given to her to the executive board? A. Yes –" Gentry Depo., 102:6-24 (App. 011). By Gentry's own account, Kisling was reporting—NOT ACCUSING—a *potential* employee issue that she had received from staff.

Local 1107 commissioned an investigation, of all of Kisling's concerns and not just those related to Gentry, by independent attorney Michal Urban. Marzan Depo., 140-42 (App. 237-39). Mr. Urban conducted the investigation and concluded that there were some questions regarding commingling of funds[6] (Marzan Depo, Ex. 5, ¶12) (App. 248) but there was no apparent credit card misuse and the reported alcohol use was supported by only hearsay statements. Marzan Depo. Ex. 5, ¶6 (App. 247). None of the concerns investigated resulted in Local 1107 adopting the position that Gentry did something wrong. In fact, Gentry continued, unfettered and undisciplined, in her directorship capacity until removed by the Trustees because of their need to ensure managers would carry out their policies and objectives. Gentry Depo., 156:5-7 (App. 011).

III

STANDARDS

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a), *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029

[6] Commingling of funds is different from misusing funds by double dipping through the use of a credit card to buy gas while receiving a car allowance for that same purpose.

(2005).[7] The substantive law pertaining to each cause of action defines which facts are material. *Id., See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment has the burden of showing there is no genuine issue of material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party meets its burden by presenting evidence that would entitle the movant to a directed verdict, the burden shifts to the other party to go beyond the pleadings and set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 249-51.

IV

LEGAL ANALYSIS & ARGUMENT

1. Plaintiffs' employment claims are preempted by the LMRDA.

Union leaders get to appoint managers of their choosing to ensure effective union governance. The United States Supreme Court precedent of *Finnegan v. Leu*, 456 U.S. 431 (1982) is the starting point for the Court's legal analysis. This binding precedent regarding the LMRDA, 29 U.S.C. § 401 et seq. says that union leaders get to choose their management team. As for Gentry and Clark, "Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy, and protecting the rights of union members from arbitrary action by the union or its officers." *Id.* 1873, 442. In short, Gentry and Clarke's contract and tort claims are preempted because Congress intended union leaders to be free of influence from prior union administrations.

Courts throughout the United States apply *Finnegan* to employment law claims such as Plaintiffs. In applying *Finnegan* to the claims of Gentry and Clarke, the Court's decision should be guided by *Screen Extras Guild, Inc. v. Super. Ct.*, 51 Cal.3d 1017,

[7] The "slightest doubt" standard was rejected in *Wood.* Substantive law controls. *Id.*

275 Cal.Rptr. 395, 800 P.2d 873 (Cal.1990).[8] The plaintiff in *Screen Extras Guild*, like Gentry and Clarke, sued her former union employer for wrongful discharge in breach of an employment contract, intentional and negligent infliction of emotional distress, breach of the covenant of good faith and fair dealing, and defamation. The California Supreme Court ruled that breach of contract and related claims were preempted by the LMRDA. As held by the California Supreme Court, "[T]he strong federal policy favoring union democracy, embodied in the LMRDA, preempts state causes of action for wrongful discharge or related torts when brought against a union-employer by its former management or policymaking employee." *Id.* at 1021. Gentry and Clarke were not only management employees, they were management employees who opposed Trustees Blue and Manteca in favor of former President Mancini. As the California Supreme Court noted, "[T]o allow [wrongful discharge] actions to be brought by former confidential or policymaking employees of labor unions would be inconsistent with the objectives of the LMRDA and with the strong federal policy favoring union democracy that it embodies." *Id.* at 1024.

Other California courts agree with *Finnegan* and *Screen Extra's Guild. See Thurderburk v. United Food & Commercial Workers' Union, Local* 3234, 92 Cal.App.4th 1332 (2001); *Hansen v. Aerospace Defense Related Indus. District Lodge 725*, 90 Cal.App.4th 977 (2001); *Ramirez v. Butcher*, 2006 WL 2337661 (Cal. Ct. App. 2006); *Burrell v. Cal. Teamsters, Public Professional and Medical Employees Union*, Local 911, 2004 WL 2163421 (Cal. Ct. App. 2004).

Federal and state courts elsewhere agree that Plaintiffs' claims are preempted by the LMRDA. *See, e.g., Hurley v. Teamsters Union Local No. 856*, Case No. C-94-3750 MHP, 1995 WL 274349 (N.D Cal. May 1, 1995); *Womack v. United Service Employees*

[8] This Court looks to California law for persuasive authority. S*ee, e.g., Whitemaine v. Aniskovich*, 124 Nev. 302, 311 (2008) ("As this is an issue of first impression in Nevada, we look to persuasive authority for guidance.").

Union Local 616, Case No. No. C-98-0507 MJJ, 1999 WL 219738 (N.D. Cal. 1999); *Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 75 P.3d 1250, 1256 (Mont. Sup. Ct. 2003); *Packowski v. United Food & Commercial Workers Local 951*, 796 N.W.2d 94, 100 (Mich. Ct. App. 2010); *Dzwonar v. McDevitt*, 791 A.2d 1020, 1024 (N.J. App. Div. 2002), aff'd on other grounds, 828 A.2d 893 (N.J. Sup. Ct. 2003).

As one federal court noted where a trustee removed an employee, "Because the trustee is empowered by the International Constitution to remove officers, Plaintiff could not have been wrongfully removed from office." *Pape v. Local 390 of Intern. Broth. of Teamsters*, 315 F.Supp.2d 1297, 1318 (S.D. Fla., 2004); *citing Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D.Mich. Sept. 18, 1989). Like the union in *Pape*, SEIU's Constitution allows a trustee to remove any employee. As such, Plaintiffs' employment contracts are preempted by the LMRDA. *Finigan, Screen Extra's Guild, Pape* and the slew of other federal and state court cases make clear that Blue and Manteca were not bound to the former President Mancini through the Gentry and Clark contracts. Plaintiffs' claims are preempted and summary judgment in favor of Local 1107 is proper.

The *Dean* case is instructive because Mr. Dean argued *Finnegan* does not apply to breach of for cause termination contract claims. The *Dean* court noted for cause employment contracts, like those of the Plaintiffs, are subject to an international's constitution "[t]o ensure that the trustee is not handicapped by the executive board in his efforts to preserve and restore the Local Union to functional status…." *Dean* at *6. Returning Local 1107 to a functional status was the charge given to Trustees Blue and Manteca. Plaintiffs, who were management level union administrators, considered that charge and the Trustees' efforts to be "repugnant and holy [sic] unjustified." Plaintiffs even started a coffee table coup to thwart the Trustees and championed the idea that one Director, Peter Nguyen, was going to take money from "stupid assholes" SEIU and Local 1107.

Gentry and Clark were loyal Mancini directors. They issued a national press release praising Mancini's presidency while deriding Trustees Blue and Manteca. As the *Dean* court noted in rejecting contract and contract related claims where a trustee terminated a union business agent, "[T]he obstruction of union democracy which can occur by leaving an elected president with his hands tied by appointed business agents, whom he could not discharge, is no less capable of occurring here." *Dean at* *5. Recent case law supports *Dean's* observation regarding the appointed Trustees' unfettered ability to freely remove Gentry and Clarke as appointed employees. The "organizational paralysis" that could occur by leaving Gentry and Clarke in power and potentially adverse to the Trustees is impermissible. *English v. Service Employees International Union, Local 73*, 2019 WL 4735400, at *4 (N.D.Ill., 2019). Without the LMRDA preemptive removal power, Mancini, who is known to have been involved with Gentry and Clarke's coup, had the ability, through the Plaintiffs, to paralyze Local 1107, which paralysis was one of the very reasons for the trusteeship.

Federal preemption is the rule and not the exception when deciding labor law issues.

> When a union activity is "arguably" covered by federal labor legislation, states may not interject themselves into its regulation (*United Farm Workers Organizing Committee v. Superior Court* (1971) 4 Cal.3d 556, 564, 94 Cal.Rptr. 263, 483 P.2d 1215.) And 'with regard to labor disputes, federal preemption of state law is the rule, not the exception. (*Bill Johnson's Restaurants, Inc. v. N.L.R.B.* (1983) 461 U.S. 731, 753, 103 S.Ct. 2161, 2176, 76 L.Ed.2d 277, 296 (conc. opn. of Brennan, J.).)

Tyra v. Kearney, 200 Cal.Rptr. 716, 720, 153 Cal.App.3d 921, 927–28 (Cal.App. 4 Dist.,1984)(conc. opn. Crosby, A.J.). "The federal interest in promoting union democracy and the rights of union members, therefore, includes an interest in allowing union leaders to discharge incumbent administrators." *Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356, 1362 (9th Cir., 1986). This means that the LMRDA's trusteeship and federal labor policy preempt the Plaintiffs' state law

claims because "[t]he Act [LMRDA] seeks uniformity in the regulation of employee, union and management relations [,...] 'an integral part of ensuring a union administration's responsiveness…'" *Tyra* at 720, 927, quoting *Finnegan v. Leu,* 456 U.S. 431, 441 (1982).

Tyra identified a crucial point from *Finnegan*; it is the "union administration's responsiveness" to union needs that is of critical concern. That concern is also part of the *English* decision that identified the appointed trustee's need to void organizational paralysis by the removed former president's appointed staff. Gentry acted as the face of Mancini's presidency given her role as union spokesperson. She was also Mancini's Strategic Communications Director. Clarke was Mancini's money man and operations director. The threat they posed to the Trustees was real, immediate and substantial, controlling messaging, money and personnel—the very functions critical to Local 1107's lifeblood. Yet, Gentry and Clarke considered the Trustees efforts to fix Mancini's mismanagement of Local 1107 "repugnant and holy [sic] unjustified."

Summary judgment in favor of the Local 1107 Defendants is required because Plaintiffs' claims are preempted by the LMRDA given their management roles with Local 1107.

2. Even if the claims were not preempted, Plaintiffs cannot prove elements of fair dealing, tortuous discharge, and bad faith claims.

No facts exists to support breaches of good faith and fair dealing covenants, tortious breach or bad faith discharge claims.

A. Good faith and fair dealing (Plaintiffs' Third and Fourth Claims).

Breaches of good faith and fair dealing occur "[w]here one party to a contract 'deliberately countervenes the intention and spirit of the contract'" *Morris v. Bank of America Nevada*, 886 P.2d 454, 457, 110 Nev. 1274, 1278 (Nev.,1994), *quoting Hilton Hotels v. Butch Lewis Productions*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991). Plaintiffs have no evidence that the Trustees sought to deliberately countervene the

employment contracts. Rather, the Trustees simply sought to manage union affairs themselves or with people that they were confident would carry out their goals and objectives. All evidence shows that Gentry and Clarke were opposed to the Trustees' efforts to manage Local 1107. Thus, the only breaches of the covenant of good faith and fair dealing that could have existed are those by Gentry and Clarke who sought to undermine Local 1107 in favor of its removed President Mancini.

B. Tortious discharge (Plaintiffs' Fifth, Sixth, Twelfth and Thirteenth Claims).

Tortious discharge is a public policy tort not applicable to this Case. "An employer commits a tortious discharge by terminating an employee for reasons which violate public policy…. Discharging an employee for seeking industrial insurance benefits, for performing jury duty or for refusing to violate the law are examples of tortious discharge." *D'Angelo v. Gardner*, at 212, 712. There is no evidence that Plaintiffs' employment was terminated due to their efforts to exercise a right.

C. Intentional Interference with Contract Relations (Plaintiffs' Seventh Claim).

Plaintiffs' intentional interference with contract relations claims fail because they and Local 1107 were the contracting parties.[9] "[T]he plaintiff must establish that the defendant had a motive to induce breach of the contract with the third party." *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 273, 71 P.3d 1264, 1268 (2003). Here, neither Local 1107, Blue nor Manteca induced a breach between the Plaintiffs and a third-party. As a matter of fact and law, no contractual interference could have occurred.

D. Wrongful Discharge (Plaintiffs' Eighth and Ninth Claims).

Wrongful discharge is actually a catch all term for bad-faith discharge and tortious discharge claims. *D'Angelo v. Gardner*, 819 P.2d 206, 211, 107 Nev. 704, 711 (1991). As such, it is not an independent claim and must be analyzed under correct legal theories.

///

[9] Blue and Manteca were sued as manages of Local 1107 in their official capacity, making the claim against Local 1107 and not them individually.

E. Bad faith discharge (Plaintiffs' Tenth and Eleventh Claims).

No facts exists showing a special relationship between Plaintiffs and Local 1107. Bad faith discharge requires a contract and special relationship between the employer and employee. *D'Angelo*, 211, 712. The *D'Angelo* court noted that *K Mart Corp. v. Ponsock,* 103 Nev. 39, 51, 732 P.2d 1364, 1372 (1987) is "the exemplar for that **narrow class of cases** in which" bad faith discharge may apply. "In *K Mart* we made it clear that 'mere breach of an employment contract' does not of itself 'give rise to tort damages' and that the kind of breach of duty that brings into play the bad faith tort arises only when there are 'special relationships between the tort-victim and the tort-feasor....'" *D'Angelo* at 215, 717. The *K Mart* facts included ten years of employment combined with fraudulent misrepresentation of employment "until retirement." *Id.* The *D'Angelo* court considered the *K Mart* standard and noted that the plaintiff had been employed less than two years and there was no "deception and perfidy which was the essence of the bad faith tort in *K Mart*." *Id.* 215, 718.

Plaintiffs, like the *D'Angelo* plaintiff, both worked less than two years and neither was promised anything by the Local 1107 Defendants (or the International for that matter). The Trustees over Local 1107 simply needed a management team that they were confident would carry out their goal of returning Local 1107 to a functioning union. Plaintiffs cannot identify a fraudulent promise made to them. Mancini hired them. The appointed Trustees fired them. No false promises exist.

F. Negligence (Plaintiffs' Fourteenth Claim).

Plaintiffs cannot identify an owed duty, much less a breach of duty. Federal law establishes that the Trustees' duty was to Local 1107 membership and not the Plaintiffs. *See* 29 U.S.C.§ 501(a). Even if a negligence duty did exist, what breach occurred? Electing to terminate a contract cannot be a breach of a duty. Otherwise, negligence would exist with every contract termination.

In addition, Plaintiffs' negligence claim violates the economic loss rule. '"The economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others."' *Calloway v. City of Reno*, 993 P.2d 1259, 1263, 116 Nev. 250, 256 (2000); quoting Sidney R. Barrett, Jr., Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C.L.Rev. 891, 894 (1989); overruled on other grounds by *Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004). Here, Plaintiffs claims are for economic loss resulting from a claimed contract breach rather than harm to them or their property from a negligent act. There is no evidence of personal or property harm. Summary judgment on the negligence claims is proper.

3. Gentry's defamation claim is preempted by federal labor law.

Federal law preempts Gentry's defamation claim against Local 1107 because it interferes with the internal management of Local 1107. "Federal labor law preempts state defamation law when applied in ways that interfere with the internal management of unions." *Sullivan v. Conway*, 157 F.3d 1092, 1099 (7th Cir. 1998) *Citing Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966).

Local 1107's Board Members were legally obligated to receive Kisling's concerns. "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." 29 USCA § 501. Kisling as a union member brought matters to Local 1107 for investigation, and Local 1107's officers were required to investigate the matter or suffer liability for not doing so.

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor

> organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.

29 USCA § 501(b).

Applying their LMRDA responsibility, Local 1107's Executive Board enlisted attorney Mike Urban to investigate the concerns raised by Kisling. As stated by Mr. Urban, "At the August 31, 2016, Executive Board Meeting in closed session, Executive Vice President Sharon Kisling presented a written list of 'concerns' ***regarding the business of SEIU***." See App. 245. Applying the LMRDA and *Sullivan* requirements, Local 1107's officers were legally required to receive and investigate the concerns raised by Kisling and they did so "***without courting liability for defamation***." *Sullivan* at 1092, 1098. (emphasis added). Summary judgment against Gentry on her defamation claim is required because Local 1107 was legally obligated to receive and investigate Kisling's concerns, which was part of Local 1107's internal management as union business.

4. Statements were privileged as a required communication even without preemption.

As shown above, Local 1107's receipt of Kisling's concerns were required by law under the LMRDA. *See also, U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, AFL-CIO, 981 F.2d 1362 (2nd Cir. 1992) (holing that union officers have a duty to investigate bad behavior and corruption within the union.) Statements required to be published are absolutely privileged when done pursuant to a lawful process and made to a qualified person. *Cucinotta v. Deloitte & Touche, L.L.P.*, 302 P.3d 1099, 1102, 129 Nev. 322, 326 (2013). Applying *Cucinotta* and *Teamsters*, summary judgment in favor of Local 1107 on the defamation claim is proper because reporting of concerns to the Executive Board was done in the labor context where

the declarant had a legal duty to raise and the hearer had a legal duty to receive the matter. The statements were therefore privileged as required communications.

5. Statements regarding Gentry were privileged as internal business communications.

"In order to establish a prima facie case of defamation, a plaintiff must prove: (1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Simpson v. Mars Inc.*, 929 P.2d 966, 967, 113 Nev. 188, 190 (1997).

Internal corporate communications regarding personnel matters are privileged. *See Jones v. Golden Spike Corp.*, 623 P.2d 970, 971, 97 Nev. 24, 27 (1981) (adopting the rule that internal business communications do not constitute defamation). The rule adopted in *Jones* was later modified to establish that the internal corporate communications privilege operates as a defense to defamatory statements. *See Simpson v. Mars Inc.*, 929 P.2d 966, 968, 113 Nev. 188, 192 (1997). All facts show that Kisling did not accuse Gentry of stealing or drinking on the job. Rather, Kisling reported issues of concern that Local 1107 was legally obligated to receive. Thus, 1) the statements were internal 2) to Local 1107's Executive Board 3) who convened an independent investigation and 4) never adopted the statements or issued discipline against Gentry. The internal communication privilege is therefore established as a defense, making summary judgment against Gentry on the matter proper.

6. The alleged defamatory statement is subject to the common interest privilege.

The concerns raised by Kisling addressed a common interest. "A qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 62 (1983). "Whether the common interest privilege applies is a question of law for the court." *Lubin v. Kunin*, 117

Nev. 107, 115 (2001). Only the presence of malice can overcome the common interest privilege. *See Bank of Am. Nevada v. Bourdeau*, 115 Nev. 263, 267 (1999).

All facts show that Kisling's concerns communicated in a confidential setting, pursuant to a legal duty, and were confidentially investigated. The credit card issue was union wide and the alcohol use was received from rank and file employees. No malice exists as Kisling was following her duty to report and only reporting potential, not actual, problems. *See preemption argument supra*.

CONCLUSION

Summary judgment in favor of the Local 1107 Defendants is proper for the foregoing reasons.

Dated this 29th day of October 2019.

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CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served in the following manner on the date it was filed with the Court:

✓ ELECTRONIC SERVICE: Pursuant to Rule 8.05 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, the document was electronically served on all parties registered in the case through the E-Filing System.

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__ UNITED STATES MAIL: By depositing a true and correct copy of the above-referenced document into the United States Mail with prepaid first-class postage, addressed as follows:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Defendants.	Case No.: A-17-764942-C DEPT. XXVI **DEFENDANTS SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES** HEARING DATE REQUESTED

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendants Service Employees International Union and Mary Kay Henry hereby move for summary judgment on all claims in this action.

This motion is based on the following memorandum of points and authorities, the

declarations of Martin Manteca, Deirdre Fitzpatrick, Luisa Blue, and Jonathan Cohen, the pleadings and papers filed in this action, and upon such other matters that may be presented to the Court in connection with this motion.

DATED: October 24, 2019

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

By _____
JONATHAN COHEN
Attorneys for Service Employees International Union and Mary Kay Henry

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Defendants Service Employees International Union ("SEIU") and SEIU President Mary Kay Henry move for summary judgment on all claims against them in the first amended complaint. As discussed below, there is no genuine issue of any material fact. SEIU and Henry are therefore entitled to summary judgment in their favor.

Defendant SEIU is an international labor union headquartered in Washington, D.C. Defendant Henry is its President. Defendant Nevada Service Employees Union, Local 1107 ("Local 1107"), is a labor union headquartered in Las Vegas and a chartered affiliate of SEIU.

Citing evidence of widespread disarray at Local 1107, including a breakdown in internal union governance and democratic procedures, leadership conflicts and in-fighting, and a failure to communicate effectively with union membership, in April 2017 SEIU President Henry placed Local 1107 into trusteeship, removed all of its officers, and appointed defendants Luisa Blue and Martin Manteca as Trustees of Local 1107. The SEIU Constitution authorized the Trustees "to take full charge of the affairs" of Local 1107, including the authority "to remove any of its employees [or] agents."

Plaintiffs Dana Gentry and Robert Clarke are former directors of Local 1107. Shortly after the trusteeship, Blue and Manteca determined that it would not be in the best interests of Local 1107 to manage the union's affairs with its former management team. Thus, in May 2017,

the Trustees terminated Gentry and Clarke. In the present lawsuit, Gentry and Clarke allege contract and wrongful termination claims against SEIU and Henry.

For several reasons, SEIU and Henry are entitled to summary judgment. First, Gentry and Clarke admit that their employment contracts were between them and Local 1107, not SEIU or Henry. Indeed, Gentry and Clarke did not work for either SEIU or Henry. Thus, plaintiffs' contract and wrongful termination claims against SEIU and Henry fail.

Second, plaintiffs' claims are preempted by the federal Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401, *et seq*. A key purpose of the LMRDA is to protect the ability of union leaders to carry out the will of the union's membership, including selecting management-level staff who will loyally carry out the union's programs and policies. Numerous courts have concluded that contract and wrongful termination claims by former management-level staff of unions conflict with that legislative goal, and are therefore preempted. Such preemption applies here and requires summary judgment in favor of SEIU and Henry. In fact, undisputed evidence demonstrates that both Gentry and Clarke were opposed to the Trustees and the trusteeship, and therefore incapable of loyally serving the new administration.

For these reasons and those that follow, SEIU and Henry respectfully request summary judgment in their favor on all claims against them in the first amended complaint.

Statement of Facts

I. The Parties.

Defendant SEIU is an international labor union headquartered in Washington, D.C. Declaration of Deirdre Fitzpatrick ("Fitzpatrick Decl."), ¶ 3. It is a not-for-profit membership association representing about 2 million workers. *Id*. Its current constitution and bylaws have been in effect since 2016. *Id*. Defendant Mary Kay Henry is its President. *Id*.

Defendant Nevada Service Employees Union, Local 1107 ("Local 1107"), is a labor union headquartered in Las Vegas, Nevada. Fitzpatrick Decl., ¶ 5. It represents public and private sector workers in Nevada. *Id*. Local 1107 is affiliated with SEIU, and has its own charter. *Id*. Except for the period of time described below, Local 1107 is governed by its own constitution and bylaws and has its own officers who are elected by its members. *Id*.

Plaintiff Dana Gentry is Local 1107's former Director of Communications. *See* Declaration of Jonathan Cohen ("Cohen Decl."), Ex. A. (Gentry Depo., 24:2-23; Gentry Depo. Ex. 1).[1] Plaintiff Robert Clarke is Local 1107's former Director of Finance and Human Resources. Cohen Decl., Ex. C (Clarke Depo., 14:5-16; Clarke Depo Ex. 25).[2]

II. Local 1107 Hires Gentry and Clarke.

A. Local 1107 Hires Gentry as Its Communications Director.

On April 6, 2016, Gentry applied for a position as Communications Director with Local 1107 by contacting the Local 1107's then-human resources representative. Gentry Depo., 84:6-15; Gentry Depo. Ex. 4. On April 18, 2016, Local 1107 hired Gentry. Gentry Depo. Ex. 1. Then-Local 1107 President Cherie Mancini and Gentry entered into an employment contract specifying the terms of Gentry's employment with Local 1107. See *id.*

Gentry negotiated her employment contract only with Local 1107. Gentry Depo., 142:10. Then-Local 1107 President Mancini, who executed the employment contract on behalf of Local 1107, never informed Gentry that she was executing the contract on behalf of another entity other than Local 1107. Gentry Depo., 141:3-16.

As Communications Director, Gentry was a "key advisor to Local 1107 leadership in a variety of internal and external communications," and was responsible for "develop[ing] short-term and long-term campaign strategies and plans for increasing the size, strength, activism and savvy" of the union's membership; "development and implementation of Local 1107 internal and external strategic communications plans, including the areas of press, graphic design, mail and digital communications;" "production of newsletters, website, social media content, press releases, public remarks and speeches, fliers, brochures, op-eds, talking points, [and] letters to

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[1] Excerpts from the certified transcript of the deposition of plaintiff Dana Gentry are attached as Exhibit A to the Declaration of Jonathan Cohen. All further references to the Gentry deposition transcript are included in Exhibit A to the Cohen Declaration. Exhibits to the Gentry deposition are attached as Exhibits B to the Cohen Declaration.

[2] Excerpts from the certified transcript of the deposition of plaintiff Robert Clarke are attached as Exhibit C to the Cohen Declaration. All further references to the Clarke deposition transcript are included in Exhibit C to the Cohen Declaration. Exhibits to the Clarke deposition are attached as Exhibit D to the Cohen Declaration.

the editor;" "training and preparing members and leadership for press events and/or other public statements;" and "development of proactive earned media and digital campaigns that reinforce, protect and expand awareness of the union's branding and mission." Gentry Depo. Ex. 13; Gentry Depo. 157:5-158:5.

Gentry was the primary individual at Local 1107 responsible for developing and implementing the union's internal and external communications strategy. Gentry Depo., 162:11-13. Gentry agreed this responsibility entailed developing the most effective message to achieve the union's short-term and long-term campaign goals. Gentry Depo., 161:20-24. In furtherance of that effort, Gentry was responsible for advising the union's elected leadership about her strategic communications plans. Gentry Depo., 158:10-11; 162:22-163:6; 164:20-25. That included, at times, writing speeches or public talking points for Local 1107's president and its other elected leaders. 165:9-166:4.

Gentry also acted as Local 1107's public spokesperson. For example, she was regularly quoted on behalf of Local 1107 in newspaper articles. See Gentry Depo. Ex. 7; Gentry Depo. 111:23-113:16. She participated in radio interviews on behalf of the union. Gentry Depo. 28:12. She developed and coordinated media strategy with community allies. Gentry Depo. 190:12-19; 192:18-193:3. She cultivated relationships with journalists in order to further the union's ability to obtain positive press coverage. Gentry Depo. 170:16-24; 171:8-15; 172:7-12; 188:25-189:5. She was also responsible for developing the union's communications calendar, which was intended as a strategic timeline for disseminating the union's message to have a maximum campaign impact. See Gentry Depo., 186:20-187:11.

Gentry even advised the union regarding its legislative strategy. Gentry Depo. 189:15-190:8. Based on her former experience as a producer on a political talk show, Gentry was able to advise the union's leadership about which elected leaders would be the most sympathetic to the union's legislative agenda. *Id.*

Gentry reported directly to then-Local 1107 President Mancini, who was Gentry's direct supervisor. Gentry Depo. 30:24-25; 154:4; Gentry Depo. Ex. 14 at 28. Gentry also attended a weekly manager's meeting with then-Local 1107 President Mancini other Local 1107 managers,

including the Director of Organizing and co-plaintiff Robert Clarke, then-Director of Finance and Human Resources. Gentry Depo. 176:7-177:5.

B. Local 1107 Hires Clarke as Its Director of Finance and Human Resources.

In July 2016, plaintiff Clarke applied for a position as Director of Finance and Human Resources at Local 1107 by sending his resume to then-Local 1107 President Mancini. Clarke Depo. 10:10-22; Clarke Depo. Ex. 23. On August 23, 2016, Local 1107 hired Clarke. Clarke Depo. 14:5-16; Clarke Depo. Ex. 25. Then-Local 1107 President Mancini and Clarke entered into an employment contract specifying the terms of Clarke's employment with Local 1107. *See* Clarke Depo. Ex. 25.

Like Gentry, Clarke negotiated his employment contract only with Local 1107. Clarke Depo., 15:3, 16:1, 21:5. Like Gentry, then-Local 1107 President Mancini, who executed the employment contract on behalf of Local 1107, never informed Clarke that she was executing the contract on behalf of another entity other than Local 1107. Clarke Depo., 21:14-18.

As Director of Finance and Human Resources, Clarke was responsible "for the financial health of [Local 1107] and [was] directly responsible for financial management, general office administration, personnel systems, technology, legal compliance, and reporting." Clarke Depo. Ex. 26; Clarke Depo. 35:25-36:12. Among other things, Clarke's financial management duties included to "prepare monthly financial statements, monitor and improve systems for accounts payable and receivable, review invoices, prepare checks for payment;" "process payroll . . . [and] assure benefits are properly distributed and recorded;" "maintain all vendor and financial files" for Local 1107; "analyze and advise on revenue and expense trends and cash flow projections;" "lead in annual budget planning and prepare month and year-to-date reports for the [Local 1107] Finance Committee and Executive Board;" "prepare deposits for the bank;" "maintain [political action committee accounts];" "prepare for and schedule the annual audit, coordinate with the auditor, [and] assist in filing . . . local and federal government reporting requirements;" and "oversee all tax and reporting obligations." *Id*. Clarke had access to all of Local 1107's financial records. Clarke Depo. 36:19.

Clarke was also the "primary Human Resource Manager" for Local 1107. Clarke Depo.

Ex. 26. His human resources duties included to "maintain staff personnel records, including the tracking of employee time and attendance; maintain current and accurate records for employee benefits;" "assure adequate systems for certain personnel administration, such as legal reporting;" and "all other matters pertaining to personnel administration." *Id*.

Clarke's duties also included to "build, implement, and improve systems for complying with state and federal laws regarding campaign finance and lobbyists' activities;" and to "maintain leases, contracts, equipment and office space" for the union. *Id*.

Like Gentry, Clarke reported directly to then-Local 1107 President Mancini, who was his direct supervisor. Clarke Depo. 28:4-8. Clarke also attended a weekly manager's meeting with then-Local 1107 President Mancini other Local 1107 managers, including the Director of Organizing and Gentry, then-Director of Communications. Clarke Depo. 58:15-22. As the head of his department, Clarke supervised various staff, from an accountant to administrative assistants. Clarke Depo. 19:16; 30:4-31:19.

III. SEIU Places Local 1107 Under Trusteeship.

Pursuant to her authority under the SEIU Constitution, in October 2016, SEIU President Henry assumed jurisdiction over various internal disciplinary charges filed by members and officers of Local 1107. Fitzpatrick Decl., ¶ 8. Following a hearing on those charges, on April 26, 2017, a hearing officer issued a report to SEIU President Henry recommending discipline against then-Local 1107 President Mancini and then-Local 1107 Executive Vice President Sharon Kisling. *Id.*; *id.* Ex. C. SEIU President Henry adopted the report and removed Mancini and Kisling from Local 1107 office later that same day. *Id.*, ¶ 8.

That same day, a hearing officer also recommended that SEIU President Henry consider placing Local 1107 under emergency trusteeship. *Id*., ¶ 9; *id.* Ex. D. Later that same day, Local 1107's executive board voted in favor of a trusteeship by SEIU. *Id.*, ¶ 10. Article VIII, Section 7(a) of the SEIU Constitution authorizes SEIU's president to place a local union into trusteeship:

> Whenever the International President has reason to believe that, in order to protect the interests of the membership, it is necessary to appoint a Trustee for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of this

> International Union, he or she may appoint such Trustee to take charge and control of the affairs of a Local Union or of an affiliated body and such appointment shall have the effect of removing the officers of the Local Union or affiliated body.

Fitzpatrick Decl., Ex. A (Art. VII, § 7(a)). On April 28, 2017, SEIU President Henry issued an order placing Local 1107 into trusteeship. Fitzpatrick Decl., ¶ 10. Pursuant to the trusteeship order, President Henry suspended Local 1107's Constitution and Bylaws, and removed the union's officers, Executive Board members, and representatives. *Id.*; *id*., Ex. E. President Henry's order cited as a basis for the trusteeship, among other things, "an on-going and serious breakdown in internal union governance and democratic procedures;" "[l]eadership conflicts and in-fighting in Local 1107;" "failure to communicate adequately with Local membership;" and a "communication breakdown in the Local [which] impeded staff oversight . . . ." Fitzpatrick Decl., Ex. E.

Notably, Gentry acknowledged that such factionalism had impeded her ability to function effectively as Communications Director. See Gentry Depo. 40:18-41:20. For example, Gentry testified that, while Mancini was still Local 1107 President, union members opposed to Mancini's leadership had "shunned" Gentry and stopped promoting Gentry's social media postings on behalf of the union. Gentry Depo. 41:4-8. Gentry further testified that most of the staff had taken Mancini's side in the factional dispute. Gentry Depo. 181:10-182:8.

SEIU President Henry appointed defendant Luisa Blue as a Trustee of Local 1107, and defendant Martin Manteca as Deputy Trustee of Local 1107. Fitzpatrick Decl., ¶ 10. Under Article VIII, Section 7(b) of the SEIU Constitution, Local 1107 Trustees Blue and Manteca were authorized to assume control over the affairs of Local 1107, including the removal of employees or agents of the union. In relevant part, Section 7(b) provides that:

> The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union or affiliated body and its related benefit funds, *to remove any of its employees, agents and/or trustees* of any funds selected by the Local Union or affiliated body and appoint such agents, employees or fund trustees during his or her trusteeship, and to take such other action as in his or her judgment is necessary for the preservation of the Local Union or affiliated body and for the protection of the interests of the membership.

Fitzpatrick Decl., Ex. E (Art. VIII, § 7(b)) (emphasis added).

IV. Clarke and Gentry Were Hostile to the Trustees and the Trusteeship.

Within days of the imposition of the trusteeship, Local 1107 staff, including both Clarke and Gentry, met with Deputy Trustee Manteca to discuss their job duties. Clarke Depo. 61:13; Gentry Depo. 221:20.

As Clarke described it, during the meeting Manteca asked him to "swear loyalty to the trustees." Clarke Depo. 63:25-64:6. During discovery, however, it became clear that both Clarke and Gentry were hostile to the Trustees and the trusteeship. At his deposition, Clarke testified that he immediately questioned the legitimacy of the trusteeship, did not want to work for a union that was illegitimately placed into trusteeship, and was "critical" of the trusteeship. Clarke Depo., 65:10-67:25; 70:21-24. Clarke further testified that, as soon as he learned of the identity of Deputy Trustee Manteca, Clarke concluded that Manteca had a reputation for being a "tyrant" and "bully." Clarke Depo. 71:4-9. Clarke formed a "negative" impression of Manteca immediately upon meeting him, and maintained that same opinion of Manteca through the time he was terminated. Clarke Depo. 72:12-73:23. Clarke testified as follows:

> Q. Given your impression of Martin Manteca at that time, did you really want to work under him?
>
> A. I wouldn't want to work with -- like what we discussed, that, I mean, I wouldn't want to work under somebody who seems to be like a tyrant or a bully, so --
>
> Q. Right. And you never changed your opinion about him between the time you met him and the time you were terminated, right?
>
> A. No.

Clarke Depo., 83:9-19.

In fact, in his private text messages, Clarke exhibited open hostility to the trusteeship, including the decision of the former Local 1107 officers who voted in favor of the trusteeship. For example, Clarke described the vote of Local 1107's Executive Board's in favor of a trusteeship as a "self inflicted" injury, and stated that, referring to Local 1107's former officers, "[y]ou would have to be a fucking idiot to vote to trustee." Clarke Depo. Ex. 30 at 176, 177; Clarke Depo. 88:5-22; 95:13-96:19. As would be expected given his disdain for the former Local 1107 officers who voted in favor of a trusteeship by SEIU, Clarke testified that "I didn't think

that they were really – you know, from what I could tell at that time, I didn't believe there were any grounds for the trusteeship." Clarke Depo., 96:22-25.

In addition, in a text to then-Local 1107 Director of Organizing Peter Nguyen, Clarke celebrated Nguyen's anticipated lawsuit against SEIU and Local 1107, stating, "Peter Inc. – doing what Wall Street does, but with a personal touch. Taking money from stupid assholes." Clarke Depo. Ex. 30 at 182; Clarke Depo. 100:14-102:13. The "stupid assholes" Clarke referred to were SEIU and Local 1107. Clarke Depo. 101:25-102:13.

Worse still, knowing that his hostile text messages would place his job in jeopardy, Clarke urged his Local 1107 colleagues, including Gentry, to delete their messages before the Trustees could find them. The following text message exchange occurred between Clarke and Nguyen on April 30, 2017:

> Clarke: Be careful – Dana [Gentry] is using union phone to text – I spoke with her so don't text her about it.
>
> Clarke: She transferred her personal phone to the union phone.
>
> …
>
> Clarke: If they get ahold of Dana [Gentry's] texts then probably all of us on the texts are OUT.
>
> Nguyen: Tell her to delete them!
>
> Nguyen: She probably needs to do a clean reset.
>
> Clarke: I told her – she doesn't seem to quite understand…thinks that she hasn't said anything bad.

Clarke Depo. Ex. 31 at 199-200; Clarke Depo. 116:11-117:7. Indeed, Clarke acknowledged in his deposition that he told Gentry to delete her text messages so that the Trustees could not find them. Clarke Depo. 120:7-20.

In yet another text thread from Clarke's phone, Nguyen confirms with the others that they were using their personal devices; Clarke testified that he understood this was to ensure that the messages would not be discovered by the Trustees. Clarke Depo. Ex. 32 at 201; Clarke Depo. 122:4-13. That same text thread included former Local 1107 President Mancini, who had been

removed from office days earlier pursuant to internal disciplinary charges filed by her fellow union officers. *See* Clarke Depo. 121:25; Clark Depo. Ex. 32 at 201.

Finally, putting to rest any doubt that Clarke and Gentry opposed the Trustees and the trusteeship, on May 15, 2017, less than two weeks after they were terminated, Clarke, Gentry, and others, including former Local 1107 President Mancini, prepared a nationwide press release condemning the Trustees and the trusteeship. *See* Gentry Depo. Ex. 18; Clarke Depo. 142:22-23; 145:21-146:5; Gentry Depo. 230:23-231:14; 233:2-10; 236:21; 237:4; 242:4-11; 245:1-3; 246:19-23. The press release, for which Gentry agreed to be the press contact, accused SEIU of, among other things, "an illegitimate take-over" of Local 1107 which placed members in "great peril," and accused Local 1107 Trustees of communicating with members in an "incomplete and misleading" manner, "ignoring" the union's legislative priorities, cancelling "[t]raining sessions, [and] bargaining sessions," and "halt[ing] member representation." Gentry Depo. Ex. 18.

V. The Trustees Terminate Clarke and Gentry.

Shortly after the imposition of the trusteeship, Blue and Manteca determined that it would not be in the best interests of Local 1107 to continue employing Gentry and Clarke. Declaration of Luisa Blue ("Blue Decl."), ¶ 5; Declaration of Martin Manteca ("Manteca Decl."), ¶ 5. In light of the widespread disarray described in the emergency trusteeship order, Blue and Manteca believed that it was necessary to manage the affairs of the union themselves and not with the union's former management team, at least until they could fill management positions with individuals whom they could be confident would carry out the union's programs and policies. *Id*.

Thus, on May 4, 2017, Deputy Trustee Manteca met individually with Clarke and Gentry. Gentry Depo. 223:12-25; 225:12; Clarke Depo. 124:13-125:10. At the meetings, Manteca presented each of them with identical letters informing them as follows:

> As you know, Local 1107 has been placed under trusteeship by [SEIU]. The Trustees of Local 1107 have been charged with the restoration of democratic procedures of Local 1107. In connection with formulating a program and implementing policies that will achieve this goal, going forward the Trustees will fill management and other positions at the Local with individuals they are confident can and will carry out the Local's new programs and policies. In the interim, the Trustees will largely be managing the Local themselves with input from member leaders. [¶] For these reasons, the Trustees have decided to terminate your employment with Local 1107, effective immediately.

Gentry Depo. Ex. 17; Clarke Depo. Ex. 33. Manteca reiterated this same message during the termination meetings with Gentry and Clarke. Gentry Depo. 225:12-24; Clarke Depo. 126:16-24.

Argument

I. Standard of Review.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Nev. R. Civ. P. 56(a). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005). On review of a motion for summary judgment, the evidence and all reasonable inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *See Allstate Inc. Co. v. Fackett*, 125 Nev. 132, 137 (2009). Even so, "the opposing party is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture." *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302 (1983).

II. Summary Judgment in Favor of SEIU and Henry Should Be Granted on Plaintiffs' Third, Fourth, Fifth, Sixth Causes of Action for Breach of the Covenant of Good Faith and Fair Dealing.

Plaintiffs were not parties to a contract with SEIU or Henry, and Plaintiffs were not employed by SEIU or Henry. For those undisputed reasons, summary judgment in favor of SEIU and Henry on plaintiffs' claims for breach of the covenant of good faith and fair dealing – the third, fourth, fifth and sixth causes of action – is proper.

A. There Is No Contractual Breach of the Covenant of Good Faith and Fair Dealing, Since Plaintiffs Did Not Have Contracts with SEIU or Henry.

There is no cause of action for breach of the implied covenant of good faith and fair dealing against parties that are not bound to the underlying contract, such as SEIU and Henry.

"As a general rule, none is liable upon a contract except those who are parties to it." *Clark County v. Bonanza No. 1*, 96 Nev. 643, 648-49 (1980). That same principle applies to an action for breach of the implied covenant and good faith and fair dealing, which, like an action for breach of contract, is based on the existence of a contract between the parties. Thus, "[w]here

the terms of a contract are literally complied with *but one party to the contract* deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991) (emphasis added); *see also id*. at 923 ("When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith.").

Plaintiffs' third and fourth claims for "Breach of Implied Covenant of Good Faith and Fair Dealing – Contractual Breach" are expressly based on employment contracts between them and Local 1107, *not SEIU or Henry*.[3] *See* First Amended Complaint, ¶ 36 ("Plaintiff Gentry entered into a valid and binding Employment Contract *with Local 1107*.") (emphasis added); ¶ 43 ("Plaintiff Clarke entered into a valid and binding Employment Contract *with Local 1107*") (emphasis added). Indeed, the only parties identified in Plaintiffs' employment contracts are plaintiffs and Local 1107. The only individuals who signed the employment contracts are then-Local 1107 President Mancini and Plaintiffs. Last, Plaintiffs admitted in their depositions that Mancini never informed them that she was entering into the contracts on behalf of another entity, such as SEIU.

The decision in *Burnick v. Office and Professional Employees International Union*, Case No. 14-C-1173, 2015 WL 1898310 (E.D. Wis. April 27, 2015), is instructive. There, the plaintiff, a former employee of a local union, alleged that the local union had promised to provide her with lifetime insurance benefits. *Id*. at *1. Thereafter, the international union placed the local union

[3] It appears from the First Amended Complaint that the first and second causes of action for breach of contract, and eighth and ninth causes of action for "wrongful termination – breach of continued employment contract" are pled only against Local 1107, Blue and Manteca, but not SEIU or Henry. *See* First Amended Complaint, ¶¶ 24-27; 30-33; 69-71; 74-76. But even if such claims were pled against SEIU and Henry, they would unquestionably fail because Plaintiffs had no employment contract with SEIU or Henry. *See Clark County v. Bonanza No. 1*, 96 Nev. at 648-49. Likewise, the fourteenth cause of action for negligence is not pled against SEIU or Henry. Indeed, it pleads only that Local 1107 owed plaintiffs a duty of care as their employer, but does not plead the existence of any such duty by SEIU or Henry. *See* First Amended Complaint, ¶¶ 95-99.

into trusteeship and appointed a trustee to manage the affairs of the local. *Id*. The plaintiff then sued both the local union and international union alleging that both unions breached the agreement to provide her with insurance benefits. *Id*. at *2. In dismissing the international union, the court emphasized that, like here, the obligation arose prior to the trusteeship, and there was no evidence the local union signed the agreement with the plaintiff on behalf of the international union. *See id.* at *3. Additionally, the court rejected the conclusion that because the international union had placed the local into trusteeship, it had implicitly assumed the obligations of the local union. *See id*. at *3-4.

Burnick directly supports summary judgment in favor of SEIU and Henry. As in *Burnick,* neither SEIU nor Henry are parties to plaintiffs' employment contracts. There is no evidence that Local 1107 entered into the contracts on behalf of SEIU or Henry, or that SEIU or Henry assumed the contracts. Put simply, because Plaintiffs have failed to show any employment contract between them and SEIU or Henry, summary judgment for SEIU and Henry must be granted on Plaintiffs' third and fourth causes of action for contractual breach of the implied covenant of good faith and fair dealing. *See Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111 (1992) ("Where an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper.").

B. There Is No Tortious Breach of the Covenant of Good Faith and Fair Dealing, Since Plaintiffs Were Not Employed by, and Were Not Parties to Employment Contracts With, SEIU or Henry.

Neither SEIU nor Henry is liable for tortious breach of the covenant of good faith and fair dealing since they did not have employment contracts with plaintiffs and did not employ them.

"[T]he covenant of good faith and fair dealing implied in an employment contract for indefinite future employment could, under certain limited circumstances, be the basis for tort liability in a manner comparable to the tort liability incurred by insurance companies when they deal in bad faith with their policyholders." *D'Angelo v. Gardner*, 107 Nev. 704, 717 (1991). Where the "employer-employee relationship becomes analogous to or approximates the kind of 'special reliance,' trust and dependency that is present in insurance cases . . . betrayal of this kind

of relationship may go well beyond the bounds of ordinary liability for breach of contract and may result in the offending party's being held tortuously liable for such perfidy." *Id.* (internal quotations and citations omitted). However, the Nevada Supreme Court has "made it clear that mere breach of an employment contract does not of itself give rise to tort damages and that the kind of breach of duty that brings into play the bad faith tort arises only when there are special relationships between the tort-victim and the tort-feasor . . . ." *Id*. (internal quotations and citation omitted).

For example, in *D'Angelo* there was no such special relationship, and therefore no breach of the covenant, where, "[a]lthough Jones had been designated as a 'permanent employee' at the time of his dismissal, he had worked less than two years." *Id*. The Court in *D'Angelo* contrasted Jones' employment, where there was no special relationship, with that of the plaintiff in *K Mart Corp. v. Ponsock*, 103 Nev. 39 (1987), who had "been a faithful employee for almost ten years with every expectation of continuing his employment for an indefinite period of time and at least until he became eligible for a retirement position," and whose "contract of continued employment was not only terminated arbitrarily but by artifice and fraud." *Id*.

Similarly, in *Clements v. Airport Auth. of Washoe Cty*., 69 F.3d 321 (9th Cir. 1995), the Ninth Circuit, applying Nevada law, affirmed summary judgment in favor of defendants on the plaintiff's claim for breach of the covenant where the plaintiff "pointed to no facts which give rise to the inference that such a special relationship existed," and observed that "[s]omething beyond the ordinary civil service relationship must be present." *Id*. at 336.

Plaintiffs' fifth and sixth claims for "Breach of Covenant of Good Faith and Fair Dealing – Tortious Breach" fail for several reasons. First, Plaintiffs' claims are expressly based on employment contracts between them and Local 1107, *not SEIU or Henry*. *See* First Amended Complaint, ¶ 50 ("That Plaintiff Gentry entered into an employment contract *with Local 1107.*") (emphasis added); ¶ 56 ("That Plaintiff Clarke entered into an employment contract *with Local 1107*.") (emphasis added). Absent an employment contract between Plaintiffs and SEIU or Henry, Plaintiffs fail to establish an essential element of their claims for tortious breach of the implied covenant of good faith and fair dealing.

Second, Plaintiffs have failed to show an employment relationship with SEIU or Henry, let alone that they had the sort of "special relationship" necessary for this cause of action. In fact, they did not even have a lengthy employment *with Local 1107*. *See Clements*, 69 F.3d at 336 (noting that "[t]he Nevada court looks for facts such as promise of employment 'until retirement,' [or a] lengthy duration of employment"). Gentry only worked for Local 1107 from April 18, 2016, to May 4, 2017, barely over a year; Clarke only worked for Local 1107 from August 23, 2016, to May 4, 2017, less than nine months.

Last, Local 1107's terminations of Plaintiffs were not characterized by "deception," "perfidy," or "betrayal." *See Clements*, 69 F.3d at 336 (noting that Nevada courts "look for facts such as . . . termination characterized by 'deception,' 'perfidy,' and 'betrayal'"). To the contrary, Deputy Trustee Manteca met with each employee and informed them that, as was the Trustees' right under the SEIU Constitution and federal law, *see infra*, the Trustees intended to manage the union themselves until they could fill their positions with individuals the Trustees were confident would carry out Local 1107's policies and programs. This was precisely the same basis that was explained in Plaintiffs' termination letters. In short, Plaintiffs cannot demonstrate the requisite deception or perfidy necessary to establish this cause of action.

Thus, like the employees in *D'Angelo* and *Clements*, Plaintiffs cannot establish essential elements of their claims for tortious breach of the covenant of good faith and fair dealing. Summary judgment on these claims should therefore be granted in favor of SEIU and Henry.

III. Summary Judgment in Favor of SEIU and Henry Should Be Granted on Plaintiffs' Tenth and Eleventh Causes of Action for Wrongful Termination – Bad Faith Discharge.

Plaintiffs' tenth and eleventh causes of action for "Wrongful Termination – Bad Faith Discharge" are the same as those described above, and should be dismissed for the same reasons as those described above. The Court in *Martin v. Sears, Roebuck and Co.*, 111 Nev. 923 (1995), described the tort of bad faith discharge in terms identical to those described above:

> "Bad faith discharge finds its genesis in Section 205 of the Restatement (Second) of Contracts, which states that: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." For this cause of action to

> apply, specific elements must exist. First, there must be an enforceable contract. Second, there must be a special relationship between the tortfeasor and the tort victim, such as the relationship that exists between an insured and an insurer, that is, a relationship of trust and special reliance. [*K Mart Corp. v. Ponsock*, 103 Nev. 39, 49 (1987)]. Third, the employer's conduct must go "well beyond the bounds of ordinary liability for breach of contract." *Id*. at 48, 732 P.2d at 1370. However, the mere breach of an employment contract by a large and powerful employer, or any employer, does not in and of itself give rise to tort damages. *Id*. The reason tort damages are appropriate for bad faith discharge is that ordinary contract damages do not adequately compensate, nor do they make the victim whole."

Martin, 111 Nev. at 928-29; *see also Beales v. Hillhaven*, 108 Nev. 96, 100 (1992) ("We have previously restricted the bad faith discharge tort to those 'rare and exceptional cases that the duty is of such a nature as to give rise to tort liability'") (quoting *Ponsock*, 103 Nev. at 49); *W. States Mineral Corp. v. Jones*, 107 Nev. 704, 711 (1991) (observing that a claim for breach of the covenant of good faith and fair dealing is "sometimes called a 'bad faith discharge tort'").

Plaintiffs cannot establish the necessary elements of these claims. First, there is no enforceable contract between Plaintiffs and SEIU or Henry, an essential element of Plaintiffs' claims. *See Martin*, 111 Nev. at 928-29. Just as with their other claims, Plaintiffs' tenth and eleventh causes of action for wrongful termination expressly rely on employment contracts between them and Local 1107, *not SEIU*. *See* First Amended Complaint, ¶ 79 ("*That Defendant SEIU 1107 and Plaintiff Gentry* entered into an employment contract on April 18, 2016.") (emphasis added); ¶ 84 ("*That Defendant Local 1107 and Plaintiff Clarke* entered into an employment contract on September 6, 2016.") (emphasis added).

Second, there was no employment relationship between Plaintiffs and SEIU or Henry, let alone a special relationship akin to that between an insurer and insured, another essential and yet unsubstantiated element of Plaintiffs' claims. *See Martin*, 111 Nev. at 928-29. Thus, summary judgement in favor of SEIU and Henry must be granted on Plaintiffs' tenth and eleventh claims.

IV. Summary Judgment in Favor of SEIU and Henry Should Be Granted on Plaintiffs' Twelfth and Thirteenth Causes of Action for Tortious Discharge.

To prevail on a cause of action for tortious discharge, "the employee must be able to establish that the dismissal was based upon the employee's refusing to engage in conduct that

was violative of public policy or upon the employee's engaging in conduct which public policy favors (such as, say, performing jury duty or applying for industrial insurance benefits)." *Bigelow v. Bullard*, 111 Nev. 1178, 1181 (1995). "The essence of a tortious discharge is the wrongful, usually retaliatory, interruption of employment by means which are deemed to be contrary to the public policy of this state." *Jones*, 107 Nev. at 718.

Plaintiffs' twelfth and thirteenth claims for "Tortious Discharge" allege that "Defendant Local 1107, at the direction of and through the actions of Defendants SEIU, Manteca, Blue and Henry improperly dismissed Plaintiff Gentry in order to fill Plaintiff's position with individuals who would carry out SEIU's new program and policies at Local 1107, which violates public policy upholding 'for cause termination' provisions in employment contracts." First Amended Complaint, ¶ 89; *see id*. at ¶ 92 (alleging same claim regarding plaintiff Clarke).

Once again, these causes of action fail because neither SEIU nor Henry employed Plaintiffs. *See D'Angelo*, 107 Nev. at 718 (observing that "a public policy tort cannot ordinarily be committed absent the employer-employee relationship"). Absent an employment relationship between Plaintiffs and SEIU or Henry, summary judgment should be granted in favor of SEIU and Henry on Plaintiffs' twelfth and thirteenth causes of action for tortious discharge.

Moreover, Plaintiffs have failed to establish that they were terminated in violation of any public policy. Rather, as discussed *infra*, Local 1107 terminated Plaintiffs *consistent with* public policy, namely, federal labor policy which favors the ability of union leaders to select their own administrations. *See Screen Extras Guild, Inc. v. Superior Court*, 51 Cal.3d 1017 (1990). Allowing Plaintiffs' claims to proceed would turn public policy on its head, not vindicate it.

V. Summary Judgment in Favor of SEIU and Henry Should Be Granted on Plaintiffs' Seventh Cause of Action for International Interference with Contractual Relations.

"In an action for intentional interference with contractual relations, a plaintiff must establish: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274 (2003). "At the heart of this action is whether Plaintiff has proved intentional acts by Defendant intended

or designed to disrupt Plaintiff's contractual relations . . . ." *Nat'l Right To Life Political Action Comm. v. Friends of Bryan*, 741 F.Supp. 807, 814 (D. Nev. 1990). Moreover, "[t]he fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability. *Inquiry into the motive or purpose of the actor is necessary." Id*. (emphasis in original) (quoting *DeVoto v. Pacific Fidelity Life Ins. Co*., 618 F.2d 1340, 1347 (9th Cir.1980)). Thus, a plaintiff must show that the defendant took some action with "an improper objective of harming Plaintiff or wrongful means that in fact caused injury to Plaintiff's contractual" relationship. *Id*. at 815.

This cause of action, like the others, fails for a straightforward reason: SEIU did not take any action intended to disrupt Plaintiffs' employment contracts with Local 1107. *See J.J. Indus., LLC*, 119 Nev. at 274. The undisputed evidence establishes that Local 1107, *not SEIU*, made the decision to terminate Plaintiffs. Because Plaintiffs have failed to show that SEIU or Henry took any action that was specifically designed to disrupt their employment contracts with Local 1107, they have failed to establish an essential element of this cause of action.

Nor does that conclusion change because Trustees Manteca and Blue were appointed by SEIU President Henry following the imposition of a trusteeship over Local 1107. To the contrary, it is well-settled that where an international union appoints a trustee to take control of the affairs of a local union, the trustee acts on behalf of the local union, *not the international union*. Fitzpatrick Decl., ¶ 11 ("As Trustees, Blue and Manteca stood in the place of SEIU Local 1107's former officers and assumed responsibility and management of the day-to-day affairs of SEIU Local 1107, including hiring, supervising and disciplining SEIU Local 1107 staff."); *see Dillard v. United Food & Commercial Workers Union Local 1657*, Case No. CV 11-J-0400-S, 2012 WL 12951189, at *9 (N.D. Ala. Feb. 9, 2012) ("As a matter of law, a trustee steps into the shoes of the local union's officers, assumes their rights and obligations, and acts on behalf of the local union."), *aff'd*, 487 F. App'x 508 (11th Cir. 2012); *Campbell v. Int'l Bhd. of Teamsters*, 69 F. Supp. 2d 380, 385 (E.D.N.Y. 1999) ("A trustee assumes the duties of the local union officer he replaces and is obligated to carry out the interests of the local union and not the appointing entity."); *see also Perez v. Int'l Bhd. of Teamsters, AFL-CIO*, Case No. 00-civ-1983-LAP-JCF,

2002 WL 31027580, at * (S.D.N.Y. Sep. 11, 2002) (same); *Fields v. Teamsters Local Union No. 988*, 23 S.W.3d 517, 525 (Tx. Ct. App. 2000) (same). Thus, to the extent Plaintiffs' tortious interference claims against SEIU and Henry are based on the fact that the Trustees were appointed by SEIU President Henry, their claims fail as a matter of law.

Moreover, where, as here, an international union's constitution authorizes a trustee to remove employees or officers of the local union following imposition of a trusteeship, courts have concluded that the removed officers or employees have no claim for tortious interference. For instance, in *Pape v. Local 390 of Int'l Bhd. of Teamsters*, 315 F. Supp. 2d 1297, 1318 (S.D. Fla. 2004), the court held that "[b]ecause the trustee is empowered by the International Constitution to remove officers, Plaintiff could not have been wrongfully removed from office." *Id.* (citing *Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D. Mich. Sept. 18, 1989)) (emphasis added). In *Pape*, the international union placed the local union into trusteeship, and the trustee thereafter terminated the plaintiff, the president of the local union. *Id*. at 1303. The plaintiff alleged that, based on the local union's constitution and bylaws, she had a right to continued employment with the local union, and that the international union interfered with that right when it removed her from office following the trusteeship. *See id*. at 1318. In granting summary judgment for defendants on the plaintiff's claim for tortious interference, the court held that the plaintiff's right to continued employment "could not be sustained in conflict with the International Constitution." *Id*. at 1318 (emphasis added). Similar to SEIU's Constitution and Bylaws, the international union's constitution in *Pape* provided that "[t]he trustee shall be authorized and empowered . . . to remove any and all officers . . . ." *Id*. at 1307; *see* Fitzpatrick Depo., Ex. A (Art. VIII, § 7(b) ("The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union . . . to remove any of its employees[or] agents . . . .").

Likewise, in *Dean*, the court ruled that a trustee was not liable for tortious interference with contractual relations for terminating plaintiff, a former business agent of the local union, following a trusteeship. *See Dean*, 1989 WL 223013. As here, the plaintiff alleged that he was hired by the local union's former officers, that they promised he would be terminated only for

good cause, and that, following imposition of a trusteeship, the trustee terminated him without cause. *See id*. at *1-3. Like *Pape*, the court ruled that the trustee "possessed authority to take whatever steps he chose to restore Local 406 to financial stability," and that "[t]he decision as to which business agents he should discharge and which agents he should retain in obtaining this objective was certainly his to make." *Id*. at *8. As here and in *Pape*, the international union's constitution authorized the trustee to remove officers of the local union upon imposition of the trusteeship. *See id*. at *6.

These cases require summary judgment in favor of SEIU and Henry on Plaintiffs' seventh claim for tortious interference. Even if the former Local 1107 president was authorized to enter into for-cause employment contracts with Plaintiffs, such authority was always subject to, and limited by, the SEIU Constitution, which clearly authorizes a trustee appointed by SEIU to remove employees in the event of a trusteeship. *See* Fitzpatrick Decl., Ex. A (Art. XV, § 3 (providing that "the Constitution and Bylaws of all Local Unions and affiliated bodies shall at all times be subordinate to the Constitution and Bylaws of the International Union as it may be amended from time to time."); Art. VIII, § 7(b) ("The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union and . . . to remove any of its employees . . . ."). Thus, Plaintiffs' tortious interference claims fail as a matter of law. *See Pape*, 315 F. Supp. 2d at 1318 ("Plaintiff cannot state a claim for tortious interference because she has failed to establish existence of a legal right."); *Dean*, 1989 WL 223013, at *6 ("[I]n light of the explicit provisions of the [international] constitution and bylaws, [the plaintiff] could not reasonably believe that his employment as a business agent was secure for a three year term and terminable only for good cause, regardless of whether or not Crane and Viviano continued in office during that time.").

VII. Plaintiffs' Claims Are Preempted by the Labor Management Reporting and Disclosure Act.

As discussed below, Plaintiffs' claims against SEIU and Henry are preempted by federal law. Summary judgment in favor of SEIU and Henry is therefore proper on that basis alone.

A. LMRDA Preemption.

The Labor Management Reporting and Disclosure Act ("LMRDA") is a federal statute that regulates the internal affairs of unions. *See* 29 U.S.C. § 401, *et seq.*; *see also Finnegan v. Liu*, 456 U.S. 431, 435-36 (1982). By virtue of the Supremacy Clause of the U.S. Constitution, U.S. Const., Art. VI, cl. 2, the LMRDA preempts state law causes of action that conflict with the federal labor policy embodied in the LMRDA.

A leading case is *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal.3d 1017 (1990), which addressed several claims by a former business agent of the Screen Extras Guild, a labor union. [4] Following the plaintiff's termination for dishonesty and insubordination, she sued the union for wrongful discharge in breach of an employment contract, intentional and negligent infliction of emotional distress, and defamation. *See* 51 Cal.3d at 1020. On appeal of the denial of the union's summary judgment motion, the California Supreme Court concluded that the plaintiff's claims conflicted with, and were therefore preempted by, the LMRDA, and directed the trial court to enter judgment in favor of the defendants on all causes of action. *See id*. 1024-33. The court held that "to allow [wrongful discharge] actions to be brought by former confidential or policymaking employees of labor unions would be inconsistent with the objectives of the LMRDA and with the strong federal policy favoring union democracy that it embodies." *Id*. at 1024.

Citing the U.S. Supreme Court's decision in *Finnegan v. Leu,* 456 U.S. 431 (1982), the *Screen Extras Guild* court noted that the "[t]he primary objective of the LMRDA . . . is to ensure that unions are democratically governed and responsive to the will of their memberships." *Screen Extras Guild, Inc*., 51 Cal.3d at 1024. In *Finnegan*, the U.S. Supreme Court, construing the language and legislative history of the LMRDA, ruled that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id*. at 441. As a result, the Supreme Court

[4] SEIU and Henry are not aware of a Nevada case that has adopted the reasoning of *Screen Extras Guild.* Because this appears to be a matter of first impression in Nevada, this court may look to California case law as persuasive authority. *See, e.g., Whitemaine v. Aniskovich*, 124 Nev. 302, 311 (2008) ("As this is an issue of first impression in Nevada, we look to persuasive authority for guidance.")

concluded that a local union did not violate the LMRDA by discharging the plaintiffs, appointed business agents of the local union, because of their loyalty to the former union president. *Id*. at 439-42.

Based on *Finnegan*, the court in *Screen Extras Guild* reasoned that "[e]lected union officials must necessarily rely on their appointed representatives to carry out their programs and policies. As a result, courts have recognized that the ability of elected union officials to select their own administrators is an integral part of ensuring that administrations are responsive to the will of union members." *Id.* at 1024-25. Relying on these federal policies, the court concluded that "allowing [wrongful discharge claims] to proceed in the California courts would restrict the exercise of the right to terminate which *Finnegan* found [to be] an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id*. at 1028 (internal quotation marks and citations omitted). Moreover, the court reached the same result regarding the plaintiffs' claims for infliction of emotional distress and defamation, which it concluded were "simply [the plaintiff's] wrongful termination claim in other garb," noting that the "facts [the plaintiff] alleged to underlie these causes of action are essentially the same as those which underlie her action for wrongful discharge (i.e., the fact and circumstances of her discharge)." *Id*. at 1032.

Finally, the court rejected the plaintiff's argument that because she was terminated for incompetence and dishonesty, not her disagreement with policy goals of the leadership of the union, her state law claims against the union did not implicate the LMRDA. *See id*. at 1027-28. The court concluded that permitting even such "garden variety" wrongful discharge actions against local unions would implicate the union democracy concerns of the LMRDA. *Id.* at 1027. The court also observed that "[r]eplacement of business agents by an elected labor union official is sanctioned by the [LMRDA] and allowance of a claim under state law would interfere with the effective administration of national labor policy." *Id*. (internal quotation marks and citations omitted). As the court explained: "The expense of litigating wrongful discharge claims, as well as the risk of liability should a discharge ultimately be deemed 'garden variety,' would surely have a chilling effect on all discharges. But, as we have seen, Congress intends that elected union

officials shall be free to discharge management or policymaking personnel." *Id*. at 1028.

Numerous California cases following *Screen Extras Guild* have similarly concluded that common law torts and breach of contract claims by discharged union employees are preempted by the LMRDA.[5] Federal district court cases have also reached this same result.[6] Additionally, a number of courts in other states have adopted the holding of *Screen Extras Guild*.[7]

Finally, as the court concluded in *Dean*, *Finnegan* applies equally to the authority of an appointed trustee to terminate union staff. As the court concluded, "[t]he obstruction of union democracy which can occur by leaving an elected president with his hands tied by appointed business agents, whom he could not discharge, is no less capable of occurring" in the context of a trusteeship. *See Dean*, 1989 WL 223013, at *5. Relying both on *Finnegan* and the trustee's authority under the international union's constitution and bylaws, the court held that "as trustee, Kantzler possessed the legal right of the displaced secretary-treasurer, Crane, to discharge Dean

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[5] *See Thurderburk v. United Food & Commercial Workers' Union, Local 3234*, 92 Cal.App.4th 1332 (2001) (LMRDA preempted suit for wrongful discharge by former union secretary); *Hansen v. Aerospace Defense Related Indus. District Lodge 725*, 90 Cal.App.4th 977 (2001) (LMRDA preempted claims for wrongful discharge in violation of public policy by former business agent); *Ramirez v. Butcher*, 2006 WL 2337661 (Cal. Ct. App. 2006) (LMRDA preempted claims for breach of contract, implied covenant of good faith and fair dealing, defamation and contract interference by former union field representative); *Burrell v. Cal. Teamsters, Public Professional and Medical Employees Union, Local 911*, 2004 WL 2163421 (Cal. Ct. App. 2004) (LMRDA preempted claims for breach of implied contract, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and defamation by former union office manager and bookkeeper); *see also Tyra v. Kearney*, 153 Cal.App.3d 921 (1984) (predating *Screen Extras Guild*; LMRDA preempted wrongful termination claim by former union business agent).

[6] *See, e.g., Hurley v. Teamsters Union Local No. 856*, Case No. C-94-3750 MHP, 1995 WL 274349 (N.D Cal. May 1, 1995) (LMRDA preempted claims for breach of implied contract and covenant of good faith and fair dealing by former union business representative); *Womack v. United Service Employees Union Local 616*, Case No. No. C-98-0507 MJJ, 1999 WL 219738 (N.D. Cal. 1999) (LMRDA preempted claims for breach of contract and implied contract and covenant of good faith and fair dealing, interference with economic advantage, infliction of emotional distress and defamation by former union executive director).

[7] *See e.g., Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 75 P.3d 1250, 1256 (Mont. Sup. Ct. 2003); *Packowski v. United Food & Commercial Workers Local 951,* 796 N.W.2d 94, 100 (Mich. Ct. App. 2010); *Dzwonar v. McDevitt*, 791 A.2d 1020, 1024 (N.J. App. Div. 2002), *aff'd on other grounds*, 828 A.2d 893 (N.J. Sup. Ct. 2003).

from his appointed position." *Id*. at *6; *see also English, et al. v. Serv. Employees Int'l Union, Local 73, et al.*, Case No. 18-c-5272, 2019 WL 4735400, *4 (N.D. Ill. Sep. 27, 2019) (concluding that *Finnegan* applied to decision by unelected trustee to terminate appointed staff).

B. Gentry and Clarke Were Policymaking, Managerial, and/or Confidential Employees Whose Claims Are Preempted by the LMRDA.

The undisputed evidence is clear that both Gentry and Clarke were policymaking and/or confidential employees subject to LMRDA preemption.

In holding that the plaintiff's claims were subject to LMRDA preemption, the court in *Screen Extras Guild* found that plaintiff, as a business agent, had "significant responsibility for the day-to-day conduct of union affairs," was "at the forefront of implementing union policy, linking the union member and the upper echelons of the union bureaucracy," and made "strategic decisions regarding pursuit of collective bargaining . . . ." 51 Cal.3d at 1031. The court also noted that the plaintiff "herself acknowledges . . . that she was considered a management employee." *Id*. These same conclusions apply to the former employment of Gentry and Clarke.

1. Gentry Was a Management and Policymaking Employee Within the Meaning of *Screen Extras Guild*.

As the former Communications Director of Local 1107, Gentry was unquestionably management or policymaking personnel whose claims are subject to LMRDA preemption.

Most obviously, Gentry *admitted in earlier submissions to this Court that she was a management employee*.[8] Gentry's repeated admission that she was a Local 1107 manager is itself sufficient to establish LMRDA preemption over her wrongful termination claims. *See Screen Extras Guild*, 51 Cal.3d at 1028 (concluding that "Congress intends that elected union officials shall be free to discharge *management* or policymaking personnel.") (emphasis added); *see id*. at

[8] *See* Plaintiffs' Motion for Partial Summary Judgment, filed 9/26/18, at 11:19-20 ("It cannot be disputed that Ms. Gentry and Mr. Clarke were hired *to their management positions* with Local 1107 by former Local 1107 President Cherie Mancini.") (emphasis added); *see also id*. at 11:21 (stating that Plaintiffs were "*management employees* that were not covered by" staff union collective bargaining agreement) (emphasis added); Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, filed 11/1/18, at 18:8 (admitting that Plaintiffs were "*management employees* that answered to [the union's former president].") (emphasis added).

1031 ("Smith herself acknowledges . . . she was considered a management employee.").

Gentry's admission was unavoidable given the undisputed facts regarding her managerial duties and responsibilities. She was supervised by, and reported directly to, the union's former president. She, along with a handful of other management-level employees, including Clarke, attended weekly manager's meetings with the former union president. Her title was Communications Director, and she was one of only three individuals at the union (along with Clarke) with a Director-level title. These undisputed facts highlight her managerial status.

It is equally clear that Gentry had significant responsibility for making strategic decisions affecting the union's collective bargaining and other goals. *See id*. at 1031 (noting plaintiff's position is responsible for making "strategic decisions regarding pursuit of collective bargaining"). It is undisputed that Gentry was responsible for, among other things, acting as a "key advisor to Local 1107 leadership in a variety of internal and external communications," "develop[ing] short-term and long-term campaign strategies" related to increasing the union's membership, and "development . . . of Local 1107 internal and external strategic communications plans . . . ." Moreover, because of her previous experience on a television show that regularly hosted politicians, Gentry even advised the union regarding its legislative strategy. Gentry Depo. 189:15-190:8. These responsibilities are of at least as much strategic importance to the union's overall programs and policies as those of the business agent in *Screen Extras Guild*. *See Screen Extras Guild*, 51 Cal.3d at 1031.

Importantly, Gentry also played a key role in directly promoting the union's message. Most notably, she regularly acted as the union's spokesperson in the media. For example, she was a spokesperson for the union in a radio interview related to a collective bargaining campaign in Elko. Gentry Depo., at 28:2-12. She was also regularly quoted in the newspaper as the union's spokesperson in connection with collective bargaining disputes. Gentry Depo. Ex. 7. What is more, Gentry cultivated relationships with journalists in order to enhance the union's ability to obtain positive coverage in the media. Gentry Depo. at 170:16-24; 171:8-15; 188:25-189:13. She likewise coordinated with community allies to develop a joint media strategy when Local 1107 and its community allies shared joint campaign objectives. *See* Gentry Depo. 190:12-19; 192:18-

193:3. These examples further establish that, like the business agent in *Screen Extras Guild*, Gentry had "significant responsibility for the day-to-day conduct of union affairs." *See Screen Extras Guild*, 51 Cal.3d at 1031.

Because Gentry was in a management or policymaking position, her claims against SEIU and Henry are subject to LMRDA preemption. *See Screen Extras Guild*, 51 Cal.3d at 1031-33.

2. Clarke Was a Management, Policymaking, and Confidential Employee Within the Meaning of *Screen Extras Guild*.

As the former Director of Finance and Human Resources, Clarke, like Gentry, was management or policymaking personnel whose claims are subject to LMRDA preemption. Clarke was also a confidential employee, an additional basis for concluding that his claims are preempted by the LMRDA.

Like Gentry, Clarke also admitted in earlier submissions to this court that he was managerial personnel.[9] That repeated admission supports the conclusion that, like Gentry's, Clarke's claims are preempted by the LMRDA. *See Screen Extras Guild*, 51 Cal.3d at 1028 (concluding that "Congress intends that elected union officials shall be free to discharge *management* or policymaking personnel.") (emphasis added); *see id*. at 1031 ("Smith herself acknowledges . . . she was considered a management employee.").

Clarke's admission, like Gentry's, was compelled by the undisputed facts regarding his duties and responsibilities. Clarke, like Gentry, was supervised by, and reported directly to, the union's former president. He, like Gentry, attended weekly manager's meetings with the former union president. Clarke, like Gentry, was one of only three individuals at the union (along with Gentry) with a Director-level title. Moreover, Clarke, as the head of his two departments, supervised a number of employees, including an accountant and administrative assistants.

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[9] *See* Plaintiffs' Motion for Partial Summary Judgment, filed 9/26/18, at 11:19-20 ("It cannot be disputed that Ms. Gentry and Mr. Clarke were hired *to their management positions* with Local 1107 by former Local 1107 President Cherie Mancini.") (emphasis added); *see also id*. at 11:21 (stating that Plaintiffs were "*management employees* that were not covered by" staff union collective bargaining agreement) (emphasis added); Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, filed 11/1/18, at 18:8 (admitting that Plaintiffs were "*management employees* that answered to [the union's former president].") (emphasis added).

Clarke was also unquestionably a confidential employee, further compelling the conclusion that his claims are subject to LMRDA preemption. In *Screen Extras Guild*, the court, relying on, among other cases, *Finnegan,* observed that "policymaking *and confidential staff* are in a position to thwart the implementation of policies and programs advanced by elected union officials and thus frustrate the ability of the elected officials to carry out the mandate of their election." 51 Cal.3d at 1029 (emphasis added); *id*. at 1024 ("In our view, to allow such actions [for wrongful discharge] to be brought by former *confidential* or policymaking employees of labor unions would be inconsistent with the objectives of the LMRDA . . . .") (emphasis added).

For example, in *Thunderburk, supra*, the court held that the union's former executive secretary was a "confidential" employee, and thus her wrongful termination claims against the union were preempted by the LMRDA. *See* 92 Cal.App.4th at 1341-43. In finding that the plaintiff was a confidential employee, the court cited the fact that the plaintiff had access to various confidential information, including "the union's communications with its attorneys; union representatives' mail; members' disciplinary notices; grievance files; . . . union membership records containing members' names, Social Security numbers, homes addresses, work location, compensation, and dues payment records . . . ." *Id*. at 1342. The plaintiff's confidential status supported preemption even though she "did not have policymaking or management responsibilities . . . ." *Id*.

Also instructive is *Hodge v. Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees & Helpers' Local Union 695*, 707 F.2d 961 (7th Cir. 1983). Although not a preemption case, the court ruled that a union secretary was a "confidential" employee and therefore, following *Finnegan*, lawfully terminated by the union's new administration. In concluding that she was a "confidential" employee, the court cited her "wide-ranging . . . access to sensitive material concerning vital union matters . . . ." *Id*. at 964.

Clarke's access to confidential, sensitive information was at least as wide-ranging as that of the plaintiffs in *Thunderburk* and *Hodge*. It is undisputed that he had access to all of the union's financial records. Indeed, as Finance Director, he prepared monthly financial statements; monitored accounts receivable and payable; reviewed invoices; prepared checks; processed staff

payroll and benefits; maintained vendor and financial files; advised the union's leadership on revenue and expense trends and cash flow projections; led in budget planning and prepared monthly and year-to-date reports for the union's Finance Committee and Executive Board; prepared bank deposits; maintained the union's political action committee accounts; prepared for the union's regular audit and coordinated with its auditors; assisted in the filing of local and federal government reporting obligations; and oversaw the union's tax and reporting obligations. Clarke, as union's Human Resources Director, also had access to the union's personnel records.

Clearly, as a result of Clarke's unrestricted access to, and responsibility over, the union's financial and personnel systems, he was a "confidential" employee whose claims are therefore preempted by the LMRDA. *See Screen Extras Guild*, 51 Cal.3d at 1029; *Thunderburk*, 92 Cal.App.4th at 1341-43; *see also Burell*, 2004 WL 2163421, at * 4 (holding that union's former office manager's claims were preempted by LMRDA where she "had access to confidential information regarding the Union, its members and officers, and its financial and legal matters."); *Hodge*, 707 F.2d at 964.

3. Plaintiffs' Flagrant Disloyalty to the Trustees Underscores the Basis for LMRDA Preemption Here.

Apart from their status as policymaking, management, and/or confidential employees, Plaintiffs' flagrant disloyalty to the Trustees highlights the reason that LMRDA preemption applies here. As noted earlier, "[e]lected union officials must necessarily rely on their appointed representatives to carry out their programs and policies," and "policymaking and confidential staff are in a position to thwart the implementation of policies and programs advanced by elected union officials and thus frustrate the ability of elected union officials to carry out the mandate of their election." *Screen Extras Guild*, 51 Cal.3d at 1024, 1029. The same concerns apply equally to a trustee's ability to select staff. *See Dean*, 1989 WL 223013, at *6 ("[A]s trustee, Kantzler possessed the legal right of the displaced secretary-treasurer, Crane, to discharge Dean from his appointed position."). As the court in *Dean* observed, "[t]he obstruction of union democracy which can occur by leaving an elected president with his hands tied by appointed business agents whom he could not discharge, is no less capable of occurring" in the context of a trusteeship. *See*

id. at *5.

This crucial point is exemplified by the undisputed facts regarding Plaintiffs' hostility to the trusteeship and the Trustees. Clarke believed the trusteeship was illegitimate. He believed Deputy Trustee Manteca was a "tyrant" and "bully," and he continued to hold that view of Manteca until he was terminated. In text messages with colleagues, Clarke described the union's former executive board members who had voted for a voluntary trusteeship as "fucking idiot[s]" and "stupid." He joked with his then-fellow Director, Pete Nguyen, about Nguyen's anticipated lawsuit against Local 1107, and mocked Local 1107. Worse still, knowing that his text messages revealed his antagonism to the trusteeship and the Trustees and would result in his termination, Clarke attempted to cover his tracks: He urged his co-workers, including Gentry, to delete their text messages.

Gentry, too, opposed the trusteeship. Less than two weeks after her termination, she volunteered to be the press contact on a press release that denounced the trusteeship and the Trustees. That press release, which Clarke also participated in creating, condemned the "illegitimate take-over" of Local 1107 which placed the union's members in "great peril," and accused Local 1107 Trustees of communicating with members in an "incomplete and misleading" manner, "ignoring" the union's legislative priorities, cancelling "[t]raining sessions, [and] bargaining sessions," and "halt[ing] member representation." Gentry Depo. Ex. 18.

Needless to say, this is precisely why the LMRDA protects the ability of union leaders to select their own staff. *See Screen Extras Guild*, 51 Cal.3d at 1029 (observing that "policymaking and confidential staff are in a position to thwart the implementation of policies and programs advanced by elected union officials and thus frustrate the ability of the elected officials to carry out the mandate of their election."). Otherwise, the Trustees would have been saddled with at least two Directors who were fervently opposed to the Trustees and the trusteeship, and who were in unique positions to undermine, if not completely sabotage, the union's policies and programs. Such facts highlight the basis for LMRDA preemption here.

Conclusion

For the foregoing reasons, SEIU and Henry respectfully request summary judgment in their favor on all claims against them in the first amended complaint.

DATED: October 24, 2019

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; LUISA BLUE, in her official capacity as Trustee of Local 1107; MARTIN MANTECA, in his official capacity as Deputy Trustee of Local 1107; MARY K. HENRY, in her official capacity as Union President; SHARON KISLING, individually; CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107, a non-profit cooperative corporation; DOES 1-20; and ROE CORPORATIONS 1-20, inclusive, Defendants.	CASE NO.: A-17-764942-C DEPT. No. XXVI **OPPOSITON TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** HEARING REQUESTED

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LUISA BLUE ("Blue"), MARTIN MANTECA ("Manteca"), and NEVADA SERVICE EMPLOYEES UNION ("Local 1107"), misnamed as "CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107" (Luisa, Martin, and Local 1107 are collectively referred to as "Local 1107 Defendants"), by and through the law firm Christensen James & Martin, hereby oppose Plaintiffs' Motion for Partial Summary Judgment.

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DATED this 12th day of November 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I

SUMMARY

The parties agree that preemption applicable to Plaintiffs' contract and contract related tort claims is a matter ripe for summary judgment. If preemption applies, all contract and related tort claims must be dismissed. If preemption does not apply, however, the for cause issue is still ripe for summary judgment because of a legitimate business purpose. As to Plaintiff Gentry's defamation claim, preemption is likewise an issue that defeats the claim. The claim is subject to defenses as well, *some* of which require Gentry to show the existence of malice, something she cannot do. Furthermore, Plaintiffs' characterization of certain defamation facts is subject to dispute, making summary judgment as argued by the Plaintiffs improper.

II

OBJECTIONS TO EVIDENCE

Local 1107 Defendants object to the 1272 pages of unauthenticated pages of information attached to Plaintiffs' Motion. While some documents appear to be self-authenticating, it is neither the Defendants' nor the Court's responsibility to sift through a mountain of evidence to do what Plaintiffs refuse to do, establish the admissibility of evidence, including but not limited to authentication and exceptions to hearsay within hearsay. As noted recently by Judge Navarro, "Judges are not like pigs, hunting for

truffles buried in briefs." *Wells Fargo Bank, N.A. v. Spring Mountain Ranch Master Association*, 2019 WL 4773786, at *4 (D.Nev., 2019) (*quoting United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

Beyond authentication, hearsay content is the larger problem with Plaintiffs' evidence. "The trial court may not consider hearsay or other inadmissible evidence whether it be in the form of direct testimony given in court or whether it appears in a deposition or answers to interrogatories." *Adamson v. Bowker*, 450 P.2d 796, 799, 85 Nev. 115, 119 (1969). Local 1107 Defendants object to the hearsay contained within the following documents:

Ex. No.	Document Title/Purpose	Notes and Additional Objections
3.	SEIU Internal Charges Report	The document is not a Local 1107 document, is hearsay, and contains hearsay within hearsay. It also contains improper opinion testimony.
4.	Urban Email	Hearsay within hearsay.
6.	Kisling Report	Plaintiffs assert that the document's contents prove that "Kisling accused Plaintiff Gentry of 'Excessive spending, concerns of alcohol use while at work….'" Motion at 4:27-28. However, the best evidence comes from the August 31, 2016 recording and the testimony of Brenda Marzan who confirmed that actual accusations of wrongdoing did not occur. See argument below.
7.	Local 668-70	The document contains hearsay and speculation. There is no evidence that information was taken from the union hall, and Ms. Gentry testified she does not know who gave her the information. For all we know, Ms. Gentry could have stolen the information or received it from her President Cheri Mancini. The evidence is unreliable.
8.	Urban Report	Plaintiffs' use of this document on page 6 of the Motion is objectionable as hearsay.
9.	Internal Charges Hearing Transcript.	This document contains hearsay, as evidenced by Plaintiffs taking the statements out of context.

FACTS

To alleviate duplicate reading for the Court, facts from the Local 1107 Defendants' Motion for Summary Judgment will not be copied and pasted here. Given that the competing summary judgment motions are to be heard together, the facts and the Local 1107 Defendants' Appendix to the summary judgment motion are incorporated herein as relevant to this Opposition.

Additional facts are important to the defamation issue.

1. Financial concerns.

Evidence regarding Gentry's claim that she was defamed by being called a thief came from Brenda Marzan who explained the source of the concerns, why they were concerns and that Gentry was never called a thief or accused of stealing anything.

> Q. So you had no evidence that the card was being misused?
>
> …
>
> THE WITNESS: So again, we were asking to make sure there wasn't anything going on. So without the additional information, we couldn't tell if there was any problems or concerns. But when you're not receiving the information, doesn't that in itself make you suspicious?
>
> BY MR. MCAVOYAMAYA:
>
> Q. I don't know. It's a good question.
>
> A. I think as a member of the executive board and a member of the finance committee, you have a fiduciary responsibility to make sure that there's nothing going on that shouldn't be going on.

See Ex. A attached hereto, Marzan Depo., 75:8-23. She further explained, "So again, there was no allegation. There was information that we saw on reports that we had concerns about and asked for additional information. When that wasn't provided, then it was moved forward as a concern." Id. at 80:18:22.

2. Potential alcohol use.

All evidence indicates that Kisling was merely informing Local 1107's Executive Board that she had received information from workers that Gentry smelled like alcohol

while at work. As Gentry explained in her deposition, "They were actual like part-time staff people that she was trying to get jobs for, and they had told her allegedly that I smelled of alcohol…. Q. So she had taken reports given to her to the executive board? A. Yes –" Gentry Depo., 102:6-24 (See App. to Local 1107's Motion for Summary J. at 011). By Gentry's own account, Kisling was reporting—NOT ACCUSING—a potential employee issue that she had received from staff.

Gentry's account is confirmed by Ms. Marzan when asked about the matter: "I just know that there was information provided to the executive board that there was some concerns that people, staff included, had brought up to Ms. Kisling that there was a concern about that." See Ex. A, Marzan Depo., at 227:8-14.

3. Recording of August 31, 2016 Executive Board Meeting.

Plaintiffs wrongly argue that Kisling called Ms. Gentry a thief and drunk as a matter of "fact" during the August 31, 2016 meeting. First, the Local 1107 Defendants never received a copy of the recording submitted to the Court by Plaintiffs, and therefore, object to the one presented to the Court as they have not had the ability to effectively evaluate the recording as presented to the Court.[1] Second, the use of the word "facts" in the recoding as cited and argued by Plaintiffs is done in the context of speaking about hiring practices and the applicability of Local 1107's constitution to those practices. The spending and smelling like alcohol concerns associated with Gentry start on the recording at 1:41:10, a full eight minutes after Plaintiffs' citation to the word "facts" on the recording. When Kisling raises the financial and alcohol concerns eight minutes later, she clearly identifies them as "concerns brought to my attention" and that there "is alcohol at the local," which is confirmed by Cheri Mancini: "There is. There is alcohol at the Local." Recording at 1:44:00. Ms. Kisling later describes further concerns regarding credit card use as potential "double dipping" (Recording at 1:47:52 – 1:48:35),

[111] A copy of the entire recoding, as disclosed to Plaintiffs, is being submitted to the Court on a memory stick. Plaintiffs, therefore, have the same recording as the Court.

which she once again describes "concerns." Id. at 1:44:31. At no time on the recording does Ms. Kisling ever say that Gentry actually stole money or was drunk at work.

III

STANDARDS

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a), *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).[2] The substantive law pertaining to each cause of action defines which facts are material. *Id., See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment has the burden of showing there is no genuine issue of material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party meets its burden by presenting evidence that would entitle the movant to a directed verdict, the burden shifts to the other party to go beyond the pleadings and set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 249-51.

IV

LEGAL ANALYSIS & ARGUMENT

Plaintiffs argue two theories for not applying LMRDA preemption, 1) lack of democracy concerns because the Trustees were not elected officials of Local 1107 and 2) applying preemption to non-collectively bargained contracts would be arbitrary and capricious. Motion, 9:23-28. Plaintiff Gentry then argues that she is entitled to summary judgment on three elements of her defamation claim.

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[2] The "slightest doubt" standard was rejected in *Wood.* Substantive law controls. *Id.*

1. Effective union governance is an independent basis for LMRDA preemption of Plaintiffs' claims.

LMRDA preemption includes more than Plaintiffs' single focus on democratic governance of unions; it includes protecting union members. Plaintiffs' argument that LMRDA preemption does not apply to their claims because Blue and Manteca were appointed trustees and not elected union officials was recently considered and rejected in the case of *English v. Service Employees International Union, Local 73*, 2019 WL 4735400, at *4 (N.D.Ill., 2019). In *English*, like here, trustees were appointed by SEIU over a local union, which was Local 73. The *English* court concluded the following in rejecting the elected vs. appointed argument now advanced by Gentry and Clark:

> Thus, in enacting the LMRDA, "Congress decided that the harm that may occasionally flow from union leadership's ability to terminate appointed employees is less than the harm that would occur in the absence of this power," *Vought*, 558, F.3d at 623, namely, the organizational paralysis that would result from retaining employees whose "'views ... were not compatible [with those of management] and thus would interfere with smooth application of the new regime's policy,' " *id*. (*quoting Hodge v. Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees & Helpers' Local Union 695*, 707 F.2d 961, 964 (7th Cir. 1983)); *see Finnegan*, 456 U.S. at 441-42. The courts have no power to "second-guess that legislative judgment." *Vought*, 558 F.3d at 623.

English at *4 (alterations in original). In other words, congressional intent of the LMRDA includes more than just union democracy, it includes ensuring that a union is not paralyzed by a former leader because "'it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect'" *Id.* (*quoting Vought,* 558 F.3d at 621) *(quoting Finnegan,* 456 U.S. at 436-37, 438).

The *English* court's member protection rational is central to the Ninth Circuit Court of Appeals application of *Finnegan*. "The federal interest in promoting union democracy ***and the rights of union members***, therefore, includes an interest in allowing union leaders to discharge incumbent administrators." *Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356, 1362 (9th Cir., 1986)

(emphasis added). This means that the LMRDA's trusteeship and federal labor policy preempt the Plaintiffs' state law claims because "[t]he Act [LMRDA] seeks uniformity in the regulation of employee, union and management relations [,...] 'an integral part of ensuring a union administration's responsiveness….'" *Tyra v. Kearney*, 200 Cal.Rptr. 716, 720, 153 Cal.App.3d 921, 927 (Cal.App. 4 Dist.,1984)(conc. opn. Crosby, A.J.). *English, Bloom and Tyra* all identify why Gentry and Clarke's elected vs. appointed argument fails; it is the "union administration's responsiveness" to member needs that is of critical concern in federal labor policy. Gentry and Clark's argument that their individual interests of job protection outweigh the interest of union members is opposite of case law and fact. Remember, Gentry and Clark issued a press release declaring Blue's and Manteca's leadership as "repugnant and holy [sic] unjustified."

The Seventh Circuit Court of Appeals also addressed Plaintiffs' argument that LMRDA preemption only applies where an elected union leader terminates an employment contract to ensure democratic governance. *See Vought v. Wisconsin Teamsters Joint Council No. 39*, 558 F.3d 617, 623 (7th Cir., 2009). In *Vought*, an unelected union leader terminated employment contracts of union business agents. Mr. Vaught argued that *Finnigan* only applied if a union leader is elected. The Seventh Circuit Court of Appeals disagreed and applied *Finnigan*. To wit, "It is not our place to second-guess that legislative judgment. And the possibility that Congress may wish to revisit its assessment in the future—perhaps in response to cases such as this—only underscores that we deal with the law as it is, not as it might be." *Id.* 623.

Plaintiffs' misinterpretation of the *Sowell* case is an example of not dealing with the law as it is. In *Sowell,* the union removed the lawsuit to federal court and Sowell moved to remand to state court. The union argued that removal was proper because *Sowell's* claims challenged the propriety of an imposed trusteeship. The court noted there is no statutory language in the LMRDA supporting the union's complete preemption argument and that the complaint on its face did not challenge the trusteeship. *Id.*, *4. The

court then remanded the lawsuit to state court because removal under the field preemption theory was wrong. *Sowell* is not applicable to this Court's analysis. *Sowell*, and the quote used by Plaintiffs, rejected the argument of field preemption by the LMRDA. That is why the court wanted express preemption language; it was looking for express field preemption language not specific contract preemption language as Plaintiffs incorrectly argue.

2. Plaintiffs' argument that Congress acted arbitrary and capricious in protecting union members at the expense of appointed union employees is wrong.

Plaintiffs' argument that the contracts of two *non-litigants*, Javier Cabrera and Peter Nguyen, makes LMRDA preemption arbitrary and capricious has no support in fact or law. A party seeking or opposing summary judgment '"is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031, 121 Nev. 724, 732 (2005) (*quoting Collins v. Union Federal Sav. & Loan Ass'n,* 99 Nev. 284, 302, 662 P.2d 610, 621 (1983). NRCP 56 requires summary judgment to be premised upon admissible facts. There are no admissible facts before this court regarding Javier Cabrera or Peter Nguyen, and those "facts" asserted by Plaintiffs are incomplete at best. With no authenticated "facts" and a nonexistent record, regarding Javier Cabrera and Peter Nguyen, Plaintiffs' arbitrary and capricious argument is built upon unallowed gossamer threads of whimsy, speculation, and conjecture.

Plaintiffs' speculation deepens when they ask the court to accept a legal conclusion that LMRDA preemption does not apply to Javier Cabrera and Peter Nguyen because of a collective bargaining agreement and union membership. These arguments are completely irrelevant to Gentry and Clarke who were not union members. In addition, Plaintiffs point to no rule supporting the proposition that LMRDA preemption of employment contracts cannot be applied to employees who fall under a collective bargaining agreement or are members of the union for which they work. Nevertheless,

Local 1107 will now cite case law that defeats Plaintiffs' irrelevant, unsupported and ipse dixit propositions.

a. A collective bargaining agreement has not stopped LMRDA preemption of employment contract claims in other cases.

In *English*, 2019 WL 4735400, the plaintiffs argued that they could not be terminated as Local 73 employees because they were elected officers of a staff union that bargained with Local 73 as the employer.[3] The court concluded that their being elected officials of the staff union (which made them subject to a collective bargaining agreement) did not protect their employment from termination by an appointed trustee pursuant to the holding in *Finnegan.* The staff union CBA did not protect them from employment termination. See also *Vought* and *Dean* below where a union member's employment with the union was not protected by the collective bargaining agreement.

b. Union membership does not trump LMRDA preemption of employment contract claims.

Union membership, or loss thereof, has no bearing on LMRDA preemption of employment guarantees. "And it mattered not that the plaintiffs lost their contingent membership rights as a result because that was 'merely incidental' to the lawful termination of their employment." *Vought* at 622, *quoting Brunt v. Service Employees Int'l. Union,* 284 F.3d 715, 720 (7th Cir., 2002). In short, loss of union membership is incidental to the lawful termination of employment.

The *Dean* court also rejected the argument union membership prevented an employment termination by a trustee appointed by an international union. *Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D.Mich. Sept. 18, 1989). Dean, a union member, was hired by the union to act as a business agent. He was given a three-year employment contract terminable only for

[3] For clarity, Local 73, although a union, was an employer. Its staff formed a union and bargained with Local 73 over the terms and conditions of their employment.

cause. In rejecting Mr. Dean's claims, the court highlighted *Finnigan's* applicability and noted that Dean was subject to the international's constitution, which allowed for the imposition of a trusteeship and the removal of any employee from office by the trustee. As the *Dean* court stated, "[I]n light of the explicit provisions of the constitution and bylaws, he could not reasonably believe that his employment as a business agent was secure for a three year term and terminable only for good cause…" *Dean* at *6.

3. Employees with for cause employment contracts may be discharged for legitimate organizational purposes.

In the context of being a labor union, Local 1107 did not breach the employment contracts because Plaintiffs' discharge occurred to restore order to a dysfunctional union with communication, financial, and other organizational failings. "[A]n employer's discharge of employees for financial or other legitimate business reasons does not offend 'for cause' language in an employment contract." *Wilde v. Houlton Regional Hosp*., 537 A.2d 1137, 1138 (Me.,1988). This type of rule is adopted by the Nevada Supreme Court when considering "good cause" termination clauses in employment contracts. "[W]e hold that a discharge for "just" or "good" cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true." *Southwest Gas Corp. v. Vargas*, 901 P.2d 693, 701, 111 Nev. 1064, 1078 (Nev.,1995).

The indisputable facts in our Case are that Local 1107 was dysfunctional and its management failing. The Trusteeship Order identifies those failings, and union members have a right to responsive leadership as a matter of federal labor law and policy. Pursuant to *Wild* and *Vargas*, the Trustees' election to manage Local 1107's affairs by the elimination of Director of Communications and Director of Finance/Human Resources is neither arbitrary, capricious, or illegal. Thus, even without the preemptive power of the LMRDA, good cause for terminating Gentry's and Clarke's employment existed because the business necessity of being responsive to 8,000 members and 16,000

represented employees is more important than perpetuating a failed management team that was not responsive to membership needs. Thus, Nevada's interest Terminating the Plaintiffs' employment was a legitimate business purpose in the context of the substantive labor

4. Gentry wrongly asserts that accusations were made against her by Local 1107.

It is Gentry's burden to prove defamation. Her motion fails to establish that the alleged statements are in fact defamatory. "Generally, only assertions of fact, not opinion, can be defamatory." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 722, 57 P.3d 82, 93, n. 47 (2002). The best evidence that no defamation occurred is the August 31, 2016 recording. The recording clearly establishes that financial matters were raised as concerns. It also establishes that Ms. Kisling was reporting issues brought to her attention by employees and that alcohol was present at the Local. Gentry's and Marzan's testimony both confirm the recording—the statements were not presented as fact.

The recording defeats the defamation claim. "In determining whether a statement is actionable for the purposes of a defamation suit, the court must ask 'whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact."' *Pegasus* at 715, 88 (*quoting Nevada Ind. Broadcasting,* 99 Nev. at 410, 664 P.2d at 342). A concern is like an opinion. An opinion is an idea, and '"there is no such thing as a false idea.'" *Pegasus* at 714, 87 *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974). A concern is a "matter of interests or importance," which by its very nature cannot be false. Kisling raised only concerns about information that she had received from others. Gentry testified that Kisling was merely reporting concerns received from others and not making allegations of actual fact. "They were actual like part-time staff people that she was trying to get jobs for, and they had told her allegedly that I smelled of alcohol…. Q. So she had taken reports given to her to the executive board? A. Yes –" Gentry Depo., 102:6-24 (App. 011). Ms. Marzan confirmed Gentry's testimony.

Gentry cannot establish that she did not smell like alcohol to the interns. Why? Because she never asked them in discovery. The record is completely void as to whether the interns were asserting a fact or an opinion. Perhaps Gentry wore perfume that smelled like alcohol. Perhaps Gentry had been at lunch and had an alcoholic beverage spilled on her. Perhaps Gentry ate food at lunch that caused the interns to believe she smelled like alcohol. All we know is that Kisling reported the matter as a concern and the Executive Board hired an independent attorney to investigate. That investigation concluded that the intern's statements could not be corroborated. That process is not defamatory. That process is legitimate business procedure that is privileged under the law.

The absence of facts establishing truth does not prove the falsity of the alleged statements. Gentry provides no admissible evidence that she did not smell like alcohol and that she was accused of stealing union funds. What we do know is that Kisling presented information to the Executive Board for an investigation and the Executive Board met its fiduciary duties in having the matters investigated.

5. Gentry cannot show malice to overcome the common interest privilege discussed below.

All facts, even Gentry's own testimony, prove lack of malice necessary to overcome the common interest and business interest privileges.

> The question of actual malice goes to the jury only if there is sufficient evidence for the jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice. As noted above, actual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity.

Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 92, 118 Nev. 706, 721–22 (2002). There is no evidence that any statement made regarding Gentry was made with the knowledge that it was false. And there is clear and convincing evidence that Local 1107 personnel had the right and the legal responsibility (see below) to review and investigate matters effecting the union.

6. Statements were privileged as a required communication even without preemption.

As established in the Local 1107's Motion for Summary Judgment, Local 1107's receipt of Kisling's concerns were required by law under the LMRDA. *See also, U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, AFL-CIO, 981 F.2d 1362 (2nd Cir. 1992) (holing that union officers have a duty to investigate bad behavior and corruption within the union.) Statements required to be published are absolutely privileged when done pursuant to a lawful process and made to a qualified person. *Cucinotta v. Deloitte & Touche, L.L.P.*, 302 P.3d 1099, 1102, 129 Nev. 322, 326 (2013). Applying *Cucinotta* and *Teamsters*, summary judgment in favor of Local 1107 on the defamation claim is proper because reporting of concerns to the Executive Board was done in the labor context where the declarant had a legal duty to raise, and the hearer had a legal duty to receive the matter. The statements were, therefore, privileged as required communications.

7. Statements regarding Gentry were privileged as internal business communications.

"In order to establish a prima facie case of defamation, a plaintiff must prove: (1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Simpson v. Mars Inc.*, 929 P.2d 966, 967, 113 Nev. 188, 190 (1997).

Internal corporate communications regarding personnel matters are privileged. *See Jones v. Golden Spike Corp.*, 623 P.2d 970, 971, 97 Nev. 24, 27 (1981) (adopting the rule that internal business communications do not constitute defamation). The rule adopted in *Jones* was later modified to establish that the internal corporate communications privilege operates as a defense to defamatory statements. *See Simpson v. Mars Inc.*, 929 P.2d 966, 968, 113 Nev. 188, 192 (1997). All facts show that Kisling did not accuse Gentry of stealing or drinking on the job. Rather, Kisling reported issues of concern that Local 1107 was legally obligated to receive. Thus, 1) the statements were internal 2) to Local 1107's Executive Board 3) who convened an independent investigation and 4) never adopted the

statements or issued discipline against Gentry. The internal communication privilege is, therefore, established as a defense, making summary judgment against Gentry on the matter proper.

8. The alleged defamatory statement is subject to the common interest privilege.

The concerns raised by Kisling addressed a common interest. "A qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 62 (1983). "Whether the common interest privilege applies is a question of law for the court." *Lubin v. Kunin*, 117 Nev. 107, 115 (2001). Only the presence of malice can overcome the common interest privilege. *See Bank of Am. Nevada v. Bourdeau*, 115 Nev. 263, 267 (1999).

All facts show that Kisling's concerns communicated to individuals with interest therein, pursuant to a legal duty, and were confidentially investigated. The credit card issue was union wide and the alcohol use was received from rank and file employees. No malice exists as Kisling was following her duty to report and only reporting potential, not actual, problems. *See preemption argument in Local 1107's Motion for Summary Judgment*.

9. Plaintiffs' assertions regarding Local 1107 discovery responses are wrong.

Plaintiffs' assertion that Local 1107 did not respond to discovery responses is wrong as evidenced by the Plaintiffs use of those responses. Despite Plaintiffs' mischaracterization of the discovery responses, their real complaint is that they do not like the responses, which is a matter to be addressed prior to summary judgment.

CONCLUSION

Plaintiffs' summary judgment motion must be denied and summary judgment for the Local 1107 Defendants is proper.

Dated this 12th day of November 2019.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*

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CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served in the following manner on the date it was filed with the Court:

✓ ELECTRONIC SERVICE: Pursuant to Rule 8.05 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, the document was electronically served on all parties registered in the case through the E-Filing System.

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__ UNITED STATES MAIL: By depositing a true and correct copy of the above-referenced document into the United States Mail with prepaid first-class postage, addressed as follows:

__ FACSIMILE: By sending the above-referenced document via facsimile as follows:

__ EMAIL: By sending the above-referenced document to the following:

CHRISTENSEN JAMES & MARTIN

By: */s/ Natalie Saville*
Natalie Saville

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EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

* * * *

DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; *et al.* Defendants.	CASE NO.: A-17-764942-C DEPT. NO.: 26 **PLAINTIFFS' OPPOSITION TO L1107 DEFENDANTS MOTION FOR SUMMARY JUDGMENT**

COME NOW, Plaintiffs DANA GENTRY and ROBERT CLARKE, by and through their attorney of record MICHAEL J. MCAVOYAMAYA, ESQ., hereby oppose the L1107 Defendants Motion for Summary Judgment.

This Motion is made based upon the pleadings and papers on file herein, the Points and Authorities that follow, and any oral argument that may be heard at the hearing of this matter.

DATED this 11th day November, 2019.

MICHAEL J. MCAVOYAMAYA
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF UNDISPUTED FACTS.

The Defendant Service Employees International Union ("SEIU") Local 1107 ("L1107") entered into an express, valid and binding contract for indefinite employment with Plaintiffs Dana Gentry and Robert Clarke, which could only be terminated by the L1107 President "for cause" and granted both Plaintiffs an appeal to the L1107 Executive Board before the termination would be final. *See* Gentry Employment Contract, attached as **Exhibit "1,"** at Local – 003; *see also* Clark Employment Contract, attached as **Exhibit "2,"** at Local – 026. During the course of Plaintiff Gentry's employment with L1107, the L1107 Executive Vice President, Defendant Sharon Kisling, was hostile towards the L1107 staff that the former L1107 President, Cherie Mancini, had chosen to hire including Plaintiffs Robert Clarke and Dana Gentry, and their colleague, L1107 Organizing Director Peter Nguyen. This hostility towards these L1107 employees boiled over on August 17, 2016, when Sharon Kisling in a fit of rage attacked Peter Nguyen and attempted to terminate his employment with L1107 while President Mancini was on vacation. *See* SEIU Internal Charges Report, attached as **Exhibit "3,"** at 20. The SEIU International Defendants held a hearing in part to address Sharon Kisling's attempt to terminate Peter Nguyen's employment in breach of his for cause contract with L1107 while President Mancini was on vacation and issued a decision regarding the facts that cannot now be disputed because they are being sued for wrongful termination and defamation.

One day after this incident between Defendant Kisling and Nguyen, on August 18, 2016, "with Sister Mancini still on vacation, Sister Kisling called an 'emergency meeting' of the Executive Board for August 20," 2016 to ask the L1107 Executive Board to grant her permission to terminate Nguyen, and Plaintiffs Gentry and Clarke. *Id.* The meeting was called after Kisling received a legal opinion from L1107's attorney, Michael Urban's office regarding an interpretation of the L1107 Constitution. *See* Urban Email RE: Termination of Staff by EVP, attached as **Exhibit "4,"** at SEIU2025-27. L1107 Attorney Sean McDonald responded to the inquiry from Kisling concluding that Kisling did not have the authority terminate Nguyen because "Article 15 of the Local 1107 Constitution vests authority over the day-to-day affairs of the Local Union in the

President." *Id.* Mr. McDonald also concluded that the President's "authority to hire or fire staff" could be limited by the Executive Board. *Id.* at SEIU2025-26. After Urban's office issued the opinion, Kisling called the emergency board meeting for August 20, 2016. *Id.*

According to the SEIU hearing officer, "Kisling's actions in attempting to terminate Peter Nguyen amount to an abuse of her position…to rid herself of an individual staff member who had long been a thorn in her side." *See* **Ex. 3,** at 22. L1107 President Brenda Marzan testified at deposition that that Defendant Kisling passed out a report at this meeting and again at the August 31, 2016 Executive Board meeting. *See* Marzan Trans., attached as **Exhibit "5,"** at 14:3-15:25. The Kisling Report, which was later presented to the Executive Board a second time at the August 31, 2016 Executive Board meeting discusses all three of the L1107 Directors: Peter Nguyen, Robert Clarke, and Dana Gentry. *See* Kisling Report, attached as **Exhibit "6,"** at Local – 678-79. Kisling accused Plaintiff Gentry of "Excessive spending, concerns of alcohol use while at work." *Id.* at Local – 679. Kisling accused the Directors, Nguyen and Gentry, of "using credit card for in town gas when they receive monthly car allowance; lunch being put on business cards in town and when out of town although they receive a daily stipend for meals." *Id.*

This meeting was recorded via audio, and Plaintiffs are submitting that audio recording of the August 31, 2016 meeting to the Court for its review in consideration of Plaintiffs' Opposition. In this recording, it can clearly be heard that Kisling's report was based on "facts," which she asserted she had proof of and wished to submit in support of the allegations. *See* Audio Recording, 8/31/16 Meeting, at 1:32.00-1:33.20. After the August 31st Executive Board meeting several of the L1107 Executive Board officers that did not get their way at the meeting, including Kisling, requested that Urban conduct an investigation into the Kisling report "[a]fter speaking with our representative, from International, Mary Grillo." *See* Urban Invest. Emails, attached as **Exhibit "7,"** at Local – 667. As is clear from the emails numerous Executive Board officers considered Kisling Report to contain "allegations" of misconduct. *Id.* at Local – 668-70. Further, "the allegations that were provided to the board in private session were allowed to be taken from the Union Hall so there is no way of telling where they will be or have been circulated." *Id.* The L1107 staff obtained a copy of the Kisling Report, as Plaintiff Gentry clearly states in her email the next

day, and one member noted that "[t]his email along with other documents discussed in an EBOARD closed session are being forward to the appropriate governing authority for SEIU Local." *Id.* Plaintiff Gentry was not the only L1107 employee who received a copy of this document, as fellow director Peter Nguyen and L1107 Organizer Javier Cabrera each received a copy of this document. *See* Nguyen Decl., at 1-2; *see also* Cabrera Decl., at 1-2.

Urban conducted the investigation into the allegations contained in the Kisling Report and issued his own report on the allegations. *See* Urban Report, attached as **Exhibit "8,"** at Local – 683-86. Plaintiff Gentry and Peter Nguyen's for-cause contracts were included with the report. *Id.* at Local – 684, 697-89. According to Urban there was "[n]o evidence of alcohol use at work was provided other than hearsay statements. Some questions were raised on spending by staff, Dana Gentry and Peter Nguyen and use of union credit cards for gas by staff with a vehicle allowance. No evidence of staff complaints was provided." *Id.* There was no explanation of what charges by Plaintiff Gentry or Nguyen were "questionable." *Id.* at Local – 686. Despite Urban failing to conclude that Plaintiff Gentry or Peter Nguyen had misused funds, Kisling proceeded to present to the SEIU Hearing officer that the Directors of L1107 were misusing funds anyway. *See* Internal Charges Hearing Transc., attached as **Exhibit "9,"** at SEIU0356-66. Kisling again argued that her report presented to the board accused the directors of misusing the L1107 credit cards and were "double-dipping." *Id.* at SEIU363-64.

The SEIU International hearing officer addressed the "[a]lleged…financial malpractice" Kisling accused the staff hired by Mancini of in her Internal Charges Report. *See* **Ex. 3,** at 11. According to the SEIU hearing officer "[a] charge of financial malpractice is **a very serious allegation** that warrants specific and probative evidence. The evidence produced by the Charging Parties does not meet that standard." *Id.* (emphasis added). The SEIU International hearing officer concluded that nobody at L1107 had "researched" the "double dipping" matter. *Id.* The testimony of "Sister Grain" was directly referencing the questioning by Defendant Kisling about her report that Plaintiff Gentry and Nguyen were double dipping with the union credit card, which neither Kisling, nor Grain actually attempted to investigate. *Id. see also* **Ex. 9,** at SEIU0356-66. In fact, according to the current L1107 President, Marzan, the L1107 "finance committee brought up the

concerns" that the "directors were misusing the credit card" and that Dana Gentry was drinking on the job, but conducted no investigation into either allegation by Kisling despite having access to the records. *Id. see also* **Ex. 5,** at 55:7-11, 71:9-17, 78:9-80:6. The report was also presented to SEIU International Representatives Steve Ury and Mary Grillo. *See* **Ex. 7,** at Local – 667. According to Marzan, the report "should not have been given out to anybody." *See* **Ex. 5,** at 160:20-161:5.

On April 28, 2017, after Ms. Gentry had been employed with L1107 for over a year, and Mr. Clarke had been employed for just over nine (9) months, SEIU imposed an emergency trusteeship over L1107 removing its officers and appointing Defendant Luisa Blue as Trustee, and Defendant Martin Manteca as Deputy Trustee. *See* Trusteeship Order, attached as **Exhibit "10,"** at 1-4. It is undisputed that neither of the SEIU appointees were employees or elected officials of Local 1107 before, during or after the trusteeship. Less than a week after SEIU imposed the emergency trusteeship over L1107, the Trustees terminated Plaintiffs' employment without cause. *See* Termination Letters, attached as **Exhibit "11,"** at 1-2. It is undisputed that Plaintiffs were not permitted to appeal their terminations pursuant to the terms of their contracts. *See* L1107 Defs' MSJ, 10/29/19, at 11:14-23.

On May 5, 2017, one day after Plaintiffs termination letters were sent out, SEIU Chief of Staff Dee Dee Fitzpatrick wrote Trustee Luisa Blue about staffing L1107. *See* Fitzpatrick Email RE: Staffing L1107, attached as **Exhibit "12,"** at SEIU0075, 204-205. Fitzpatrick wrote about L1107 staffing issues, and made express recommendations that the Trustees terminate Plaintiffs' employment, and fill the positions with other SEIU employees. *Id.* SEIU was aware of Plaintiffs for cause contracts, as they had received a copy of the Urban Report at the Internal Charges Hearing. *See* **Ex. 9,** at 13:14-20. Despite knowing that Plaintiffs had for cause contracts with L1107, they recommended that the Trustees terminate Plaintiffs' contracts. *See* **Ex. 12,** at SEIU0075, 204-05. L1107 has admitted that the contracts attached to this Opposition as Exhibits 1 and 2 are genuine and authentic copies of the employment contracts entered into between Defendant L1107 and Plaintiffs Dana Gentry and Robert Clarke. *See* L1107 Defs' Resp. 1st RFA, attached as **Exhibit "13,"** at 1-3. L1107 has also admitted that it is not disputing "that an

employment contract between L1107 and Dana Gentry [and Robert Clarke] existed." *See* L1107 Defs' Resp. 2nd RFA, attached as **Exhibit "14,"** at 3:16-4:11. Plaintiffs expressly dispute that the SEIU Constitution permitted the Trustees to terminate any employee. *See* L1107 Defs' MSJ, 10/29/19, at 3:22-25.

II. ARGUMENT

A. Standard of Review for Summary Judgment.

A moving party is entitled to summary judgment when there are no genuine issues of material fact. Fed. R. Civ. P. 56(a). When a motion for summary judgment is properly made and supported, an opposing party must set out facts showing a genuine issue for trial. FRCP 56(c)(1)(A)-(B). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The party opposing summary judgment has the burden to come forward with specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

B. LMRDA Preemption Does Not Apply To This Case.

Defendants only argument for why they should not be held liable for knowingly and intentionally breaching Plaintiffs' for-cause contracts is that this Court should create new law in the state of Nevada preempting Plaintiffs, and all other union staff employees' contracts pursuant to federal labor law. *See* L1107 Defs' Opp. Cntr MSJ, at 9:1-10:2; *see also* SEIU Defs' Opp. Ctr MSJ, at 12:3-15:23; *see also* L1107 MSJ, 10/29/19, at 11:11-21:7. The reasons this doctrine should not be applied to this case are numerous and will be discussed in detail below. However, Plaintiffs will first outline the analysis this Court must undergo when determining preemption.

1. Finnegan, Bloom, Lynn, Screen And The Proper Federal Preemption Analysis.

While Defendants' preemption defense is advanced pursuant to *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990), what the Defendants actually request this Court do is apply three federal cases, two United States Supreme Court Cases and one Ninth Circuit Case: *Finnegan v. Leu,* 456 U.S. 431, 436-37 (1982); *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989); and *Bloom v. Gen. Truck Drivers Union, Local 952*, 783 F.2d 1356, 1357 (9th Cir. 1986). Defendants rely heavily on *Screen Extras Guild*, but this case applied *Finnegan*, *Lynn*, and *Bloom* when crafting its preemption doctrine. Thus, a thorough review of these cases is necessary.

In *Finnegan*, "[t]he question presented…[was] whether the discharge of a union's appointed business agents **by the union president, following his election** over the candidate supported by the business agents, violated the Labor-Management Reporting and Disclosure Act of 1959" ("LMRDA"). *Finnegan*, 456 U.S. at 432-33. The plaintiff in *Finnegan* was an appointed union business agent. *Id.* The plaintiff's at-will employment and job duties as business agent were expressly defined by the union's bylaws. *Id.* at 434. The plaintiff supported the incumbent union president in the union election immediately preceding the termination. *Id.* at 433. The incumbent president subsequently lost the election, and the newly elected union president terminated all the business agents who supported the incumbent, one of which filed the suit pursuant to the LMRDA.

The *Finnegan* Court went through an extensive analysis of the LMRDA's legislative history noting that Title I of the LMRDA was intended to protect members, not union employment, when deciding the case. *Id.* The *Finnegan* Court ultimately held that "discharge from union employment does not impinge upon the incidents of union membership, and affects union members only to the extent that they happen also to be union employees." *Id.* at 438. For this reason, and because there was "nothing in § 609, or its legislative history, to support petitioners' claim that Congress intended to establish a system of job security or tenure for appointed union employees," the *Finnegan* Court held Title I of the LMRDA could not be used to seek redress for terminations from union employment by appointed policymaking union-member employees. *Id.* at 438. The Court concluded that "Congress simply was not concerned with perpetuating **appointed union employees** in office at the expense of an **elected president's** freedom to choose his own staff." *Id.* at 441-42.

In a concurring opinion by Justice Blackmun he found no issue with concluding that "**the newly elected president** may discharge the **union's appointed business agents and other appointed union member-employees who will be instrumental in evolving the president's administrative policies**." *Id.* at 442-43. Justice Blackmun also made clear that the "opinion is not reaching out further to decide the same issue with respect to nonpolicymaking employees, that is, rank-and-file member-employees." *Id.* Justice Blackmun's definition of policy making elected or appointed union-member employees appears to conform with the LMRDA's own definitions

section, which accounts for "elected or appointed" business agents and key administrative personnel "such as **business agents**, heads of departments or major units, and organizers **who exercise substantial independent authority**." 29 U.S.C.S. § 402(q); *see also* 29 U.S.C. § 501.

In *Bloom*, like in *Finnegan*, the Court was dealing with an action brought by a union business agent relating to his discharge from union employment. *See Bloom*, 783 F.2d at 1357. This time, the business agent plaintiff brought claims under Title I of the LMRDA and the California labor code. *Id.* The plaintiff, Bloom, "was hired by then-Secretary-Treasurer Lee Kearney as a business agent for the Local." *Id.* Like in *Finnegan*, Bloom was considered to be a policy making employee because the business agent position at issue in *Bloom* had "significant policymaking responsibility in the negotiation of contracts and in processing and resolving grievances." *Id.* The position of business agent was also accounted for "[u]nder the Local's bylaws," and gave "the Secretary-Treasurer" plenary "power to hire or fire business agents" at will. *Id.* When the Secretary-Treasurer who hired Bloom retired, an election was held and the winning candidate terminated Bloom. *Id.* at 1357-58. The *Bloom* Court noted that all the requisite elements outlined in the *Finnegan* decision were met. *Id.* at 1359 n.3. However, *Bloom* also involved an additional element because he alleged his removal was based on his refusal to falsify union records. *Id.* at 1358-59. Because Bloom met all the elements of a policymaking appointed union member-employee discussed in *Finnegan*, his claim under the Title I of the LMRDA was barred because it did not affect his membership rights. *Id.* at 1359.

The *Bloom* Court then turned to analyzing Bloom's wrongful termination claims and the union defendant's preemption argument. *Id.* at 1359-60. "Because the statutes are largely silent as to what aspects of state law Congress intended to preempt, we have developed a preemption doctrine 'based on legislative history and judicial conceptions of what federal labor policy requires.'" *Id.* at 1360. The *Bloom* Court proceeded by analyzing the legislative history and determining the respective state and federal interests at issue. *Id.* The Court found that the state had a strong interest in wrongful termination case based on public policy in preventing embezzlement and retaliatory discharge for whistleblowing. *Id.* The Court noted that Bloom was an at-will employee covered by California law. *Id.* However, the *Bloom* Court, citing to 29 U.S.C.

§ 523, held that the LMRDA "itself explicitly saves both state criminal actions and state-imposed responsibilities of union officers from preemption by the Act." *Id. citing* 29 U.S.C. §§ 523, 524. "The continued vitality of the California statutes in light of these saving clauses **logically implies the continued vitality of the state's means of enforcing those statutes**, including, as here, a cause of action for wrongful discharge." *Id.* at 1361 *citing* 29 U.S.C. §§ 523, 524. "Thus, although the savings clauses addressing union members do not directly save Bloom's state cause of action, as discussed above, the clauses…imply that Bloom can maintain his action." *Id.*

The *Bloom* Court then moved to the federal interest citing Title I of the LMRDA noting that "[t]hese rights clearly aim at promoting union democracy and at making democratically elected union leaders responsive to the wishes of their memberships," and noting that *Finnegan* held that "'**the ability of an elected union president** to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.'" *Id. citing Finnegan*, 456 U.S. at 441-42. However, the *Bloom* Court stopped short of issuing a decision on "whether allowing a state cause of action for wrongful discharge would generally undermine this federal interest and rob the union leader of discretion needed to serve the wishes of the membership and thus the purposes of the Act" because the wrongful discharge claim at issue actually furthered rather than conflicted with the Congressional intent of the LMRDA. *Id.* at 1362 *citing Tyra v. Kearney*, 153 Cal. App. 3d 921, 926-27, 200 Cal. Rptr. 716, 719-20 (1984). "In *Tyra* and *Finnegan*, the discharge of the employee was central to the concerns of federal labor policy, and a state cause of action would have interfered with the federal regulatory scheme." *Id.* Because "[t]he subject of the suit here is merely peripheral to the concerns of the Act,…and a state cause of action would not interfere with federal policy at all," there was no conflict thus no preemption.

In *Lynn*, the facts were nearly identical to the facts in *Finnegan*, *Bloom*, and *Tyra* with a few notable differences. *See Lynn*, 488 U.S. at 349-50. The plaintiff, Lynn, was an elected rather than appointed business agent. *Id.* Lynn ran his election opposing a dues increase campaigning on cutting union expenses rather than increasing dues. After Lynn was elected to business agent, the international union trusteed the local. *Id.* The international union appointed a trustee pursuant to the international constitution, which permitted the trustee to terminate any officers and business

agents. *Id.* The trustee sought increase the union dues and demanded that Lynn support the decision. *Id.* Lynn refused, and after voicing opposition to the increase the trustee terminated him. The *Lynn* Court stressed that "the basis for the *Finnegan* holding was the recognition that the newly elected president's victory might be rendered meaningless if a disloyal staff were able to thwart the implementation of his programs" and interfere with "the need to vindicate the democratic choice made by the union electorate." *Id.* at 354-55. Those issues were not present in *Lynn* because Lynn was an elected official, he was removed by an unelected trustee and his removal was based on his objection to a union dues increase implicating his Title I rights. *Id.*

None of the federal cases relied on by the *Screen Extras Guild* Court actually conclude that a state wrongful termination action is preempted by federal labor law. Further, *Screen Extras Guild*, like *Finnegan*, *Bloom*, *Lynn*, and *Tyra* fit squarely within the *Finnegan* framework. 51 Cal. 3d at 1020. In each of these cases the plaintiff was employed as an elected or appointed union business agent. *Id.* The union's bylaws accounted for the plaintiff's specific position of business agent, and provided that "power to hire and discharge paid business representatives is vested solely with" elected union officials. *Id.* at 1021. The plaintiff's job "responsibilities included handling SEG members' claims, filing claims and grievances by SEG members against the studios that employed them, settling wage claims, settling grievances, and granting waivers of certain terms of the collective bargaining agreement between SEG and various motion picture studios." *Id.* The plaintiff was terminated by the elected union officials on the union's board. *Id.* Like *Finnegan*, the plaintiff in *Screen Extras Guild* met all the requisite elements that rendered the union employee's claim under Title I of the LMRDA not actionable were present. *Id.* The *Screen Extras Guild* Court then proceeded to conduct an analysis of conflict preemption reviewing the LMRDA, its legislative history and the state and federal interests involved. *Id.* at 1023-32.

All these cases are consistent in their analysis of federal preemption and this Court must conduct the same analysis when determining preemption here by first analyzing the statues in the LMRDA and their Congressional intent. *Id.* If there is no statute expressly preempting Plaintiffs' claims, the Court must then weigh the facts against state a federal interests involved and determine if there is a conflict. *Id.* Without conflict preemption, L1107's preemption defense must be denied.

2. Congress Did Not Intend The LMRDA To Preempt State Law.

As the *Bloom* Court held, "although the savings clauses addressing union members do not directly save [Plaintiffs'] state cause[s] of action," they indicate that Plaintiffs can maintain this action for wrongful termination and defamation. *See Bloom*, 783 F.2d at 1361 *citing* 29 U.S.C. § 523. However, the *Bloom* Court appears to have missed an important part of this statute, which provides that "Except as explicitly provided to the contrary, nothing in this chapter **shall reduce or limit the responsibilities of any labor organization**…**under any other Federal law or under the laws of any State**." *See* 29 U.S.C. § 523(a). The statute also provides that nothing "contained in said titles (except section 505 [29 USCS § 186]) of this Act be construed to confer any rights, privileges, immunities, **or defenses upon employers**, **or to impair or otherwise affect the rights of any person** under the National Labor Relations Act." 29 U.S.C.S. § 523(b). Clearly, Congress did not intend to preempt actions by employees against employers or unions except where explicitly provided in the act.

This expressly saves from preemption rights and remedies that union members have under state law. *Id.* This statute also expressly saves from preemption the legal "responsibilities of any labor organization" under any other Federal law or under the laws of any state law and also disclaims any intent to "confer any… **defenses upon employers**, **or to impair or otherwise affect the rights of any person** under the National Labor Relations Act." *Id.* This is an extremely broad disclaimer of preemption that this Court cannot overlook. In later cases, the Ninth Circuit and many other federal courts have cited to this provision to reject numerous preemption arguments.

For example, in *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, the state regulation at issue was a New Jersey statute preventing a labor organization from permitting union officers or employees with felony criminal records from being employed with a union if the union was collecting dues from casino industry employees. 468 U.S. 491, 494 (1984). Unions with nonconforming officials sued and argued preemption of the state regulation pursuant to the LMRDA. *Id.* "As the Court has already recognized, another provision of LMRDA, § 603(a), is 'an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided. . . .'" *Id.* at 491. The *Brown* Court held that

"[i]n affirmatively preserving the operation of state laws, § 603(a) indicates that Congress necessarily intended to preserve *some* room for state action concerning the responsibilities and qualifications of union officials." *Id.*

Similarly, in *O'Hara v. Teamsters Union Local #856*, which is a California case decided after both *Bloom* and *Screen Extras Guild*, the Ninth Circuit Court was addressing a lawsuit pursuant to the California Labor Code as it applied to a union employee. 151 F.3d 1152, 1161 (9th Cir. 1998). The plaintiff was a bookkeeper for a California union. *Id.* at 1155. The plaintiff was required to take part in a federal investigation into the local union. *Id.* After meeting with investigators, the union officers began retaliating against O'Hara, demoted her, and ultimately terminated her employment with the local union. *Id.* at 1155-56. O'Hara brought numerous causes of action against the union for breach of contract, tortuous discharge, breach of the union constitution, ERISA, and the LMRDA. *Id.* The California District Court had dismissed several of the plaintiff's causes of action. *O'Hara v. Teamsters Local # 856*, No. C 92-1262 FMS, 1997 U.S. Dist. LEXIS 2074, at *3 (N.D. Cal. Feb. 24, 1997). The California Northern District Court granted summary judgment on numerous causes of action, but allowed the plaintiff to maintain her state breach of contract and tortuous discharge claims. *See O'Hara v. Teamsters Local # 856*, No. C 92-1262 FMS Docket, attached as **Exhibit "15,"** at 8 (ECF No. 58).

After settlement, the *O'Hara* parties also filed cross-motions for indemnity pursuant to the California Labor Code due to the plaintiff, O'Hara, having to vindicate here wrongful termination due to the misconduct of the local union officers. *O'Hara*, 151 F.3d at 1161. The union argued that enforcement of the California Labor Code was preempted by the LMRDA. *Id.* at 1161. In rejecting the union's preemption argument, the Ninth Circuit Court held "**[i]t is clear that Congress did not intend to occupy the entire field of regulation, as the text of LMRDA explicitly makes reference to the continued viability of state laws**." *Id. citing* 29 U.S.C. § 523. The *O'Hara* Court held "[i]n sum, section 501 and section 2802 **are not in conflict; they may exist side by side**." *Id.* at 1162. "Indeed, far from pre-empting state law, one of the major thrusts of the LMRDA was to enforce state rights and remedies." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 323 (1971) *citing* 29 U.S.C. § 523.

Similarly, in *Ardingo v. Local 951*, the Sixth Circuit Court held that "the savings clause makes it clear that the LMRDA does not occupy the field of regulation **with respect to the relationships between union leaders and subordinates so thoroughly that union employees cannot enter into and enforce just-cause employment contracts under state law**" when rejecting the argument that *Finnegan* stood for the proposition that an union employee's breach of just cause contract claim was preempted by the LMRDA. 333 F. App'x 929, 934 (6th Cir. 2009); *see also Paul v. Winco Foods*, 156 F. App'x 958, 959 (9th Cir. 2005) (finding that the plaintiffs state law RICO and fiduciary duty claims not preempted citing to § 523); *Simo v. Union of Needletrades*, 322 F.3d 602, 612 (9th Cir. 2003) (holding that the union employee's breach of employment contract claim pursuant to a CBA was not preempted by the LMRDA citing to § 523); *Brookens v. Binion*, No. 99-7030, 2000 U.S. App. LEXIS 2055, at *7 (D.C. Cir. Jan. 28, 2000) (holding that the plaintiff's state breach of contract claim was not preempted by the LMRDA citing to § 523); *United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 286 n.20 (3d Cir. 1985) (holding that state RICO claims not preempted citing to § 523); *Fitzgerald v. Catherwood*, 388 F.2d 400, 405 (2d Cir. 1968) (state fiduciary duty regulations not preempted by the LMRDA citing to § 523); *Antablin v. Motion Picture Consumers, Local # 705*, No. 2:18-cv-09474-RGK-SS, 2019 U.S. Dist. LEXIS 169359, at *9 (C.D. Cal. June 11, 2019); *Corns v. Laborers Int'l Union of N. Am.*, No. 09-CV-4403 YGR, 2014 U.S. Dist. LEXIS 44997, at *21 n.4 (N.D. Cal. Mar. 31, 2014); *Int'l Union, Sec., Police & Fire Prof'ls of Am. v. United Gov't Sec. Officers of Am. Int'l Union*, No. 04-2242-KHV, 2004 U.S. Dist. LEXIS 26309, at *17 (D. Kan. Dec. 30, 2004); *Davis v. United Auto.*, No. 1:03CV1311, 2003 U.S. Dist. LEXIS 28190, at *26 (N.D. Ohio Dec. 31, 2003) (state wrongful discharge claim not preempted by the LMRDA citing § 523); *Schepis v. Local Union No. 17, United Bhd. of Carpenters & Joiners*, 989 F. Supp. 511, 515 (S.D.N.Y. 1998); *Reed v. United Transp. Union*, 633 F. Supp. 1516, 1528 (W.D.N.C. 1986); *Horne v. Dist. Council 16 Internat. Union of Painters & Allied Trades*, 234 Cal. App. 4th 524, 542, 183 Cal. Rptr. 3d 879, 893 (2015) (state anti-discrimination employment laws not preempted by the LMRDA citing § 523); *Casumpang v. ILWU, Local 142*, 94 Haw. 330, 340, 13 P.3d 1235, 1245 (2000) (citing to *O'Hara* and § 523 to conclude that an employee's state law action to recover lost wages was not

preempted); *Int'l UNION, UNITED Auto. v. RUSSELL*, 356 U.S. 634, 646 (1958) (Supreme Court concluded "that an employee's right to recover, in the state courts, *all* damages caused him by" a union was not preempted by the LMRDA).

The fact is the LMRDA includes six separate savings clauses expressly disclaiming preemption of state law. *See* 29 U.S.C. §§ 413, 466, 501, 523, 524, 524(a). Although it can be argued that none of these statutes expressly saves Plaintiffs' causes of action, they indicate Congressional intent to preserve state law except where explicitly provided to the contrary. *See Bloom*, 783 F.2d at 1361. To ensure that there can be no confusion about what Congress intended by the LMRDA, Plaintiffs are including a searchable pdf of the entire legislative history of the LMRDA and a declaration that includes every page that discusses preemption, and the jurisdiction of state and federal courts, and the enforcement of state laws in the field of labor-management. *See* Pltfs' Appendix II. Thus, because there is no express preemption the only way this Court may find preemption here is Plaintiffs contracts conflict with the democracy concerns of the LMRDA.

3. Conflict Preemption Does Not Apply To This Case Because The Democracy Concerns Of The LMRDA Are Not Implicated By This Case.

Conflict preemption does not apply for three reasons: (1) Plaintiffs were not terminated by elected union officials; (2) Plaintiffs' employment was not governed by the L1107 or SEIU International Constitutions; and (3) Plaintiffs were not confidential or policymaking employees.

i. Plaintiffs Were Not Terminated By Elected Union Officials.

Starting with the federal precedent both the Ninth Circuit and the Supreme Court made clear that the democracy concern that applied to the *Finnegan* line of cases was the right of an elected union official to hire their own staff to effect the will of the union membership. *Finnegan*, 456 U.S. at 441. The *Finnegan* Court made remarkably clear that Title I of the LMRDA did not "restrict the **freedom of an elected union leader** to choose a staff whose views are compatible with his own," and that "the **ability of an elected union president** to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id.* This citation to elected union officials is consistent throughout all the case law.

In *Bloom*, the Ninth Circuit Court made abundantly clearly that rights in the LMRDA "clearly aim at promoting union democracy and **at making democratically elected union leaders**

responsive to the wishes of their memberships." *Id. citing Finnegan*, 456 U.S. at 441-42; *see Cehaich*, 710 F.2d at 239 n.9; *see also* 29 U.S.C. § 401 (1982). "This responsiveness requires a degree of power and autonomy, and 'the ability **of an elected union president to select his own administrators** is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.'" *Id. quoting Finnegan*, 456 U.S. at 441. In contrast, the *Lynn* Court, which involved an appointed trustee overseeing a trusteeship over a local union, ultimately concluded that the Trustee's power to terminate union officers was not unrestricted and the plaintiff's claim actionable under the LMRDA. *Lynn*, 488 U.S. at 353. The *Lynn* Court described the *Finnegan* holding "that the business agents could not establish a violation of § 102 because their claims were inconsistent with the LMRDA's 'overriding objective' of democratic union governance," and that "**[p]ermitting a victorious candidate to appoint his own staff did not frustrate that objective**; rather, it ensured a union's '**responsiveness to the mandate of the union election**.'" *Id. citing Finnegan*, 456 U.S. at 441. "We thus concluded that the LMRDA did not 'restrict **the freedom of an elected union leader** to choose a staff whose views are compatible with his own.'" *Id.* The *Lynn* Court held that Lynn's removal "hardly was 'an integral part of ensuring a union administration's responsiveness to the mandate of the union election'" because he was an elected official and was removed at a critical time for the union when his advice was needed by an unelected trustee. *Id.*

In *Screen Extras Guild*, like *Finnegan*, *Bloom*, *Lynn*, and *Tyra* the Court focused its holding on the union democracy concerns of the LMRDA, which "mandates that labor unions be democratically governed," concluding that "[d]emocratic union governance dictates that **elected union officials** be responsive to the will of their union membership-electorate." 51 Cal. 3d at 1020-21. "To effectuate this policy, **elected union officials** have the authority to discharge union employees in management or policymaking positions who do not, in their opinion, serve the union membership properly." *Id.* Permitting policy making employees to bring civil action against the unions "**would undermine the ability of elected union leaders** to effectuate the will and policies of the union membership they represent." *Id.* At one point the *Screen Extras Guild* Court even