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 III

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notes that "**Smith does not dispute that she was discharged by elected union officials**." *Id.* at 1027. Termination by an elected union official is a critical element of this preemption doctrine.

It is undisputed that Plaintiffs were not terminated by elected union officials effectuating the will of the L1107 membership expressed in an election. Plaintiffs have fully briefed this basis for why preemption does not apply to this case in their Motion for Partial Summary Judgment. *See* Pltfs' MPSJ, 10/30/19, at 10:1-16:8.[1] Defendants cite to two cases for the proposition that an unelected trustee appointed to oversee a union trusteeship can remove any employee of a union: (1) *Pape v. Local 390 of the Int'l Bhd. of Teamsters*, 315 F. Supp. 2d 1297, 1300 (S.D. Fla. 2004); and (2) *Dean v. Gen. Teamsters Union, Local No. 406*, No. G87-286 CA7, 1989 U.S. Dist. LEXIS 18070, at *7 (W.D. Mich. Sep. 18, 1989). *See* L1107 Defs' MSJ, 10/29/19, at 13:6-16. The relevance of the district court's decision in *Pape* is easily dispelled because the plaintiff was an elected union officer who brought her federal case pursuant to the LMRDA and breaches of the international constitution after removal from office upon the imposition of a trusteeship. *Pape*, 315 F. Supp. 2d at 1300-01. The *Pape* case was not analyzed pursuant to the LMRDA's sections preserving union democracy. Rather, the *Pape* Court clearly stated that all the claims related to challenging the sufficiency trusteeship, which is not at issue in this case. *Pape*, 315 F. Supp. 2d at 1309-1317. For the democracy concerns to be at issue, the termination must be by an elected union official. Defendants' Motion for Summary Judgment must, therefore, be denied.

ii. Plaintiffs' Employment Was Not Governed By The L1107 Or SEIU Constitution.

The L1107 Defendants argue that the *Dean* case is instructive because Plaintiffs contracts "are subject to [the] international's constitution." *See* L1107 Defs' MSJ, 10/29/19, at 13:11-20. Plaintiffs do not disagree that to establish preemption of a policymaking employees' wrongful termination case the Defendants must demonstrate that Plaintiffs' employment with L1107 was expressly governed by the L1107 and SEIU Constitutions. This element is a staple of all the preemption and LMRDA case law the Defendants have cited. In each of the primary cases, *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean*, the Courts made sure to note that the positions at issue were expressly accounted for in the union's constitution or bylaws

[1] Plaintiffs incorporate by reference the arguments made in their Motion for Partial Summary Judgment as though fully stated herein.

including the at-will status of the specific position and its duties integral to the union's administration. *Finnegan*, 456 U.S. at 434; *Bloom*, 783 F.2d at 1357; *Lynn*, 488 U.S. at 359 (Justice White concurring); *Screen Extras Guild*, 51 Cal. 3d at 1029. *Pape*, 315 F. Supp. 2d at 1300-01.

The Court in the *Dean* case came to the same conclusion. *Dean*, No. G87-286 CA7, 1989 U.S. Dist. LEXIS 18070, at *7. The plaintiff in *Dean* brought suit against the union for wrongful termination in violation of state employment law. *Id.* at 6-7. The plaintiff in *Dean* was an appointed union-member Business Agent of the local union. *Id.* A trusteeship was imposed over the local union and the trustee terminated all the business agents upon imposition of the trusteeship. *Id.* at *5-6. The *Dean* Court determined that "[i]n order to resolve this issue, it is first necessary to examine the nature of the business agent position within Local 406." *Id.* at *10. The *Dean* Court cited the international constitution's express provision on "Business Agents" noting that the provision expressly stated that business agents could be appointed or elected, and that "Business Agents may be **removed at will** only by the appointing authority." *Id.* The Court then turned to local union's bylaws noting that the bylaws stated that the Secretary-Treasurer of the union "shall have power to appoint, suspend, or discharge all appointive organizers, appointive Business Agents, and employees," and concluded that "these provisions, when read together, establish that the business agent position is appointive and the official responsible for appointing the business agents is the secretary-treasurer." *Id.* at *11. The *Dean* Court held that the plaintiff, who was a union member, could not contract around the express provisions in the international and local union documents that governed his employment. *Id.* at *18-19.

Here, Plaintiffs' employment with L1107 did not arise from, nor was it governed by the L1107 Constitution or the SEIU Constitution. *See* L1107 Constitution, attached as **Exhibit "16,"** at SEIU0920-97. Unlike *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean*, Plaintiffs' positions of "Communications Director" and "Finance and HR Director" appear nowhere in the L1107 Constitution. *Id.* There is no description of Plaintiffs' job duties integral to the union's administration nor does it indicate that their employment was terminable at-will. *Id.* The provision relating to the authority of the L1107 President to hire and fire staff is Article 15. *Id.* at SEIU0964; *see also* **Ex. 4,** at SEIU2025. This provision provides the President of L1107 the

power to "[h]ire and fire…local Union's staff **in accordance with any applicable bargaining agreement, rules, laws and regulations regarding discrimination and pursuant to any staff-related policies adopted by the Executive Board**." *Id.*

Here, unlike the provisions at issue in *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean*, the L1107 Constitution does not state that Plaintiffs positions as directors of L1107 were subject to termination at-will. *Id.* Rather, the L1107 President has the power to terminate staff "in accordance with any applicable bargaining agreement." *Id.* Here, the L1107 membership voted for a constitution that expressly states that the President of L1107 is not granted authority to terminate employees' at-will, and expressly permits for-cause/just-cause contracts by including the term "applicable bargaining agreement." *Id.* The term "bargaining agreement" is found throughout the L1107 Constitution, as would be expected of a union constitution. However, every other time the term "bargaining agreement" appears in the L1107 Constitution it is immediately preceded by the term "collective." *Id.* at SEIU0927, 928, 929, 931, 932, 936, 942, 943, 944, 947, 952, 961, 964, 967, 968, 969, 971, 972, 981, 989, 992. In fact, the term "Collective Bargaining Agreement" is found twice in bullet point number "2" of Article 15, Section 1(A), just two bullet points before the relevant provision. *Id.* at SEIU964. This is not an error, as a for cause employment contract negotiated pursuant to state law like those at issue in this case are bargaining agreements that were not bargained collectively. *See* **Ex. 1,** at Local - 003; *see also* **Ex. 2,** at Local – 026. For this reason, unlike *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean*, the local constitution in this case expressly permits individual for-cause contracts like Plaintiffs' contracts, as well as those bargained collectively like L1107's contract with the Nevada Service Employees Union Staff Union ("NSEUSU"), which the L1107 Defendants have already conceded "was not terminated." *See* L1107 Defs' Reply MSJ, 11/6/18, at 7:9-19.

Defendants attempt to liken *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean* to the facts of this case by arguing that after the SEIU Defendants imposed the trusteeship over L1107 the L1107 Constitution was suspended and the SEIU Constitution became the applicable governing document of the local union. *See* L1107 Defs' MSJ, 10/29/19, at 13:6-16. According to Defendants, because "SEIU's Constitution allows a trustee to remove any

employee," the trustees were not bound by Plaintiff Gentry or Clarke's contracts, citing *Pape*. However, like in *Lynn*, the fact that the international constitution permits the trustee to remove officers and employees does not mean the trustees are exempt from compliance with the law. *Lynn*, 488 U.S. at 353. The Defendants also ignore the decision of the *Pape* Court that noted that because the "Plaintiff concede[d] that her employment as President of the Local 390 is governed by the local union's Bylaws,…that the local union's Bylaws cannot conflict with the provisions of the International Constitution" her employment was governed by both documents. *Pape*, 315 F. Supp. 2d at 1318. The plaintiff in *Pape* also "failed to submit a copy" of the alleged contract giving rise to her "right to maintain her position as President of the Local 390 that is independent from the International Constitution or the Local 390 Bylaws." *Id.* Here, unlike *Pape*, Plaintiffs employment was not governed by the L1107 or SEIU Constitutions, and have provided the contracts that give rise to their right to continued employment with L1107, which were expressly permitted by the Local 1107 Constitution. *See* **Ex. 1,** at Local – 003; **Ex. 2,** at Local – 026; **Ex. 16,** at SEIU0964.

Defendants have pointed to no provisions of the SEIU Constitution that bar local unions from entering into for-cause employment contracts with their employees, or otherwise indicate that all local union employees are always at-will employees. Defendants have pointed to no provisions of the SEIU Constitution that expressly define or describe Plaintiffs' director positions as at-will, or their integral duties. The sole provision cited to by the Defendants for their argument that the SEIU Constitution governed Plaintiffs' employment is the trusteeship provision that gives the Trustee power to terminate "any employee." *See* L1107 Defs' Reply MSJ, 11/6/18, at 13:11-12. However, because the L1107 Defendants have conceded that "the NSEUSU collective bargaining [agreement] was not terminated," clearly not all staff were terminable at will by the Trustees. *See* L1107 Defs' Reply MSJ, 11/6/18, at 7:9-19. If the Trustees could terminate "any employee," the NSEUSU CBA would not be enforceable. Because the NSEUSU is enforceable, so are Plaintiffs individual "bargaining agreements" absent some other provision in the SEIU Constitution expressly making director positions terminable at will. *See* **Ex. 16,** at SEIU0964. As such, Defendants' Motion for Summary Judgment must be denied.

iii. Plaintiffs Were Not Policy-Making Or Confidential Employees.

Defendants argue that "Plaintiffs held confidential, policy making, management positions as L1107 directors" in support of their preemption defense. *See* L1107 Defs' MSJ, 10/29/19, at 4:4-5. However, none of the case law cited for this defense includes any reference to management employees being a subset of employees covered by *Finnegan*. Rather, the two classes of employees considered to be covered by ruling in *Finnegan* were policymaking employees and confidential employees. *Finnegan*, 456 U.S. at 441 n.11. While the *Screen Extras Guild* Court references "management or policymaking personnel," it does so citing to the same footnote in *Finnegan* referencing nonpolicymaking and nonconfidential employees, indicating that the "management…employees" referenced by the Court were synonymous with the "confidential employees" contemplated in *Finnegan*. *Screen Extras Guild*, 51 Cal. 3d at 1028-30.

The primary case Defendants cite for application of the doctrine to nonpolicymaking "confidential employees" is *Thunderburk*, where the California Appellate Court, relying on *Hodge v. Drivers, Salesmen, etc. Local Union 695*, 707 F.2d 961, 962 (7th Cir. 1983), decided that it needed to conduct its inquiry into whether the plaintiff was a "confidential employee." 92 Cal. App. 4th at 1341-42. The *Hodge* case was an action by a union-member employee in the position of "head secretary" seeking to bring action pursuant to the LMRDA for improper discipline. *Hodge*, 707 F.2d at 962. There was no independent employment contract, and the termination was made by newly elected union officials. *Id.* The *Hodge* Court noted that "[t]he proper application of the word 'nonconfidential' as used in this footnote has proven to be the fulcrum of" cases involving nonpolicymaking employees, and was described as the "non- 'policymaking' **half** of the Supreme Court's *Finnegan* reservation." *Id.* at 963. The ruling of the *Hodge* Court and *Thunderburk's* citation to it makes abundantly clear that there are only two classes of employees encompassed by the decisions in *Finnegan* and *Screen Extras Guild*, policymaking employees and confidential employees. *Id. see also Thunderburk*, 92 Cal. App. 4th at 1339.

Defendants do not cite to any case law where an employee's claim was found preempted simply because they were a manager. The "policymaking employee" prong of the *Finnegan* analysis has never been applied to an unelected unappointed salaried union employee whose employment was not expressly defined and governed by the union's constitution and bylaws. *See*

Finnegan, 456 U.S. at 434; *Bloom*, 783 F.2d at 1357; *Lynn*, 488 U.S. at 359 (Justice White concurring); *Screen Extras Guild*, 51 Cal. 3d at 1029; *Tyra*, 153 Cal. App. 3d at 925; *Pape*, 315 F. Supp. 2d at 1318; *Dean*, No. G87-286 CA7, 1989 U.S. Dist. LEXIS 18070, at *19; *Womack*, No. C 98-0507 MJJ, 1999 U.S. Dist. LEXIS 5280, at *3; *Vitullo v. IBEW, Local 206*, 2003 MT 219, ¶ 11, 317 Mont. 142, 146, 75 P.3d 1250, 1252; *Hansen*, 90 Cal. App. 4th at 983. It cannot be disputed that Plaintiffs' employment was not expressly defined by the L1107 or SEIU constitutions. Indeed, Defendants' entire job duties argument rests on Plaintiffs' testimony and job descriptions included in undated job postings for their positions. *See* L1107 Defs' MSJ, 10/29/19, at 4:7-6:25. Further evidence of Plaintiffs' non-policymaking status is found in an organization charge produced by L1107's attorney, Michael Urban, Esq. *See* **Ex. 8,** at Local – 958. As the Court can plainly see from this Organization Chart of authority Plaintiffs as the directors of L1107 performed no supervisory or policy making function in the union. Plaintiffs' positions fall within the box of "Other Hall Staff" that reported directly to the L1107 President. *Id.* Of further note is the positions of the sector "Vice Presidents," who oversee the work of the Chief Stewards and Stewards, and are assisted by "Field Staff Representatives (Contract Reps. Organizers)." *Id.* The sector Vice President position is the policy making position at L1107 akin to business agents responsible for negotiating contracts and participate in grievances. Plaintiffs were not policymaking employees.

Thus, the inquiry here is whether Plaintiffs were confidential employees. *See Thunderburk*, 92 Cal. App. 4th at 1339; *Hansen*, 90 Cal.App.4th at 977; *Ramirez v. Butcher*, 2006 WL 2337661 (Cal. Ct. App. 2006); *Burrell*, 2004 WL 2163421 (Cal. Ct. App. 2004). In *Thunderburk*, the plaintiff did not have a for cause employment contract with the union, and brought her contract claims for "breach of an implied contract." *Thunderburk*, 92 Cal. App. 4th at 1338. The Court decided that it needed to conduct its inquiry into whether the plaintiff was a "confidential employee." *Id.* at 1341-42. The Court determined that the plaintiff's "job duties included providing Spanish-English translation services for Local 324 representatives and **attorneys in connection with legal proceedings, opening and maintaining grievance files**, **processing arbitration claims for union representatives**, **transmitting legal files and documents from Local 324 to the union's attorneys**, opening and **processing the union representatives' daily mail**,

monitoring files of disciplinary actions taken against Local 324 members, processing member applications for union academic scholarships, and **processing applications for death benefits paid by the union to deceased members' families**" gave her "wide access to confidential and sensitive union information" making her a confidential employee. *Id.* at 964-65.

However, the part of *Thunderburk* and *Hodge* that Defendants argue indicates "access" to confidential information makes one a "confidential employee" has been expressly rejected by United States Supreme Court. *Hodge*, 707 F.2d at 965. The *Hodge* Court correctly relied on National Labor Relations Board ("NLRB") precedent when coming to its definition of "confidential employee" finding that "[t]he better view of 'confidential' status in the industrial relations employment context is, we think, stated in *Teledyne Dental Products Corp.*, 210 NLRB Dec. (CCH) 435, 441 (1974), **where a nonsupervisory personal secretary to a plant manager was held to be a confidential employee whose conduct was attributable to the employer**." *Id.* The *Hodge* Court's analysis of *Teledyne Dental Prods. Corp.*, is simply incorrect. 210 N.L.R.B. 435, 441, (N.L.R.B. April 30, 1974). The Board in *Teledyne Dental Prods. Corp.*, determined that the secretary "occupied a position of confidentiality in the front office and that her duties included the transmission of messages to" bargaining unit employees reflecting the position of management on matters concerning anticipated changes for upcoming collective-bargaining negotiations. *Id.* The Board determined that the secretary's involvement in collective bargaining matters on behalf of the employer were issues of confidential nature that rendered her the "Respondent's **agent in this affair**." *Id.* at *25-26.

The United States Supreme Court has resolved all conflicts of the appellate courts in regards to what constitutes a "confidential employee" for the purposes of federal labor-management law. *NLRB v. Hendricks Cty. Rural Elec. Mbrshp. Corp.*, 454 U.S. 170, 176 (1981). In *Hendricks*, the Court expressly adopted the "labor-nexus test as formulated by the Board." *Id.* at 183-84. The labor-nexus test limits "the term 'confidential' so as to embrace **only** those employees who **assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations**'" on behalf of an employer. *Id.* at 181-82. The Court analyzed the legislative history of the Labor-Management Relations Act ("LMRA") noting that

Congress had considered and expressly rejected a broader definition of the term "supervisor" in the LMRA to "include within its scope the **confidential employee**, broadly defined as one 'who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.'" *Id.* "The Court of Appeals interpreted the legislative history of Congress' exclusion of 'supervisors' from the definition of 'employees' as warranting an implied exclusion for all workers who may **have access to confidential business information** of their employer. **That interpretation must be rejected**" belied by the legislative history. *Id.* at 184.

The United States Supreme Court has expressly limited the term "confidential employee" to those employees whose duties involve confidential "labor relations" information, not anyone with access to confidential business information. *Id.* at 189. The Court also noted that the NLRB "has deviated from that stated intention **in only one major respect**: it has also, on occasion, consistent with the underlying purpose of the labor-nexus test,…designated as **confidential employees** persons who, although not assisting persons exercising managerial functions **in the labor-relations area**, '**regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations**.'" *Id.* The definition of confidential employee that was applied in *Teledyne Dental Prods. Corp.* was the Board's narrower definition of confidential employee. 210 N.L.R.B. at 439-41.

The NLRB's definition of "confidential employee" that the Supreme Court approved of in *Hendricks* is what the Supreme Court was referencing in *Finnegan*. 456 U.S. at 434. Contrary to Defendants' characterizations of the holding in *Thunderburk*, the fact that an employee has access to information that could be considered "confidential business information" is not what establishes "confidential employee" status. Rather, there are "two categories of **confidential employees**…: (1) those employees who 'assist and act in a confidential capacity to persons who formulate, determine, and effectuate **management policies in the field of labor relations**'…, and (2) 'those employees who, in the course of their duties, regularly have **access to confidential information concerning anticipated changes which may result from collective bargaining negotiations**.'" *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985).

This definition of "confidential employee" is supported by nearly all the case law the Defendants cite in support of their preemption defense, which concluded that policymaking employees were high level appointed or elected union officials whose employment was expressly governed by the union's constitution, and whose duties directly involved independent decision making authority in collective bargaining negotiations, CBA enforcement activities like grievances, and other responsibilities of the union as a collective bargaining representative. *See Finnegan*, 456 U.S. at 434; *Bloom*, 783 F.2d at 1357; *Lynn*, 488 U.S. at 359 (Justice White concurring); *Screen Extras Guild*, 51 Cal. 3d at 1029; *Tyra*, 153 Cal. App. 3d at 925; *Pape*, 315 F. Supp. 2d at 1318; *Dean*, No. G87-286 CA7, 1989 U.S. Dist. LEXIS 18070, at *19; *Womack*, No. C 98-0507 MJJ, 1999 U.S. Dist. LEXIS 5280, at *3; *Vitullo v. IBEW, Local 206*, 2003 MT 219, ¶ 11, 317 Mont. 142, 146, 75 P.3d 1250, 1252; *Hansen*, 90 Cal. App. 4th at 983. This definition of "policymaking employee" conforms to labor-nexus test for determining what a "confidential employee" is under the NLRA in that a "policymaking employee" would be akin to the persons who formulate, determine, and effectuate management policies in the field of labor relations that are assisted by confidential employees. A "confidential employee" is one that assists the policymaking employees in the field of labor relations. *Id.*

The *Thunderburk* Court's analysis of whether the employee was a "confidential employee" centered on the employees' duties in relation to collective bargaining: "[a]s a result of these duties, plaintiff had access to confidential information, such as the union's **communications with its attorneys**; **union representatives' mail**; **members' disciplinary notices**; **grievance files**" etc. *Id.* The Supreme Court's reference to "confidential" union employees in *Finnegan* must be reviewed pursuant to the express definition of "confidential employee" as it has been defined by the Supreme Court, not Defendants' self-serving and lazy interpretation of the California persuasive authority.

Such was the case in *Shuck v. Int'l Ass'n of Machinist & Aero. Workers, Dist. 837*, where Court expressly rejected application of the *Screen Extras Guild* holding to the plaintiff's state wrongful termination claims. No. 4:16-CV-309 RLW, at *2-5 (E.D. Mo. Mar. 7, 2017). The *Shuck* Court noted that "[t]he California Supreme Court held that 'allowing even 'garden-variety' wrongful termination actions to proceed from the discharge of *appointed* union business agents by

elected union officials would implicate the union democracy concerns of the LMRDA.'" *Id.* The defendant argued "that Shuck was a 'Secretary-Business Representative' who worked for the President-Directing Business Representative and, therefore, Shuck had **access to confidential union information**." *Id.* at *3-4. The *Shuck* Court found this argument unpersuasive, holding that "[t]he **mere fact that confidential documents** crossed Shuck's desk in her capacity as secretary for the union President-Directing Business Representative does not connect her claim with the autonomy of the union's administration." *Id.* at *4.

Similarly, in *Lyons v. Teamsters Local Union No. 961*, a Colorado Appellate Court held that "permitting Lyons [a secretary and book keeper] to pursue her claims" would not implicate the LMRDA's democracy concerns because there was no "showing that Lyons was instrumental in establishing the Union's administrative policies or that her firing was related to her views on union policy." 903 P.2d 1214, 1220 (Colo. App. 1995). Similarly, in *Young v. Int'l Bhd. of Locomotive Eng'rs*, the Court found that preemption did not apply to the plaintiff's wrongful termination claims. 114 Ohio App. 3d 499, 502, 683 N.E.2d 420, 421 (1996). The "Appellee was employed by appellant **as Director of Health and Welfare and Director of Taxes**." *Id.* "Appellee was not a union member," and "[h]er job consisted of bookkeeping for the pension fund and employee benefits fund and collecting of taxes." *Id.* "Appellee was not involved in policy making for the union." *Id.* The Court noted that the employee's job duties gave her access to confidential information, but that access to confidential information did not establish her "confidential employee" status. *Id.* at 423.

Unlike all of these cases, Plaintiffs' job duties at L1107 did not involve the kind of confidential information the Supreme Court has deemed necessary for the determination of "confidential employee" status. While irrelevant, Plaintiff Gentry clearly and credibly testified that nobody reported to her, and she did not "supervise anyone at 1107." *See* L1107 Appdx., at 013:1-14:25. Defendants do not allege that Plaintiff Gentry had access to any confidential information that relates to the union's labor relations activities, nor that she advised anyone at Local 1107 in the field of labor relations. *See* L1107 Defs' MSJ, 10/29/19, at 4:7-6:2. Defendants do not allege that Gentry was involved with collective bargaining negotiations, grievances of other labor

relations matters, or had access to confidential labor relations information. *Id.* Indeed, the "SEIU Nevada L1107 Job Description" that Defendants' have provided in support of this argument demonstrates rather clearly that Plaintiff Gentry had no duties in the field of labor relations. *See* L1107 Appdx., at Appendix 048.

Similarly, while Plaintiff Clarke held the position of "Director of Finance & Human Resources," his job duties did not include access to the type of confidential labor relations information that would make him a confidential employee. The job description Defendants rely on for establishing that Plaintiff Clarke was a confidential, policy making, management employee expressly describes his position as "responsible for the financial health of the Local and is directly responsible for financial management, general office administration, personnel systems, technology, legal compliance, and reporting" in the field of finance, not labor relations. *Id.* at Appendix 143-44. Defendants do not argue, and nothing in the job description indicates that Plaintiff Clarke was involved with collective bargaining negotiations or enforcement, or had access to confidential labor relations information, or provided any advice to those advancing the labor relations policy of L1107. Defendants do not argue that Clarke had access to member grievance files. *See* L1107 Defs' MSJ, 10/29/19, at 4:7-6:2. Plaintiff Clarke had general access to the union's financial information, and gave advice to L1107 officers on general financial matters.

It cannot be disputed that Plaintiffs were not involved in participating, advising, assisting or acting in a confidential capacity to any L1107 officials who formulated, determined, or effectuated "management policies in the field of labor relations.'" *Lorimar Prods., Inc.*, 771 F.2d at 1298. Plaintiffs also did not, "in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations.'" *Id.* The entirety of Defendants argument appears to rest on the notion that Plaintiffs, as managers, were "given by the employer information that is of a confidential nature.'" *Hendricks*, 454 U.S. at 183-84. This broader definition of "confidential employee" that the Defendants seek to apply here has been expressly rejected by the Supreme Court. *Id.* at 184. Defendants also fail to connect Plaintiffs' duties to being integral to the advancement and autonomy of the union. *Id. see also Lorimar Prods., Inc.*, 771 F.2d at 1298; *Young*, 114 Ohio App. 3d at 502. Because Plaintiffs

were not policy making or confidential employees, and their terminations were not made by any elected union official, the federal interest in preserving union democracy expressed in the LMRDA, and Nevada's interest in deterring wrongful termination in breach of for cause contracts are not in conflict. For this reason, Defendants' Motion for Summary Judgment must be denied.

C. <u>Defendants' Breached The Covenant Of Good Faith And Fair Dealing.</u>

There is an "implied covenant of good faith and fair dealing that is part of every contract." *Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 232 (1991). "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.." *Id.* at 923-24. "Under the implied covenant, each party must act in a manner that is faithful 'to the purpose of the contract and the justified expectations of the other party.'" *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2 (1994). "Where one party to a contract 'deliberately countervenes the intention and spirit of the contract, that party can incur liability.'" *Id.*

Here, the Trustees unquestionably and deliberately contravened the intention and spirit of Plaintiffs' contracts with L1107. Defendants do not argue that they were not aware that Plaintiffs had for cause contracts with L1107. According to the Defendants, "the Trustees simply sought to manage union affairs themselves or with people that they were confident would carry out their goals and objectives." *See* L1107 Defs' MSJ, 10/29/19, at 16:1-6. The L1107 Defendants appear to argue that the Trustees' desire to fill Plaintiffs' positions with other people somehow makes them incapable of deliberately contravening the intention and spirit of Plaintiffs' contracts. To the contrary, the fact that the Trustees knew Plaintiffs had for cause contracts with L1107 that required a hearing before an impartial fact finder and terminated Plaintiffs anyway establishes that Plaintiffs deliberately contravened the intention and spirit of the contracts.

The L1107 Defendants cite to Plaintiffs' supposed opposition "to the Trustees' efforts to manage L1107" as a basis for summary judgment on this claim. *Id.* However, the evidence the Defendants cite in support of this argument were not known to the Trustees when they terminated Plaintiffs' employment. *Id.* at 7:1-13. Defendants cite to Plaintiff Gentry's testimony that she met with members of L1107 who wished to challenge the trusteeship. *Id.* Defendants conveniently

leave out the fact that this meeting occurred "within a week or two of the terminations," May 14, 2017. *See* L1107 Defs' Appdx., at 035:3-18. Plaintiff Gentry's actions after her termination are simply not relevant nor admissible for justifying the Trustees breach of contract. Similarly, Defendants cite to Plaintiff Clarke's text messages he exchanged with other employees of L1107 around the time the trusteeship was imposed, which were only available to Defendants via this case. Defendants have expressly admitted that they did not terminate Plaintiffs based on any known objections to the imposition of the trusteeship. *See* L1107 Resp. 3rd. RFA, attached as **Exhibit "17,"** at 5:7-18. As such, the L1107 Defendants' Motion for Summary Judgment must be denied.

D. <u>Tortious Discharge, Bad Faith Discharge, And Negligence.</u>

"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. The prototypical tortious discharge case is found in *Hansen v. Harrah's,* 100 Nev. 60, 675 P.2d 394 (1984), in which an employee claimed to have been discharged to penalize him because he had filed a worker's compensation claim." *D'angelo*, 819 P. 2d at 216. In Nevada, public policy dictates that "[p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." *St. Mary v. Damon*, 129 Nev. 647, 658, 309 P.3d 1027, 1035 (2013). "[C]ontract terms that violate public policy are often one-sided in favor of the more powerful party, rendering them substantively unconscionable." *Gonski v. Second Judicial Dist. Court of Nev.*, 126 Nev. 551, 563 (2010).

In this case, Plaintiffs can point to two clear issues relating to Plaintiffs' terminations that violate Nevada public policy. First, Plaintiff Gentry had expressed to both SEIU International and L1107 personnel offense relating to Defendant Kisling's defamation of Plaintiff Gentry noting on numerous occasions that she might file a lawsuit against L1107 for defamation if there was no investigation or apology and retraction. *See* **Ex. 7,** at Local – 665-72. Plaintiff Gentry was terminated in part because she complained of mistreatment by her employer and expressed intent on exercising her right to pursue legal action for defamation to Defendants. *Id.* This fits squarely within the tortious discharge framework. Second, Plaintiffs' terminations in breach of their for-cause contracts with L1107 violates Nevada's public policy permitting employers and employees

to enter into for-cause contracts. *D'angelo*, 819 P. 2d at 216. Defendants argue that Plaintiffs' contracts are unenforceable because of LMRDA preemption, which is not the law of Nevada or the federal courts. Defendants cite to several California cases in support of this argument. *See* L1107 MSJ, 10/29/19, at 12:16-21. One of those cases, *Ramirez*, expressly noted that "[t]o the extent the union engages in misrepresentation to solicit employees, an injured employee may pursue a claim for fraud, not simply wrongful termination; such a fraud claim is unlikely to be found preempted by LMRDA's objective of protecting the labor union's democratic processes." *RAMIREZ*, B182958, 2006 Cal. App. Unpub. LEXIS 7103, at *25 n.11.

Evidence of "fraud, oppression or malice, express or implied" is typically found to support a claim for tortious discharge. *D'Angelo*, 107 Nev. at 723; *see also Shoen v. Amerco, Inc.*, 111 Nev. 735, 749, 896 P.2d 469, 477 (1995). Plaintiffs' tortious discharge claim can be based on Nevada's public policy and state interest in punishing misrepresentation or fraud in the inducement of contracts like Plaintiffs. *Id.* If preemption is found applicable to this case then L1107, a sophisticated party in the field of labor-management with aid of a seasoned labor attorney misrepresented to Plaintiffs that their for-cause contracts were enforceable. If this is the case, the L1107 Defendants guilty of tortious discharge based on their misrepresentations to Plaintiffs that their contracts could only be terminated for cause in violation of Nevada public policy in preventing fraud, misrepresentations and enforcement of contracts. *See Bloom*, 783 F.2d at 1357; *RAMIREZ*, B182958, 2006 Cal. App. Unpub. LEXIS 7103, at *25 n.11.

Bad faith discharge requires a contract and special relationship between the employer and employee. *D'Angelo*, 819 P. 2d at 211. "Bad Faith Discharge Tort…is committed when an employer, acting in bad faith, discharges an employee who has established contractual rights of continued employment and who has developed a relationship of trust, reliance and dependency with the employer. *Id.* According to the Defendants neither Plaintiffs were "promised anything by the L1107 Defendants (or the International for that matter). The Trustees over L1107 simply needed a management team that they were confident would carry out their goal of returning L1107 to a functioning union." *See* L1107 Defs' MSJ, 10/29/19, at 17:15-20. However, the Defendants presume that Plaintiffs need to demonstrate that the Trustees made them a promise that would

result in the special relationship discussed in *D'Angelo*, 819 P. 2d at 211. This is not the case. Plaintiffs' had a special relationship with L1107 via President Mancini, who promised them continued employment with L1107 as evidenced by their contracts. According to the L1107 Defendants, those contracts were not enforceable because of LMRDA preemption. *See* L1107 Defs' MSJ, 10/29/19, at 11:11-15:17. If this is, indeed, the case then L1107 made false promises to Plaintiffs of continued employee and L1107 breached those promises arising to bad faith discharge. *See Bloom*, 783 F.2d at 1357; *see also RAMIREZ*, B182958, 2006 Cal. App. Unpub. LEXIS 7103, at *25 n.11. If this is not the case, Plaintiffs have a claim for bad faith discharge as Local 1107 breached the promise of continued employment made by Local 1107 in bad faith believing they could induce this Court to invalidate Plaintiffs' contracts via preemption.

If Defendants succeed on their preemption defense, they may argue that Local 1107 making false promises to Plaintiffs were not intentional. It was, however, at least negligent. Defendants argue that Plaintiffs' negligence claim is barred by the economic loss doctrine. *See* L1107 Defs' MSJ, 10/29/19, at 18:1-11 *citing Calloway v. City of Reno*, 993 P.2d 1259, 1263, 116 Nev. 250, 256 (2000). The *Calloway* decision was superseded by statute. *Olson v. Richard*, 120 Nev. 240, 243, 89 P.3d 31, 33 (2004). Further, the Nevada Supreme Court has recognized several exceptions "such as negligent misrepresentation and professional negligence actions against attorneys, accountants, real estate professionals, and insurance brokers." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 75, 206 P.3d 81, 87 (2009).

E. <u>Plaintiff Gentry's Defamation Claims Are Not Preempted And No Privilege Applies.</u>

Plaintiffs have addressed the Defendants' privilege argument in their Motion for Partial Summary Judgment and incorporate those arguments by reference as though fully stated herein. *See* Pltfs' MPSJ, 10/30/19, at 29:25-32:24. Succinctly stated, the Defendants cannot claim privilege because the defamatory statements by Kisling were published to third parties outside of L1107 including SEIU International Representatives Steve Ury and Mary Grillo, and other L1107 employees who were not supposed to receive the information. *Id. see also* Nguyen Declaration, at 1-2; *see also* Cabrera Declaration, at 1-2.

Defendants' defamation preemption argument is also meritless. The United States Supreme Court has upheld defamation suits by union officers against their unions in circumstances such as union elections, which, are actually preempted by the LMRDA. *See Linn v. Plant Guard Workers*, 383 U.S. 53, 55-61 (1966); *see also Maryland Drydock Co.* v. *Labor Board,* 183 F. 2d 538 (C. A. 4th Cir. 1950) (addressing whether the NLRA preempts state defamation claims); *Tellez v. Pacific Gas & Electric Co.,* 817 F.2d 536058 (9th Cir.); *Hayden v. Reickerd,* 957 F.2d 1506, 1509 (9th Cir.1991); and *Gulden v. Crown Zellerbach Corp.,* 890 F.2d 195, 198-99 (9th Cir.1989)' *Hahn v. Rauch*, 602 F. Supp. 2d 895 (N.D. Ohio 2008); *TOENSMEIER v. AMALGAMATED TRANSIT UNION, DIVISION 757*, No. 3: 15-CV-01998-HZ (D. Or. Mar. 8, 2016); *Fulton Lodge No. 2 of Int. Ass'n of Mach. & Aero. Wkrs. v. Nix*, 415 F.2d 212 n17 (5th Cir. 1969). Regardless of whether preemption applies to Plaintiffs contract claims, it is universally held to not apply to the defamation claim.

Defendants cite to three cases in support of this preemption defense (1) *Sullivan v. Conway*, 157 F.3d 1092, 1099 (7th Cir. 1998); (2) *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974); and (3) *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966). *See* L1107 Defs' MSJ, at 18:13-19. Both *Linn* and *Old Dominion* found the defamation claim was not preempted "provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that 'an overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances. *Linn*, 383 U.S. at 61-62; *Old Dominion*, 418 U.S. at 278. *Sullivan* is not a preemption case and simply cites to *Old Dominion* and *Linn*. *Sullivan*, 157 F.3d at 1099.

Here, Plaintiff Gentry brought her defamation claim asserting that Kisling made the defamatory statements with malice and knowledge of their falsity. *See* FAC, at 14:14-15:25. The evidence demonstrates that Defendant Kisling made the statements with malice and knowledge of their falsity. Defendants have presented no evidence that Kisling made these statements believing they were true other than hearsay statements of Local 1107 "interns," which are inadmissible. *See* L1107 Defs' MSJ, 10/29/19, at 10:3-9; *see also* **Ex. 3,** at RG0015. The defamation claim is, therefore, not preempted.

III. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully requests this Court **GRANT** their Motion for Partial Summary Judgment on Defendants Liability for wrongful termination.

Dated this 12th day of November, 2019.

Respectfully submitted,

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/s/ Michael J. Mcavoyamaya

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of MICHAEL J. MCAVOYAMAYA, and that on September 26, 2018, I caused the foregoing document entitled **PLAINTIFFS' OPPOSITION TO THE LOCAL 1107 DEFENDANTS' MOTION FOR 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

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 SEIU 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 SEIU 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.

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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.[1] 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

[1] The exhibits for Plaintiffs' response to Local 1107's Motion for Summary Judgment and SEIU's Motion for Summary Judgment are the same. As such, the same appendix will govern both documents.

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 8:18-28.

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.

Plaintiffs have already extensively briefed the preemption issue in response to the Local 1107 Defendants' Motion for Summary Judgment and in their own Motion for Partial Summary Judgment on the issue. *See* Pltfs' MPSJ, 10/30/19, at 9:17-24:28; *see also* Pltfs' Resp. L1107 MSJ, 11/12/19, at 6:14-27:4. All motions will be heard before this Court on the same hearing date. To avoid retreading the same issues in this Opposition, Plaintiffs incorporate by reference the arguments made in those filings as though fully stated herein.

C. SEIU And Local 1107 Are Alter Egos.

"[T]he requirements for application of the alter ego doctrine [are] (1) The corporation must be influenced and governed by the person asserted to be its alter ego. (2) There must be such unity of interest and ownership that one is inseparable from the other; and (3) The facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice." *Frank McCleary Cattle Company v. Sewell*, 317 P. 2d 957, 959 (Nev. 1957). "'It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two

entities as separate would result in an injustice.'" *Id. citing Gordon v. Aztec Brewing Company*, 33 Cal.2d 514, 522; 203 P.2d 522, 527.

"Under the principle of corporate separateness, the actions of a subsidiary company are generally not attributable to its parent corporation." *Viega GmbH v. Eighth Jud. Dist. Ct.*, 328 P.3d 1152, 1162 (Nev. 2014) *citing Dole Food Co. v. Patrickson*, 538 U.S. 468, 474, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). "But this principle may yield where a subsidiary is so dominated by its parent that the two corporations are, as a practical matter, the same entity or "alter egos," and recognizing their corporate separateness would sanction fraud or promote injustice." *Id. citing Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir.1979); *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987). "By extension, jurisdiction over a parent corporation can be established on an alter ego theory where there is such unity of interest and ownership that in reality no separate entities exist and failure to disregard the separate identities would result in fraud or injustice." *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir.1996).

Alter ego liability has been routinely found by other Courts in the union context. In *International Union of Op. Eng. v. JA Jones Const. Co.*, 240 S.W.2d 49, 54 (Ky. Ct. App. 1951), the Court "conclude that the Local Union is the International Union itself in action." When coming to this conclusion, the Court noted that:

> International and its local union have a common constitution. There is no independent membership in the parent body separate and apart from the membership in the local unions except where a charter has lapsed or been revoked, any member under certain conditions may become classified as a "member of the General Office Membership." This is apparently to maintain a union status temporarily. The parent body possesses and dominates its constituent parts. The locals have very little automony. They are given certain rights of local organization and administration, but over all stand the reserved powers of the parent body to approve or disapprove its action.

Id.

Indeed, in Labor Management Relations Act ("LMRA") cases for breach of a collective bargaining agreement ("CBA"), an employment contract, the United States Supreme Court has recognized that a suit can be maintained for "a breach-of-contract claim under LMRA § 301(a) against Local as a CBA signatory, **and against IBT as Local's agent or alter ego**." *Granite Rock*

v. Intern. Broth. of Teamsters, 130 S. Ct. 2847, 561 U.S. 287, 177 L. Ed. 2d 567 (2010). The federal courts have also held an International Union a proper party in National Labor Relations Board ("NLRB") cases when the local union is under trusteeship and the claim of liability arose during the trusteeship. *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 837-38 (9th Cir. 1978).

Defendants previously offered two cases for their argument that SEIU International should not be determined the alter ego, or otherwise held "vicariously liable for the conduct of a local union." *See* SEIU's Opp. To Pltfs' Mot. Amend., at 7:23-28 *citing Garity v. APWU-AFL-CIO*, Case No. 2:11-CV-01110-KJD, 2012 WL 215036, at *3 (D. Nev. Jan. 24, 2012); *see Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217 (1979) ("In the face of Congress' clear statement of the limits of an international union's legal responsibility for the acts of one of its local unions, it would be anomalous to hold that an international union is nonetheless liable for its failure to take certain steps in response to actions of the local."). There is an obvious and important distinction between these cases and the case at bar. Neither of the local unions in these cases were under trusteeship when the conduct resulting in liability occurred.

In *Garity*, the plaintiff filed the "complaint asserting, essentially, her local postal workers union, Defendant APWU-LOCAL #7156 ("the Local"), violated its duty of fair representation by failing to file and investigate grievances, by abandoning and withdrawing grievances, and by failing to represent Plaintiff," that the "Local and the APWU-AFL-CIO ("the National") breached the union Constitution and Bylaws in twenty-one separate ways," and numerous other causes of action "for unfair labor practices, common law breach of fiduciary duty, and violation of the Labor Managment Relations Act ("LMRA") § 5…..violations of Plaintiff's Weingarten rights and the Civil Service Reform Act, 5 U.S.C. § 7114(a)(2)(B) [and]….that her Constitutional right to free speech was violated at the Local's meetings." *Garity*, Case No. 2:11-CV-01110-KJD, 2012 WL 215036, at *1. The *Garity* Court dismissed "all claims against the National in Count I and II," the duty of fair representation claims, "because **no actionable conduct by the National has been alleged by Plaintiff**." *Id.* at 3. "Every factual allegation includes action taken or not taken by the Local or an agent of the Local." *Id.* The *Garity* Court held that "an international union is not vicariously liable for the conduct of a local union **simply by virtue of the local union's affiliation**

with it." *Id. citing Carbon Fuel Co.*, 444 U.S. 212. The Court held that "Plaintiff must allege with specific facts **that the National instigated, ratified, or encouraged the Local's activities**" to sustain a claim against the National union. *Id.* Similarly, in *Carbon Fuel*, "[t]he question for decision in this case is whether an international union, which neither instigates, supports, ratifies, nor encourages 'wildcat' strikes engaged in by local unions in violation of a collective-bargaining agreement, may be held liable in damages to an affected employer if the union did not use all reasonable means available to it to prevent the strikes or bring about their termination." *See Carbon Fuel Co.*, 444 U.S. at 213.

The analysis for evaluating whether a National Union can be held liable for conduct occurring at a local union is twofold. First, did the plaintiff allege actionable conduct by the National union. *See Garity*, Case No. 2:11-CV-01110-KJD, 2012 WL 215036, at *3. If yes, the claim may be sustained against the National union so long as other prerequisites are met. In *Garity* and *Carbon Fuel*, the claims seeking to hold the National union liable for breach of the duty of fair representation and for the strike respectively, were dismissed because the plaintiff did not plead facts that the National union "instigated, ratified, or encouraged the Local's activities." *Id. see also Carbon Fuel Co.*, 444 U.S. at 213. In *Garity*, the claims that the National Union violated the National Constitution were dismissed because the plaintiff failed to "exhaust internal union procedures before filing suit," not because the National could not be held vicariously liable. *Id.*

Here, the SEIU Defendants "instigated, ratified, or encouraged the Local's activities" because it is undisputed that the SEIU International trustees were in charge of and directing the day to day operations of Local 1107, and reported directly to SEIU International President Henry. Further, it is the actions of the SEIU International trustees that led to this suit, and Plaintiffs pled that the SEIU International trustees were the ones engaging in the actionable conduct in the initial Complaint, and the amended Complaint. *See* FAC, at 15:24-16:1-8, 16:25-17:1-4.

Defendants have admitted all the facts that this Court needs to find that SEIU is the alter-ego of Local 1107 or otherwise vicariously liable for actionable conduct occurring after imposition of the trusteeship by the SEIU International trustees as agents of SEIU International. In her declaration in support of Defendants' Counter-Motion for Summary Judgment, SEIU International

Chief of Staff noted that upon imposition of the trusteeship over Local 1107 that the Local 1107 Constitution and Bylaws were suspended, and the SEIU Constitution governs the local. *See* Decl. Fitzpatrick, at 2:26-3:1-4. This same declaration was attached to their Motion for Summary Judgment. *Id.* Local 1107's governing body was also suspended, and "President Henry appointed Defendant Luisa Blue as a Trustee of SEIU Local 1107, and Defendant Martin Manteca as Deputy Trustee of SEIU Local 1107," who controlled Local 1107's day to day operations, hiring, training, supervising and firing, and report directly to the SEIU International President. *Id.* at 3:14-25. In fact, Henry recently decided to extend the trusteeship past eighteen months based on the report of one of the Local 1107 trustees. *See* Shepherd Decl., attached to SEIU's Ctr MSJ, (2018), at 4:11-20. In this declaration, Shepherd, now co-trustee over Local 1107 asserts that "As a Co-Trustee of Local 1107, I work with the other Co-Trustee to manage the day to day operations and administration of the Local Union." *Id.* at 1:3-10. The trustees report to "President Mary Kay Henry." *Id.* at 4:11-19; 9-19.

The SEIU Defendants argue that they cannot be held liable for the misdeeds of their employees because the SEIU Defendants were not parties to the contracts. *See* SEIU Defs' MSJ, 10/29/19, at 12:14-28. However, the SEIU Defendants' Trusteeship Order expressly states that it imposed the Trusteeship over Local 1107 "and appointed Luisa Blue as Trustee of Local 1107 and Martin Manteca as Deputy Trustee of Local 1107, with all of the powers that they are entitled to assume under the SEJU Constitution and Bylaws and applicable law, **for the purposes of preventing disruption of contracts**, assuring that the Local Union performs its duties as collective bargaining representative, restoring democratic procedures, protecting the interests of Local 1107 and its membership, and otherwise carrying out the legitimate objects of the International Union." *See* SEIU Appdx. Fitzpatrick Decl., at 204 (emphasis added). Yet, one of the very first things the SEIU International employees charged with ensuring that disruption of contracts did not occur was to disrupt Plaintiffs' for cause contracts. *See* **Ex. 11**, at Appendix754-56. The SEIU Defendants admit that it removed Local 1107's officers. *See* SEIU Defs' MSJ, 10/29/19, at 8:3-11. The SEIU Defendants admit that they suspended the Local 1107 Constitution. *Id.* The provision of the SEIU Constitution Defendants cite to for their defense expressly states

that "The Trustee and all of the acts of the Trustee shall be subject to the supervision and direction of the International President." *See* SEIU Appdx. Fitzpatrick Decl., at 22. It cannot be disputed that the SEIU International President directly supervised the acts of the Trustees while Local 1107 was in trusteeship.

The Nevada Supreme Court has recognized that a parent corporation may be held accountable for its agent subsidiary. *Viega GmbH*, 328 P.3d at1158-59 *citing In re Amerco Derivative Litig.*, 252 P.3d 681, 695 (2011) ("Under basic corporate agency law, the actions of corporate agents are imputed to the corporation."). In "*Hospital Corp. of America v. Second Judicial District Court*, we summarily extended this concept to the subsidiary-parent relationship, recognizing that a prima facie showing of personal jurisdiction over foreign parent corporations can be established by evidence demonstrating 'agency or control' by the parent corporations over their local subsidiaries." *Id. citing* 112 Nev. 1159, 1161, 924 P.2d 725, 726 (1996); *see also Daimler AG*, 571 U.S. at n.13, 134 S. Ct. at 759 n.13 (indicating that an agency relationship may be used to establish specific jurisdiction and noting that "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there"); *C.R. Bard, Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998) ("Under the agency theory, the court may attribute the actions of a subsidiary company to its parent where the subsidiary acts on the parent's behalf or at the parent's direction.").

"Generally, an agency relationship is formed when one person has the right to control the performance of another." *Id.*; Restatement (Second) of Agency § 14 (1958) (providing that an agency relationship exists when the principal possesses the right to control the agent's conduct). While "the relationship between a parent company and its wholly owned subsidiary necessarily includes some elements of control," corporate entities are presumed separate. *Id. citing Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 99 Cal. Rptr. 2d 824, 838 (Ct. App. 2000) ("The relationship of owner to owned contemplates a close financial connection between parent and subsidiary and a certain degree of direction and management exercised by the former over the latter."). For this reason, "mere ownership are not alone" is not sufficient. *F. Hoffman-La Roche, Ltd. v. Superior Court*, 130 Cal. App. 4th 782, 30 Cal. Rptr. 3d 407, 418 (Ct. App. 2005); *Sonora*,

99 Cal. Rptr. 2d at 838 ("We start with the firm proposition that neither ownership nor control of a subsidiary corporation by a foreign parent corporation, without more, subjects the parent to the jurisdiction of the state where the subsidiary does business." (citing *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336, 45 S. Ct. 250, [*1159] 69 L. Ed. 634 (1925))); *see MGM Grand, Inc. v. Eighth Judicial Dist. Court*, 107 Nev. 65, 68-69, 807 P.2d 201, 203 (1991) (holding that Walt Disney Company's Nevada subsidiaries' contacts could not be imputed to Disney because it "exercise[d] no more control over its [Nevada] subsidiaries than [wa]s appropriate for a sole shareholder of a corporation"); Restatement (Second) of Agency § 14M (1958) (discussing when a subsidiary can be considered an agent of its parent corporation).

As stated above, he basic requisites for the application of the doctrine of alter ego have been well established.

> (1) The corporation must be influenced and governed by the person asserted to be its alter ego. (2) There must be such unity of interest and ownership that one is inseparable from the other; and (3) The facts must be such that adherence to the fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice.

Bonanza Hotel Gift Shop v. Bonanza No. 2, 95 Nev. 463, 466, 596 P.2d 227, 229 (1979) *quoting McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957), *as quoted in Mosa v. Wilson-Bates Furniture Co.*, 94 Nev. 521, 583 P.2d 453, 454 (1978).

"A mere showing that one corporation is owned by another, or that the two share interlocking officers or directors is insufficient to support a finding of alter ego." *Id. citing Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 566 P.2d 819 (1977). Rather, "[i]t must further be shown that the subsidiary corporation 'is so organized and controlled, and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation.'" *Id. citing Savage v. Royal Properties, Inc.*, 417 P.2d 925, 927 (Ariz.App. 1966). *See also* P*ittsburgh Reflector Co. v. Dwyer & Rhodes Co.*, 23 P.2d 1114 (Wash. 1933); *Markow v. Alcock*, 356 F.2d 194 (5th Cir. 1966).

Here, it is undisputed that the Trustees were appointed by SEIU International President Henry, and "all of the acts of the Trustee shall be subject to the supervision and direction of the International President." *See* SEIU Appdx. Fitzpatrick Decl., at 22. Thus, upon imposition of the trusteeship, Local 1107 was influenced and governed by Defendant Henry, the SEIU International President. It is undisputed that upon imposition of the trusteeship over Local 1107, Local 1107's

officers were removed, its constitution was suspended, and the SEIU Constitution controlled Local 1107, and the SEIU International Trustees controlled its operations. *See* SEIU MSJ, 10/29/19, at 19:15-21. There was, therefore, such a unity of interests that the two entities were inseparable from each other. It is undisputed that the unlawful actions Local 1107 is charged with were committed by the SEIU International employees appointed to oversee the trusteeship over Local 1107. As such, adherence to the fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice by making the Local 1107 membership pay for unlawful actions of the SEIU International Trustee.

The SEIU Defendants also expressly directed the terminations of Plaintiffs' employment with Local 1107. *See* **Ex. 12**, at SEIU204-05. In an email between Henry and the SEIU Chief of Staff Dee Dee Fitzpatrick indicates, Liusa Blue had reported to Henry that "She is on the program to get rid of staff quickly. She is documenting the staff." *Id.* at SEIU204. In response, SEIU Chief of Staff Fitzpatrick noted that "[t]hey are getting rid of the managers who are not a fit with the new directly of the local…they need to temper themselves on the rest for a variety of reasons. Documenting is good." *Id.* Here, two officers of SEIU International are discussing SEIU's "program to get rid of staff quickly." *Id.* In an earlier email that day, Fitzpatrick tells Blue and Manteca directly that they need to run staffing issues through SEIU International because "MK's policy is that needs to know when we are. suggesting asking other locals to support a trusteed local, just so it's aligned with other moving parts between her and SEIU locals. In general it's a good way to fill gaps; **the process should just move through exec office**." *Id.* at SEIU0074. ·

Fitzpatrick then notes that the "the separation conversation with Dana was uneventful and that Richard's was more dramatic but ultimately okay. Hopefully things get smoother from here (with the exception of Peter). You may want to think about doing his meeting off-site, and either bringing him his personal things or telling him that they will be delivered to his house same day /shortly thereafter. He will no doubt be disruptive when you meet." *Id.* Fitzpatrick also recommended that Local 1107 hire temporary employment agencies to "hire arrangements for professional financial/ accounting staff." *Id.* SEIU International was directly involved in Plaintiffs' terminations and staffing matters relating to Local 1107. *Id.* Upon imposition of the trusteeship,

SEIU International became the alter ego of Local 1107 and the SEIU International Trustees' breach of Plaintiffs' contracts should be imputed on them, especially considering they imposed the trusteeship in part "for the purposes of preventing disruption of contracts." *See* SEIU Appdx. Fitzpatrick Decl., at 204.

The elements of alter ego liability are met in this case. Local 1107 is and was, at all times relevant herein, influenced and governed by SEIU International when the actionable conduct occurred. There was such unity of interest and ownership at that time that one is inseparable from the other during the trusteeship. Finally, and most importantly, adherence to the fiction that Local 1107 is a separate entity would, under the circumstances, sanction a fraud or promote injustice. *See Sewell*, 317 P. 2d at 959. If this Court holds Local 1107 solely liable for the SEIU International trustees' conduct, the result would be clearly unjust, forcing the Local 1107 membership to front the bill for the SEIU International trustees' misconduct while Local 1107 is in trusteeship. For this reason, the SEIU International Defendants should be considered the alter ego of Local 1107. The SEIU Defendants primary argument in this case for why they should not be held liable for the SEIU International Trustees' violation of the law relies almost exclusively on the fact that Plaintiffs were not employed by SEIU International and have not contracts with SEIU International. *See* SEIU Defs' MSJ, 10/29/19, at 12:17-24, 13:8-17, 14:21-22; 15:21-28, 16:1-7, 17:12-23, 18:12-16

As stated above, and as pled, upon imposition of the trusteeship Local 1107 became the alter ego of SEIU International or is otherwise vicariously liable for the actions of the SEIU International trustees that ultimately resulted in liability in this action. Defendants argue that Defendants never employed Plaintiffs and never had contracts with Plaintiffs. *See* SEIU Defs' MSJ, 10/29/19, at 12:17-29. Defendants had previously cite two cases in support of this argument: *Perez v. Int'l Bhd. of Teamsters, AFL-CIO*, Case No. 00-CIV-1983-LAP-JCF, 2002 WL 31027580, at *5 (S.D.N.Y. 2002) and *Campbell v. Int'l Bhd. of* Teamsters, 69 F. Supp. 2d 380, 385-86 (E.D.N.Y. 1999). *Id.* at 11:20-28.

Both of these cases were alleged under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. *See Perez*, Case No. 00-CIV-1983-LAP-JCF, 2002 WL 31027580, at *5; *Campbell*, 69 F. Supp. 2d at 388. "A district court may only exercise jurisdiction over a defendant

in a Title VII case if, *inter alia,* the defendant is an 'employer,' as defined by 42 U.S.C. § 2000e." *See Campbell*, 69 F. Supp. 2d at 385 *citing EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248-49, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (describing the term "employer" as used in Title VII as "jurisdictional"); *Astarita v. Urgo Butts & Co.,* No. 96 CIV 6991(PKL), 1997 WL 317028, at *3 (S.D.N.Y. June 10, 1997); *Perezic v. Crespo,* No. 94 Civ. 8283, 1996 WL 233687, at *2 (S.D.N.Y. May 7, 1996). In *Campbell*, "the parties agree[d] that IBT was not plaintiff's employer of record." *Id.* Both cases cited to the Title VII standard for determining "whether two entities should be treated as a single employer for Title VII purposes, the Second Circuit considers whether the two entities have: (1) interrelated operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control." *Id. citing Cook v. Arrowsmith Shelburne, Inc.,* 69 F.3d 1235, 1240 (2d Cir. 1995). Importantly, the *Campbell* Court noted that "plaintiff cannot assert that IBT and Local 918 were single employers **solely on the basis that IBT appointed a trustee who terminated plaintiff's employment**," and the mere fact that the IBT Constitution permitted the appointment of a trustee did not establish that the local and international were a single employer. *Id.*

The *Campbell* Court cited to the IBT Constitution, which like the SEIU Constitution, permits the trustee to "take full charge of the affairs of the Local Union or other subordinate body, to remove any or all officers and appoint temporary officers at any time during his trusteeship, and to take such other action as in his judgment is necessary for the preservation of the Local Union or other subordinate body and its interests." *Id.* at n4. However, the SEIU Constitution has one significant difference to the IBT Constitution cited in *Campbell*: the SEIU Constitution expressly states that the trustees "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**." *See* **Ex. 3,** at 3:14-25. Here, the SEIU Constitution does not simply allow for the appointment of a trustee, it makes the trustees' actions subject to the supervision and direction of the SEIU International President. *Id.* Similarly, *Perez* only stated that "Generally, an international union does not control" the local union in a manner that would make them liable for employment discrimination occurring at a local, not that

an international union can never be held liable for employment discrimination occurring at a local union. *Perez*, Case No. 00-CIV-1983-LAP-JCF, 2002 WL 31027580, at *5.

Further, in the Ninth Circuit in a Title VII suit, if it is proven that "the Local is an agent of the [international union], a suit against [the local] as agent of the [the international] meets the Title VII jurisdictional requirement." *Childs v. LOCAL 18, INTERN. BROTH. OF ELEC. WKRS.*, 719 F.2d 1379, 1982-83 (9th Cir. 1983); *see also Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209, 1215 (9th Cir.1980) (International liable for actions of Local only if Local is agent of International). In *Childs*, the plaintiff did not allege or offer any proof "of the traditional indicia of an agency relationship (such as consent by the alleged agent that another shall act on his behalf, and control of the alleged agent by the principal)." *Id. citing Nelson v. Serwold,* 687 F.2d 278, 282 (9th Cir.1982); *Kaplan v. International Alliance of Theatrical and Stage Employees of the United States and Canada,* 525 F.2d 1354, 1360 (9th Cir.1975) (International liable for discrimination of Local under Title VII where International exhibited **"high degree" of involvement in Local's affairs**).

Here, it cannot be disputed that SEIU International, through the SEIU International trustees who report to and are under the direction of the SEIU International President, was acting on behalf of Local 1107, controlling Local 1107, and exhibits a high degree of control over Local 1107's affairs. The facts, as pled, and the declarations of Defendants' own personnel indicate that an agency, or alter ego relationship exists between Local 1107 and SEIU.

The only new case that the SEIU Defendants cite for the argument that they cannot be held liable for the actions of their appointees, who were directly supervised by the SEIU International President is *Burnick v. Office and Professional Employees International Union*, Case No. 14-C-1173, 2015 WL 1898310 (E.D. Wis. April 27, 2015). However, this case is distinguishable from this case. In *Burnick*, after the international union imposed the trusteeship over the local union the international union paid the plaintiff's insurance benefits. *Id.* The international trustee informed the plaintiff that the insurance benefits would cease because the international was revoking the local's charter and the local would cease to exist. The Court held that because there was no allegations of merger, and the international did not assume the local's obligations under the contract, the international union could not be held liable for continuing to pay the insurance

benefits under the plaintiff's contract with the local that was being dissolved after its dissolution. The *Burnick* case was argued under successor liability not alter ego or agency.

Indeed, nowhere in the *Burnick* decision does it state that the international union was not responsible for paying the plaintiff's insurance benefits honoring the contract while the trusteeship was in place. Rather, the decision is limited to a finding that the international could not be held liable for providing the plaintiff lifetime insurance benefits after the local ceased to exist and the trusteeship dissolved. *Id.* Here, SEIU International expressly assumed responsibility to prevent disruption of Local 1107's contracts when it imposed the trusteeship over Local 1107. *See* Appdx. Fitzpatrick Decl., at 204. The SEIU International Trustees' intentional breach of Plaintiffs' contracts, at the direction of SEIU International and in accordance with SEIU International's "policy" and trusteeship "program" suffice to establish agency and alter ego liability. *See* **Ex. 12.** at APPENDIX758-60.

Because the entirety of the SEIU International Defendants' Motion for Summary Judgment rests on repetitive assertions that there was no contract between Plaintiffs and the SEIU Defendants, and no employment relationship between Plaintiffs and the SEIU Defendants this analysis applies equally to Defendants' arguments under headings II, III, and IV. The argument under each of these headings is exactly the same that the SEIU Defendants cannot be held accountable for their employees' unlawful conduct because Plaintiffs had no contracts with SEIU International and were not employed by SEIU International. The SEIU Defendants fail to even attempt to address agency and alter ego liability. For this reason, their Motion for Summary Judgment on these claims should be denied. To the extant Plaintiffs have missed any arguments relating to the merits of Plaintiffs' claims, Plaintiffs incorporate by reference their arguments in their opposition to Local 1107's Motion for Summary Judgment as though fully stated herein.

In regards to Defendants' assertion that Plaintiffs cannot establish deception, perfidy or betrayal for the breach of the covenant of good faith claim, Plaintiffs respectfully disagree. *See* SEIU Defs' MSJ, 10/29/19, at 15:16-20 *citing Clements v. Airport Auth.*, 69 F.3d 321, 336 (9th Cir. 1995). The SEIU Defendants do not argue lack of knowledge of Plaintiffs' for cause contracts, nor could they as they were in direct contact and supervising the Trustees appointed over Local

1107. The SEIU Defendants also expressly approved Plaintiffs' terminations as part of SEIU International's program and policy despite knowing of Plaintiffs' for cause contracts. *See* **Ex. 12,** at APPENDIX758-60. This conduct demonstrates malice, and willful disregard for Plaintiffs' rights under their contracts. To force Local 1107 to pay for their malicious conduct would be a grave injustice.

D. <u>The SEIU Defendants Are Liable For Intentional Interference With Contractual Relations.</u>

This particular cause of action is against SEIU International, not Local 1107, as Local 1107 is the entity Plaintiffs' contracted with and the SEIU International Trustees are the individuals who interfered with Plaintiffs' contracts. "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)).

Defendants argue that they did not take any action "intended to disrupt Plaintiffs' employment contracts with Local 1107." *See* SEIU MSJ, 10/29/19, at 19:9-14. This is clearly not the case. The emails between the SEIU International officials demonstrates clearly that SEIU International was promoting and recommending that the Trustees terminate Plaintiffs' employment with Local 1107 to further the new program, and was recommending replacing Plaintiffs' with employees the SEIU International was recommending. *See* **Ex. 12,** at APPENDIX758-60. The SEIU Defendants do not argue that they were not aware of Plaintiffs' contracts. Defendants cannot argue that they were not involved in Plaintiffs' terminations. *Id.* The highest officers of SEIU International were directing and ensuring that the Local 1107 trustees

were "on the program to get rid of staff quickly" and were "documenting staff" to justify terminations. *Id.*

Contrary to the SEIU Defendants self-serving assertions that "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*," it cannot be disputed that SEIU International was directly supervising the trusteeship over Local 1107. *See* SEIU MSJ, 10/29/19, at 19:15-28. If the Trustees "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," and their conduct was directly supervised by the SEIU International President, the SEIU Interantional President and SEIU International are responsible for their conduct. *Id. see also See* Appdx. Fitzpatrick Decl., at 22, 204.

Like the Local 1107 Defendants, the SEIU Defendants cite to the irrelevant cases *Pape v. Local 390 of the Int'l Bhd. of Teamsters*, 315 F. Supp. 2d 1297, 1300 (S.D. Fla. 2004); and *Dean v. Gen. Teamsters Union, Local No. 406*, No. G87-286 CA7, 1989 U.S. Dist. LEXIS 18070, at *7 (W.D. Mich. Sep. 18, 1989). *See* SEIU MSJ, 10/29/19, at 20:5-24. The relevance of the district court's decision in *Pape* is easily dispelled because the plaintiff was an elected union officer who brought her federal case pursuant to the LMRDA and breaches of the international constitution after removal from office upon the imposition of a trusteeship. *Pape*, 315 F. Supp. 2d at 1300-01. The *Pape* case was not analyzed pursuant to the LMRDA's sections preserving union democracy. Rather, the *Pape* Court clearly stated that all the claims related to challenging the sufficiency trusteeship, which is not at issue in this case. *Pape*, 315 F. Supp. 2d at 1309-1317. The plaintiff in *Pape* had not for cause contract and the entire case was evaluated under the trusteeship provisions of the LMRDA as a challenge to the trusteeship.

Similarly irrelevant is the *Dean* case. *Dean*, No. G87-286 CA7, 1989 U.S. Dist. LEXIS 18070, at *7. The plaintiff in *Dean* brought suit against the union for wrongful termination in violation of state employment law. *Id.* at 6-7. The plaintiff in *Dean* was an appointed union-member Business Agent of the local union. *Id.* A trusteeship was imposed over the local union and the trustee terminated all the business agents upon imposition of the trusteeship. *Id.* at *5-6. The

Dean Court determined that "[i]n order to resolve this issue, it is first necessary to examine the nature of the business agent position within Local 406." *Id.* at *10. The *Dean* Court cited the international constitution's express provision on "Business Agents" noting that the provision expressly stated that business agents could be appointed or elected, and that "Business Agents may be **removed at will** only by the appointing authority." *Id.* The Court then turned to local union's bylaws noting that the bylaws stated that the Secretary-Treasurer of the union "shall have power to appoint, suspend, or discharge all appointive organizers, appointive Business Agents, and employees," and concluded that "these provisions, when read together, establish that the business agent position is appointive and the official responsible for appointing the business agents is the secretary-treasurer." *Id.* at *11. The *Dean* Court held that the plaintiff, who was a union member, could not contract around the express provisions in the international and local union documents that governed his employment. *Id.* at *18-19.

Here, Plaintiffs' employment with L1107 did not arise from, nor was it governed by the L1107 Constitution or the SEIU Constitution. *See* L1107 Constitution, attached as **Exhibit "16,"** at SEIU0920-97. Unlike *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean*, Plaintiffs' positions of "Communications Director" and "Finance and HR Director" appear nowhere in the L1107 Constitution. *Id.* There is no description of Plaintiffs' job duties integral to the union's administration nor does it indicate that their employment was terminable at-will. *Id.* The provision relating to the authority of the L1107 President to hire and fire staff is Article 15. *Id.* at SEIU0964; *see also* **Ex. 4,** at SEIU2025. This provision provides the President of L1107 the power to "[h]ire and fire…local Union's staff **in accordance with any applicable bargaining agreement, rules, laws and regulations regarding discrimination and pursuant to any staff-related policies adopted by the Executive Board**." *Id.*

Here, unlike the provisions at issue in *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean*, the L1107 Constitution does not state that Plaintiffs positions as directors of L1107 were subject to termination at-will. *Id.* Rather, the L1107 President has the power to terminate staff "in accordance with any applicable bargaining agreement." *Id.* Here, the L1107 membership voted for a constitution that expressly states that the President of L1107 is not granted

authority to terminate employees' at-will, and expressly permits for-cause/just-cause contracts by including the term "applicable bargaining agreement." *Id.* The term "bargaining agreement" is found throughout the L1107 Constitution, as would be expected of a union constitution. However, every other time the term "bargaining agreement" appears in the L1107 Constitution it is immediately preceded by the term "collective." *Id.* at SEIU0927, 928, 929, 931, 932, 936, 942, 943, 944, 947, 952, 961, 964, 967, 968, 969, 971, 972, 981, 989, 992. In fact, the term "Collective Bargaining Agreement" is found twice in bullet point number "2" of Article 15, Section 1(A), just two bullet points before the relevant provision. *Id.* at SEIU964. This is not an error, as a for cause employment contract negotiated pursuant to state law like those at issue in this case are bargaining agreements that were not bargained collectively. *See* **Ex. 1,** at Local - 003; *see also* **Ex. 2,** at Local – 026. For this reason, unlike *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean*, the local constitution in this case expressly permits individual for-cause contracts like Plaintiffs' contracts, as well as those bargained collectively like L1107's contract with the Nevada Service Employees Union Staff Union ("NSEUSU"), which the L1107 Defendants have already conceded "was not terminated." *See* L1107 Defs' Reply MSJ, 11/6/18, at 7:9-19.

Defendants attempt to liken *Finnegan*, *Bloom*, *Lynn*, *Screen Extras Guild*, *Tyra*, *Pape* and *Dean* to the facts of this case by arguing that after the SEIU Defendants imposed the trusteeship over L1107 the L1107 Constitution was suspended and the SEIU Constitution became the applicable governing document of the local union. *See* L1107 Defs' MSJ, 10/29/19, at 13:6-16. According to Defendants, because "SEIU's Constitution allows a trustee to remove any employee," the trustees were not bound by Plaintiff Gentry or Clarke's contracts, citing *Pape*. However, like in *Lynn*, the fact that the international constitution permits the trustee to remove officers and employees does not mean the trustees are exempt from compliance with the law. *Lynn*, 488 U.S. at 353. The Defendants also ignore the decision of the *Pape* Court that noted that because the "Plaintiff concede[d] that her employment as President of the Local 390 is governed by the local union's Bylaws,…that the local union's Bylaws cannot conflict with the provisions of the International Constitution" her employment was governed by both documents. *Pape*, 315 F. Supp. 2d at 1318. The plaintiff in *Pape* also "failed to submit a copy" of the alleged contract giving rise

to her "right to maintain her position as President of the Local 390 that is independent from the International Constitution or the Local 390 Bylaws." *Id.* Here, unlike *Pape*, Plaintiffs employment was not governed by the L1107 or SEIU Constitutions, and have provided the contracts that give rise to their right to continued employment with L1107, which were expressly permitted by the Local 1107 Constitution. *See* **Ex. 1,** at Local – 003; **Ex. 2,** at Local – 026; **Ex. 16,** at SEIU0964.

Defendants have pointed to no provisions of the SEIU Constitution that bar local unions from entering into for-cause employment contracts with their employees, or otherwise indicate that all local union employees are always at-will employees. Defendants have pointed to no provisions of the SEIU Constitution that expressly define or describe Plaintiffs' director positions as at-will, or their integral duties. The sole provision cited to by the Defendants for their argument that the SEIU Constitution governed Plaintiffs' employment is the trusteeship provision that gives the Trustee power to terminate "any employee." *See* L1107 Defs' Reply MSJ, 11/6/18, at 13:11-12. However, because the L1107 Defendants have conceded that "the NSEUSU collective bargaining [agreement] was not terminated," clearly not all staff were terminable at will by the Trustees. *See* L1107 Defs' Reply MSJ, 11/6/18, at 7:9-19. If the Trustees could terminate "any employee," the NSEUSU CBA would not be enforceable. Because the NSEUSU is enforceable, so are Plaintiffs individual "bargaining agreements" absent some other provision in the SEIU Constitution expressly making director positions terminable at will. *See* **Ex. 16,** at SEIU0964. As such, Defendants' Motion for Summary Judgment must be denied.

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III. CONCLUSION.

Based upon the foregoing, Plaintiffs respectfully requests this Court **DENY** the Defendants Motion for Summary Judgment.

Dated this 12th day of November, 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 I am an employee of MICHAEL J. MCAVOYAMAYA, and that on September 26, 2018, I caused the foregoing document entitled **PLAINTIFFS' OPPOSITION TO THE SEIU DEFENDANTS' MOTION FOR 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. 26

SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Introduction

Plaintiffs Dana Gentry's and Robert Clarke's ("Plaintiffs") motion for partial summary judgment should be denied.

Plaintiffs contend that they are entitled to partial summary judgment on their breach of contract claims. To the contrary, their motion highlights the absence of any contractual or employment relationship between Plaintiffs and defendant Service Employees International Union ("SEIU") or defendant Mary Kay Henry, SEIU's President. Thus, for the reasons described in SEIU's and Henry's pending motion for summary judgment, SEIU and Henry are entitled to summary judgment on Plaintiffs' contract and wrongful termination claims.

Plaintiffs also contend that the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq*. ("LMRDA"), does not preempt their wrongful termination and contract claims. However, a uniform body of caselaw supports the opposite conclusion. Once SEIU placed defendant Service Employees International Union, Local 1107 ("Local 1107") into trusteeship and appointed trustees to take over the affairs of Local 1107, federal law authorized those trustees, just like the union's former officers they replaced, to terminate policymaking and confidential staff like Plaintiffs. Permitting Plaintiffs' claims to proceed would conflict with that clear federal law authority.

For the reasons that follow, as well as those described in SEIU's and Henry's pending summary judgment motion, Plaintiffs' motion for partial summary judgment should be denied, and SEIU's and Henry's motion for summary judgment should be granted in full.[1]

Argument

I. Plaintiffs' Motion Relies on Unauthenticated and/or Inadmissible Documents.

SEIU and Henry object to the following evidence included with Plaintiffs' motion for partial summary judgment:

Plaintiffs' Ex. 4: Exhibit 4 is an unauthenticated email chain that contains

[1] Plaintiffs also seek partial summary judgment on their defamation claim against Local 1107. Because that claim is not against either SEIU or Henry, SEIU and Henry do not address that portion of Plaintiffs' motion.

inadmissible hearsay.

Plaintiffs' Ex. 5. Exhibit 10 to the deposition of Brenda Marzan, included within Exhibit 5, contains various emails with inadmissible hearsay, including, but not limited to, the claim that the Kisling Report was "allowed to be taken from the Union Hall . . . ." Pltffs' Appx. at 130.

Plaintiffs' Ex. 7: Exhibit 7 is an unauthenticated email chain that contains inadmissible hearsay.

Plaintiffs' Ex. 17: Exhibit 17 is a transcript from a National Labor Relations Board ("NLRB") proceeding. Such testimony is not admissible against SEIU or Henry, nonparties to that proceeding, because they were not in privity with any of the parties to the proceeding, and the issues in the proceeding were not substantially the same as in this case. *See* NRS § 51.325.

Plaintiffs' Ex. 21: Exhibit 21 is a decision from an administrative law judge in the NLRB proceeding. It is not relevant to any claim or defense, and is more prejudicial than probative. *See* NRS §§ 48.015, 48.025, 48.035.

Plaintiffs' Ex. 22: Exhibit 22 is a transcript from a hearing in a case pending in the United States District Court for the District of Nevada. It is not relevant to any claim or defense. *See* NRS §§ 48.015, 48.025.

Plaintiffs' Ex. 27: Exhibit 27 is the minutes of a Local 1107 Executive Board meeting and contains inadmissible hearsay.

II. Plaintiffs' Motion Concedes They Had Employment Contracts with Local 1107, Not SEIU or Henry, and that They Were Employed by Local 1107, Not SEIU or Henry.

As described in SEIU's motion for summary judgment, all of Plaintiffs' claims are based on their employment with Local 1107, and contracts between them and Local 1107. *See* SEIU Motion at 12-18. Plaintiffs did not work for or have employment contracts with SEIU or Henry.

Plaintiffs' motion for partial summary judgment implicitly concedes these points. They repeatedly emphasize that the employment contracts underlying their claims were between them and Local 1107, not SEIU or Henry. See Pltffs' Motion at 3 (asserting that "SEIU Local 1107 entered into an express, valid and binding" contract with Gentry and Clarke); *id*. at 8 (asserting

that "Local 1107 entered into contracts of employment with Plaintiffs"); *id*. at 26-27 ("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"). Plaintiffs offer no evidence whatsoever that SEIU or Henry had an employment contract with Plaintiffs.

Not surprisingly, Plaintiffs repeatedly describe their employment with Local 1107, not SEIU or Henry. *See id*. at 8 (asserting that "Plaintiffs performed their obligations under the contracts by working for Local 1107" and that "Local 1107 provided them the compensation, benefits and other terms of the contract for nearly a year"); *id*. at 26 ("On the effective date of the offer of employment, both Ms. Gentry and Mr. Clarke were to 'commence employment with Local 1107.'"). In fact, Plaintiffs offer no evidence at all that SEIU or Henry employed them.[2]

As a result, summary judgment in favor of SEIU and Henry on all of Plaintiffs' wrongful termination and contract claims is proper.

II. Plaintiffs' Claims Are Preempted by the Labor Management Reporting and Disclosure Act.

Plaintiffs contend that their claims are not preempted by the federal Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401, *et seq*. They raise two arguments to support their contention. First, they argue that LMRDA preemption does not apply here because the Local 1107 Trustees were not elected, but instead appointed. Second, they argue that application of LMRDA preemption here would be arbitrary and capricious. Each argument is unpersuasive.

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[2] Desperate to connect themselves to SEIU where no legally significant connection exists, Plaintiffs misrepresent that an SEIU representative "made express recommendations about Plaintiffs' terminations," relying on an email between then-SEIU Deputy Chief of Staff Deirdre Fitzpatrick to then-Local 1107 Trustee Luisa Blue. Pltffs' Motion at 8 (citing Pltffs' Appx., Ex. 12). However, even a cursory examination of that evidence makes clear that there was no such "express recommendation." To the contrary, the email from Blue to Fitzpatrick dated May 5, 2017 shows that Blue, then-Local 1107 Trustee, informed Fitzpatrick, SEIU's then-Deputy Chief of Staff, that Blue had terminated Clarke and Gentry *the day before*. *See* Pltffs' Appx., Ex. 12, at 759-60 ("So far so good 8 days into the trusteeship. 2 dirs., Financial Dir. And Communications Dir. Were let go yesterday . . . ."). Later that day, Fitzpatrick reported the terminations to SEIU President Henry. *See* Pltffs' Appx., Ex. 12, at 759. Nowhere does Fitzpatrick recommend anything, expressly or otherwise, regarding Plaintiffs' employment with Local 1107. Plaintiffs' characterization of this evidence is therefore incorrect, if not misleading.

A. The LMRDA Protects an Unelected Union Leader's Ability to Terminate Appointed Staff.

As described in detail in SEIU's motion for summary judgment, the LMRDA is a federal statute that regulates the internal affairs of unions. SEIU Motion at 21-25; *see Finnegan v. Leu*, 456 U.S. 431, 435-36 (1982). "[T]he [LMRDA's] overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. Based on that premise, the U.S. Supreme Court concluded "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*.

Emphasizing that same overriding objective of the LMRDA, the California Supreme Court ruled that the LMRDA preempts wrongful termination, contract, and related claims by former management or policymaking personnel of a union. *See Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990). "Elected union officials must necessarily rely on their appointed representatives to carry out their programs and policies." *Id*. at 1024. Thus, "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). In addition to the lower California courts which follow it, federal district courts, and courts in Montana, Michigan, and New Jersey have adopted the holding of *Screen Extras Guild*. *See* SEIU Motion at 24, notes 5-7; *see also infra* at notes 8-10.

In their motion, Plaintiffs argue that *Screen Extras Guild* is inapplicable here because the Local 1107 Trustees were not elected by the membership of Local 1107, but instead appointed by SEIU pursuant to its trusteeship order. This argument is unconvincing for several reasons. First, at least three federal courts have rejected the exact same argument that Plaintiffs raise here, namely, that *Finnegan* does not support the ability of unelected union leaders to terminate

appointed staff.[3] The decision in *Vought v. Wisconsin Teamsters Joint Council No. 39*, 558 F.3d 617 (8th Cir. 2009), is on point. Like this case, several union representatives filed internal charges against one another. *Id*. at 619-20. The union's parent body, the Joint Council, held a hearing on the charges and removed the union's Secretary-Treasurer, the union's highest elected position, from office. *Id*. at 619. The union's President then became the acting Secretary-Treasurer and fired the plaintiff, an appointed business representative, later that same day. *Id*.

Relying on *Finnegan*, the court affirmed summary judgment in favor of the union on the former business representative's LMRDA claim. *See id*. at 621-23. Although the court acknowledged that unlike in *Finnegan* the acting Secretary-Treasurer was not elected, it concluded that *Finnegan* required dismissal of the plaintiff's LMRDA claim. *See id*. at 622-23. As the court observed, "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." *Id*. at 623.

At least two federal district courts have also concluded that *Finnegan* authorizes unelected union leaders to terminate appointed management or policymaking staff. In *English v. Service Employees International Union, Local 73*, Case No. 18-c-5272, 2019 WL 4735400 (N.D. Ill. Sep. 27, 2019), as here, SEIU placed a local union under trusteeship and appointed a trustee to oversee the union. *Id*. at *1. The trustee thereafter terminated the plaintiffs' employment, and the plaintiffs sued the union under the LMRDA. *Id*. Like Plaintiffs here, the plaintiffs argued that *Finnegan* did not apply because the trustee was appointed, not elected. Id. at *3. Relying on *Vought*, the court rejected that argument and held that "*Finnegan* applies just the same" to the

[3] Plaintiffs claim there is a "dearth of case law on the particular circumstances of this case." Pltffs' Motion at 12. To the contrary, as is discussed in the body of this brief, at least three cases are directly on point and contrary to Plaintiffs' argument. Moreover, the single case Plaintiffs rely on, *Sowell v. Int'l Bhd. of Teamsters*, Case No. H-09-1739, 2009 WL 4255556 (S.D. Tex. Nov. 24, 2009), is easily distinguishable. That case addressed whether a well-pleaded complaint relying exclusively on state law supports removal to federal court under the LMRDA based on the complete preemption doctrine. *See id*. at *2-4. That case did not consider whether LMRDA preemption was a defense to state law claims for wrongful termination, a distinct legal issue. As described above and in SEIU's opening brief, caselaw from a number of jurisdictions clearly supports such a defense.

authority of an unelected trustee to terminate union staff. *Id*. at *4.

Similarly, in *Dean v. General Teamsters Union, Local Union No. 406*, Case No. G87-286-CA7, 1989 WL 223013 (W.D. Mich. Sept. 18, 1989), an international union placed a local union under trusteeship and appointed a trustee to oversee the union. *Id*. at *1. The trustee terminated the plaintiff's employment with the union, and the plaintiff thereafter brought several state claims against the union. *Id*. Like the courts in *Vought* and *English*, the court concluded that *Finnegan* supported the trustee's authority to terminate the plaintiff: "The 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." *Id*. at *5.

In addition to caselaw which directly undermines their position, Plaintiffs' argument should be rejected for a second reason. The LMRDA expressly authorizes an international union to place a local union into trusteeship. *See* 29 U.S.C. § 462.[4] It would make no sense for the LMRDA to authorize a trusteeship over a local union – where a trustee steps into the shoes of the former elected officers, *see 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.") – and at the same time deprive trustees of the same authority as the elected officers they replace. Plaintiffs' argument would therefore undermine, not further, this statutory framework.

Third, the facts of this case exemplify the reason that *Finnegan* applies in this context, and by extension, requires LMRDA preemption of Plaintiffs' claims, regardless of the fact that the Trustees were not directly elected by Local 1107's membership. As detailed in SEIU's

[4] SEIU and Henry request that this Court take judicial notice of the recent decision of the U.S. District Court for the District of Nevada, which upheld the lawfulness of SEIU's trusteeship over Local 1107. *See Garcia, et al. v. Serv. Employees Int'l Union, et al.*, Case No. 2:17-cv-01340-APG-NJK, 2019 WL 4279024 (Dist. Nev. Sept. 10, 2019) (granting summary judgment to SEIU); *see also Mancini, et al. v. Serv. Employees Int'l Union, et al.*, Case No. 17-17357, 738 Fed. Appx. 440 (Mem) (9th Cir. Aug. 31, 2018) (affirming district court's denial of motion to preliminarily enjoin trusteeship).

motion for summary judgment, Clarke and Gentry opposed the trusteeship and the Trustees.[5] Saddling the Trustees with managers like Clarke and Gentry would therefore have spelled disaster for implementation of the trusteeship's goals and burdened the union with some of the very same factionalism that it was trying to overcome. That conclusion holds true whether the Trustees were elected or not.

Last, Plaintiffs' argument ignores the degree to which the appointment of the Local 1107 Trustees was itself the product of democracy at Local 1107.[6] *See Finnegan*, 456 U.S. at 441. It is undisputed that immediately prior to the imposition of the trusteeship Local 1107's executive board, the elected governing body of the union, *voted in favor of the trusteeship*.[7] Fitzpatrick Decl., ¶ 10; *see also id*., Ex. E (Appx. at 204) (noting that "on April 26, 2017, the Local 1107 Executive Board voted to request that the International Union place the Local into an emergency trusteeship."). Thus, the principle objective of the LMRDA – "to ensure that unions are democratically governed, and responsive to the will of the union membership," *Finnegan*, 456 U.S. at 441 – is furthered by validating the choice of Local 1107's former elected executive board to transfer management of the union's day-to-day affairs to the Local 1107 Trustees. *See*

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[5] That is undisputed based on Clarke's text messages from the first days of the trusteeship, in which he was hostile to the trusteeship and the Trustees, as well as the press release that Gentry and Clarke prepared days after their terminations, which excoriated the trusteeship and Trustees. *See* SEIU Motion at 9-11; 29-30. It is also undisputed that most of the union's staff supported ousted former Local 1107 President Cherie Mancini in the prior factional dispute, one of the cited causes for the trusteeship. *See* SEIU Motion at 8. Moreover, Clarke admitted in his deposition that he immediately questioned the legitimacy of the trusteeship, and believed Deputy Trustee Manteca was a "bully" and "tyrant." *See* SEIU Motion at 9.

[6] Plaintiffs point to a number of discovery responses by Local 1107 regarding the appointment of the Local 1107 Trustees and claim that Local 1107 failed to timely respond to the requests. Pltffs' Motion at 14-15. This is nonsense. From Plaintiffs' brief it is clear that Local 1107 *did* respond, and that Plaintiffs simply dislike the responses. If Plaintiffs wanted to challenge those discovery responses, they should have done so at the appropriate time, not at summary judgment.

[7] SEIU and Henry request the Court to take judicial notice of the recent decision of the U.S. District Court for the District of Nevada granting summary judgment to SEIU and Local 1107 on claims related to the vote of the former Local 1107 Executive Board requesting the trusteeship. *See Garcia v. Serv. Employees Int'l Union, et al.*, Case No. 2:17-cv-01340-APG-NJK, 2019 WL 4281625 (D. Nev. Sep. 10, 2019). This case was consolidated with the one described in note 4, *supra*.

Screen Extras Guild, Inc., 51 Cal. 3d at 1029 n.8 (noting that *Finnegan* applied even though "Smith was discharged by a board of directors upon the recommendation of an appointed official, rather than directly by a union president").

In sum, LMRDA preemption of Plaintiffs' claims, as described in *Screen Extras Guild*, applies here regardless of whether the Trustees were elected to their positions. *See Vought*, 558 F.3d at 623; In *English*, 2019 WL 4735400 at *4; *Dean*, 1989 WL 223013 at *5.

B. Applying *Screen Extras Guild* Here Is Neither Arbitrary nor Capricious.

Plaintiffs' second argument regarding the applicability of LMRDA preemption and *Screen Extras Guild* is even less convincing than their first. Their argument, although confusing, appears to be that because claims by certain former Local 1107 personnel are not preempted by the LMRDA, it would be arbitrary for Plaintiffs' claims to be preempted. Pltffs' Motion at 16-24. They further argue that *Screen Extras Guild* was wrongly decided.

i. Plaintiffs' Attempt to Compare This Case to Other Pending Lawsuits Against SEIU and Local 1107 Fails.

As an initial matter, Plaintiffs' argument relies on two other lawsuits that are not before this Court. They point to a lawsuit by another former Local 1107 Director, Peter Nguyen, in *Nguyen v. Service Employees Int'l Union, et al.*, Case No. A-19-794662-C. They also point to a lawsuit by a former organizer of Local 1107, Javier Cabrera, in *Cabrera, et al. v. Serv. Employees Int'l Union, et al.,* Case No. 2:18-cv-00304-RFC-DJA. According to Plaintiffs, it would be arbitrary for these cases to proceed and for the present case to be dismissed on the basis of LMRDA preemption.

This attempted comparison fails. First, Plaintiffs have failed to support their argument with admissible evidence regarding the facts of those other cases.[8] Second, even if such a factual comparison were possible, Plaintiffs have failed to introduce evidence of the claims or defenses

[8] Apparently in an effort to make their comparison, Plaintiffs have introduced the transcript of a hearing before an administrative law judge of the National Labor Relations Board in a proceeding in which SEIU and Mary Kay Henry were not parties. *See* Plaintiffs' Appendix in Support of Motion for Partial Summary Judgment, Ex. 22. As discussed earlier, such testimony is not admissible against SEIU or Henry. *See* NRS § 51.325.

at issue in those cases, let alone that the defense of LMRDA preemption has been rejected in those cases. Last, and perhaps needless to say, the outcome of LMRDA preemption here depends on the application of law to the undisputed facts *before this Court*, not whether such a defense may exist in other cases with different facts pending in different courts.

Plaintiffs' comparison fails for another reason. According to Plaintiffs, LMRDA preemption depends on whether Plaintiffs were members of Local 1107. Pltffs' Motion at 16-17. Plaintiffs argue it would be arbitrary for LMRDA preemption to apply to Plaintiffs, who were not Local 1107 members, but not to Peter Nguyen, another former Director of Local 1107 who allegedly was a Local 1107 member.

Even assuming *arguendo* that this argument had any factual support, it fails as a matter of law. In *Finnegan* the Supreme Court made clear that the LMRDA supported the ability of union leaders to terminate appointed staff regardless of whether such staff were also members of the union. *See Finnegan*, 456 U.S. at 437-38. That principle is now a well-established one. *See, e.g., Brunt v. Serv. Employees Int'l Union*, 284 F.3d 715, 720 (7th Cir. 2002) ("Discharge from union employment does not violate LMRDA even if it has an indirect effect on union membership rights."); *Bloom v. Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356 (9th Cir. 1986) ("An indirect burden on membership rights, such as a forced choice between expressing one's opinion and losing one's job, is insufficient to state an LMRDA claim."); *English*, 2019 WL 4735400, *4 ("It makes no difference that when defendants terminated plaintiffs' employment, they terminated plaintiffs' status as SEIU Local 73 members as well.").

Finally, Plaintiffs appear to argue that it would be arbitrary for Plaintiffs' claims to be preempted by the LMRDA, when other types of claims, such as those arising under a collective bargaining agreement, would not be preempted. Pltffs' Motion at 18-19. This argument is little more than misdirection. Again, whether other claims by other parties involving other contracts can survive LMRDA preemption is irrelevant here. Regarding the facts *of this case*, it is clear that Plaintiffs' claims are preempted by the LMRDA and should be dismissed in their entirety.

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ii. Plaintiffs' Argument that *Screen Extras Guild* Was Wrongly Decided is Unpersuasive.

Plaintiffs' last-ditch argument is that *Screen Extras Guild* was wrongly decided. Pltffs' Motion at 19-24. This argument is unconvincing too.

The reasoning of *Screen Extras Guild* is clear, straightforward, and correct. Rather than revisit that reasoning here and burden the Court with duplicative briefing, SEIU and Henry respectfully refer the Court to their brief in support of summary judgment, which describes the case in detail. SEIU Motion at 21-25.

In short, the decision rests on conflict preemption. "[E]ven when Congress's enactments do not pervade a legislative field or regulate an area of uniquely federal interest, Congress's intent to preempt state law is implied to the extent that federal law actually conflicts with any state law." *Nanopierce Techs., Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 371 (2007). Conflict preemption requires a court to determine whether, "in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives." *Id*. at 372. The court in *Screen Extras Guild* found such a direct conflict between the LMRDA's primary goal of allowing union leaders to freely appoint policymaking and confidential staff to carry out the union's policies and programs, and allowing former policymaking and confidential staff to pursue wrongful termination, contract and related claims against the union. *See generally Screen Extras Guild, Inc.*, 51 Cal. 3d 1017.

Plaintiffs criticize the reasoning of *Screen Extras Guild*, noting that the primary case upon which it relied, *Finnegan*, was itself not a preemption case. Pltffs' Motion at 22. That distinction ignores the central premise of *Finnegan*, upon which *Screen Extras Guild* is based: the LMRDA protects the ability of union leaders to select their own administrators. *See Finnegan*, 456 U.S. at 441. *Screen Extras Guild* therefore correctly relied on *Finnegan* in concluding that allowing former policymaking and confidential staff to pursue wrongful termination, contract, and related claims would directly conflict with that key legislative purpose. *See Screen Extras Guild, Inc.*, 51 Cal. 3d at 1024.

Plaintiffs also point to 29 U.S.C. § 523, a provision of the LMRDA that they believe

prevents preemption here. Pltffs' Motion at 23-24. However, *Screen Extras Guild* rejected this argument, concluding that the statute's savings clauses "save only causes of action enjoyed by union members." *Screen Extras Guild, Inc.*, 51 Cal. 3d at 1030 n.10. Because neither Clarke nor Gentry were members of Local 1107, they are not entitled to the rights of union membership guaranteed by the LMRDA. *See id*. at 1030-31; *see also Bloom*, 783 F.2d at 1360 (holding that savings provisions of LMRDA "save causes of action enjoyed by union *members*, and . . . Bloom is not bringing this action as a union member but as a union employee") (emphasis in original).

Not only are Plaintiffs' criticisms of *Screen Extras Guild* themselves unconvincing, their arguments run headlong into a number of other cases in agreement with its holding. In addition to being followed by California appellate courts,[9] at least two federal district courts in California have followed it,[10] as have courts in Montana, Michigan, and New Jersey.[11] The number of courts that have followed *Screen Extras Guild* is itself ample cause to believe that Nevada's Supreme Court would follow it too. By contrast, Plaintiffs tellingly fail to cite a single case from any jurisdiction that rejects the holding of *Screen Extras Guild*.

Finally, Plaintiffs' attempt to discredit the holding of *Screen Extras Guild* overlooks the strong reason for applying in this case. As noted earlier, Clarke and Gentry, two of the three former Directors of Local 1107, were uniquely suited as managers of the union to thwart the goals of the trusteeship. *See* SEIU Motion at 4-7 (describing Plaintiffs' former responsibilities as

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[9] *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); *see also Tyra v. Kearney*, 153 Cal. App. 3d 921 (1984) (predating *Screen Extras Guild* and holding that LMRDA preempted wrongful termination claim by former union business agent).

[10] *See 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 Union Local 616*, Case No. No. C-98-0507 MJJ, 1999 WL 219738 (N.D. Cal. 1999).

[11] *See 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).

Directors of Local 1107); *Screen Extras Guild, Inc.*, 51 Cal. 3d at 1029 (observing that *Finnegan* was based "on the realization that policymaking and confidential staff are in a position to thwart the implementation of policies and programs" of the union). That is especially true given their hostility to the Trustees and the trusteeship. *See* SEIU Motion at 9-11 (describing evidence of Plaintiffs' opposition to trusteeship). The logic of *Screen Extras Guild* is therefore compelling here, where Plaintiffs' continued employment as Directors at Local 1107 would certainly have impeded the Trustees' ability to carry their programs and policies.

Conclusion

For the foregoing reasons, and those identified in SEIU's and Henry's pending motion for summary judgment, Plaintiffs' motion for partial summary judgment should be denied, and SEIU's and Henry's motion for summary judgment should be granted in full.

DATED: November 12, 2019

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

By */s/ Jonathan Cohen*
JONATHAN COHEN
Attorneys for Service Employees International Union and Mary Kay Henry

CERTIFICATE OF SERVICE

I am an employee of Rothner, Segall & Greenstone; my business address is 510 South Marengo Avenue, Pasadena, California 91101. On November 12, 2019, I served the foregoing document described as **SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** on the interested parties in this action as follows:

[X] **(By 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

Evan James: elj@cjmlv.com

[ ] **(By U.S. 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:

Michael J. Mcavoyamaya 4539 Paseo Del Ray Las Vegas, NV 89121 Tel: (702) 685-0879 Email: Mmcavoyamayalaw@gmail.com	Evan L. James Christensen James & Martin 7440 W. Sahara Avenue Las Vegas, NV 89117 Tel: (702) 255-1718 Fax: (702) 255-0871 Email: elj@cjmlv.com

[ ] **(By UPS Next Day Air)**
I caused such envelope to be placed in the UPS collection box, located at 200 East Del Mar Boulevard, Pasadena, California, the scheduled pickup time for which is 4:45 p.m. United Parcel Service guarantees delivery of packages deposited into this collection box, as addressed above, the following business day.

/s/ Lisa C. Posso
Lisa C. Posso

REPLY
CHRISTENSEN JAMES & MARTIN
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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 **REPLY TO OPPOSITION TO 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 reply to Plaintiffs' Opposition to Motion for Summary Judgment.

///

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DATED this 22nd day of November 2019.

CHRISTENSEN JAMES & MARTIN

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MEMORANDUM OF POINTS AND AUTHORITIES

I

UNDISPUTED FACTS[1]

Service Employees International Union's ("SEIU") constitution contains the following pertinent language that undisputedly applies to Local 1107:

> (a) 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.
>
> (b) 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 appoint such agents, employees … and to take such other action as in his or her judgment is necessary for the preservation of the Local

[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.

> Union or affiliated body and for the protection of the interests of the membership.[2]

SEIU Const. Art. VII §§ 7(a) & (b), App. 167.

III

LEGAL ANALYSIS & ARGUMENT

1. Plaintiffs' prove the propriety of their employment termination because of a special relationship with their President Mancini.

Plaintiffs assert, "Plaintiffs' had a special relationship with L1107 via President Mancini, who promised them continued employment with L1107 as evidenced by their contracts." See Opp'n at 29:2-3. Plaintiffs just summed up why their claims are preempted, "a special relationship with" the removed union leader. She had their back and they had hers, as evidenced by their conspiracy to overthrow the Trusteeship, calling the Trustees' actions toward Manci "repugnant and unjustified." Plaintiffs even destroyed evidence of their insubordination to the Trusteeship prior to their employment termination:

> 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.

[2] Gentry and Clarke's argument that their special friend, former President Mancini, unilaterally voided these SEIU constitutional provisions is a bit like arguing that a United States President may unilaterally change provisions of the United States Constitution—a proposition that we all should agree is wrong.

> 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). Yes, there was a special relationship between Plaintiffs and Mancini, a relationship strong enough to lead high ranking management officials to destroy evidence and seek to thwart the Trustees' governance of Local 1107.

2. Plaintiffs' arguments regarding the LMRDA's state law saving clauses do not apply because Plaintiffs are not union members nor are criminal acts at issue.

The savings clauses of the LMRDA do not apply to Plaintiffs.

> Bloom first argues that his wrongful discharge action cannot be preempted by the LMRDA because it is specifically "saved" from preemption by the Act itself. He cites 29 U.S.C. §§ 413, 523, and 524, which he asserts "save" his state claim. 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. Just as he is not entitled to the substantive protections of the LMRDA as an employee, so he cannot enjoy its savings clauses. The remaining section, 29 U.S.C. § 524, saves only state criminal laws and thus cannot directly save appellant's civil action.

Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952, 783 F.2d 1356, 1360 (9th Cir. 1986). Plaintiffs have never been members of Local 1107 nor is criminal activity alleged in their First Amended Complaint. The LMRDA preemption savings clauses cited by Plaintiffs do not apply.

3. Plaintiffs' elected union official argument fails because the need for effective union governance is an independent reason for preempting Plaintiffs' claims.

LMRDA preemption applies to ensure effective union governance in addition to securing union democracy. *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 Clarke:

> 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). "'[I]t 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). *See also, Vought v. Wisconsin Teamsters Joint Council No. 39*, 558 F.3d 617, 623 (7th Cir., 2009) (rejecting the argument that *Finnegan* only applies if the union leader is elected.)

The *English* court's member protection rationale is central to the Ninth Circuit Court of Appeals' application of the *Finnegan* case. "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 Clarkes' elected vs.

appointed argument fails; it is the "union administration's responsiveness" to member needs that is of critical concern in federal labor policy.

4. Federal preemption applies regardless of a union's constitution.

Two lines of case law have evolved from the *Finnegan* case, 1) cases relying solely on the LMRDA and 2) cases applying union constitutions. Neither *English*,[3] nor *Vought*, considered the union's constitution when applying LMRDA preemption. These cases make clear that LMRDA preemption applies regardless of a union's constitution.

Contrary to Plaintiffs' assertions, *Screen Extras Guild* did not consider the union's constitution when applying LMRDA preemption. Rather, it merely noted the board of directors was an elected body under the constitution. The court was not stating, as Plaintiffs incorrectly assert, that the union's constitution had to specifically address a plaintiff's job position before LMRDA preemption applies. In *Bloom,* and contrary to Plaintiffs' argument, the union's constitution was not an issue associated with preemption of the employment law claims. Rather, the constitution was a topic of discussion for union membership rights. In *Tyra*, the union's constitution is not even mentioned or discussed, making Plaintiffs' assertion that *Tyra* was premised upon consideration of the union's constitution patently false.

Cases relying upon a union's constitution to defeat employment claims include *Dean* and *Pape*. The *Dean* court discussed the union's constitution as it related to Mr. Dean's position as a Business Agent and specifically found that "Dean's argument that

[3] The *English* case did involve SEIU's constitution but only in the context of freedom of speech rights. The *English* court's ruling on preemption of employment law claims was made independent of any evidence regarding SEIU's constitutional provisions. While there is no record of the *English* court considering SEIU's constitution in regard to preemption of employment law claims, it is obvious that preemption applies because the court reached its preemption decision with or without SEIU's constitution. Thus, if SEIU's constitution required preemption in *English*, it certainly is going to require preemption to this Litigation given that the same constitution is at issue.

his employment contract does not include the provisions of the constitution and the bylaws ignores the vital function that those provisions were intended to fulfill—that is, the preservation of internal democracy and order." *Dean v. General Teamsters Union, Local No. 406*, 1989 WL 223013, at *6 (W.D.Mich. 1989). In short, the union's constitution in Dean served the same function as LMRDA preemption. Like the *Dean* case, Plaintiffs' contracts were subject to the international's constitution that authorized the Trustees to "remove any of [Local 1107's] employees." In *Pape*, the court relied upon *Dean* and applied the union's constitution that allowed an appointed trustee to remove an employee. SEIU's constitution also allows for the removal of employees. As such, Gentry and Clarke's claims, as a matter of federal labor policy applying union constitutions, are preempted and not enforceable.

Either way, pursuant to SEIU's constitution or directly by LMRDA, federal preemption of Plaintiffs' claims applies.

5. LMRDA preemption applies to any appointed employee who may thwart effective union governance.

Plaintiffs' reliance on "policy making employee" and "confidential employee" language found in case law ignores congressional intent and federal labor policy that a union employee, regardless of position, is not allowed to thwart effective union governance. The *Womack* court noted that the United States Supreme Court intended LMRDA preemption to apply to "**administrators**, policy-makers, and **other appointees**." *Womack v. United Service Employees Union Local 616*, 1999 WL 219738, at *4 (N.D.Cal. 1999)(emphasis added). The *Womack* court also noted that the "Court was not troubled by the effect this interpretation of LMRDA would have on the job security of union appointees. *Id.* The *Womack* court then noted that the *Screen Extras Guild* case applied to a "terminated **management** or policy-making employee" *Id.* (emphasis added). It is undisputed that Gentry and Clarke were management employees with substantial responsibilities. (Motion for Summ. J., Job Descriptions, App. 142-147.)

Thus, Plaintiffs' election to focus solely on two phrases from case law ignores the purpose of the rulings and the reality of their management roles.

Plaintiffs' effort to insert a "labor-nexus" into the LMRDA preemption doctrine is found in no LMRDA preemption cases. Plaintiffs' citation to cases such as *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981)[4] ignores federal labor policy applying the LMRDA. It also ignores that such cases address unfair labor practices relating to bargaining rather than the LMRDA preemption fulcrum of effective union governance.

6. Related tort claims.

Plaintiffs argue that the breach of covenant of good faith and fair dealing claims must survive because the Trustees did not act faithful. However, the Trustees were not parties to the contracts nor were they at Local 1107 when the contracts were entered or performed. As noted by the Plaintiffs, their employment contracts came from a special relationship with Mancini and not the Trustees. The Trustees therefore, as a matter of fact, could not have acted badly under the contracts, making a breach of the covenant of good faith and fair dealing impossible.

Plaintiffs argue that Gentry's threatening a defamation lawsuit is sufficient to save the bad faith discharge and negligence claims. First, she never actually sued on the defamation claim while employed at Local 1107,[5] so Plaintiffs' argument fails because

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[4] Plaintiffs' sophistic use of case law is highlighted in *Shuck v. International Association of Machinists and Aerospace Workers, District 837*, 2017 WL 908188 (E.D.Mo. 2017). *Shuck,* contrary to Plaintiffs' selective use of language from the case, involved the defendant's effort to remove the case to federal court despite the plaintiff having alleged wrongful termination for reporting illegal conduct; "Shuck's claims arise from allegedly illegal misconduct under state law." *Id.* at 2. The federal court refused removal and noted that reporting illegal conduct is not preempted by the LMRDA.

[5] The defamation claim was first asserted in Plaintiffs' First Amended Complaint filed on March 25, 2019, almost two years after the Trustees were appointed on April 28, 2018. See First Amended Complaint at 4:¶16.

no legal right was exercised prior to employment termination. Second and as stated above, the Trustees were not part of Local 1107 when Gentry made the litigation threat in 2016. Gentry's employment termination occurred on May 4, 2017, within days of the Trustees' appointment on April 28, 2017. Third, there also is no evidence that the Trustees fired Gentry because of a litigation threat.

7. Gentry addressed two of the four argued defamation defenses—preemption and internal business communications—and ignored required communications and common interest privilege defenses.

Failure to address an argument is consent to that argument. "The nonmoving party "'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).

a. *As to preemption, Gentry failed to show any evidence of malice necessary to overcome summary judgment.*

Gentry needed to show some evidence that Kisling acted with malice to overcome federal preemption of her defamation claim. *See Linn v. United Plant Guard Workers of America, Local 114,* 86 S.Ct. 657, 659, 383 U.S. 53, 55 (1966) (stating the need to plead and prove malice to overcome federal preemption of defamation claims). All evidence shows that Kisling reported information she had received from others. It also shows that she reported the information as a "concern" and not as fact.

Contrary to Gentry's assertion, Defendants have no burden to prove Kisling made the statements believing them to be true. Rather it is Plaintiffs' burden to provide evidence that Kisling made the statements with malice. Gentry has provided no evidence.

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b. *Gentry's argument that the internal business communication privilege does not apply—asserting that statements were published to SEIU representatives and Local 1107 personnel—fails because SEIU has a common interest in Local 1107's functions and no evidence regarding outside publication by Kisling exists.*[6]

Local 1107 and SEIU have to share internal business communications to adhere to organizational documents. SEIU had and has an internal interest in the effective and proper management of affiliated locals, including Local 1107. See SEIU Constitution Art. XXI, App. 193 (setting forth a local's duty to enforce the SEIU Constitution); SEIU Const. Art. VII §§ 7(a) & (b), App. 167 (setting forth the ability to appoint a trustee to correct mismanagement of a local); and SEIU Const. Code of Ethics, App. 197 (stating that "Corruption in all forms will not be tolerated.") The only way SEIU will know of issues relating to its constitution is by hearing about those issues from individuals associated with local unions. Thus, Kisling's communications to Local 1107 and SEIU were internal.

In regard to the declarations of Peter Nguyen (unsigned) and Javier Cabrera,[7] there is no evidence that Local 1107 or Kisling circulated the report. The supposed defamatory statement of alcohol use originated from the staff and the credit card verification purchases issue was part of the Finance Committee's deliberations. Thus, the

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[6] Gentry argued that Local 1107 and SEIU are alter egos. See Opposition to SEIU's Motion for Summary J. Although Local 1107 disputes that argument, if true, the SEIU representatives and Local 1107 representatives are treated as one and the same. Gentry's conflicting arguments defeat one another.

[7] Peter Nguyen and Javier Cabrera are known haters of the Defendants, both having filed lawsuits against the union and the Trusteeship, *Nguyen v. SEIU*, Case No. A-19-794662-C in this Court, and *Cabrera v. SEIU*, Case No. 2:18-cv-00304 RFB in the United States District Court for the District of Nevada. In fact, Nguyen is one of Gentry's and Clarke's evidence destroying coconspirators.

issues claimed as defamatory were clearly common knowledge among Local 1107 personnel.

c. Gentry did not oppose the argument that Kisling's report to the Executive Board was privileged as a required communication.

Gentry did not dispute that Kisling's communications were required by law. (See Motion at 19)(*supported by U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,* 981 F.2d 1362 (2nd Cir. 1992) and *Cucinotta v. Deloitte & Touche, L.L.P.*, 302 P.3d 1099, 1102, 129 Nev. 322, 326 (2013)). Thus, there is no evidence disputing Kisling's duty to disclose. Summary judgment is proper.

d. Gentry did not oppose the argument that Kisling's report to the Executive Board was privileged as a common interest communication.

Had Gentry addressed the common interest privilege, she could not have argued that Kisling's report was improperly disclosed to SEIU representatives. As shown above, Local 1107 and SEIU both have a common interest in the proper and effective management of Local 1107. Summary judgment in favor of Local 1107 is proper.

CONCLUSION

Summary judgment in favor of the Local 1107 Defendants is proper.

Dated this 22nd day of November 2019.

CHRISTENSEN JAMES & MARTIN

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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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By: */s/ 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' REPLY IN SUPPORT OF 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 submit this *Reply in Support of Motion for Partial Summary Judgment.*

DATED this 18th day November, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

The Local 1107 Defendants have advanced several frivolous arguments in their opposition to Plaintiffs' Motion for Partial Summary Judgment that this Court must reject. First, the "Local 1107 Defendants object to the 1272 pages of unauthenticated pages of information attached to Plaintiffs' Motion," but note that most are self-authenticating. Defendants argue that "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." *See* L1107 Defs' Opp., 11/12/19, at 2:24-27. Second, Defendants again argue preemption, this time focusing on a recently decided case: *English v. Service Employees International Union, Local 73*, 2019 WL 4735400, at *4 (N.D.Ill., 2019). *Id.* at 7:1-9:6. However, Defendants misrepresent the holding of the *English* case, which actually supports the rejection of their preemption argument. Third, Defendants misrepresent that Plaintiffs argued in the Motion for Partial Summary Judgment that "Congress acted arbitrary and capricious in protecting union members at the expense of appointed union employees is wrong." *Id.* at 9:7-9. Plaintiffs made no such argument. Rather, Plaintiffs have argued that the California Supreme Court's inference that federal case law preempts state causes of action for breach of contract is arbitrary and capricious. Fourth, Defendants argue, without pointing to evidence, that Plaintiffs were terminated "for legitimate organizational purposes." *Id.* at 11:7-12:4. Fifth, Defendants argue based on double hearsay that Kisling did not accuse Plaintiff Gentry of drinking alcohol at work or stealing money. *Id.* at 12:5-13:14. Finally, Defendants again argue common interest and business communication privilege, but fail to address Kisling's publication of the defamation outside of Local 1107. Each of these arguments are meritless and will be discussed in detail below.

A. Authenticity Of Documents.

Defendants argue that Plaintiffs were required to argue the authenticity of each page of the "1272 pages" of documents included in Plaintiffs' Appendix. This is not the case, and Defendants do not cite to any authority for this proposition. "Authentication is a basic prerequisite to the admission of evidence….Under NRS 52.015(1), authentication of a document requires evidence

or some other showing 'that the matter in question is what its proponent claims.'" Sanders v. Sears-Page, 2015 Nev. App. LEXIS 8, *26, 354 P.3d 201, 210, 131 Nev. Adv. Rep. 50 *citing* Nev. R. Stat. 52.015. "Authentication relates to relevancy because 'evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims.'" *Id. quoting Rodriguez v. State*, 273 P.3d 845, 848 (2012). "NRS 52.025 through NRS 52.105 provide a nonexhaustive list of methods by which a document may be authenticated…As relevant here, NRS 52.025 permits a witness to authenticate a document through testimony "if the witness has *personal knowledge* that a matter is what it is claimed to be.'" *Id. citing* Nev. R. Stat. 52.025.

On summary judgment, however, the non-moving party has the opportunity to "object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Nev. R. Civ. P. 56(c). "[W]hen a party does not object to the inadmissibility of evidence below, the issue is waived and otherwise inadmissible evidence can be considered." *See Clark v. JDI Realty, LLC (In re Cay Clubs)*, 340 P.3d 563, 573-74 (Nev. 2014) *citing Whalen v. State*, 100 Nev. 192, 195-96, 679 P.2d 248, 250 (1984) (considering otherwise inadmissible evidence with respect to a summary judgment because the issue of admissibility was waived for lack of an objection). "All relevant evidence is admissible unless barred by a particular rule of evidence." *Whalen v. State*, 100 Nev. 192, 195-96, 679 P.2d 248, 250 (1984). "The **responsibility for objecting to the admission of incompetent evidence devolves upon the party who seeks its exclusion**." *Id. citing See* NRS 47.040(1)(a). "A rule of evidence not invoked is waived." I *Wigmore on Evidence* 790 (Tiller's Rev. 1983).

In *Whalen*, the respondent had filed a reply witn points and authorities in support of their motion summary judgment. *Id.* The *Whalen* Court noted that the "respondents had the opportunity to object to the trial court's consideration of the document" but "did not do so." *Id.* The respondent then objected to consideration of the document on appeal. "Indeed, as far as we can determine, the district court considered the unauthenticated document in reaching its decision." *Id.* Because the respondent failed to object, the district court apparently considered the supposedly unauthenticated

document. The Nevada Supreme Court considered the objection to the unauthenticated document waived, and reversed the judgment in favor of the appellee. *Id.*

Plaintiffs are not required to provide proof of authentication of evidence until the Defendants object based on a specific evidentiary rule. *Id.* Here, the Local 1107 Defendants have advanced several specific objections to several of the documents Plaintiffs have included in their Motion for Summary Judgment, and advanced only a general objection to the rest. Their failure to specifically object to the admissibility of the other documents via a "particular rule of evidence" constitutes waiver of any objections to that evidence. Even so, Plaintiffs will now address the admissibility of all the documents Plaintiffs have provided in support of their motion for summary judgment. Defendants also object to numerous documents as being hearsay. *See* L1107 Defs' Opp., 11/12/19, at 3:10-27. Hearsay "means a statement offered in evidence to prove the truth of the matter asserted." Nev. Rev. Stat. Ann. § 51.035. However, a statement is not hearsay if:

> 1. The statement is one made by a witness while testifying at the trial or hearing;
> 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
> (a) Inconsistent with the declarant's testimony;
> (b) Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;
> (c) One of identification of a person made soon after perceiving the person; or
> (d) A transcript of testimony given under oath at a trial or hearing or before a grand jury; or
> 3. The statement is offered against a party and is:
> (a) The party's own statement, in either the party's individual or a representative capacity;
> (b) A statement of which the party has manifested adoption or belief in its truth;
> (c) A statement by a person authorized by the party to make a statement concerning the subject;
> (d) A statement by the party's agent or servant concerning a matter within the scope of the party's agency or employment, made before the termination of the relationship; or
> (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Id.

As the Defendants recognize, many of the documents Plaintiffs have included are self-authenticating. However, Defendants have advanced specific evidentiary objections to the

admissibility of Plaintiffs' Exhibit 3-4, and 6-9. *See* L1107 Defs' Opp., 11/12/19, at 3:10-26. The documents Plaintiffs have provided in support of their Motion for Partial Summary Judgment are, indeed, authentic. The majority of these documents having been authenticated previously in this case or other cases.

For example, the Local 1107 Defendants already admitted to the authenticity and admissibility of the Termination Letters, the Trusteeship Order, and the Local 1107 Constitution in their responses and counter motions for summary judgment filed back in October 2018. *See* L1107 Defs' Opp and Ctr MSJ, 10/11/18, at 2:26-27, 10:26-27; *see also* SEIU Intl Opp and Ctr MSJ, 10/11/18, Exhibit B, at 1-74. The contracts that Plaintiffs included in the Motion as Exhibits 1 and 2 were also admitted to be authentic by the Defendants via Defendants' responses to Plaintiffs' Firs Requests for Admission. *See* Pltfs' Exhibit 13, at 3:2-9. The documents attached as Plaintiffs' Exhibits 1, 2, 10, 11, and 18 have, therefore, already been authenticated by Defendants' prior admissions. Plaintiffs' Exhibits 13, 14, 15, 16, 20, 23, and 24 are the Local 1107 and SEIU Defendants responses to Plaintiffs' written discovery requests. They are on the defense counsel's formatted pleading paper, they were electronically served via the filing system, are signed by defense counsel and contain a certificate of service. These documents cannot be disputed as authentic.

When this case began the parties stipulated that "they will not duplicate discovery exchanged in the consolidated federal court litigation case of *Garcia, et al. v. Service Employees International Union, et al.*, 2:17-cv-01340-APG-NJK" (the "*Garcia* case"). *See* JCCR, attached as **Exhibit "1,"** at 6:20-23. Indeed, the Plaintiffs' view in the JCCR was that "discovery disclosed in other related cases should not be duplicated," and Defendants concurred, and added that such discovery would be subject to "federal court protective orders." *Id.* at 9:7-14. Discovery is not limited to disclosure of documents, and encompasses both documents, written discovery requests and deposition testimony. Many of the Exhibits Plaintiffs have used in their Motion for Summary Judgment were authenticated already in the *Garcia* case and are, therefore, admissible.

The Internal Charges Report and Recommendation ("ICRR"), which Defendants object to, was filed by the Local 1107 Defendants in the trusteeship case. *See* Pltfs' Exhibit 3, at RG0005-

0031; *Garcia et al v. SEIU et al.*, Case 2:17-cv-01340-APG-NJK (ECF NO. 271-18), at RG0005-0031. The document is signed by the SEIU International Hearing Officer, Carol Nieters, an agent of the Defendant SEIU. *See* Nev. Rev. Stat. § 52.055 ("Appearance, contents, substance, internal patterns or other distinctive characteristics are sufficient for authentication when taken in conjunction with circumstances.") Defendant SEIU International President May Kay Henry also provided a sworn declaration in the *Garcia* case attesting to the authenticity of this document. *See* Henry Declaration, *Garcia* case (ECF No 271-5), attached as **Exhibit "2,"** at 3:2-21. Finally, the SEIU International Defendants have included their own copy of the Nieters' reports and do not dispute their authenticity. *See* SEIU Appendix Fitzpatrick Decl., Exhibit C, at 158-85. The document has already been authenticated.

The Local 1107 Defendants object to the admissibility of this document as hearsay and containing hearsay within hearsay, and improper opinion testimony. However, Henry declared in the *Garcia* case that she "decided to adopt Nieters' report and recommendation in its entirety" making the report a statement of a party opponent outside of the hearsay rule. *See* **Ex. 2,** at 3:2-21. Nieters is also an agent of SEIU International, making her report also a statement of a party opponent. *Id. see also* Nev. Rev. Stat. § 51.035(3). Defendants' argument that the report contains hearsay within hearsay is also meritless. Plaintiffs have included the Internal Charges Hearing Transcript attached as Plaintiffs' Exhibit 9, which includes the testimony referenced in the report that Plaintiffs assume the Local 1107 Defendants are characterizing as hearsay within hearsay.

The internal charges hearing transcript has also already been authenticated by the Defendants, as the SEIU International and Local 1107 Defendants both filed this document in the *Garcia* case with the declaration of Defendant Henry attesting that "A true and correct copy of the transcript of those proceedings, followed by select exhibits from the charges proceeding, is attached hereto as Exhibit 'F.'" *Id.* at 2:20-23. All the witness testimony from the Internal Charges Hearing was "GIVEN UNDER OATH" before a court reporter. *See* Pltfs' Exhibit 9, at SEIU0201:28. The witness testimony Plaintiffs cited to in their Motion, and which is referenced in the ICRR, was that of Local 1107 Treasurer, Shiela Grain, an officer of Local 1107 authorized to speak on behalf of Local 1107. *Id.* at SEIU0364:2-365:5. Indeed, as the Hearing Officer clearly

states, Ms. Grain was giving testimony "AS THE TREASURER OF THE UNION." *Id.* This is a sworn statement of a party opponent, and a statement made on behalf of Local 1107 by an officer authorized to "speak for" the organization. *See* Nev. Rev. Stat. § 51.035(3); *see also Palmer v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943, 961, 59 P.3d 1237, 1248 (2002). It is not hearsay.

Finally, Plaintiffs' Exhibit 27 are the minutes from the August 31, 2016 Local 1107 Executive Board meeting that was filed by the SEIU Defendants in the *Garcia* case. *See Garcia* case, (ECF No. 174). Plaintiffs include the declaration of SEIU General Counsel Steve Ury filed in the *Garica* case attesting to the document's authenticity. *See* Ury Declaration, attached as **Exhibit "3,"** at 1-19. Like the other documents from the *Garcia* case, this document is already authenticated. The SEIU Defendants argue that this document contains hearsay. However, all the individuals whose statements were recorded in this document were officers of Local 1107 or SEIU authorized to speak on behalf of their respective organizations. The document, therefore, contains statements of a party opponent and are not hearsay. *See* Nev. Rev. Stat. § 51.035(3).

Plaintiffs' Exhibit 4 is an email chain between Local 1107 President Cherie Mancini, Sharon Kisling, and Local 1107 attorney Michael Urban. Plaintiffs provide the declaration of former Local 1107 President and recipient of this email, Cherie Mancini, confirming its authenticity. *See* Mancini Declaration, attached as **Exhibit "4,"** at 1:22-27. Mancini has personal knowledge of the facts and circumstances surrounding the matters at issue in this case and the documents Plaintiffs have provided in support of their Motion for Summary Judgment, and has attested to the authenticity of Plaintiffs' Exhibits 4 (Urban email), 5 (Kisling Report), 7 (Mancini's email), 8 (Urban Report), and 27 (Minutes of August 31, 2016 Board Meeting). *Id.* at 2:1-4:4. These documents are, therefore, authentic. Plaintiffs' Exhibit 5, the Kisling Report, was presented to the current Local 1107 President, Brenda Marzan, at her deposition and she clearly authenticated the document. *See* Pltfs' Exhibit 5, at 16:1-19; *see also* L1107 Appendix, at 240-44. The Local 1107 Defendants have also produced their own copy of the Kisling and Urban Reports admitting to their authenticity. *Id.* at 240-48.

The Defendants' objections to Plaintiffs use of the Kisling Report to prove Kisling's defamation of Plaintiff Gentry are also meritless. Defendants argue that "Plaintiffs assert that the document's contents prove that 'Kisling accused Plaintiff Gentry of 'Excessive spending, concerns of alcohol use while at work….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* L1107 Defs' Opp., 11/12/19, at 3:14-18. However, Defendants ignore entirely the different types of defamation. "any false and malicious writing published of another is libelous *per se*." *Talbot v. Mack*, 41 Nev. 245, 264, 169 P. 25, 30 (1917). Slander, on the other hand, is a spoken defamatory statement. *Branda v. Sanford*, 97 Nev. 643, 646, 637 P.2d 1223, 1225 (1981). This case involves both libel and slander. The Kisling Report is evidence of Kisling's libelous statements of fact printed in writing about Plaintiff Gentry in her report, which was disseminated to third parties. The audio recording, which is also evidence of Kisling's defamation of Plaintiff Gentry, is evidence of slander, a separate form of defamation. The audio recording cannot be used to prove that Kisling published libelous statements in writing because it was slander, not libel. Both the recording and the Kisling Report evidence different types of defamation, and as such, the audio recording cannot be used as the "best evidence" to prove Kisling's libel of Plaintiff Gentry. Defendants wish to restrict Plaintiffs' defamation claim to Kisling's statements at the August 31, 2016 Local 1107 Executive Board meeting because doing so would better support their privilege defense. However, it is Kisling's libelous report that was taken from the union hall.

The emails between Dee Dee Fitzpatrick, Henry, Luisa Blue and Martin Manteca attached as Plaintiffs' Exhibit 12 were all authenticated by Fitzpatrick at her deposition. *See* Fitzpatrick Deposition, attached as **Exhibit "5,"** at 36:10-37:20. Further, because of the sensitive nature of the Fitzpatrick emails, SEIU International's General Counsel, Steve Ury, provided a declaration, attached as Plaintiffs' Exhibit 26, authenticating these emails and requesting that they be observed as containing confidential information. The NLRB Trial Transcript is produced with several certifications of its authenticity. *See* Pltfs' Exhibit 17, at 161, 336. It contains sworn testimony of party opponents and is thus authentic and not hearsay. The NLRB Decision is self-authenticating,

having been signed by Administrative Law Judge Dickie Montemayor. *See* Pltfs' Exhibit 16, at 16. It is used in support of a purely legal argument that the NSEUSU collective bargaining agreement with Local 1107 has been ruled legally enforceable by the NLRB. Other than that legal issue, Plaintiffs did not use the order to support any factual matter. The same is true for the hearing transcript from the *Cabrera et al v. SEIU et al*, 2:18-cv-304 case. *See* Pltfs' Exhibit 22, at 1-70. The Grillo Deposition transcript is a deposition taken in the *Garcia* case, it is provided with a certification from the report certifying its authenticity. *See* Ptlfs' Exhibit 25, at APPENDIX001264. Pltfs' Exhibit 26 is a declaration from SEIU General Counsel Steve Ury, and is self-authenticating. *See* Pltfs' Exhibit 26, at APPENDIX001266-68. All the documents included in Plaintiffs' Motion for Partial Summary Judgment are authentic and admissible.

B. Matters That Are Not In Dispute.

The Local 1107 Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment fails to dispute the majority of the facts and merits of this case. As such, it is important to highlight was matters the Local 1107 Defendants have failed to dispute to guide the Court's review of the pending motions and this case as a whole. First, the Defendants do not dispute that Local 1107 breached the contracts with Plaintiffs. *See generally* L1107 Defs' Opp., 11/12/19, at 7:1-12:4. Defendants again anchor their argument in preemption because their client breached the contracts. *Id.* The closest the Local 1107 Defendants come to disputing the merits of Plaintiffs' breach of contract claims is found under Defendants' Section 3 where they assert that "Employees with for cause employment contracts may be discharged for legitimate organizational purposes." *Id.* at 11:7-12:4. Defendants do not identify any for-cause basis for Plaintiffs' terminations, and rely on out of state precedent for law that is already established in Nevada. Because Defendants have not disputed that Plaintiffs were not terminated for-cause, and have also not disputed that their client breach the contracts by failing to permit the appeal before the Local 1107 Executive Board to determine if their terminations were for-cause, there is no issue of material fact on the elements of contractual duty and breach, and Plaintiffs are entitled to summary judgment as a matter of law on those elements of the breach of contract claim.

Defendants have also failed to dispute that Plaintiff Gentry is entitled to summary judgment on the publication element of the defamation claim. Plaintiffs' argued that "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* Pltfs' MPSJ, 10/30/19, at 31:1-20. Defendants fail to address Kisling's publication of the defamatory statements to third party SEIU International employees Grillo and Ury. *See generally* L1107 Opp., 11/12/19, at 1-15. Defendants failure to dispute this issue entitles Plaintiff Gentry to summary judgment on the publication element of the defamation claim, which renders Defendants' arguments of privilege meritless.

C. Kisling's Statements About Plaintiff Gentry Were False.

Defendants also do not dispute that Kisling's statements about Plaintiff Gentry drinking at work and stealing Local 1107 money were false. *Id.* at 4:8-6:2, 12:5-15:23. Instead, the Defendants advance two frivolous arguments in defense of Kisling's defamation of Plaintiff Gentry. First, Defendants assert that because Kisling used the word "concern" when making the defamatory statements, the statements "cannot be false," and Kisling could not have defamed Plaintiff Gentry. *Id.* at 12:14-27. Defendants define the word "concern" as "a 'matter of interests or importance,' which by its very nature cannot be false." *Id.* This is a bold and absurd position that would create a dangerous precedent in Nevada permitting anyone to lodge malicious defamation against another person with impunity so long as they use the word "concern" first. *Id.* For example, a party could tell someone's employer that they should be concerned about their employee because the employee is stealing money from the employer, and according to the Defendants' analysis, because the party prefaced the false and defamatory statement with the word "concern," "by its very nature [the statement] cannot be false," and thus cannot be actionable for defamation even if the employer fired the employee based on the party's false and defamatory statement that the employee was stealing money. *Id.*

This would turn Nevada's defamation law on its head. Defendants' definition of the word "concern" as a matter of interest or importance to someone is not wholly incorrect.[1] A concern

[1] https://www.merriam-webster.com/dictionary/concern

could be a matter to be of importance to someone. *Id.* When used as a transitive verb, the word "concern" is defined as "to relate to **:** be about" someone or something: "The novel concerns three soldiers. The report concerns global warming." *Id.* A "concern" is also defined as "to bear on" or "to have an influence on **:** involve also **:** to be the business or affair of" someone or something": "The problem concerns us all. This conversation does not concern you." *Id.* A "concern" is also defined as "to be a care, trouble, or distress to" someone or something: "Her ill health concerns me. Her son's frequent tantrums concerned her." *Id.* When used as a noun, a "concern" is defined as a matter of "marked interest or regard usually arising through a personal tie or relationship" to someone: "Their friend's health is a constant cause of concern." *Id.* As a noun, a "concern" is also defined as "an uneasy state of blended interest, uncertainty, and apprehension" to someone: "The actor's sudden collapse on stage caused concern." Also, as "something that relates or belongs to" someone: "It's no concern of yours." *Id.*

Nothing in these definitions means that the matter the speaker is telling the recipient they need to be concerned over renders the matter that supposedly warrants "concern" something that "cannot be false." *See* L1107 Defs' Opp., 11/12/19, at 12:20-22. The word "concern" is used to invoke a reaction, concern, in the person the information is being conveyed to. The use of the word "concern" does not render the matters the speaker is stating the person concerned about unable to be false. Defendants do not cite to anything to support this position, simply making a baseless self-serving argument unsupported by law, fact or reason. Here, Kisling told the Local 1107 Executive Board that they should be concerned about Plaintiff Gentry stealing money and drinking at work. Plaintiff Gentry was not stealing money. Plaintiff Gentry was not drinking at work. The fact that Kisling wanted the Local 1107 Executive Board to be "concerned" about her false and defamatory statements about Plaintiff Gentry does not magically convert the false statement into a statement that "cannot be false." *Id.*

Second, Defendants argue that Plaintiff Gentry cannot establish that Kisling's comments about Plaintiff Gentry drinking at work were false because she did not subpoena the "interns" that supposedly told Kisling that Plaintiff Gentry smelled like alcohol. *Id.* at 13:1-14. To advance this argument, the Defendants mischaracterize Plaintiff Gentry's testimony to rely on hearsay evidence

to prove the matter asserted that Kisling was told by interns that Plaintiff Gentry smelled of alcohol. *Id.* at 12:14-27. Defendants argue that "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.'" *Id.* Defendants rely on double hearsay for this argument. Defendants asked Plaintiff Gentry:

> Q. Do you know anybody who actually heard her utter those words?
>
> A. Yes. People came in to me and told me that she said -- not that I was drunk at work, but that her people -- she had some people working there, some interns -- not interns. 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**. That's what she said at the meeting, that I smelled of alcohol, which I was like, That's quite amazing.
>
> Q. So she had taken reports given to her to the executive board?
>
> A. Yes
>
> Q. Okay.
>
> A. -- well, that is what she said. **I have no idea of the validity of that**. She's the one who made the statements.

See Full Gentry Transcript, attached as **Exhibit "6,"** at 102:1-103:3 (emphasis added).

Gentry did not hear the staff tell Kisling that she smelled of alcohol. Gentry did not testify that "Kisling was merely reporting concerns received from others not making allegations of actual fact." *See* L1107 Defs' Opp., 11/12/19, at 12:21-27. Gentry testified that some unidentified "[p]eople" told her that Kisling told them that some "part-time staff people that she was trying to get jobs for" "allegedly" told Kisling that Gentry smelled like alcohol at work. This is hearsay within hearsay that is not within any exception and is not admissible. Kisling has not appeared to give testimony in this case despite having been noticed of her deposition, which she failed to attend. *See* Decl. of Counsel, at 1. Defendants argue that:

> 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.

Id. at 13:1-8.

This argument cannot be considered because Defendants admittedly do not cite to any admissible evidence in support of this defense. Truth and substantial truth are defenses to a defamation claim. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002). However, it is up to the Defendants to actually argue and prove that the defamatory statements made by Kisling were true. *Id.* Defendants do neither. Defendants do not argue that Kisling's statements about Plaintiff Gentry were true or substantially. *See* L1107 Opp., 11/12/19, at 13:1-8. Rather, Defendants argue that Gentry cannot establish that unnamed individuals who supposedly told Kisling that Gentry smelled like alcohol at work did not believe that she smelled like alcohol at work. *Id.* Defendants have presented no admissible evidence that Kisling was actually told by Local 1107 staff that Gentry smelled of alcohol. Defendants' argument is entirely based on inadmissible double hearsay statements that Kisling was actually told others what she ultimately told the Local 1107 Executive Board. If the Defendants wished to use the "interns" as their defense that Kisling reasonably relied on the statements of staff about Gentry smelling like alcohol, it was their burden to subpoena those witnesses to give that testimony. Without that testimony, Defendants' argument that unnamed staff told Kisling that Plaintiff Gentry smelled like alcohol at work is nothing more than speculation based on inadmissible double hearsay statements.

Plaintiff Gentry has provided evidence that she was not drinking at work and did not smell of alcohol. Plaintiff Gentry testified under oath credibly that the last time she remembers even having even one drink of alcohol "was 2007 in Carson City. I had a frozen daiquiri. I don't drink at all." *Id.* at 33:18-20. Defendants have done nothing to discredit Plaintiff Gentry's sworn deposition testimony. Further, negligence is an element of defamation. "The general elements of a defamation claim require a plaintiff to prove: '(1) a false and defamatory statement by [a] 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.'" *Pegasus v. Reno*

Newspapers, Inc., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). Kisling's presentation to the Local 1107 Executive Board that they should be concerned that Plaintiff Gentry smelled of alcohol at work is defamatory if Kisling was "at least negligen[t]" in making the statement. Even assuming *arguendo* that there were some "interns" that actually told Kisling that Plaintiff Gentry smelled of alcohol at work, Kisling needed to do something to corroborate those statements before going to the Local 1107 Executive Board to seek Plaintiff Gentry and her fellow directors' terminations because of those false claims. Kisling's failure to do so is at least negligent. Defendants do not argue that Kisling went to Plaintiff Gentry before making the accusation, or did any other investigation into the matter before making the defamatory statements about her to the Local 1107 Executive Board and writing a report that included the libelous statements that were ultimately published outside of Local 1107. Kisling was, therefore, at least negligent in making the statements and Plaintiff Gentry is entitle to summary judgment on the defamation claim.

D. Nevada Law Does Not Permit Termination Of A For-Cause Employment Contract For A Legitimate Organizational Purpose.

Defendants have no argument in defense of the merits of this case, and for this reason they request this Court to create new law to exempt their client from the consequences of their unlawful conduct. Defendants argue that "[i]n 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." *See* L1107 Defs' Opp., 11/12/19, at 11:7-19. Defendants cite a Maine Supreme Court case, *Wilde v. Houlton Reg'l Hosp.*, for their argument that an employer can violate a for-cause contract for "organizational purposes." 537 A.2d 1137, 1138 (Me. 1988).

However, in *Wilde*, the employer discharged the "employees for financial reasons," not "organizational purposes." *Id.* The *Wilde* employees had a "contract that includes a 'for cause' provision as **the only limitation** on the employer's right to terminate employment at will." *Id.* The *Wilde* Court held that "an employer's discharge of employees for financial or other legitimate business reasons does not offend 'for cause' language in an employment contract" because, "[a]bsent some clear indication to the contrary, a 'dismissal for cause' provision refers only to disciplinary discharge." *Id.* The Court recognized "that a private employer has an essential

business prerogative to adjust his work force as market forces and business necessity require," and "[i]n the absence of some explicit contractual limitation on the employer's fundamental right to reduce his work force, we refuse to infer such a contractual term." *Id.* The *Wilde* case is clearly distinguishable from this case. Defendants do not argue that Plaintiffs were terminated for financial reasons, nor do they provide any other business necessity as a basis for their terminations. Rather, the Defendants simply wanted to fill the positions with other people and declined to give Plaintiffs any opportunity to work under the trusteeship. Further, Plaintiffs' contracts had an explicit contractual limitation on Local 1107's right to reduce its work force because Plaintiffs for-cause terminations were appealable to the Local 1107 Executive Board. *See* Pltfs' APPENDIX000002-4. Plaintiffs' contracts had an established post-termination procedure that was not followed.

According to Defendants, the Nevada Supreme Court has adopted the same rule "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.'" *Id. citing Southwest Gas Corp. v. Vargas*, 901 P.2d 693, 701, 111 Nev. 1064, 1078 (Nev.,1995). However, Defendants cannot argue that Plaintiffs' terminations were for cause, or for good cause, or for just cause is based on "substantial evidence" because, as the Nevada Supreme Court noted in *Vargas*, the employer is only the "ultimate finder of facts constituting good cause for termination" when there is no "express or implied agreement contracting away its fact-finding prerogatives to some other arbiter." *Id.* at 700.

The Nevada Supreme Court has "emphasize[d], however, that the employer's decision to terminate must be consistent with its contractual prerogatives; the employment contract may subject an employer's termination authority to relevant policy provisions defining or limiting the term 'good cause,' or to defined procedures that the employer must follow prior to termination." *Sw. Gas Corp. v. Vargas*, 111 Nev. 1064, 1075-76, 901 P.2d 693, 700 (1995) *quoting K Mart Corp. v. Ponsock*, 103 Nev. 39, 42, 732 P.2d 1364, 1366 (1987) (employer that summarily fired employee for alleged good cause breached contract stating that if there were any deficiencies in employee's performance, employer would provide assistance and would release employee only

after a series of correction notices and a determination that the performance remained unacceptable); *see also Rulon-Miller v. Intern. Bus. Mach. Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524, 531-32 (Ct. App. 1984) (employee wrongfully terminated for romantic involvement with manager of rival firm where "the right to be free of inquiries concerning her personal life was based on substantive direct contract rights she had flowing to her from [company] policies").

Here, Local 1107 expressly contracted away its fact-finding prerogatives by making Plaintiffs' terminations subject to appeal in a hearing before the Local 1107 Executive Board. *See* Pltfs' MPSJ, Exhibit 1, at Local – 003. Local 1107's failure to conduct that fact finding hearing to determine if the terminations were for cause disentitles them to any argument that Plaintiffs' employment were actually terminated for cause, especially considering the termination letters do not identify any for cause basis for Plaintiffs' terminations. *See* Pltfs' APPENDIX000754-56. The Local 1107 Defendants contracted away the right of the Local 1107 chief executive officer to terminate Plaintiffs' employment, requiring a hearing before the Local 1107 Executive Board to be held before the terminations would be final. Local 1107 failed to conduct that fact finding proceeding, and cannot now argue "legitimate business purpose in the context of the substantive labor" as a basis for the terminations. *See* L1107 Defs' Opp., 11/12/19, at 12:1-4. For these reasons, the Defendants' "legitimate organizational purposes" defense is not based on any relevant law, or material facts or evidence, and Plaintiffs' are entitled to summary judgment as a matter of law.

E. <u>Kisling's Defamatory Statements Were Not Privilege.</u>

"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 v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983) *citing Scarpelli v. Jones*, 626 P.2d 785 (Kan. 1981); *Hamm v. Merrick*, 605 P.2d 499 (Hawaii 1980); Annot., 60 A.L.R.3d 1080, 1084-90 (1974). "Whether a particular communication is conditionally privileged by being published on a 'privileged occasion' is a question of law for the court; the burden then shifts to the plaintiff to prove to the jury's satisfaction that the defendant abused the privilege by publishing the communication with malice in fact." *Gallues v. Harrah's Club*, 87 Nev. 624, 626

n.2, 491 P.2d 1276, 1277 n.2 (1971); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 494 P.2d 1287 (Colo. 1972); *Roscoe v. Schoolitz*, 464 P.2d 333 (Ariz. 1970). "The question goes to the jury only if there is sufficient evidence for the jury reasonably to infer that the publication was made with malice in fact." *Id citing Aspell v. Amer. Contract Bridge League*, 595 P.2d 191 (Ariz.App. 1979); Annot., 60 A.L.R.3d 1080, 1090 (1974). "[A]ctual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity. Reckless disregard for the truth may be found when the 'defendant entertained serious doubts as to the truth of the statement, but published it anyway.'" *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 721-22, 57 P.3d 82, 92-93 (2002). The "test is a subjective one, relying as it does on 'what the defendant believed and intended to convey, and not what a reasonable person would have understood the message to be.' Recklessness or actual malice may be established through cumulative evidence of negligence, motive, and intent." *Id.*

The facts of this case are clear and indisputable. Kisling did not like the staff that Local 1107 President Cherie Mancini had hired and began harassing the Local 1107 staff almost immediately after she was elected Executive Vice President. Plaintiff Gentry outlined Kisling's harassment of her specifically in an email she sent to Cherie Mancini on August 31, 2016, before Kisling defamed her at the August 31, 2016 Local 1107 Executive Board meeting. *See Garcia* Defs' Ex. C to MSJ, attached as **Exhibit "7,"** at SEIU0027-90.[2] The charges Kisling filed with SEIU International demonstrate Kisling's disdain for the staff Mancini had hired, as she specifically included a charge against Mancini for giving offers of employment "to Alexander Roche, Dana Gentry, Peter Nguyen, Andrea Bond nor Robert Clarke." *Id.* at SEIU0035. In the charges against Kisling filed by Local 1107 Executive Board member Amelia Gayton, Ms. Gayton outlines Kisling's harassment of Plaintiff Gentry in detail: "Kisling violated subsection 13 by attempting to prevent Communications Director Dana Gentry from publishing the SEIU Nevada "Local Matters" news magazine as approved by President Mancini. This action subjected the local to both financial and political harm." *Id.* at SEIU0041. "On two occasions, Kisling directed Dana

[2] This document was filed by the SEIU and Local 1107 Defendants in the *Garcia* case and is, therefore, authenticated by admission of the Defendants. It also includes statements of Local 1107 officers authorized to speak on behalf of the union, constituting statements of a party opponent.

Gentry to interrupt her holiday travel unnecessarily to go back to the office and deal with non-essential work. This constituted an abuse and disrespect of staff." *Id.*

> Kisling has also failed on multiple occasions to complete tasks that she takes on or has promised to complete for the union. On July 14, 2016, she offered to provide to Dana Gentry names of Clark County contacts to disseminate a newsletter. The following day, she refused to do so and to Ms. Gentry to get the information from President Mancini, who she know was driving to California. In August, 2016, Kisling offered to arrange a site visit to the new SEIU offices so that Gentry could do a story on it for the news magazine, she failed to do so. Instead, she offered to write the story herself, which Kisling also failed to do . These misbehaviors caused unnecessary delay in the operations of the local and constitute nonfeasance by Kisling as an officer of the union.

Id. at SEIU0042.

Emails between Plaintiff Gentry and Kisling outline her harassment before the defamation occurred as well. *Id.* at SEIU0066-77. Kisling's harassment ultimately prompted Plaintiff Gentry to send a formal email to Local 1107 President Mancini requesting an investigation into Kisling over her harassment, which was sent just a few hours before Kisling's report was presented to the Local 1107 Executive Board on August 31, 2016. *Id.* at SEIU0072. Kisling's harassment of the Local 1107 staff erupted in the incident at the Local 1107 union hall between Kisling and Peter Nguyen. *See* Pltfs' APPENDIX000028. The SEIU International Hearing Officer Nieters, and SEIU International President Henry described Kisling's actions as "appalling conduct" and was described as:

> "yelling," "shouting," "out of control", verbally attacking Brother Nguyen, approaching "within inches" of him, putting her finger in his face, swinging her arms around, stomping, following him from one conference room to another to his office, trying to force herself into the room he occupied, and ordering him to "get out of my union hall."11 According to her credible testimony, Sister Gayton twice physically inserted herself between the combatants out of a professed fear that Brother Nguyen was in danger of violence from Sister Kisling, and she was not alone in fearing physical harm.

Id.

Kisling harbored malice towards the entire Local 1107 staff hired by Mancini, and nearly every single Local 1107 staff member filed formal complaints against Kisling for her appalling and malicious conduct, including Plaintiff Gentry. *See* **Ex. 7,** at SEIU0047-63. After this incident

Kisling called an emergency board meeting to request the Local 1107 Executive Board grant her the authority to terminate Local 1107 staff while Mancini was on vacation, which the Board denied. *See* Pltfs' APPENDIX000028-29.

At the August 31, 2016 Local 1107 Executive Board meeting, after Plaintiff Gentry requested an investigation into Kisling for her harassment, Kisling presented her report to the Local 1107 Executive Board that they should be concerned about: (1) "Dana Gentry – Excessive spending, concerns of alcohol use while at work, and $3000;" (2) "Directors are 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;" (3) "Co – Mingling of Funds (Credit Card Statements of Dana and Peter)." *See* Pltfs' APPENDIX000158-162. These representations were presented as facts, not merely concerns. They were at least negligent, as Defendants make no attempt to dispute that Kisling did not conduct an investigation into these issues before making the allegations to the Local 1107 Executive Board, and the claims were made after nearly every single Local 1107 staff member, including Plaintiff Gentry, filed complaints against Kisling.

The evidence of Kisling's malice is indisputable. For this reason, even if a conditional privilege applied it is rebutted by the clear evidence of malice. However, the conditional privilege does not apply because Kisling published the statements to third parties who did not have an interest in the matter. *See* Pltfs' APPENDIX001246. Grillo clearly and credibly testified that she told Kisling to take her report and concerns to Local 1107 attorney Michael Urban "[b]ecause it wasn't International business; it was internal union business." *Id.* The law on common interest privilege is clear, the publication must be "made to a person with a corresponding interest or duty." *Witherspoon*, 657 P.2d at 105. Kisling's publication to Grillo was not a publication to someone with a corresponding interest or duty "[b]ecause it wasn't International business; it was internal union business." *See* Pltfs' APPENDIX001246. For this same reason, which the Local 1107 Defendants have failed to dispute, the "internal business communications" privilege also does not apply. *See* L1107 Defs' Opp., 11/12/19, at 14:14-27. Local 1107 itself argued that SEIU International was a third party who could not be held liable for the defamation. They cannot now

walk back that argument to argue that SEIU International was not a third party for publication purposes.

Contrary to Defendants argument that Kisling was required by law to report her defamatory statements, there is no law requiring a union official to defame an employee the official does not like. The Local 1107 Defendants have presented no evidence, and no issue of material fact regarding Kisling's state of mind when she made the allegations against Plaintiff Gentry. The wealth of evidence produced in this case demonstrates that Kisling was hostile to all the Local 1107 staff, including Gentry, and maliciously sought Plaintiffs' terminations through the Board because, as the SEIU International Hearing Officer put it, Kisling's actions were "a blatant attempt to aggrandize to herself the authority of Sister Mancini long enough to rid herself of …staff member[s] who had long been a thorn in her side." *See* Pltfs' APPENDIX000028. Without evidence that Kisling actually believed the allegations she was making were true, rather than SEIU International's conclusion that Kisling was simply motivated by a desire to terminate staff she did not like, there is no issue of material fact on the first three elements of Plaintiff Gentry's defamation claim and Plaintiff is entitled to summary judgment as a matter of law.

F. Preemption Does Not Apply Because No Elected Union Official Terminated Plaintiffs' Employment.

This is a Nevada state Court case, and this Court is bound by Nevada law and the Nevada Supreme Court's rulings. Defendants' preemption argument relies on the unfounded presumption that the Nevada Supreme Court has not ruled on labor management preemption. This presumption is incorrect. The Nevada Supreme Court has not issued the same ruling as the California Supreme Court on the nonexistent LMRDA preemption issue they advance here, but the Nevada Supreme Court has ruled on labor-management preemption on numerous occasions and has consistently declined to preempt Nevada law based on federal labor law when there is no express directive by Congressional to preempt state law. "**[P]re-emption should not be lightly inferred**…since the establishment of labor standards falls within the traditional police power of the State." *W. Cab Co. v. Eighth Judicial Dist. Court of Nev.*, 390 P.3d 662, 667 (Nev. 2017) *quoting Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of

the [federal act], it conflicts with none of the purposes of the Act." *Id.* at 668. "Congress did not intend to disturb state laws in existence that set minimum labor standards, but are unrelated in any way to the processes of bargaining or self-organization. 'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.'" *MGM Grand Hotel-Reno v. Insley*, 102 Nev. 513, 518, 728 P.2d 821, 824 (1986) *quoting Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, , 105 S.Ct. 2380, 2398 (1985). This is the law that this Court is bound by, not the California Supreme Court's expansive view of the nonexistent LMRDA preemption doctrine Defendants advance here.

In *W. Cab Co.*, the Nevada Supreme Court analyzed federal preemption as it related to the National Labor Relations Act ("NLRA") and Employee Retirement Income Security Act ("ERISA"). 390 P.3d at 666. The Court noted that the "Although the NLRA contains no express preemption clause, the Supreme Court of the United States has articulated two types of implied preemption," *Garmon* preemption and *Machinists* preemption. *Id.* at 667. The Nevada Supreme Court preserved Nevada law declining to extend federal preemption in the manner the petitioner requested. In *Insley*, the Nevada Supreme Court noted that Section 301 of the LMRA "does not necessarily preempt every state law claim asserting a right that relates in some way to a provision in a collective bargaining agreement, or that relates more generally to the parties to such an agreement. Congress did not intend to disturb state laws in existence that set minimum labor standards, but are unrelated in any way to the processes of bargaining or self-organization." *MGM Grand Hotel-Reno v. Insley*, 102 Nev. 513, 518, 728 P.2d 821, 824 (1986). The Court declined to extend preemption the way the employer requested. The same principles apply to the Defendants' requests to apply the California Supreme Court's LMRDA preemption doctrine.

Neither the SEIU nor Local 1107 Defendants have explained why enforcing Plaintiffs' contracts conflicts with the democracy concerns, other legislative goals and specific provisions of the LMRDA. In fact, the term "conflict" is not found at all in the Local 1107 Defendants Opposition, and the SEIU Defendants' Opposition includes a single self-serving statement that "Permitting Plaintiffs' claims to proceed would conflict with that clear federal law authority." *See* SEIU Defs' Opp., 11/12/19, at 2:16-17. However, there is no federal law authority that has applied

the Defendants' requested California Supreme Court LMRDA preemption doctrine other than federal district courts sitting in California, which are bound by the decision when ruling on matters of California law. In their response the Defendants turn to federal LMRDA case law.

Defendants assert that the "LMRDA preemption includes more than Plaintiffs' single focus on democratic governance of unions; it includes protecting union members." *See* L1107 Defs' Opp., 11/12/19, at 7:1-22. However, none of the case law cited by the Local 1107 Defendants supports that argument. The Defendants misrepresent the holding of the new case they cite to in support of their preemption defense: *English v. Service Employees International Union, Local 73*, 2019 WL 4735400, at *4 (N.D.Ill., 2019). *Id.* First, nowhere in the *English* does the Court ever say that "protecting union members" is a separate basis for finding preemption separate from democracy concerns because *English* is not a preemption case. Preemption is not referenced anywhere in the *English* decision. *Id.*

Defendants assert that the *English* Court rejected "the elected vs. appointed argument now advanced by Gentry and Clark." *Id.* This is not the case. In *English*, the plaintiffs were previously elected officers of Local 73 who were removed from office upon imposition of an emergency trusteeship. *Id.* at *7. However, after imposition of the trusteeship, the *English* plaintiffs retained their employment with the local union, and some of the former executive board officers were appointed by the trustees to appointed positions, and thereafter, the plaintiffs openly opposed the trusteeship by running against the trustee in upcoming election. *Id.* "Plaintiffs disagreed with the policies, direction, and management of Local 73 under Polyac's trusteeship, and, while the trusteeship was still in place, plaintiffs independently formed a slate of candidates to campaign for election to leadership positions in the next Local 73 election." *Id.* at 2-3. The *English* plaintiffs were subsequently terminated for not supporting the trusteeship. *Id.* The *English* Court held that the "flaw in plaintiffs' reasoning" was that "at the time of their suspension and termination, plaintiffs were not elected officials in Local 73." *Id.* at 9. Thus, their LMRDA arguments pursuant to *Sheet Metal Workers' International Association v. Lynn*, 488 U.S. 347, 355, 109 S. Ct. 639, 102 L. Ed. 2d 700 (1989) was misplaced, and the fact that the employees were elected officers of the

staff union had "little to do with the goal of 'ensur[ing]' that Local 73, the larger entity, is 'democratically governed, and responsive to the will of the union membership.'" *Id.* at 9-10.

The *English* holding was centered on the LMRDA claims of the former officers, and specifically, the part of the *Finnegan* holding that "LMRDA…does not 'establish a system of job security or tenure for appointed union employees.'" *Id.* at 12 *citing Finnegan v. Leu,* 456 U.S. 431, 432 (1982); *Vought v. Wis. Teamsters Joint Council No. 39*, 558 F.3d 617, 621 (7th Cir. 2009). The distinction between *English* and this case is clear when you look at the *English* Complaint. *See English* Complaint, attached as **Exhibit "8,"** at 4 ¶10. Upon imposition of the Local 73 trusteeship, the plaintiffs were "stripped" of their elected positions by the trustees "and demoted to" appointed positions as directors. *Id.* at 4 ¶10, 13-14 ¶63. In *English*, the SEIU defendants made support for the trusteeship a "condition of employment for individuals who wish to work for the Local Union **in appointed staff positions while in trusteeship**." *Id.* (emphasis added). The plaintiffs in the *English* case were appointed *by the trustees* to *appointed* local union positions. The *English* case is obviously distinguishable because here Plaintiffs were not appointed to their positions with Local 1107. Rather, they were local union professional staff hired the same way as any other rank and file Local 1107 employee was prior to imposition of the trusteeship. The *English* decision barred the LMRDA claims pursuant to *Finnegan* because the plaintiffs were union-member employees in appointed positions, who were appointed by the trustees, and they openly opposed the trusteeship. The former officer plaintiffs did not have LMRDA claims pursuant to *Finnegan* because the LMRDA does not "establish a system of job security or tenure for appointed union employees." *Finnegan*, 456 U.S. at 438.

The *English* case is not an LMRDA preemption case. The *English* case is an LMRDA case involving whether a union-member employee may seek redress pursuant to Title I of the LMRDA for discharge from appointed union employment. Indeed, the *English* Court held that "the LMRDA does not provide plaintiffs with a cause of action against defendants arising out of their suspension and termination. Because they fail to state a claim, their LMRDA claims are dismissed." *English*, No. 18 C 5272, 2019 U.S. Dist. LEXIS 167471, at *13. The Defendants cannot cite to *English* for their preemption argument because it is a Circuit court case does not involve LMRDA preemption.

Id. The entire body of case law cited by the Local 1107 and SEIU Defendants in support of their state law preemption defense focuses on union democracy concerns, not "protecting union members." *See* L1107 Defs' Opp., 11/12/19, at 7:1-22. Defendants have not pointed to a single case preempting a state law wrongful termination claim that cited to anything other than the LMRDA's democracy concerns and rights of elected union officials, and without such a case, their preemption defense fails.

Defendants' position is further undermined by the conclusion of the *English* Court that the collective bargaining agreement ("CBA") breach of contract claims by the staff were, in fact, actionable. The *English* Court noted that the SEIU Defendants requested dismissal of the CBA claims, which were considered preempted by Section 301 of the Labor Management Relations Act ("LMRA"). *English*, No. 18 C 5272, 2019 U.S. Dist. LEXIS 167471, at *13-18. The Court's reasoning for dismissing the CBA claims was not that the claims were not actionable, but rather because the plaintiffs' "allegations are sketchy, containing virtually no factual details other than the bare fact that the [staff] union did not pursue plaintiffs' grievances." *Id.* at *16. "Defendants ask for a dismissal without leave to amend, **but that result would be overly harsh with respect to plaintiffs' breach of contract claims**. Plaintiffs' LMRDA claims are doomed, for the reasons the Court has explained above, **but the Court cannot say the same for 'certain' for the breach of contract claims**, which plaintiffs may be able to replead in accord with this Opinion and the Federal Rules of Civil Procedure." *Id.* at 17-18 (emphasis added).

Defendants' citation to *Vought* is similarly misguided. 558 F.3d at 618. In *Vaught*, the plaintiffs "Vought and Alexander worked as appointed business agents for Local 662 in Eau Claire, Wisconsin." *Id.* "At the time, James Newell was the Secretary-Treasurer, the union official with the most authority in the Local. But in a matter of months, all three would be on the outside looking in, **removed by new leadership** that viewed them with suspicion and distrust." *Id.* The *Vought* case does not involve a trusteeship. *Id.* Rather, it involves a union leader to obtained an elected union position by default based on operation of the union constitution when the elected Secretary-Treasurer was removed by a Joint Council. *Id.* at 619. "As a result, Reardon became the acting Secretary-Treasurer until the Local 662 Executive Board could meet and decide upon a permanent

replacement. Reardon didn't take long to exercise his new-found power. The same day he was tapped for the job, he fired Vought as a business agent." *Id.*

In *Vought* the person doing the firing still occupied an elected union position. It just so happened that they had not been elected to that position because the prior occupant had been removed and the official ascended to the position by default. *Id.* The union was not in trusteeship and was still democratically governed. Further, the *Vought* Court expressly noted "It is hard to see how democracy is furthered by allowing someone like Reardon, an unelected leader, to fire a business agent." *Id.* at 622. The Court ruled, however, "these observations do not necessarily mean Vought has a claim. First, there is nothing in the LMRDA that says he does. Second, despite the difference between this case and the *Finnegan* line, ruling against Vought does not run afoul of the controlling precedent." *Id.*

> Ultimately, the viability of Vought's claim "must be judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed, and responsive to the will of the union membership as ex-pressed in open, periodic elections.'" *Id.* at 354 (quoting *Finnegan*, 456 U.S. at 441). Though we doubt the termination in this case advanced this objective, we do not believe it thwarted it. And we do not have to agree with the decision to force out Vought to uphold it. 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. 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. at 623.

Here, Nevada law states that Plaintiffs have a claim. Neither *Vought* nor *English* are LMRDA preemption cases, so neither can be used as a basis for extending a preemption doctrine that has not been adopted in Nevada to state claims by non-appointed union employees with for cause contracts. Defendants seek summary judgment by misdirection. They ask this Court to apply *Screen Extras Guild*, a California Supreme Court case crafting an LMRDA preemption doctrine that has not been adopted by any federal Court not bound by the decision because they sit in California. When Plaintiffs pointed out that the *Screen Extras Guild* LMRDA preemption doctrine

has only been held to apply to elected union officials terminating employees, Defendants misdirect the Court's attention to LMRDA precedent that does not involve preemption.

The *Vought* and *English* cases were rulings relating to whether an appointed union-member employee had a claim under the LMRDA, not whether the LMRDA preempted nonmember, unappointed employees claims under state law pursuant to a for cause employment contract. The Defendants want this Court to apply the *Screen Extras Guild* Court's analysis of *Finnegan* and *Bloom* to find preemption. That preemption doctrine and all the cases where a California court has ever applied it has relegated the doctrine to elected union officials because of democracy concerns of the LMRDA. It does not apply to unelected trustees. Because there is no federal precedent concluding that Plaintiffs' claims are preempted, and Defendants have pointed to no state cases finding LMRDA preemption where that doctrine applied to an unelected union official, the argument must be rejected regardless of the conclusion in *English* and *Vought* that upholding the termination of an appointed union-member employee does not offend LMRDA precedent. This case does not involve any LMRDA claims. Plaintiffs were not appointed union employees. Neither *English* nor *Vought* apply to the facts and law of this case.

Defendants' entire analysis of this case law rests on misrepresentations of the holdings. Defendants assert that in "*Vought*, an unelected union leader terminated employment contracts of union business agents." *See* L1107 Defs' Opp., 11/12/19, at 8:15-21. This is objectively a misrepresentation of the *Vought* case. The Business Agents in *Vought* were not alleged to have employment contracts. *See generally Vought*, 558 F.3d 617. In fact, the term "contract" does not appear even once in the *Vought* holding. *Id.* Again, this is because *Vought* was an LMRDA case, not a breach of contract case. Defendants argue that the *English* holding "means that the LMRDA's trusteeship and federal labor policy preempt the Plaintiffs' state law claims." *See* L1107 Defs' Opp., 11/12/19, at 8:1-3. This is also objectively false, as the *English* Court's preemption ruling was based on the LMRA not the LMRDA, and the *English* Court did not conclude that any state law claims were preempted. Further, the *English* Court found that the plaintiffs could state a claim for breach of an employment contract, the CBA. In sum, none of the new case law the Defendants have cited rebuts Plaintiffs' Motion for Partial Summary Judgment on the preemption issue for

lack of termination by an elected union official. As such, because Defendants have not rebutted the argument, summary judgment in Plaintiffs' favor on the preemption defense is warranted.

G. Plaintiffs Have Not Argued That Congress Acted Arbitrarily Or Capriciously In Protecting Union Members At The Expense Of Appointed Union Officials.

Defendants assert that Plaintiffs argued "that Congress acted arbitrary and capricious in protecting union members at the expense of appointed union employees." *See* L1107 Defs' Opp, 11/12/19, at 9:7-8. Plaintiffs have made no such argument. The fact is that the Defendants' entire preemption argument rests on conflict preemption, which is a form of preemption that is applied when Congress has not expressly preempted a field of law. *See* Pltfs' MPSJ, 10/30/19, at 20:7-21:22. Congress did not act arbitrarily or capriciously in protecting union members by preempting state law causes of action for breach of employment contracts with unions for one simple and obvious reason, Congress did not preempt state law causes of action for breach of employment contracts with unions when it passed the LMRDA at all. It is only the California Supreme Court that has applied the expanded LMRDA preemption doctrine Defendants request here, not the federal courts, and certainly not Congress. Once again, the LMRDA expressly disclaims preemption in six separate anti-preemption statutes. *See* 29 U.S.C. §§ 413, 466, 501, 523, 524, 524(a). This Court is tasked with determining if conflict preemption applies. It is arbitrary and capricious to apply it to this case because Congress expressly disclaimed preemption (*id.*) and substantially identical contracts to those Plaintiffs seek to enforce here are, without question, enforceable under the law and precedent the Defendants have cited.

Defendants also seek to rely on a split between the federal Circuit Courts regarding whether loss of union membership upon termination of a union-member employee from an appointed position gives rise to an LMRDA claim. The *Bloom* Court expressly held that "[a] union *employee* who is discharged **in a way that does not affect his rights as a union *member* has no cause of action under section 412.**" *Bloom v. Gen. Truck Drivers Union, Local 952*, 783 F.2d 1356, 1359 (9th Cir. 1986) (emphasis added). If after termination the member retains "all the rights and privileges of union membership he had had before…" such an "indirect burden on membership rights…is insufficient to state an LMRDA claim." *Id. citing Finnegan*, 456 U.S. at 440-42. "Without some infringement on his rights as a union member, Bloom does not state an action under

sections 411 and 412, despite his artful pleading." *Id.* In contrast, if union membership is affected, the member has a claim under the LMRDA. *Id.*

Defendants now ask this Court not to apply the rule in *Bloom*, but instead apply the Seventh Circuit's rule that "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*, 558 F.3d at 622. These holdings are at odds, representing a split between the Ninth Circuit and the Seventh Circuit on whether a union-member employee who is terminated and loses membership with the union has a claim under the LMRDA. *Id.* The *Dean* case is irrelevant to this argument because such an argument was not advanced in that case. *Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D.Mich. Sept. 18, 1989).

In sum, none of the new case law and arguments advanced by the Defendants undermines Plaintiffs' arguments on summary judgment. The democracy concerns of the LMRDA are not at issue in this case, and for that reason preemption does not apply. Defendants' entire defense strategy can be succinctly stated as follows: "Because my client is union they should not be accountable for their unlawful conduct." Defendants make almost no arguments to the merits of this case instead requesting this Court invalidate every Nevada union employees' for cause contracts with their union employers based on the California Supreme Court's "**solitary interpretation regarding 'the union democracy concerns of LMRDA**.'" *Shuck v. Int'l Ass'n of Machinist & Aero. Workers*, Dist. 837, No. 4:16-CV-309 RLW, 2017 U.S. Dist. LEXIS 31992, at *2-5 (E.D. Mo. Mar. 7, 2017). This Court should create Nevada law stripping Nevada employees of their negotiated contract rights to exempt union defendants from the consequences of their unlawful conduct without Congressional directive or the United States Supreme Court expressly instructing it to do so. As such, summary judgment in Plaintiffs' favor on the preemption defense is warranted.

II. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully requests this Court **GRANT** their Motion for Partial Summary Judgment.

Dated this 30th day of November, 2019.

Respectfully submitted,

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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

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' REPLY IN SUPPORT OF 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 submit this *Reply in Support of Motion for Partial Summary Judgment.*

DATED this 18th day November, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

The Local 1107 Defendants have advanced several frivolous arguments in their opposition to Plaintiffs' Motion for Partial Summary Judgment that this Court must reject. First, the "Local 1107 Defendants object to the 1272 pages of unauthenticated pages of information attached to Plaintiffs' Motion," but note that most are self-authenticating. Defendants argue that "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." *See* L1107 Defs' Opp., 11/12/19, at 2:24-27. Second, Defendants again argue preemption, this time focusing on a recently decided case: *English v. Service Employees International Union, Local 73*, 2019 WL 4735400, at *4 (N.D.Ill., 2019). *Id.* at 7:1-9:6. However, Defendants misrepresent the holding of the *English* case, which actually supports the rejection of their preemption argument. Third, Defendants misrepresent that Plaintiffs argued in the Motion for Partial Summary Judgment that "Congress acted arbitrary and capricious in protecting union members at the expense of appointed union employees is wrong." *Id.* at 9:7-9. Plaintiffs made no such argument. Rather, Plaintiffs have argued that the California Supreme Court's inference that federal case law preempts state causes of action for breach of contract is arbitrary and capricious. Fourth, Defendants argue, without pointing to evidence, that Plaintiffs were terminated "for legitimate organizational purposes." *Id.* at 11:7-12:4. Fifth, Defendants argue based on double hearsay that Kisling did not accuse Plaintiff Gentry of drinking alcohol at work or stealing money. *Id.* at 12:5-13:14. Finally, Defendants again argue common interest and business communication privilege, but fail to address Kisling's publication of the defamation outside of Local 1107. Each of these arguments are meritless and will be discussed in detail below.

A. Authenticity Of Documents.

Defendants argue that Plaintiffs were required to argue the authenticity of each page of the "1272 pages" of documents included in Plaintiffs' Appendix. This is not the case, and Defendants do not cite to any authority for this proposition. "Authentication is a basic prerequisite to the admission of evidence….Under NRS 52.015(1), authentication of a document requires evidence

or some other showing 'that the matter in question is what its proponent claims.'" Sanders v. Sears-Page, 2015 Nev. App. LEXIS 8, *26, 354 P.3d 201, 210, 131 Nev. Adv. Rep. 50 *citing* Nev. R. Stat. 52.015. "Authentication relates to relevancy because 'evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims.'" *Id. quoting Rodriguez v. State*, 273 P.3d 845, 848 (2012). "NRS 52.025 through NRS 52.105 provide a nonexhaustive list of methods by which a document may be authenticated…As relevant here, NRS 52.025 permits a witness to authenticate a document through testimony "if the witness has *personal knowledge* that a matter is what it is claimed to be.'" *Id. citing* Nev. R. Stat. 52.025.

On summary judgment, however, the non-moving party has the opportunity to "object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Nev. R. Civ. P. 56(c). "[W]hen a party does not object to the inadmissibility of evidence below, the issue is waived and otherwise inadmissible evidence can be considered." *See Clark v. JDI Realty, LLC (In re Cay Clubs)*, 340 P.3d 563, 573-74 (Nev. 2014) *citing Whalen v. State*, 100 Nev. 192, 195-96, 679 P.2d 248, 250 (1984) (considering otherwise inadmissible evidence with respect to a summary judgment because the issue of admissibility was waived for lack of an objection). "All relevant evidence is admissible unless barred by a particular rule of evidence." *Whalen v. State*, 100 Nev. 192, 195-96, 679 P.2d 248, 250 (1984). "The **responsibility for objecting to the admission of incompetent evidence devolves upon the party who seeks its exclusion**." *Id. citing See* NRS 47.040(1)(a). "A rule of evidence not invoked is waived." I *Wigmore on Evidence* 790 (Tiller's Rev. 1983).

In *Whalen*, the respondent had filed a reply witn points and authorities in support of their motion summary judgment. *Id.* The *Whalen* Court noted that the "respondents had the opportunity to object to the trial court's consideration of the document" but "did not do so." *Id.* The respondent then objected to consideration of the document on appeal. "Indeed, as far as we can determine, the district court considered the unauthenticated document in reaching its decision." *Id.* Because the respondent failed to object, the district court apparently considered the supposedly unauthenticated

document. The Nevada Supreme Court considered the objection to the unauthenticated document waived, and reversed the judgment in favor of the appellee. *Id.*

Plaintiffs are not required to provide proof of authentication of evidence until the Defendants object based on a specific evidentiary rule. *Id.* Here, the Local 1107 Defendants have advanced several specific objections to several of the documents Plaintiffs have included in their Motion for Summary Judgment, and advanced only a general objection to the rest. Their failure to specifically object to the admissibility of the other documents via a "particular rule of evidence" constitutes waiver of any objections to that evidence. Even so, Plaintiffs will now address the admissibility of all the documents Plaintiffs have provided in support of their motion for summary judgment. Defendants also object to numerous documents as being hearsay. *See* L1107 Defs' Opp., 11/12/19, at 3:10-27. Hearsay "means a statement offered in evidence to prove the truth of the matter asserted." Nev. Rev. Stat. Ann. § 51.035. However, a statement is not hearsay if:

> 1. The statement is one made by a witness while testifying at the trial or hearing;
> 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
> (a) Inconsistent with the declarant's testimony;
> (b) Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;
> (c) One of identification of a person made soon after perceiving the person; or
> (d) A transcript of testimony given under oath at a trial or hearing or before a grand jury; or
> 3. The statement is offered against a party and is:
> (a) The party's own statement, in either the party's individual or a representative capacity;
> (b) A statement of which the party has manifested adoption or belief in its truth;
> (c) A statement by a person authorized by the party to make a statement concerning the subject;
> (d) A statement by the party's agent or servant concerning a matter within the scope of the party's agency or employment, made before the termination of the relationship; or
> (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Id.

As the Defendants recognize, many of the documents Plaintiffs have included are self-authenticating. However, Defendants have advanced specific evidentiary objections to the

admissibility of Plaintiffs' Exhibit 3-4, and 6-9. *See* L1107 Defs' Opp., 11/12/19, at 3:10-26. The documents Plaintiffs have provided in support of their Motion for Partial Summary Judgment are, indeed, authentic. The majority of these documents having been authenticated previously in this case or other cases.

For example, the Local 1107 Defendants already admitted to the authenticity and admissibility of the Termination Letters, the Trusteeship Order, and the Local 1107 Constitution in their responses and counter motions for summary judgment filed back in October 2018. *See* L1107 Defs' Opp and Ctr MSJ, 10/11/18, at 2:26-27, 10:26-27; *see also* SEIU Intl Opp and Ctr MSJ, 10/11/18, Exhibit B, at 1-74. The contracts that Plaintiffs included in the Motion as Exhibits 1 and 2 were also admitted to be authentic by the Defendants via Defendants' responses to Plaintiffs' Firs Requests for Admission. *See* Pltfs' Exhibit 13, at 3:2-9. The documents attached as Plaintiffs' Exhibits 1, 2, 10, 11, and 18 have, therefore, already been authenticated by Defendants' prior admissions. Plaintiffs' Exhibits 13, 14, 15, 16, 20, 23, and 24 are the Local 1107 and SEIU Defendants responses to Plaintiffs' written discovery requests. They are on the defense counsel's formatted pleading paper, they were electronically served via the filing system, are signed by defense counsel and contain a certificate of service. These documents cannot be disputed as authentic.

When this case began the parties stipulated that "they will not duplicate discovery exchanged in the consolidated federal court litigation case of *Garcia, et al. v. Service Employees International Union, et al.*, 2:17-cv-01340-APG-NJK" (the "*Garcia* case"). *See* JCCR, attached as **Exhibit "1,"** at 6:20-23. Indeed, the Plaintiffs' view in the JCCR was that "discovery disclosed in other related cases should not be duplicated," and Defendants concurred, and added that such discovery would be subject to "federal court protective orders." *Id.* at 9:7-14. Discovery is not limited to disclosure of documents, and encompasses both documents, written discovery requests and deposition testimony. Many of the Exhibits Plaintiffs have used in their Motion for Summary Judgment were authenticated already in the *Garcia* case and are, therefore, admissible.

The Internal Charges Report and Recommendation ("ICRR"), which Defendants object to, was filed by the Local 1107 Defendants in the trusteeship case. *See* Pltfs' Exhibit 3, at RG0005-

0031; *Garcia et al v. SEIU et al.*, Case 2:17-cv-01340-APG-NJK (ECF NO. 271-18), at RG0005-0031. The document is signed by the SEIU International Hearing Officer, Carol Nieters, an agent of the Defendant SEIU. *See* Nev. Rev. Stat. § 52.055 ("Appearance, contents, substance, internal patterns or other distinctive characteristics are sufficient for authentication when taken in conjunction with circumstances.") Defendant SEIU International President May Kay Henry also provided a sworn declaration in the *Garcia* case attesting to the authenticity of this document. *See* Henry Declaration, *Garcia* case (ECF No 271-5), attached as **Exhibit "2,"** at 3:2-21. Finally, the SEIU International Defendants have included their own copy of the Nieters' reports and do not dispute their authenticity. *See* SEIU Appendix Fitzpatrick Decl., Exhibit C, at 158-85. The document has already been authenticated.

The Local 1107 Defendants object to the admissibility of this document as hearsay and containing hearsay within hearsay, and improper opinion testimony. However, Henry declared in the *Garcia* case that she "decided to adopt Nieters' report and recommendation in its entirety" making the report a statement of a party opponent outside of the hearsay rule. *See* **Ex. 2,** at 3:2-21. Nieters is also an agent of SEIU International, making her report also a statement of a party opponent. *Id. see also* Nev. Rev. Stat. § 51.035(3). Defendants' argument that the report contains hearsay within hearsay is also meritless. Plaintiffs have included the Internal Charges Hearing Transcript attached as Plaintiffs' Exhibit 9, which includes the testimony referenced in the report that Plaintiffs assume the Local 1107 Defendants are characterizing as hearsay within hearsay.

The internal charges hearing transcript has also already been authenticated by the Defendants, as the SEIU International and Local 1107 Defendants both filed this document in the *Garcia* case with the declaration of Defendant Henry attesting that "A true and correct copy of the transcript of those proceedings, followed by select exhibits from the charges proceeding, is attached hereto as Exhibit 'F.'" *Id.* at 2:20-23. All the witness testimony from the Internal Charges Hearing was "GIVEN UNDER OATH" before a court reporter. *See* Pltfs' Exhibit 9, at SEIU0201:28. The witness testimony Plaintiffs cited to in their Motion, and which is referenced in the ICRR, was that of Local 1107 Treasurer, Shiela Grain, an officer of Local 1107 authorized to speak on behalf of Local 1107. *Id.* at SEIU0364:2-365:5. Indeed, as the Hearing Officer clearly

states, Ms. Grain was giving testimony "AS THE TREASURER OF THE UNION." *Id.* This is a sworn statement of a party opponent, and a statement made on behalf of Local 1107 by an officer authorized to "speak for" the organization. *See* Nev. Rev. Stat. § 51.035(3); *see also Palmer v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943, 961, 59 P.3d 1237, 1248 (2002). It is not hearsay.

Finally, Plaintiffs' Exhibit 27 are the minutes from the August 31, 2016 Local 1107 Executive Board meeting that was filed by the SEIU Defendants in the *Garcia* case. *See Garcia* case, (ECF No. 174). Plaintiffs include the declaration of SEIU General Counsel Steve Ury filed in the *Garica* case attesting to the document's authenticity. *See* Ury Declaration, attached as **Exhibit "3,"** at 1-19. Like the other documents from the *Garcia* case, this document is already authenticated. The SEIU Defendants argue that this document contains hearsay. However, all the individuals whose statements were recorded in this document were officers of Local 1107 or SEIU authorized to speak on behalf of their respective organizations. The document, therefore, contains statements of a party opponent and are not hearsay. *See* Nev. Rev. Stat. § 51.035(3).

Plaintiffs' Exhibit 4 is an email chain between Local 1107 President Cherie Mancini, Sharon Kisling, and Local 1107 attorney Michael Urban. Plaintiffs provide the declaration of former Local 1107 President and recipient of this email, Cherie Mancini, confirming its authenticity. *See* Mancini Declaration, attached as **Exhibit "4,"** at 1:22-27. Mancini has personal knowledge of the facts and circumstances surrounding the matters at issue in this case and the documents Plaintiffs have provided in support of their Motion for Summary Judgment, and has attested to the authenticity of Plaintiffs' Exhibits 4 (Urban email), 5 (Kisling Report), 7 (Mancini's email), 8 (Urban Report), and 27 (Minutes of August 31, 2016 Board Meeting). *Id.* at 2:1-4:4. These documents are, therefore, authentic. Plaintiffs' Exhibit 5, the Kisling Report, was presented to the current Local 1107 President, Brenda Marzan, at her deposition and she clearly authenticated the document. *See* Pltfs' Exhibit 5, at 16:1-19; *see also* L1107 Appendix, at 240-44. The Local 1107 Defendants have also produced their own copy of the Kisling and Urban Reports admitting to their authenticity. *Id.* at 240-48.

The Defendants' objections to Plaintiffs use of the Kisling Report to prove Kisling's defamation of Plaintiff Gentry are also meritless. Defendants argue that "Plaintiffs assert that the document's contents prove that 'Kisling accused Plaintiff Gentry of 'Excessive spending, concerns of alcohol use while at work….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* L1107 Defs' Opp., 11/12/19, at 3:14-18. However, Defendants ignore entirely the different types of defamation. "any false and malicious writing published of another is libelous *per se*." *Talbot v. Mack*, 41 Nev. 245, 264, 169 P. 25, 30 (1917). Slander, on the other hand, is a spoken defamatory statement. *Branda v. Sanford*, 97 Nev. 643, 646, 637 P.2d 1223, 1225 (1981). This case involves both libel and slander. The Kisling Report is evidence of Kisling's libelous statements of fact printed in writing about Plaintiff Gentry in her report, which was disseminated to third parties. The audio recording, which is also evidence of Kisling's defamation of Plaintiff Gentry, is evidence of slander, a separate form of defamation. The audio recording cannot be used to prove that Kisling published libelous statements in writing because it was slander, not libel. Both the recording and the Kisling Report evidence different types of defamation, and as such, the audio recording cannot be used as the "best evidence" to prove Kisling's libel of Plaintiff Gentry. Defendants wish to restrict Plaintiffs' defamation claim to Kisling's statements at the August 31, 2016 Local 1107 Executive Board meeting because doing so would better support their privilege defense. However, it is Kisling's libelous report that was taken from the union hall.

The emails between Dee Dee Fitzpatrick, Henry, Luisa Blue and Martin Manteca attached as Plaintiffs' Exhibit 12 were all authenticated by Fitzpatrick at her deposition. *See* Fitzpatrick Deposition, attached as **Exhibit "5,"** at 36:10-37:20. Further, because of the sensitive nature of the Fitzpatrick emails, SEIU International's General Counsel, Steve Ury, provided a declaration, attached as Plaintiffs' Exhibit 26, authenticating these emails and requesting that they be observed as containing confidential information. The NLRB Trial Transcript is produced with several certifications of its authenticity. *See* Pltfs' Exhibit 17, at 161, 336. It contains sworn testimony of party opponents and is thus authentic and not hearsay. The NLRB Decision is self-authenticating,

having been signed by Administrative Law Judge Dickie Montemayor. *See* Pltfs' Exhibit 16, at 16. It is used in support of a purely legal argument that the NSEUSU collective bargaining agreement with Local 1107 has been ruled legally enforceable by the NLRB. Other than that legal issue, Plaintiffs did not use the order to support any factual matter. The same is true for the hearing transcript from the *Cabrera et al v. SEIU et al*, 2:18-cv-304 case. *See* Pltfs' Exhibit 22, at 1-70. The Grillo Deposition transcript is a deposition taken in the *Garcia* case, it is provided with a certification from the report certifying its authenticity. *See* Ptlfs' Exhibit 25, at APPENDIX001264. Pltfs' Exhibit 26 is a declaration from SEIU General Counsel Steve Ury, and is self-authenticating. *See* Pltfs' Exhibit 26, at APPENDIX001266-68. All the documents included in Plaintiffs' Motion for Partial Summary Judgment are authentic and admissible.

B. Matters That Are Not In Dispute.

The Local 1107 Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment fails to dispute the majority of the facts and merits of this case. As such, it is important to highlight was matters the Local 1107 Defendants have failed to dispute to guide the Court's review of the pending motions and this case as a whole. First, the Defendants do not dispute that Local 1107 breached the contracts with Plaintiffs. *See generally* L1107 Defs' Opp., 11/12/19, at 7:1-12:4. Defendants again anchor their argument in preemption because their client breached the contracts. *Id.* The closest the Local 1107 Defendants come to disputing the merits of Plaintiffs' breach of contract claims is found under Defendants' Section 3 where they assert that "Employees with for cause employment contracts may be discharged for legitimate organizational purposes." *Id.* at 11:7-12:4. Defendants do not identify any for-cause basis for Plaintiffs' terminations, and rely on out of state precedent for law that is already established in Nevada. Because Defendants have not disputed that Plaintiffs were not terminated for-cause, and have also not disputed that their client breach the contracts by failing to permit the appeal before the Local 1107 Executive Board to determine if their terminations were for-cause, there is no issue of material fact on the elements of contractual duty and breach, and Plaintiffs are entitled to summary judgment as a matter of law on those elements of the breach of contract claim.

Defendants have also failed to dispute that Plaintiff Gentry is entitled to summary judgment on the publication element of the defamation claim. Plaintiffs' argued that "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* Pltfs' MPSJ, 10/30/19, at 31:1-20. Defendants fail to address Kisling's publication of the defamatory statements to third party SEIU International employees Grillo and Ury. *See generally* L1107 Opp., 11/12/19, at 1-15. Defendants failure to dispute this issue entitles Plaintiff Gentry to summary judgment on the publication element of the defamation claim, which renders Defendants' arguments of privilege meritless.

C. <u>Kisling's Statements About Plaintiff Gentry Were False.</u>

Defendants also do not dispute that Kisling's statements about Plaintiff Gentry drinking at work and stealing Local 1107 money were false. *Id.* at 4:8-6:2, 12:5-15:23. Instead, the Defendants advance two frivolous arguments in defense of Kisling's defamation of Plaintiff Gentry. First, Defendants assert that because Kisling used the word "concern" when making the defamatory statements, the statements "cannot be false," and Kisling could not have defamed Plaintiff Gentry. *Id.* at 12:14-27. Defendants define the word "concern" as "a 'matter of interests or importance,' which by its very nature cannot be false." *Id.* This is a bold and absurd position that would create a dangerous precedent in Nevada permitting anyone to lodge malicious defamation against another person with impunity so long as they use the word "concern" first. *Id.* For example, a party could tell someone's employer that they should be concerned about their employee because the employee is stealing money from the employer, and according to the Defendants' analysis, because the party prefaced the false and defamatory statement with the word "concern," "by its very nature [the statement] cannot be false," and thus cannot be actionable for defamation even if the employer fired the employee based on the party's false and defamatory statement that the employee was stealing money. *Id.*

This would turn Nevada's defamation law on its head. Defendants' definition of the word "concern" as a matter of interest or importance to someone is not wholly incorrect.[1] A concern

[1] https://www.merriam-webster.com/dictionary/concern

could be a matter to be of importance to someone. *Id.* When used as a transitive verb, the word "concern" is defined as "to relate to **:** be about" someone or something: "The novel concerns three soldiers. The report concerns global warming." *Id.* A "concern" is also defined as "to bear on" or "to have an influence on **:** involve also **:** to be the business or affair of" someone or something": "The problem concerns us all. This conversation does not concern you." *Id.* A "concern" is also defined as "to be a care, trouble, or distress to" someone or something: "Her ill health concerns me. Her son's frequent tantrums concerned her." *Id.* When used as a noun, a "concern" is defined as a matter of "marked interest or regard usually arising through a personal tie or relationship" to someone: "Their friend's health is a constant cause of concern." *Id.* As a noun, a "concern" is also defined as "an uneasy state of blended interest, uncertainty, and apprehension" to someone: "The actor's sudden collapse on stage caused concern." Also, as "something that relates or belongs to" someone: "It's no concern of yours." *Id.*

Nothing in these definitions means that the matter the speaker is telling the recipient they need to be concerned over renders the matter that supposedly warrants "concern" something that "cannot be false." *See* L1107 Defs' Opp., 11/12/19, at 12:20-22. The word "concern" is used to invoke a reaction, concern, in the person the information is being conveyed to. The use of the word "concern" does not render the matters the speaker is stating the person concerned about unable to be false. Defendants do not cite to anything to support this position, simply making a baseless self-serving argument unsupported by law, fact or reason. Here, Kisling told the Local 1107 Executive Board that they should be concerned about Plaintiff Gentry stealing money and drinking at work. Plaintiff Gentry was not stealing money. Plaintiff Gentry was not drinking at work. The fact that Kisling wanted the Local 1107 Executive Board to be "concerned" about her false and defamatory statements about Plaintiff Gentry does not magically convert the false statement into a statement that "cannot be false." *Id.*

Second, Defendants argue that Plaintiff Gentry cannot establish that Kisling's comments about Plaintiff Gentry drinking at work were false because she did not subpoena the "interns" that supposedly told Kisling that Plaintiff Gentry smelled like alcohol. *Id.* at 13:1-14. To advance this argument, the Defendants mischaracterize Plaintiff Gentry's testimony to rely on hearsay evidence

to prove the matter asserted that Kisling was told by interns that Plaintiff Gentry smelled of alcohol. *Id.* at 12:14-27. Defendants argue that "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.'" *Id.* Defendants rely on double hearsay for this argument. Defendants asked Plaintiff Gentry:

> Q. Do you know anybody who actually heard her utter those words?
>
> A. Yes. People came in to me and told me that she said -- not that I was drunk at work, but that her people -- she had some people working there, some interns -- not interns. 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**. That's what she said at the meeting, that I smelled of alcohol, which I was like, That's quite amazing.
>
> Q. So she had taken reports given to her to the executive board?
>
> A. Yes
>
> Q. Okay.
>
> A. -- well, that is what she said. **I have no idea of the validity of that**. She's the one who made the statements.

See Full Gentry Transcript, attached as **Exhibit "6,"** at 102:1-103:3 (emphasis added).

Gentry did not hear the staff tell Kisling that she smelled of alcohol. Gentry did not testify that "Kisling was merely reporting concerns received from others not making allegations of actual fact." *See* L1107 Defs' Opp., 11/12/19, at 12:21-27. Gentry testified that some unidentified "[p]eople" told her that Kisling told them that some "part-time staff people that she was trying to get jobs for" "allegedly" told Kisling that Gentry smelled like alcohol at work. This is hearsay within hearsay that is not within any exception and is not admissible. Kisling has not appeared to give testimony in this case despite having been noticed of her deposition, which she failed to attend. *See* Decl. of Counsel, at 1. Defendants argue that:

> 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.

Id. at 13:1-8.

This argument cannot be considered because Defendants admittedly do not cite to any admissible evidence in support of this defense. Truth and substantial truth are defenses to a defamation claim. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002). However, it is up to the Defendants to actually argue and prove that the defamatory statements made by Kisling were true. *Id.* Defendants do neither. Defendants do not argue that Kisling's statements about Plaintiff Gentry were true or substantially. *See* L1107 Opp., 11/12/19, at 13:1-8. Rather, Defendants argue that Gentry cannot establish that unnamed individuals who supposedly told Kisling that Gentry smelled like alcohol at work did not believe that she smelled like alcohol at work. *Id.* Defendants have presented no admissible evidence that Kisling was actually told by Local 1107 staff that Gentry smelled of alcohol. Defendants' argument is entirely based on inadmissible double hearsay statements that Kisling was actually told others what she ultimately told the Local 1107 Executive Board. If the Defendants wished to use the "interns" as their defense that Kisling reasonably relied on the statements of staff about Gentry smelling like alcohol, it was their burden to subpoena those witnesses to give that testimony. Without that testimony, Defendants' argument that unnamed staff told Kisling that Plaintiff Gentry smelled like alcohol at work is nothing more than speculation based on inadmissible double hearsay statements.

Plaintiff Gentry has provided evidence that she was not drinking at work and did not smell of alcohol. Plaintiff Gentry testified under oath credibly that the last time she remembers even having even one drink of alcohol "was 2007 in Carson City. I had a frozen daiquiri. I don't drink at all." *Id.* at 33:18-20. Defendants have done nothing to discredit Plaintiff Gentry's sworn deposition testimony. Further, negligence is an element of defamation. "The general elements of a defamation claim require a plaintiff to prove: '(1) a false and defamatory statement by [a] 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.'" *Pegasus v. Reno*

Newspapers, Inc., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). Kisling's presentation to the Local 1107 Executive Board that they should be concerned that Plaintiff Gentry smelled of alcohol at work is defamatory if Kisling was "at least negligen[t]" in making the statement. Even assuming *arguendo* that there were some "interns" that actually told Kisling that Plaintiff Gentry smelled of alcohol at work, Kisling needed to do something to corroborate those statements before going to the Local 1107 Executive Board to seek Plaintiff Gentry and her fellow directors' terminations because of those false claims. Kisling's failure to do so is at least negligent. Defendants do not argue that Kisling went to Plaintiff Gentry before making the accusation, or did any other investigation into the matter before making the defamatory statements about her to the Local 1107 Executive Board and writing a report that included the libelous statements that were ultimately published outside of Local 1107. Kisling was, therefore, at least negligent in making the statements and Plaintiff Gentry is entitle to summary judgment on the defamation claim.

D. Nevada Law Does Not Permit Termination Of A For-Cause Employment Contract For A Legitimate Organizational Purpose.

Defendants have no argument in defense of the merits of this case, and for this reason they request this Court to create new law to exempt their client from the consequences of their unlawful conduct. Defendants argue that "[i]n 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." *See* L1107 Defs' Opp., 11/12/19, at 11:7-19. Defendants cite a Maine Supreme Court case, *Wilde v. Houlton Reg'l Hosp.*, for their argument that an employer can violate a for-cause contract for "organizational purposes." 537 A.2d 1137, 1138 (Me. 1988).

However, in *Wilde*, the employer discharged the "employees for financial reasons," not "organizational purposes." *Id.* The *Wilde* employees had a "contract that includes a 'for cause' provision as **the only limitation** on the employer's right to terminate employment at will." *Id.* The *Wilde* Court held that "an employer's discharge of employees for financial or other legitimate business reasons does not offend 'for cause' language in an employment contract" because, "[a]bsent some clear indication to the contrary, a 'dismissal for cause' provision refers only to disciplinary discharge." *Id.* The Court recognized "that a private employer has an essential

business prerogative to adjust his work force as market forces and business necessity require," and "[i]n the absence of some explicit contractual limitation on the employer's fundamental right to reduce his work force, we refuse to infer such a contractual term." *Id.* The *Wilde* case is clearly distinguishable from this case. Defendants do not argue that Plaintiffs were terminated for financial reasons, nor do they provide any other business necessity as a basis for their terminations. Rather, the Defendants simply wanted to fill the positions with other people and declined to give Plaintiffs any opportunity to work under the trusteeship. Further, Plaintiffs' contracts had an explicit contractual limitation on Local 1107's right to reduce its work force because Plaintiffs for-cause terminations were appealable to the Local 1107 Executive Board. *See* Pltfs' APPENDIX000002-4. Plaintiffs' contracts had an established post-termination procedure that was not followed.

According to Defendants, the Nevada Supreme Court has adopted the same rule "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.'" *Id. citing Southwest Gas Corp. v. Vargas*, 901 P.2d 693, 701, 111 Nev. 1064, 1078 (Nev.,1995). However, Defendants cannot argue that Plaintiffs' terminations were for cause, or for good cause, or for just cause is based on "substantial evidence" because, as the Nevada Supreme Court noted in *Vargas*, the employer is only the "ultimate finder of facts constituting good cause for termination" when there is no "express or implied agreement contracting away its fact-finding prerogatives to some other arbiter." *Id.* at 700.

The Nevada Supreme Court has "emphasize[d], however, that the employer's decision to terminate must be consistent with its contractual prerogatives; the employment contract may subject an employer's termination authority to relevant policy provisions defining or limiting the term 'good cause,' or to defined procedures that the employer must follow prior to termination." *Sw. Gas Corp. v. Vargas*, 111 Nev. 1064, 1075-76, 901 P.2d 693, 700 (1995) *quoting K Mart Corp. v. Ponsock*, 103 Nev. 39, 42, 732 P.2d 1364, 1366 (1987) (employer that summarily fired employee for alleged good cause breached contract stating that if there were any deficiencies in employee's performance, employer would provide assistance and would release employee only

after a series of correction notices and a determination that the performance remained unacceptable); *see also Rulon-Miller v. Intern. Bus. Mach. Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524, 531-32 (Ct. App. 1984) (employee wrongfully terminated for romantic involvement with manager of rival firm where "the right to be free of inquiries concerning her personal life was based on substantive direct contract rights she had flowing to her from [company] policies").

Here, Local 1107 expressly contracted away its fact-finding prerogatives by making Plaintiffs' terminations subject to appeal in a hearing before the Local 1107 Executive Board. *See* Pltfs' MPSJ, Exhibit 1, at Local – 003. Local 1107's failure to conduct that fact finding hearing to determine if the terminations were for cause disentitles them to any argument that Plaintiffs' employment were actually terminated for cause, especially considering the termination letters do not identify any for cause basis for Plaintiffs' terminations. *See* Pltfs' APPENDIX000754-56. The Local 1107 Defendants contracted away the right of the Local 1107 chief executive officer to terminate Plaintiffs' employment, requiring a hearing before the Local 1107 Executive Board to be held before the terminations would be final. Local 1107 failed to conduct that fact finding proceeding, and cannot now argue "legitimate business purpose in the context of the substantive labor" as a basis for the terminations. *See* L1107 Defs' Opp., 11/12/19, at 12:1-4. For these reasons, the Defendants' "legitimate organizational purposes" defense is not based on any relevant law, or material facts or evidence, and Plaintiffs' are entitled to summary judgment as a matter of law.

E. <u>Kisling's Defamatory Statements Were Not Privilege.</u>

"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 v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983) *citing Scarpelli v. Jones*, 626 P.2d 785 (Kan. 1981); *Hamm v. Merrick*, 605 P.2d 499 (Hawaii 1980); Annot., 60 A.L.R.3d 1080, 1084-90 (1974). "Whether a particular communication is conditionally privileged by being published on a 'privileged occasion' is a question of law for the court; the burden then shifts to the plaintiff to prove to the jury's satisfaction that the defendant abused the privilege by publishing the communication with malice in fact." *Gallues v. Harrah's Club*, 87 Nev. 624, 626

n.2, 491 P.2d 1276, 1277 n.2 (1971); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 494 P.2d 1287 (Colo. 1972); *Roscoe v. Schoolitz*, 464 P.2d 333 (Ariz. 1970). "The question goes to the jury only if there is sufficient evidence for the jury reasonably to infer that the publication was made with malice in fact." *Id citing Aspell v. Amer. Contract Bridge League*, 595 P.2d 191 (Ariz.App. 1979); Annot., 60 A.L.R.3d 1080, 1090 (1974). "[A]ctual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity. Reckless disregard for the truth may be found when the 'defendant entertained serious doubts as to the truth of the statement, but published it anyway.'" *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 721-22, 57 P.3d 82, 92-93 (2002). The "test is a subjective one, relying as it does on 'what the defendant believed and intended to convey, and not what a reasonable person would have understood the message to be.' Recklessness or actual malice may be established through cumulative evidence of negligence, motive, and intent." *Id.*

The facts of this case are clear and indisputable. Kisling did not like the staff that Local 1107 President Cherie Mancini had hired and began harassing the Local 1107 staff almost immediately after she was elected Executive Vice President. Plaintiff Gentry outlined Kisling's harassment of her specifically in an email she sent to Cherie Mancini on August 31, 2016, before Kisling defamed her at the August 31, 2016 Local 1107 Executive Board meeting. *See Garcia* Defs' Ex. C to MSJ, attached as **Exhibit "7,"** at SEIU0027-90.[2] The charges Kisling filed with SEIU International demonstrate Kisling's disdain for the staff Mancini had hired, as she specifically included a charge against Mancini for giving offers of employment "to Alexander Roche, Dana Gentry, Peter Nguyen, Andrea Bond nor Robert Clarke." *Id.* at SEIU0035. In the charges against Kisling filed by Local 1107 Executive Board member Amelia Gayton, Ms. Gayton outlines Kisling's harassment of Plaintiff Gentry in detail: "Kisling violated subsection 13 by attempting to prevent Communications Director Dana Gentry from publishing the SEIU Nevada "Local Matters" news magazine as approved by President Mancini. This action subjected the local to both financial and political harm." *Id.* at SEIU0041. "On two occasions, Kisling directed Dana

[2] This document was filed by the SEIU and Local 1107 Defendants in the *Garcia* case and is, therefore, authenticated by admission of the Defendants. It also includes statements of Local 1107 officers authorized to speak on behalf of the union, constituting statements of a party opponent.

Gentry to interrupt her holiday travel unnecessarily to go back to the office and deal with non-essential work. This constituted an abuse and disrespect of staff." *Id.*

> Kisling has also failed on multiple occasions to complete tasks that she takes on or has promised to complete for the union. On July 14, 2016, she offered to provide to Dana Gentry names of Clark County contacts to disseminate a newsletter. The following day, she refused to do so and to Ms. Gentry to get the information from President Mancini, who she know was driving to California. In August, 2016, Kisling offered to arrange a site visit to the new SEIU offices so that Gentry could do a story on it for the news magazine, she failed to do so. Instead, she offered to write the story herself, which Kisling also failed to do . These misbehaviors caused unnecessary delay in the operations of the local and constitute nonfeasance by Kisling as an officer of the union.

Id. at SEIU0042.

Emails between Plaintiff Gentry and Kisling outline her harassment before the defamation occurred as well. *Id.* at SEIU0066-77. Kisling's harassment ultimately prompted Plaintiff Gentry to send a formal email to Local 1107 President Mancini requesting an investigation into Kisling over her harassment, which was sent just a few hours before Kisling's report was presented to the Local 1107 Executive Board on August 31, 2016. *Id.* at SEIU0072. Kisling's harassment of the Local 1107 staff erupted in the incident at the Local 1107 union hall between Kisling and Peter Nguyen. *See* Pltfs' APPENDIX000028. The SEIU International Hearing Officer Nieters, and SEIU International President Henry described Kisling's actions as "appalling conduct" and was described as:

> "yelling," "shouting," "out of control", verbally attacking Brother Nguyen, approaching "within inches" of him, putting her finger in his face, swinging her arms around, stomping, following him from one conference room to another to his office, trying to force herself into the room he occupied, and ordering him to "get out of my union hall."11 According to her credible testimony, Sister Gayton twice physically inserted herself between the combatants out of a professed fear that Brother Nguyen was in danger of violence from Sister Kisling, and she was not alone in fearing physical harm.

Id.

Kisling harbored malice towards the entire Local 1107 staff hired by Mancini, and nearly every single Local 1107 staff member filed formal complaints against Kisling for her appalling and malicious conduct, including Plaintiff Gentry. *See* **Ex. 7,** at SEIU0047-63. After this incident

Kisling called an emergency board meeting to request the Local 1107 Executive Board grant her the authority to terminate Local 1107 staff while Mancini was on vacation, which the Board denied. *See* Pltfs' APPENDIX000028-29.

At the August 31, 2016 Local 1107 Executive Board meeting, after Plaintiff Gentry requested an investigation into Kisling for her harassment, Kisling presented her report to the Local 1107 Executive Board that they should be concerned about: (1) "Dana Gentry – Excessive spending, concerns of alcohol use while at work, and $3000;" (2) "Directors are 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;" (3) "Co – Mingling of Funds (Credit Card Statements of Dana and Peter)." *See* Pltfs' APPENDIX000158-162. These representations were presented as facts, not merely concerns. They were at least negligent, as Defendants make no attempt to dispute that Kisling did not conduct an investigation into these issues before making the allegations to the Local 1107 Executive Board, and the claims were made after nearly every single Local 1107 staff member, including Plaintiff Gentry, filed complaints against Kisling.

The evidence of Kisling's malice is indisputable. For this reason, even if a conditional privilege applied it is rebutted by the clear evidence of malice. However, the conditional privilege does not apply because Kisling published the statements to third parties who did not have an interest in the matter. *See* Pltfs' APPENDIX001246. Grillo clearly and credibly testified that she told Kisling to take her report and concerns to Local 1107 attorney Michael Urban "[b]ecause it wasn't International business; it was internal union business." *Id.* The law on common interest privilege is clear, the publication must be "made to a person with a corresponding interest or duty." *Witherspoon*, 657 P.2d at 105. Kisling's publication to Grillo was not a publication to someone with a corresponding interest or duty "[b]ecause it wasn't International business; it was internal union business." *See* Pltfs' APPENDIX001246. For this same reason, which the Local 1107 Defendants have failed to dispute, the "internal business communications" privilege also does not apply. *See* L1107 Defs' Opp., 11/12/19, at 14:14-27. Local 1107 itself argued that SEIU International was a third party who could not be held liable for the defamation. They cannot now

walk back that argument to argue that SEIU International was not a third party for publication purposes.

Contrary to Defendants argument that Kisling was required by law to report her defamatory statements, there is no law requiring a union official to defame an employee the official does not like. The Local 1107 Defendants have presented no evidence, and no issue of material fact regarding Kisling's state of mind when she made the allegations against Plaintiff Gentry. The wealth of evidence produced in this case demonstrates that Kisling was hostile to all the Local 1107 staff, including Gentry, and maliciously sought Plaintiffs' terminations through the Board because, as the SEIU International Hearing Officer put it, Kisling's actions were "a blatant attempt to aggrandize to herself the authority of Sister Mancini long enough to rid herself of …staff member[s] who had long been a thorn in her side." *See* Pltfs' APPENDIX000028. Without evidence that Kisling actually believed the allegations she was making were true, rather than SEIU International's conclusion that Kisling was simply motivated by a desire to terminate staff she did not like, there is no issue of material fact on the first three elements of Plaintiff Gentry's defamation claim and Plaintiff is entitled to summary judgment as a matter of law.

F. Preemption Does Not Apply Because No Elected Union Official Terminated Plaintiffs' Employment.

This is a Nevada state Court case, and this Court is bound by Nevada law and the Nevada Supreme Court's rulings. Defendants' preemption argument relies on the unfounded presumption that the Nevada Supreme Court has not ruled on labor management preemption. This presumption is incorrect. The Nevada Supreme Court has not issued the same ruling as the California Supreme Court on the nonexistent LMRDA preemption issue they advance here, but the Nevada Supreme Court has ruled on labor-management preemption on numerous occasions and has consistently declined to preempt Nevada law based on federal labor law when there is no express directive by Congressional to preempt state law. "**[P]re-emption should not be lightly inferred**…since the establishment of labor standards falls within the traditional police power of the State." *W. Cab Co. v. Eighth Judicial Dist. Court of Nev.*, 390 P.3d 662, 667 (Nev. 2017) *quoting Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of

the [federal act], it conflicts with none of the purposes of the Act." *Id.* at 668. "Congress did not intend to disturb state laws in existence that set minimum labor standards, but are unrelated in any way to the processes of bargaining or self-organization. 'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.'" *MGM Grand Hotel-Reno v. Insley*, 102 Nev. 513, 518, 728 P.2d 821, 824 (1986) *quoting Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, , 105 S.Ct. 2380, 2398 (1985). This is the law that this Court is bound by, not the California Supreme Court's expansive view of the nonexistent LMRDA preemption doctrine Defendants advance here.

In *W. Cab Co.*, the Nevada Supreme Court analyzed federal preemption as it related to the National Labor Relations Act ("NLRA") and Employee Retirement Income Security Act ("ERISA"). 390 P.3d at 666. The Court noted that the "Although the NLRA contains no express preemption clause, the Supreme Court of the United States has articulated two types of implied preemption," *Garmon* preemption and *Machinists* preemption. *Id.* at 667. The Nevada Supreme Court preserved Nevada law declining to extend federal preemption in the manner the petitioner requested. In *Insley*, the Nevada Supreme Court noted that Section 301 of the LMRA "does not necessarily preempt every state law claim asserting a right that relates in some way to a provision in a collective bargaining agreement, or that relates more generally to the parties to such an agreement. Congress did not intend to disturb state laws in existence that set minimum labor standards, but are unrelated in any way to the processes of bargaining or self-organization." *MGM Grand Hotel-Reno v. Insley*, 102 Nev. 513, 518, 728 P.2d 821, 824 (1986). The Court declined to extend preemption the way the employer requested. The same principles apply to the Defendants' requests to apply the California Supreme Court's LMRDA preemption doctrine.

Neither the SEIU nor Local 1107 Defendants have explained why enforcing Plaintiffs' contracts conflicts with the democracy concerns, other legislative goals and specific provisions of the LMRDA. In fact, the term "conflict" is not found at all in the Local 1107 Defendants Opposition, and the SEIU Defendants' Opposition includes a single self-serving statement that "Permitting Plaintiffs' claims to proceed would conflict with that clear federal law authority." *See* SEIU Defs' Opp., 11/12/19, at 2:16-17. However, there is no federal law authority that has applied

the Defendants' requested California Supreme Court LMRDA preemption doctrine other than federal district courts sitting in California, which are bound by the decision when ruling on matters of California law. In their response the Defendants turn to federal LMRDA case law.

Defendants assert that the "LMRDA preemption includes more than Plaintiffs' single focus on democratic governance of unions; it includes protecting union members." *See* L1107 Defs' Opp., 11/12/19, at 7:1-22. However, none of the case law cited by the Local 1107 Defendants supports that argument. The Defendants misrepresent the holding of the new case they cite to in support of their preemption defense: *English v. Service Employees International Union, Local 73*, 2019 WL 4735400, at *4 (N.D.Ill., 2019). *Id.* First, nowhere in the *English* does the Court ever say that "protecting union members" is a separate basis for finding preemption separate from democracy concerns because *English* is not a preemption case. Preemption is not referenced anywhere in the *English* decision. *Id.*

Defendants assert that the *English* Court rejected "the elected vs. appointed argument now advanced by Gentry and Clark." *Id.* This is not the case. In *English*, the plaintiffs were previously elected officers of Local 73 who were removed from office upon imposition of an emergency trusteeship. *Id.* at *7. However, after imposition of the trusteeship, the *English* plaintiffs retained their employment with the local union, and some of the former executive board officers were appointed by the trustees to appointed positions, and thereafter, the plaintiffs openly opposed the trusteeship by running against the trustee in upcoming election. *Id.* "Plaintiffs disagreed with the policies, direction, and management of Local 73 under Polyac's trusteeship, and, while the trusteeship was still in place, plaintiffs independently formed a slate of candidates to campaign for election to leadership positions in the next Local 73 election." *Id.* at 2-3. The *English* plaintiffs were subsequently terminated for not supporting the trusteeship. *Id.* The *English* Court held that the "flaw in plaintiffs' reasoning" was that "at the time of their suspension and termination, plaintiffs were not elected officials in Local 73." *Id.* at 9. Thus, their LMRDA arguments pursuant to *Sheet Metal Workers' International Association v. Lynn*, 488 U.S. 347, 355, 109 S. Ct. 639, 102 L. Ed. 2d 700 (1989) was misplaced, and the fact that the employees were elected officers of the

staff union had "little to do with the goal of 'ensur[ing]' that Local 73, the larger entity, is 'democratically governed, and responsive to the will of the union membership.'" *Id.* at 9-10.

The *English* holding was centered on the LMRDA claims of the former officers, and specifically, the part of the *Finnegan* holding that "LMRDA…does not 'establish a system of job security or tenure for appointed union employees.'" *Id.* at 12 *citing Finnegan v. Leu,* 456 U.S. 431, 432 (1982); *Vought v. Wis. Teamsters Joint Council No. 39*, 558 F.3d 617, 621 (7th Cir. 2009). The distinction between *English* and this case is clear when you look at the *English* Complaint. *See English* Complaint, attached as **Exhibit "8,"** at 4 ¶10. Upon imposition of the Local 73 trusteeship, the plaintiffs were "stripped" of their elected positions by the trustees "and demoted to" appointed positions as directors. *Id.* at 4 ¶10, 13-14 ¶63. In *English*, the SEIU defendants made support for the trusteeship a "condition of employment for individuals who wish to work for the Local Union **in appointed staff positions while in trusteeship**." *Id.* (emphasis added). The plaintiffs in the *English* case were appointed *by the trustees* to *appointed* local union positions. The *English* case is obviously distinguishable because here Plaintiffs were not appointed to their positions with Local 1107. Rather, they were local union professional staff hired the same way as any other rank and file Local 1107 employee was prior to imposition of the trusteeship. The *English* decision barred the LMRDA claims pursuant to *Finnegan* because the plaintiffs were union-member employees in appointed positions, who were appointed by the trustees, and they openly opposed the trusteeship. The former officer plaintiffs did not have LMRDA claims pursuant to *Finnegan* because the LMRDA does not "establish a system of job security or tenure for appointed union employees." *Finnegan*, 456 U.S. at 438.

The *English* case is not an LMRDA preemption case. The *English* case is an LMRDA case involving whether a union-member employee may seek redress pursuant to Title I of the LMRDA for discharge from appointed union employment. Indeed, the *English* Court held that "the LMRDA does not provide plaintiffs with a cause of action against defendants arising out of their suspension and termination. Because they fail to state a claim, their LMRDA claims are dismissed." *English*, No. 18 C 5272, 2019 U.S. Dist. LEXIS 167471, at *13. The Defendants cannot cite to *English* for their preemption argument because it is a Circuit court case does not involve LMRDA preemption.

Id. The entire body of case law cited by the Local 1107 and SEIU Defendants in support of their state law preemption defense focuses on union democracy concerns, not "protecting union members." *See* L1107 Defs' Opp., 11/12/19, at 7:1-22. Defendants have not pointed to a single case preempting a state law wrongful termination claim that cited to anything other than the LMRDA's democracy concerns and rights of elected union officials, and without such a case, their preemption defense fails.

Defendants' position is further undermined by the conclusion of the *English* Court that the collective bargaining agreement ("CBA") breach of contract claims by the staff were, in fact, actionable. The *English* Court noted that the SEIU Defendants requested dismissal of the CBA claims, which were considered preempted by Section 301 of the Labor Management Relations Act ("LMRA"). *English*, No. 18 C 5272, 2019 U.S. Dist. LEXIS 167471, at *13-18. The Court's reasoning for dismissing the CBA claims was not that the claims were not actionable, but rather because the plaintiffs' "allegations are sketchy, containing virtually no factual details other than the bare fact that the [staff] union did not pursue plaintiffs' grievances." *Id.* at *16. "Defendants ask for a dismissal without leave to amend, **but that result would be overly harsh with respect to plaintiffs' breach of contract claims**. Plaintiffs' LMRDA claims are doomed, for the reasons the Court has explained above, **but the Court cannot say the same for 'certain' for the breach of contract claims**, which plaintiffs may be able to replead in accord with this Opinion and the Federal Rules of Civil Procedure." *Id.* at 17-18 (emphasis added).

Defendants' citation to *Vought* is similarly misguided. 558 F.3d at 618. In *Vaught*, the plaintiffs "Vought and Alexander worked as appointed business agents for Local 662 in Eau Claire, Wisconsin." *Id.* "At the time, James Newell was the Secretary-Treasurer, the union official with the most authority in the Local. But in a matter of months, all three would be on the outside looking in, **removed by new leadership** that viewed them with suspicion and distrust." *Id.* The *Vought* case does not involve a trusteeship. *Id.* Rather, it involves a union leader to obtained an elected union position by default based on operation of the union constitution when the elected Secretary-Treasurer was removed by a Joint Council. *Id.* at 619. "As a result, Reardon became the acting Secretary-Treasurer until the Local 662 Executive Board could meet and decide upon a permanent

replacement. Reardon didn't take long to exercise his new-found power. The same day he was tapped for the job, he fired Vought as a business agent." *Id.*

In *Vought* the person doing the firing still occupied an elected union position. It just so happened that they had not been elected to that position because the prior occupant had been removed and the official ascended to the position by default. *Id.* The union was not in trusteeship and was still democratically governed. Further, the *Vought* Court expressly noted "It is hard to see how democracy is furthered by allowing someone like Reardon, an unelected leader, to fire a business agent." *Id.* at 622. The Court ruled, however, "these observations do not necessarily mean Vought has a claim. First, there is nothing in the LMRDA that says he does. Second, despite the difference between this case and the *Finnegan* line, ruling against Vought does not run afoul of the controlling precedent." *Id.*

> Ultimately, the viability of Vought's claim "must be judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed, and responsive to the will of the union membership as ex-pressed in open, periodic elections.'" *Id.* at 354 (quoting *Finnegan*, 456 U.S. at 441). Though we doubt the termination in this case advanced this objective, we do not believe it thwarted it. And we do not have to agree with the decision to force out Vought to uphold it. 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. 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. at 623.

Here, Nevada law states that Plaintiffs have a claim. Neither *Vought* nor *English* are LMRDA preemption cases, so neither can be used as a basis for extending a preemption doctrine that has not been adopted in Nevada to state claims by non-appointed union employees with for cause contracts. Defendants seek summary judgment by misdirection. They ask this Court to apply *Screen Extras Guild*, a California Supreme Court case crafting an LMRDA preemption doctrine that has not been adopted by any federal Court not bound by the decision because they sit in California. When Plaintiffs pointed out that the *Screen Extras Guild* LMRDA preemption doctrine

has only been held to apply to elected union officials terminating employees, Defendants misdirect the Court's attention to LMRDA precedent that does not involve preemption.

The *Vought* and *English* cases were rulings relating to whether an appointed union-member employee had a claim under the LMRDA, not whether the LMRDA preempted nonmember, unappointed employees claims under state law pursuant to a for cause employment contract. The Defendants want this Court to apply the *Screen Extras Guild* Court's analysis of *Finnegan* and *Bloom* to find preemption. That preemption doctrine and all the cases where a California court has ever applied it has relegated the doctrine to elected union officials because of democracy concerns of the LMRDA. It does not apply to unelected trustees. Because there is no federal precedent concluding that Plaintiffs' claims are preempted, and Defendants have pointed to no state cases finding LMRDA preemption where that doctrine applied to an unelected union official, the argument must be rejected regardless of the conclusion in *English* and *Vought* that upholding the termination of an appointed union-member employee does not offend LMRDA precedent. This case does not involve any LMRDA claims. Plaintiffs were not appointed union employees. Neither *English* nor *Vought* apply to the facts and law of this case.

Defendants' entire analysis of this case law rests on misrepresentations of the holdings. Defendants assert that in "*Vought*, an unelected union leader terminated employment contracts of union business agents." *See* L1107 Defs' Opp., 11/12/19, at 8:15-21. This is objectively a misrepresentation of the *Vought* case. The Business Agents in *Vought* were not alleged to have employment contracts. *See generally Vought*, 558 F.3d 617. In fact, the term "contract" does not appear even once in the *Vought* holding. *Id.* Again, this is because *Vought* was an LMRDA case, not a breach of contract case. Defendants argue that the *English* holding "means that the LMRDA's trusteeship and federal labor policy preempt the Plaintiffs' state law claims." *See* L1107 Defs' Opp., 11/12/19, at 8:1-3. This is also objectively false, as the *English* Court's preemption ruling was based on the LMRA not the LMRDA, and the *English* Court did not conclude that any state law claims were preempted. Further, the *English* Court found that the plaintiffs could state a claim for breach of an employment contract, the CBA. In sum, none of the new case law the Defendants have cited rebuts Plaintiffs' Motion for Partial Summary Judgment on the preemption issue for

lack of termination by an elected union official. As such, because Defendants have not rebutted the argument, summary judgment in Plaintiffs' favor on the preemption defense is warranted.

G. Plaintiffs Have Not Argued That Congress Acted Arbitrarily Or Capriciously In Protecting Union Members At The Expense Of Appointed Union Officials.

Defendants assert that Plaintiffs argued "that Congress acted arbitrary and capricious in protecting union members at the expense of appointed union employees." *See* L1107 Defs' Opp, 11/12/19, at 9:7-8. Plaintiffs have made no such argument. The fact is that the Defendants' entire preemption argument rests on conflict preemption, which is a form of preemption that is applied when Congress has not expressly preempted a field of law. *See* Pltfs' MPSJ, 10/30/19, at 20:7-21:22. Congress did not act arbitrarily or capriciously in protecting union members by preempting state law causes of action for breach of employment contracts with unions for one simple and obvious reason, Congress did not preempt state law causes of action for breach of employment contracts with unions when it passed the LMRDA at all. It is only the California Supreme Court that has applied the expanded LMRDA preemption doctrine Defendants request here, not the federal courts, and certainly not Congress. Once again, the LMRDA expressly disclaims preemption in six separate anti-preemption statutes. *See* 29 U.S.C. §§ 413, 466, 501, 523, 524, 524(a). This Court is tasked with determining if conflict preemption applies. It is arbitrary and capricious to apply it to this case because Congress expressly disclaimed preemption (*id.*) and substantially identical contracts to those Plaintiffs seek to enforce here are, without question, enforceable under the law and precedent the Defendants have cited.

Defendants also seek to rely on a split between the federal Circuit Courts regarding whether loss of union membership upon termination of a union-member employee from an appointed position gives rise to an LMRDA claim. The *Bloom* Court expressly held that "[a] union *employee* who is discharged **in a way that does not affect his rights as a union *member* has no cause of action under section 412.**" *Bloom v. Gen. Truck Drivers Union, Local 952*, 783 F.2d 1356, 1359 (9th Cir. 1986) (emphasis added). If after termination the member retains "all the rights and privileges of union membership he had had before…" such an "indirect burden on membership rights…is insufficient to state an LMRDA claim." *Id. citing Finnegan*, 456 U.S. at 440-42. "Without some infringement on his rights as a union member, Bloom does not state an action under

sections 411 and 412, despite his artful pleading." *Id.* In contrast, if union membership is affected, the member has a claim under the LMRDA. *Id.*

Defendants now ask this Court not to apply the rule in *Bloom*, but instead apply the Seventh Circuit's rule that "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*, 558 F.3d at 622. These holdings are at odds, representing a split between the Ninth Circuit and the Seventh Circuit on whether a union-member employee who is terminated and loses membership with the union has a claim under the LMRDA. *Id.* The *Dean* case is irrelevant to this argument because such an argument was not advanced in that case. *Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D.Mich. Sept. 18, 1989).

In sum, none of the new case law and arguments advanced by the Defendants undermines Plaintiffs' arguments on summary judgment. The democracy concerns of the LMRDA are not at issue in this case, and for that reason preemption does not apply. Defendants' entire defense strategy can be succinctly stated as follows: "Because my client is union they should not be accountable for their unlawful conduct." Defendants make almost no arguments to the merits of this case instead requesting this Court invalidate every Nevada union employees' for cause contracts with their union employers based on the California Supreme Court's "**solitary interpretation regarding 'the union democracy concerns of LMRDA**.'" *Shuck v. Int'l Ass'n of Machinist & Aero. Workers*, Dist. 837, No. 4:16-CV-309 RLW, 2017 U.S. Dist. LEXIS 31992, at *2-5 (E.D. Mo. Mar. 7, 2017). This Court should create Nevada law stripping Nevada employees of their negotiated contract rights to exempt union defendants from the consequences of their unlawful conduct without Congressional directive or the United States Supreme Court expressly instructing it to do so. As such, summary judgment in Plaintiffs' favor on the preemption defense is warranted.

II. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully requests this Court **GRANT** their Motion for Partial Summary Judgment.

Dated this 30th day of November, 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. 26

SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: December 3, 2019
Time: 9:30 a.m.
Ctrm: 10D

Introduction

Plaintiffs Dana Gentry and Robert Clarke ("Plaintiffs") do not dispute two essential points: They did not work for defendants Service Employees International Union ("SEIU") or SEIU President Mary Kay Henry ("Henry), and they did not have employment contracts with SEIU or Henry. Nor do they point to a single piece of evidence that demonstrates that either SEIU or Henry had any role in, let alone directed, their terminations from defendant Service Employees International Union, Local 1107 ("Local 1107"), their former employer. Summary judgment for SEIU and Henry is therefore proper on all of the claims against them in the first amended complaint.

Hoping the Court will ignore the absence of evidence tying SEIU or Henry to their terminations, Plaintiffs now argue that SEIU and Henry are alter-egos of Local 1107. However, Plaintiffs were required to plead this theory of liability in their first amended complaint, and they did not. Having failed to plead it, they waived it. And even if they did not waive it, they have nonetheless failed to create a genuine issue of material fact regarding the putative alter-ego status of SEIU, Henry, and Local 1107.

Last, regardless of any of the above, Plaintiffs offer no convincing reason that would overcome federal preemption of their claims. A consistent body of caselaw supports the conclusion that the sort of breach of contract, wrongful termination, and related claims Plaintiffs have brought conflict with the federal Labor Management Reporting and Disclosure Act ("LMRDA"). Because Plaintiffs were former policymaking and confidential personnel at Local 1107, the LMRDA authorized the Local 1107 Trustees' termination of their employment. That is especially so in the face of the undisputed evidence of Plaintiffs' hostility to the Local 1107 Trustees and the trusteeship itself.

In short, SEIU and Henry respectfully submit that summary judgment should be granted in their favor on all claims against them in the first amended complaint.

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Argument

I. Plaintiffs' Have Waived their Alter-Ego Argument by Failing to Raise it in the First Amended Complaint.

Plaintiffs do not dispute that they did not have employment contracts with either SEIU or Henry, an essential, and yet missing element of their breach of contract claims. Plaintiffs also do not dispute that they did not work for either SEIU or Henry, another essential, and yet missing element of their wrongful termination claims. Instead, at the eleventh hour, Plaintiffs now argue that SEIU and/or Henry were alter-egos of Local 1107, their former employer. Pltffs' Opp. at 6-18.

Plaintiffs' alter-ego argument is waived. A complaint must "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *Western States Constr. v. Michoff*, 108 Nev. 931, 936 (1992). A plaintiff therefore "cannot oppose summary judgment on grounds not in issue under the pleadings." *Kimura v. Decision One Mortg. Co., LLC*, Case No. 2:09-cv-01970-GMN-PAL, 2011 WL 915086, at *4 (D. Nev. Mar. 15, 2011); Nev. Civ. Prac. Manual 19.08[1] ("[T]he party opposing summary judgment may not do so on the basis of unpled allegations or claims appearing for the first time in the opposition to summary judgment.").

In particular, courts have ruled that a plaintiff may not oppose summary judgment by raising an alter ego theory that is not pleaded in the operative complaint. *See Marshall v. Anderson Excavating & Wrecking Co*., 901 F.3d 936, 942-43 (8th Cir. 2018) (holding that district court erred in applying alter ego theory of liability where "plaintiffs never pleaded an alter ego theory in their complaint"); *Garcia v. Village Red Rest. Corp*., Case No. 15-civ-62 92 (JCF), 2017 WL 1906861, *5-6 (S.D.N.Y. 2017) (rejecting alter ego argument where not raised in pleadings); *Travelers Cas. And Sur. Co. v. Dormitory Authority-State of New York*, 735 F. Supp. 2d 42, 81-82 (S.D.N.Y. 2010) (holding that party may not "resist summary judgment by relying on alter-ego theory" where not raised in pleadings; noting "summary judgment is not a procedural second chance to flesh out inadequate pleadings"). Plaintiffs did not raise the alter-ego claim in their complaint or in their first amended complaint. Having failed to plead it, they

are barred from raising it as a basis to resist summary judgment.

The only time Plaintiffs raised an alter-ego argument was in their reply in support of their motion to amend the complaint, *but the Court denied their motion for leave to amend as to SEIU and Henry*. And despite making the argument in support of their motion to amend, Plaintiffs did not plead their alter-ego claim *in their first amended complaint*. As a result, SEIU and Henry were not on notice that Plaintiffs intended to litigate the alter-ego status of SEIU, Henry, and Local 1107 in connection with the claims in the first amended complaint. Plaintiffs therefore cannot defeat summary judgment on the basis of a theory of liability not pled in the first amended complaint. Because alter ego liability is the only basis for holding SEIU and Henry liable for the contract and wrongful termination claims in the first amended complaint, summary judgment in favor of SEIU and Henry is appropriate.[1]

II. Even If Plaintiffs Did Not Waive the Alter-Ego Theory, They Fail to Create a Genuine Issue of Material Fact Regarding the Alter-Ego Status of SEIU, Henry, and Local 1107.

Even if Plaintiffs are permitted to raise their alter-ego claim to defeat summary judgment, despite having waived it by not pleading it in their complaint or first amended complaint, they have failed to create a genuine issue of material fact regarding the alleged alter-ego status of SEIU, Henry, and Local 1107.

Plaintiffs' alter-ego argument relies primarily on two contentions. First, they contend that SEIU and Local 1107 are alter-egos by virtue of SEIU's imposition of a trusteeship over Local 1107. Pltffs' Opp. at 10-11. Second, they contend that two email chains among former Local 1107 Trustee Luisa Blue, then-SEIU Deputy Chief of Staff Deirdre Fitzpatrick, and SEIU President Mary Kay Henry establish that SEIU "expressly directed the terminations of Plaintiffs' employment with Local 1107." Pltffs' Opp. at 13. As discussed below, these contentions do not create a genuine issue of material fact that SEIU, Henry, and Local 1107 are alter-egos.

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[1] The only remaining claim against SEIU and Henry is intentional interference with contractual relations. That claim is addressed in Section III, *infra*.

A. Alter-Ego Standard.

"[T]he corporate cloak is not lightly thrown aside and . . . the alter ego doctrine is an exception to the general rule recognizing corporate independence." *Truck Ins. Exchange v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 635 (2008). Thus, "[u]nder the principle of corporate separateness, the actions of a subsidiary company are generally not attributable to its parent corporation." *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. 368, 383 (2014) (Pickering, J., concurring).

Instead, "[i]t must be shown that the subsidiary corporation is so organized and controlled, and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation."[2] *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 95 Nev. 463, 466 (1979). The "'essence' of the alter-ego doctrine is to 'do justice' whenever it appears that the protections provided by the corporate form are being abused." *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 845-46 (2000).

> The elements for finding an alter ego, which must be established by a preponderance of the evidence, are: '(1) the corporation must be influenced and governed by the person asserted to be the alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction [a] fraud or promote injustice.' [*Polaris Indus. Corp. v. Kaplan, 103 Nev. 598, 601*]. Further, the following factors, though not conclusive, may indicate the existence of an alter ego relationship: (1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate formalities. *See id.* at 601, 747 P.2d at 887. We have

[2] Plaintiffs appear to argue that the U.S. Supreme Court's decision in *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212 (1979), establishes the appropriate standard for evaluating SEIU's alter-ego liability. Pltffs' Opp. at 8-9. *Carbon Fuel* has no application here. That case addressed a distinct issue, *i.e.*, agency liability of an international union under 29 U.S.C. § 185 for a wildcat strike of a local union. *See Carbon Fuel*, 444 U.S. at 213. By contrast, Plaintiffs' claims are based on state law, not federal law. Hence, alter-ego status must be evaluated under Nevada law. Moreover, Plaintiffs contend that SEIU is Local 1107's alter-ego, not that Local 1107 was SEIU's agent, a distinct legal concept addressed in *Carbon Fuel*.

emphasized, however, that "[t]here is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case." *Id.* at 602, 747 P.2d at 887.

Loomis, 116 Nev. at 904. As shown below, Plaintiffs fail to demonstrate the existence of a genuine issue of material fact regarding the alter-ego status of SEIU, Henry, and Local 1107.

B. Plaintiffs Fail to Show SEIU or Henry Influenced or Governed Local 1107.

Plaintiffs have failed to create a genuine issue of material fact regarding the first alter-ego factor, namely, that Local 1107 was "influenced and governed" by SEIU or Henry. *Loomis*, 116 Nev. 896, 904.

The mere fact that the Local 1107 Trustees were appointed by SEIU – the primary pillar of Plaintiffs' alter-ego argument, *see* Pltffs' Opp. at 12-13 – does not make the Local 1107 Trustees "influenced and governed" by SEIU or Henry. *The opposite is true as a matter of law*. "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*." *Campbell v. Int'l Bhd. of Teamsters*, 69 F. Supp. 2d 380, 385 (E.D.N.Y. 1999) (emphasis added); *see also 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*.") (emphasis added), *aff'd*, 487 F. App'x 508 (11th Cir. 2012); *see also Perez v. Int'l Bhd. of Teamsters, AFL-CIO*, Case No. 00-civ-1983-LAP-JCF, 2002 WL 31027580, at *5 (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). In fact, at her deposition SEIU Chief of Staff Dierdre Fitzpatrick described the role of a trustee in precisely these terms: "The trustees stand in the shoes of the local and they make all decisions for the local around staffing." Supplemental Declaration of Jonathan Cohen ("Supp. Cohen Decl."), Ex. A, Depo. Tr. at 34:19-22.

Hoping to overcome this point, Plaintiffs note that the SEIU Constitution provides that an appointed trustee "shall report on the affairs/transactions of the Local Union . . . 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." Pltffs' Opp. at 15 (*see* Fitzpatrick Appx. at 22 (SEIU Const., Art. VI, § 7(b))). However, in the corporate context, a parent company <u>*always has some measure of control over a subsidiary*</u>. *See Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. 368, 378 (2014) ("In the corporate context, however, the relationship between a parent company and its wholly owned subsidiary necessarily includes some elements of control."); *MGM Grand, Inc. v. Eighth Judicial Dist.*, 107 Nev. 65, 68-69 (1991) (holding that Disney's Nevada subsidiaries' contacts could not be imputed to Disney for purposes of exercising jurisdiction where "Disney exercises no more control over its subsidiaries than is appropriate for the sole shareholder of a corporation"); *In re W. States Wholesale Natural Gas Antitrust Litigation*, Case No. 2:03-CV-01431-PMP-PAL, 2009 WL 455653, *12 (D. Nev. Feb. 23, 2009) (rejecting alter-ego status between parent and subsidiaries, noting that "[the parent's] promulgation of general policies for its subsidiaries is consistent with its indirect investor status").

Furthermore, the mere fact that an international union has the right to supervise or control the acts of a trustee is not evidence that <u>*it actually exercises control over the day-to-day operations of a local union under trusteeship*</u>. That principle was recognized in *Herman v. United Bhd. Of Carpenters and Joiners of Am., Local Union No. 971*, 60 F.3d 1375 (9th Cir. 1995), where the court rejected the argument that an international and local union were a single employer of purposes of establishing liability under the federal Age Discrimination in Employment Act or Nevada law, even though under the international union's constitution it "ha[d] the power to impose trusteeships over locals and *control their affairs*." *Id*. at 1383 (emphasis added). As the court observed, such features "are common in union constitutions and do not sufficiently evidence the type of inter-relationship between the day-to-day operations of the International and the local union" required to establish they were a single employer.[3] *Id*. at 1383-84. That same reasoning applies here: That the SEIU Constitution reserves to the SEIU

[3] The four factors the Ninth Circuit considered in evaluating single employer status were "1) inter-relation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership or financial control." *Herman*, 60 F.3d at 1383.

president some degree of supervision over the conduct of a trustee does not mean that SEIU or Henry actually exercised influence and control over the Local 1107 Trustees.

The decision in *Fields v. Teamsters Local Union No. 988*, 23 S.W. 3d 517 (Tx. Ct. App. 2000), is also instructive. There, an international union placed a local union under trusteeship, and the international president had authority "to involve himself in staffing decisions of the local union during trusteeship." *Id*. at 525. The court also found that, although the trustee was in charge of the local union, he was "under the direction of the [international] General President." *Id*. Even so, the court held that the two unions were not a "single employer" for purposes of liability for the plaintiff's termination under the state's discrimination statutes.[4] *See id.* at 524-25. Among other things, the court cited the principle that "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," and found that the trustee "made the final decisions regarding employment matters related to [the plaintiff]." *Id*. at 525.

As in *Fields*, the evidence is uncontradicted that the Local 1107 Trustees, not SEIU or Henry, made the decision to terminate Plaintiffs. *See* Declaration of Martin Manteca in Support of Summary Judgment, ¶ 5; Declaration of Luisa Blue in Support of Summary Judgment, ¶ 5. Equally important, there is no evidence that SEIU or Henry exercised day-to-day control over the affairs of Local 1107. *See In re W. States Wholesale Natural Gas Antitrust Litigation*, 2009 WL 455653, *12 (rejecting alter ego status where "Plaintiffs present no evidence that [the parent] played a role in the day-to-day conduct [of its subsidiaries] operational business."). To the contrary, SEIU Chief of Staff Fitzpatrick's testimony is undisputed that "[t]he trustees of the local union make determinations about how to handle all of their contracts and staffing." Supp. Cohen Decl., Ex. A, Depo Tr. at 60:6-8; *see also id.*, Ex. A, Depo. Tr. at 33:18-20 ("The International union doesn't advise or direct in [any] way around staff contract and management of the decision-making around staff."); *id*., Ex. A, Depo Tr. at 48:16-17 ("It is our practice not to advise locals, period. Locals employ staff."); *id*.. Ex. A, Depo Tr. at 60:6-8 ("The trustees of the

[4] The court in *Fields* evaluated the "single employer" issue by applying the same four factors applied by the court in *Herman*. *See* note 3, *supra*; *Fields*, 23 S.W. 3d at 524.

local union make determinations about how to handle all of their contracts and staffing."); *id*., Ex. A, Depo. Tr. at 96:14-18 ("[T]he Local 1107 trustees are charged with the responsibility of running the local union. And the International union does not monitor the activities of trustees in running the local union."). *Missing from Plaintiffs' opposition is any evidence to the contrary, i.e., that SEIU or Henry exercised day-to-day control over the Trustees' administration of Local 1107, let alone that they made the decision to terminate the Plaintiffs*.

The most Plaintiffs have mustered in support of their belated alter-ego claim are two email chains, neither of which creates a genuine issue of material fact regarding whether Local 1107 was influenced or governed by SEIU. *See Truck Ins. Exchange*, 124 Nev. at 636 (rejecting alter-ego status between firms where no evidence "that the Nevada firm was influenced and governed by the California firm"). The first email chain shows that *the day after* the Trustees terminated Plaintiffs' employment with Local 1107, then-Local 1107 Trustee Luisa Blue reported the terminations to then-SEIU Deputy Chief of Staff Fitzpatrick, and that Fitzpatrick, in turn, reported the terminations to SEIU President Henry.[5] *See* Pltffs' Opp. at 13 (citing Pltffs' Appx, Ex. 12, 759-60). But the mere fact that Blue reported the terminations to SEIU *after Plaintiffs were terminated* is insufficient to overcome the presumption of corporate separateness and establish alter-ego status between SEIU and Local 1107. *See In re W. States Wholesale Nat. Gas Antitrust Litigation*, 2009 WL 455653, *12 (rejecting alter-ego status between parent and subsidiary despite evidence that parent "monitor[ed] [subsidiaries'] performance" and that subsidiary engaged in "daily reporting" to parent); *cf. Viega GmbH*, 130 Nev. at 380 (holding that regular reporting by subsidiary to parent did not establish agency relationship but instead "merely show the amount of control typical in a parent-subsidiary relationship").

Plaintiffs note that in the same email chain SEIU President Henry wrote to then-SEIU

[5] Plaintiffs grossly mischaracterize this email chain, contending it shows that "[t]he SEIU Defendants also expressly directed the terminations of Plaintiffs' employment with Local 1107." Pltffs' Opp. at 13. In fact, the email chain begins with then-Trustee Blue reporting to then-SEIU Deputy Chief of Staff Fitzpatrick that *she had already terminated the Plaintiffs*. Pltffs' Appx., Ex. 12 at 760 ("So far so good 8 days into the trusteeship. 2 dirs., Financial Dir. And Communications Dir. were let go yesterday . . . ."). Nothing in that email shows that SEIU "expressly directed" Plaintiffs' terminations from Local 1107.

Deputy Chief of Staff Fitzpatrick stating that then-Local 1107 Trustee Blue was "on the program to get rid of staff quickly. She is documenting the staff." Pltffs' Opp. at 13 (citing Appx., Ex. 12 at 759). Fitzpatrick responded to Henry, "[t]hey are getting rid of managers who are not a fit with the new direction of the local . . . Positive steps. They need to temper themselves on the rest, for a variety of reasons. Documenting is good." *Id*. *Again, missing from these emails, which are from the day after Plaintiffs' terminations, is any evidence that SEIU influenced or governed the decision of the Local 1107 Trustees to terminate Plaintiffs.* Instead, this is an email conversation *internal to SEIU*, not with the Local 1107 Trustees, regarding the status of the recently imposed trusteeship.

As Fitzpatrick explained in her deposition when asked about this email with SEIU President Henry:

> THE WITNESS: This was several days after the imposition of the trusteeship, and I believe that what I was referring to here was [Trustee] Luisa [Blue]'s report that she had let staff go and my sort of general awareness that they were running a process of interviewing all of the staff to learn about sort of what the work in progress was and to verify that they were willing to work under the direction of the trustees.

Supp. Cohen Decl., Ex. A, Depo. Tr. at 39:19-40:4. Fitzpatrick further testified as follows regarding the email:

> Q. Okay. Yeah, what did you mean in your email?
>
> A. Yeah. What I meant in my e-mail was that I was conveying what I learned from Luisa [Blue], the trustee of the local, about the course they were on to assess the staff and to ensure that they could run the local union. I thought it was a positive development that they were assessing the staff and making progress on getting the function of the local union back up, period.

Supp. Cohen Decl., Ex. A, Depo. Tr. at 41:7-14. When asked whether there is an SEIU "program to get rid of staff when a trusteeship was imposed," Fitzpatrick responded, "No, there is not." Supp. Cohen Decl., Ex. A, Depo. Tr. at 29:5. Finally, when asked what she meant in her email when she said, "Documenting is good," Fitzpatrick testified as follows:

Q. What do - - what's the documenting part? What are you documenting? Documenting for the purpose of termination, or - -?

A. I don't - - I wouldn't read it that way. I read it as the conversations with staff to learn everything about what they're doing, what pressing work is coming up, what the scope of their work is, and confirming their willingness to cooperate under the direction of the trustees.

Supp. Cohen Decl., Ex. A, Depo. Tr. at 41:18-42:1.[6]

In short, this first email chain does not create a genuine issue of fact regarding SEIU's control or influence over Local 1107. It simply reflects, as one would expect, a report from the Local 1107 Trustees about the state of affairs following imposition of the trusteeship, and an internal conversation between SEIU's then-Deputy Chief of Staff and its President regarding the Trustees' actions, including their decision to terminate the Plaintiffs. Such evidence is insufficient to establish alter-ego status between SEIU and Local 1107. *See Truck Ins. Exchange*, 124 Nev. at 636; *In re W. States Wholesale Nat. Gas Antitrust Litigation*, 2009 WL 455653, *12; *cf. Viega GmbH*, 130 Nev. at 380.

Finally, Plaintiffs point to a second email from Fitzpatrick to then-Local 1107 Trustees Blue and Manteca. Pltffs' Opp. at 13 (citing Pltffs' Appx., Ex. 12, 758). *As with the other email chain, nothing about this email chain establishes that SEIU played any role in the day-to-day affairs of Local 1107, that Local 1107 was influenced or governed by SEIU, or that SEIU directed Plaintiffs' terminations*. In her email, Fitzpatrick informs the Trustees that if they are going to ask other SEIU-affiliated local unions to loan staff to Local 1107 during the trusteeship, to let Fitzpatrick, then-SEIU Deputy Chief of Staff, know beforehand. In relevant part, the email from Fitzpatrick states as follows:

Otherwise, do either of you have ideas from other local union staff? If so, please let me

[6] As discussed in SEIU's motion for summary judgment, the Local 1107 Trustees met with Local 1107 staff following imposition of the trusteeship to learn about their job duties and to confirm their loyalty to the Trustees. SEIU Motion at 9:2-6. The Trustees also asked staff to complete a written questionnaire regarding their job duties. Appx. to Cohen Decl. at 33-34 (Depo. Tr. 183:17-184:15).

know and I'd like [SEIU President Henry] to help loosen things up to get staff on a longer term loan (or Luisa, depending on the local you may be the better person but let's talk first). It's important to let me know before going to other locals to make the ask – [SEIU President Henry's] policy is that need to know when we are suggesting asking other locals to support a trusteed local, just so it's aligned with other moving parts between her and SEIU locals. In general, it's a good way to fill gaps; the process should just move through exec office.

Pltffs' Appx., Ex. 12, 758. In her deposition, Fitzpatrick explained as follows about this email:

Q. If you'll look in the middle of that first paragraph, it says MK's policy is that needs to go - - or that needs to know when we are suggesting asking other locals to support a trusteed local. What's that policy?

A. There is no written policy. This is probably more - - would have been better put as a practice, that Mary Kay's operating need is to know when we're making asks for a trusteeship of other local unions within SEIU, because the International union is in all kinds of transaction with other local unions and she needs to be aware when we're asking local unions to commit capacity to a trusteeship in the event that it pulls against another priority for that local.

Supp. Cohen Decl., Ex. A, Depo. Tr. at 49:9-18. Fitzpatrick was then asked if "the SEIU International is involved in the staffing of a trusteed local then," and she responded,

THE WITNESS: I would say involved only in the broadest sense, that a local in trusteeship very often identifies urgent operating needs and areas of expertise and staffing shortfalls and asks the International union if we can hep locate people who could go in and work under the trustees' direction in the local. And in that way, the International sometimes reaches to local unions to say do you have two field organizers who could come in for two weeks and work with the trustees in Local ABC.

Supp. Cohen Decl., Ex. A, Depo. Tr. at 50:5-14.

As Fitzpatrick's testimony makes clear, this second email chain reflects, at most, that SEIU wanted to be aware if the Local 1107 Trustees were asking other SEIU-affiliated local

unions to loan staff to "work under the trustees' direction." But evidence that a subsidiary entity regularly reports to a parent corporation, and that parent corporation monitors the subsidiary entity's operation, does not establish they are alter-egos. *See In re W. States Wholesale Nat. Gas Antitrust Litigation*, 2009 WL 455653, *12; *cf. Viega GmbH*, 130 Nev. at 380. Again, this email chain fails to show that SEIU played any role in the day-to-day affairs of Local 1107, that Local 1107 was influenced or governed by SEIU, or that SEIU directed Plaintiffs' terminations.

In sum, Plaintiffs have failed to create a genuine issue of fact regarding the first alter-ego factor.

C. Plaintiffs Fail to Show SEIU or Henry Shared a Unity of Interest with Local 1107.

Plaintiffs have utterly failed to create a genuine issue of material fact that SEIU or Henry shared a unity of interest and ownership with Local 1107, the second alter-ego factor. *See Bonanza, No. 2*, 95 Nev. at 466.

In support of their argument, Plaintiffs point to the fact that SEIU imposed a trusteeship over Local 1107, removed its officers, suspended its bylaws, and appointed trustees. Pltffs' Opp. at 12-13. But, as noted earlier, the Local 1107 Trustees "assume[d] the duties of the local union officer [they] replace[d] and [were] obligated to carry out the interests of the local union and *not the appointing entity*." *Campbell*, 69 F. Supp. 2d at 385 (emphasis added); *Dillard*, 2012 WL 12951189, at *9; *Perez*, 2002 WL 31027580, at *5; *Fields*, 23 S.W.3d at 525. Thus, <u>*as a matter of law*</u>, the trusteeship itself is not evidence that there was a unity of interest between SEIU, Henry, and Local 1107. The contrary conclusion Plaintiffs urge would turn this well-established legal principle on its head.

<u>*Moreover, Plaintiffs have failed to present an iota of evidence regarding the traditional unity of interest factors*</u>. Plaintiffs do not point to evidence that there was any comingling of funds between SEIU and Local 1107; that SEIU and Local 1107 had the same operations; that SEIU and Local 1107 had the same headquarters;[7] that SEIU and Local 1107 had the same bank

[7] To the contrary, Local 1107 is headquartered in Las Vegas, while SEIU is headquartered in Washington, D.C. Fitzpatrick Decl., ¶¶ 3, 5. SEIU has its own officers and executive board that

accounts; or that SEIU or Local 1107 failed to observe corporate formalities. *See Truck Ins. Exchange*, 124 Nev. at 637 (affirming finding that no alter-ego relationship existed where, *inter alia*, purported alter-ego maintained separate federal tax identification numbers; possessed independent business license; tax license; staff; phone line; insurance coverage; office sublease); *Bonanza No. 2*, 95 Nev. at 467 (affirming finding that no alter-ego relationship existed where "separate corporate books and accounts were kept," separate directors' meetings where held; "corporations had independent headquarters, separate business responsibilities and operations"). Nor do Plaintiffs offer a shred of evidence or a single argument regarding SEIU President Henry's alleged unity of interest or ownership with Local 1107.

Put simply, Plaintiffs have failed to create a genuine issue of material fact that there was a unity of interest between SEIU, Henry, and Local 1107, the second alter-ego factor.

D. Plaintiffs Fail to Show Adherence to Separate Corporate Forms Would Sanction a Fraud or Promote Injustice.

As with the second alter-ego factor, Plaintiffs have completely failed to demonstrate a genuine issue of material fact that adherence to separate corporate forms would sanction a fraud or promote injustice, the third alter-ego factor. *See Bonanza, No. 2*, 95 Nev. at 466; *see DFR Apparel Co., Inc. v. Triple Seven Promotional Prods., Inc.*, Case No. 2:11-cv-01406-APG-CWH, 2014 WL 4828874, *3 (D. Nev. Sep. 30, 2014) ("Even where two companies appear to be heavily intertwined, alter ego liability applies only if adherence to corporate forms would result in injustice.").

Plaintiffs' sole argument regarding this factor is that it would sanction a fraud and promote injustice to make the Local 1107 membership pay for the actions of the Trustees. Pltffs' Opp. at 13-14. There is nothing fraudulent or unjust about this.[8] The Trustees were acting on behalf of Local 1107, not SEIU, during the trusteeship. *Campbell*, 69 F. Supp. 2d at 385.

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govern its affairs. *See id.*, ¶ 3; *see also id.*, Ex. A (SEIU Constitution and Bylaws, Arts. VII-XI).

[8] If anything, imposing liability on SEIU, the international union with which Local 1107 is affiliated, would be a greater injustice. *See Loomis*, 116 Nev. at 905-06 (recognizing "that there are other equities to be considered in the reverse piercing situation – namely, whether the rights of innocent shareholders or creditors are harmed by the pierce").

In any event, Plaintiffs' argument fundamentally misconstrues the basis of the third alter-ego factor. "In cases finding the injustice prong met, there is usually evidence proving the controlling entity somehow used the alter-ego company to commit tortious conduct, hide assets, or prevent debtors from collecting their debts." *DFR Apparel Co., Inc.*, 2014 WL 4828874, *3; *In re W. States Wholesale Natural Gas Antitrust Litigation*, 2009 WL 455653, at *12 (rejecting alter-ego claim where plaintiff failed to show "fraudulent intent or perpetration of a fraud through use of the corporate structure on the parent's part"). *Here, there is no evidence whatsoever that the trusteeship was merely a ruse to commit tortious conduct or perpetuate fraud*. In fact, the United States District Court for the District of Nevada rejected the argument that the trusteeship was imposed in bad faith, and instead concluded that SEIU imposed the trusteeship for a lawful, and critically important, purpose – because, among other reasons, "board meetings were marked by yelling and near physical confrontations that impacted the board's ability to function," the union was "chaotic and dysfunctional," "the Local was not meeting its obligations to members," and "[m]embers and staff were filing charges against each other, calling the police on each other, and taking out temporary protective orders against each other."[9] *Garcia v. Serv. Employees Int'l Union, et al.*, Case No. 2:17-cv-01349-APG-NJK, 2019 WL 4279024, *13 (D. Nev. Sep. 10, 2019).

Finally, Plaintiffs have failed to demonstrate that Local 1107 would be unable to satisfy an eventual judgment in favor of the Plaintiffs. *Cf. Lorenz v. Belito, Ltd.*, 114 Nev. 795, 809 (1998) (holding that plaintiffs satisfied third alter-ego factor where "[i]f the Strubles are not held personally liable for Beltio, Ltd.'s debt, the Lorenzes will never have a chance to receive the rent or other payments they deserve because Betlio, Ltd. filed for bankruptcy").

/ / /

[9] Citing to SEIU's emergency trusteeship order, Plaintiffs repeatedly claim that the trusteeship was imposed in part "for the purposes of preventing disruption of contracts." *See, e.g.,* Pltffs' Opp. at 10 (citing Fitzpatrick Appx. at 204). Based on that contention, they claim it is somehow inconsistent with the emergency trusteeship order to sanction the Trustees' termination of their employment, despite their employment agreements. This argument is specious. The purpose of the trusteeship, as found by the District Court and as recited in the trusteeship order, was to prevent Local 1107 from slipping any further into chaos and dysfunction, not to protect the Plaintiffs' employment with Local 1107. *See Garcia*, 2019 WL 4279024, *12-14.

In sum, Plaintiffs have failed to establish a genuine issue of material fact regarding the third alter-ego factor.

III. Plaintiffs Have Failed to Create a Genuine Issue of Material Fact Regarding their Claim for Interference with Contract.

Plaintiffs have failed to create a genuine issue of material fact regarding their claim against SEIU and Henry for intentional interference with contractual relations.

Plaintiffs' argument in support of their claim is somewhat confusing. First, they argue that the "Trustees are the individuals who interfered with Plaintiffs' contract." Pltffs' Opp. at 18:8-9. But the Trustees acted on behalf *of Local 1107*, not SEIU or Henry. *Campbell*, 69 F. Supp. 2d at 385; *Dillard*, 2012 WL 12951189, at *9; *Perez*, 2002 WL 31027580, at *5; *Fields*, 23 S.W.3d at 525. Hence, taking Plaintiffs at their word that the Local 1107 Trustees were the ones that interfered with their contracts, their claim is really one against Local 1107 for breach of contract, not a claim against SEIU or Henry.

However, Plaintiffs also contend that SEIU "was promoting and recommending that the Trustees terminate Plaintiffs' employment with Local 1107 to further the new program, and was recommending replacing Plaintiffs with employees the SEIU International was recommending." Pltffs' Opp. at 18:22-25. Again, Plaintiffs rely on the email chain discussed in Section II.B, *supra*. Pltffs' Opp. at 18 (citing Pltffs' Appx., Ex. 12, 758-60).

As already discussed at length above, *nothing in those emails demonstrates that SEIU or Henry recommended the Plaintiffs' terminations*, let alone that they took any concrete action "intended or designed to disrupt the contractual relationship" between Local 1107 and Plaintiffs. *See J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274 (2003). To the contrary, the emails show that then-Local 1107 Trustee Blue reported to SEIU about the terminations of Plaintiffs *after they occurred*. Hence, as a matter of timing alone, the emails fail to demonstrate that SEIU or Henry did anything designed to disrupt Plaintiffs' contracts.

Furthermore, aside from Blue's report to Fitzpatrick, the emails reflect only an internal conversation between SEIU about the fact of Plaintiffs' terminations and the status of the trusteeship. Indeed, the emails fail to show that SEIU or Henry *did anything at all to disrupt*

Plaintiffs' employment with Local 1107. Put simply, nothing in the emails creates a genuine issue of material fact that SEIU or Henry engaged in any "intentional acts designed to disrupt the contractual relationship" between Plaintiffs and Local 1107. *See J.J. Indus., LLC*, 119 Nev. at 274.

Finally, Plaintiffs' attempt to distinguish the decisions in *Pape v. Local 390 of Int'l Bhd. of Teamsters*, 315 F. Supp. 2d 1297, 1318 (S.D. Fla. 2004), and *Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D. Mich. Sept. 18, 1989), fails. In each case, as here, the international union constitution authorized an appointed trustee to terminate the plaintiffs. *See* SEIU Motion for Summary Judgment, at 19-20. In each case, as here, the plaintiff's claim to a contractual right of continued employment with the local union was subject to the right of the international union to appoint a trustee who could terminate that employment. *See id*. Thus, as in both *Pape* and *Dean*, Plaintiffs' intentional interference with contract claims fail.

In sum, Plaintiffs fail to present even a scintilla of evidence that SEIU or Henry took some action with "an improper objective of harming Plaintiff[s] or wrongful means that in fact caused injury to Plaintiff[s'] contractual" relationship with Local 1107. *See Nat'l Right to Life Political Action Comm. v. Friends of Bryan*, 741 F. Supp. 807, 815 (D. Nev. 1990).

IV. LMRDA Preemption Applies Here.

In their opposition to Local 1107's motion for summary judgment, Plaintiffs argue that LMRDA preemption does not apply here for two main reasons. Since their arguments apply equally to SEIU's and Henry's LMRDA preemption defense, SEIU and Henry address the arguments here.

A. The LMRDA Protects an Unelected Union Leader's Ability to Terminate Appointed Staff.

Plaintiffs argue that LMRDA preemption does not apply because they were terminated by an appointed trustee, not an elected officer. SEIU and Henry have already addressed this argument at length in their opposition to Plaintiffs' motion for partial summary judgment. *See* SEIU Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 5-9. They therefore

refer the Court to that briefing instead of repeating it here.

B. Plaintiffs Were Policymaking and Confidential Staff Subject to LMRDA Preemption.

Plaintiffs argue that they were not the type of appointed employees that are subject to LMRDA preemption. Pltffs' Opp. to Local 1107's Motion for Summary Judgment ("Pltffs' Local 1107 Opp."), at 20-27. Their arguments are not convincing.

1. *Screen Extras Guild* Applies to Managers Like Plaintiffs.

First, Plaintiffs argue that the holding of *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990), only applies to policymaking or confidential employees, not "management employees."[10] Pltffs' Local 1107 Opp. at 20.

That argument is easy to refute: As the Court held in *Screen Extras Guild*, "Congress intends that elected union officials shall be free to discharge *management* or policymaking personnel." 51 Cal. 3d at 1028 (emphasis added); *see also id.* at 1031-32 (noting that "Smith herself acknowledges . . . that she was considered a management employee"). Ultimately, however, the distinction between policymaking and managerial personnel is a semantic one; managers of an organization are by definition policymaking personnel.

2. Undisputed Evidence Establishes Plaintiffs' Policymaking Responsibilities.

Next, despite having already admitted that they were managers, Plaintiffs argue that they were not policymaking personnel. Pltffs' Local 1107 Opp. at 21. Their argument rests primarily on two points: They note that their positions are not defined by the Local 1107 or SEIU constitutions, and they claim that an organizational chart from Local 1107 shows their lack of policymaking authority. *Id.*

Whether their positions are defined or identified by either union's constitution is irrelevant. Indeed, Plaintiffs fail to cite a single case identifying that as a consideration in evaluating LMRDA preemption in this context. Rather, the key consideration here is the role

[10] This is a key point for Plaintiffs, since they already conceded in earlier briefing to this Court that they were managers at Local 1107. *See* SEIU Motion for Summary Judgment, at 25, 27.

Plaintiffs played in carrying out the programs and policies of the union's leadership. *See Screen Extras Guild, Inc.*, 51 Cal. 3d at 1031. SEIU and Henry have already briefed at length the Plaintiffs' significant responsibility in that regard, and refer the Court to that briefing. *See* SEIU Motion for Summary Judgment, at 25-29.

Nor does the organizational chart reveal anything about their duties and responsibilities. That is especially so, since Plaintiffs do not dispute *any* of the substantial evidence that they had significant responsibility in connection with implementing Local 1107 policy, *which is based on, inter alia, their own sworn deposition testimony, their detailed job descriptions which they admitted were accurate, and their own written descriptions of their job duties following implementation of the trusteeship.*[11]

3. Plaintiffs Were Also Confidential Employees.

Plaintiffs also contend that neither of them was a confidential employee within the meaning of *Screen Extras Guild* and its progeny. Pltffs' Local 1107 Opp. at 21-25.

The undisputed facts belie that claim.[12] Given the nature of their job duties, it is obvious

[11] Adding to the mountain of evidence against the Plaintiffs on this point, former Local 1107 Executive Board member (and current Local 1107 President) Brenda Marzan testified as follows regarding Gentry's policymaking responsibility: "But let me be clear on this. As the communications director, [Gentry] would have had complete authority to bring information to [former Local 1107 President] Cherie Mancini that would have been used the help create policy. [¶] So as management, she would have had the ability to influence policy." Supp. Cohen Decl., Ex. B, Depo. Tr. 237:9-14. When asked, "But did she [Gentry] make policy?" Marzan responded, "*That is making policy. If you're influencing policy, you are helping make policy*." *Id*., Ex. B, Depo. Tr. 237:15-17 (emphasis added).

[12] Plaintiffs do not dispute that Gentry, the union's Director of Communications, was responsible for, *inter alia*, devising and implementing all of the union's strategic external and internal communications plans regarding collective bargaining, political, and other vital matters, advising the union's leadership about strategic communications, acting as the union's public spokesperson, and advising the union about its legislative strategy. SEIU Motion at 4-6. Plaintiffs likewise do not dispute that Clarke, the Finance and Human Resources Director, *inter alia*, had access to and oversaw all of the union's finances, including all of its bank accounts; oversaw payroll and accounts payable and receivable; led in budget planning; was responsible for legal compliance regarding human resources matters; coordinated the union's annual audit; oversaw the union's tax and Department of Labor reporting obligations; maintained all of the union's personnel records; and oversaw personnel administration. SEIU Motion at 6-7. Clarke also played a key role providing financial advice to Local 1107 in connection with its collective bargaining negotiations with its staff, and participating in disciplinary hearings for staff. *See*

that each of them, in addition to being policymaking employees, were also confidential employees. *See Thunderburk v. United Food and Commercial Workers' Union*, 92 Cal. App. 4th 1332, 1343 (2001) (holding that union's executive secretary was confidential employee within meaning of *Finnegan v. Leu*, 456 U.S. 431 (1982), where she "had access to confidential union information, which, if disclosed, could have thwarted union policies and objectives"); *Burrell v. Cal. Teamsters, Public Professional and Medical Employees Union, Local 911*, Case No. B166276, 2004 WL 2163421, *4 (Cal. Ct. App. 2004) (holding that union office manager was confidential employee within meaning of *Finnegan* where she "had access to confidential information regarding the Union, its members and officers, and its financial and legal matters"); *Hodge v. Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees & Helpers Local Union 695*, 707 F.2d 961, 964 (7th Cir. 1983) (holding that union secretary was confidential employee within meaning of *Finnegan* where she had "wide-ranging . . . access to sensitive material concerning vital union matters").[13]

4. The Caselaw Plaintiffs Rely On is Inapposite.

Plaintiffs also rely on several inapposite cases in support of their argument that LMRDA preemption does not apply here. Pltffs' Local 1107 Opp. at 24-25.

First, *Shuck v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. 837*, Case No. 4:16-CV-309 RLW, 2017 WL 908188 (E.D. Mo. March 7, 2017), is a case about removal on the basis of complete preemption, not the defense of conflict preemption. And while the decision disagrees with the holding of *Screen Extras Guild*, SEIU and Henry are not aware of a single other case that has cited it as authority. It is therefore of limited persuasive authority here.

Supp. Cohen Decl., Ex. C, Depo. Tr. at 50:5-53:3.

[13] Plaintiffs cite *NLRB v. Henricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981), and related cases as support for their argument that a confidential employee is one who acts in a confidential capacity "to persons who exercise managerial functions in the field of labor relations." Pltffs' Local 1107 Opp. at 22-23. As an initial matter, *Hendricks* addresses a distinct issue from LMRDA preemption – it concerns what type of individual is considered an employee under §2(3) of the National Labor Relations Act. *See id.* at 177. In any event, even if the Court were to consider that test here, Plaintiffs easily satisfy it, *since they themselves were managers overseeing sensitive, confidential matters related to the union's collective bargaining and related strategic goals.*

Second, Plaintiffs cite *Lyons v. Teamsters Local Union No. 961*, 903 P.2d 1214 (Ct. App. Colo. 1995), which addressed the termination of a union secretary and bookkeeper. But the court expressly noted that "there has been no contention or showing that [the plaintiff] was instrumental in establishing the Union's administrative policies or that her firing was related to her views on union policy." *Id*. at 1220. By contrast, Plaintiffs, not mere clerical employees but former Directors at Local 1107, were regularly engaged in management-level decision making in connection with their respective duties.

Third, Plaintiffs cite *Young v. Int'l Bhd. of Locomotive Engineers*, 114 N.E.2d 420 (Ct. App. Ohio 1996). But that case is more helpful to SEIU and Henry than it is to Plaintiffs, *since the court acknowledged that whether the action was preempted depended on "whether the appellee was a policy-making or confidential employee*." *Id*. at 504.[14] Citing *Lyons, supra*, the court noted that "[a] purely clerical employee, such as a secretary/bookkeeper, is not the type of employee to whom preemption applies." *Id*. Here, however, neither Plaintiff was a "purely clerical employee;" each was a manager and Director with significant policymaking responsibility.

5. Plaintiffs Ignore Evidence of Their Disloyalty.

Last, Plaintiffs simply ignore the undisputed evidence of their disloyalty to the Local 1107 Trustees, perhaps hoping the Court will too.

Such evidence should not be ignored. That evidence is a key reason that LMRDA preemption exists – to prevent policymaking employees from undermining the administration of the union. *See Screen Extras Guild, Inc.*, 51 Cal. 3d at 1029. Given the widespread dysfunction and chaos that plagued Local 1107 prior to the trusteeship, *see Garcia*, 2019 WL 4279024, *13, the Local 1107 Trustees had every reason for wanting to replace the former management-level staff of the union. Federal law gave them that right.

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[14] *Young* reflects that Ohio, yet another jurisdiction in addition to California, Montana, Michigan, and New Jersey, *See* SEIU Motion for Summary Judgment, at 24, & n.5-7, has applied the reasoning of *Screen Extras Guild*.

V. SEIU President Henry Must Be Dismissed from This Case.

Aside from any earlier point in this brief, *there is no reason that SEIU President Henry belongs in this case*.

Plaintiffs do not dispute that Henry had no contract with them. Plaintiffs do not dispute that Henry did not employ them. In fact, Plaintiffs have failed to present evidence that Henry had a single contact or communication with them, or took any action relevant to this lawsuit, other than imposing the trusteeship over Local 1107 at the request of Local 1107's former executive board and pursuant to her undisputed authority under the SEIU Constitution.

It therefore appears that the only reason Plaintiffs have sued SEIU President Henry is because she is the top elected official of SEIU, not because she personally did anything to subject her to liability. As a result, she should be dismissed from this lawsuit.

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: November 22, 2019

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

By */s/ Jonathan Cohen*
JONATHAN COHEN
Attorneys for Service Employees International Union and Mary Kay Henry

CERTIFICATE OF SERVICE

I am an employee of Rothner, Segall & Greenstone; my business address is 510 South Marengo Avenue, Pasadena, California 91101. On November 22, 2019, I served the foregoing document described as **SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action as follows:

[X] **(By 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

Evan James: elj@cjmlv.com

[ ] **(By U.S. 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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/s/ Lisa C. Posso
Lisa C. Posso

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of: **SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1107,** Respondent, and **JAVIER CABRERA, an Individual,** Charging Party.	Case No. **28-CA-209109**

The above-entitled matter came on for hearing pursuant to notice, before **DICKIE MONTEMAYOR,** Administrative Law Judge, at the **National Labor Relations Board, 300 Las Vegas Boulevard South, Suite 2-901, Las Vegas, Nevada,** on **Tuesday, February 26, 2019,** at **9:00 a.m.**

A P P E A R A N C E S

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I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Barry Roberts	38	48	68	70	--
Martin Manteca	73	135	152	--	142

E X H I B I T S

EXHIBIT	FOR IDENTIFICATION	IN EVIDENCE
GENERAL COUNSEL'S		
GC-1(a) through 1(j)	6	7
GC-2	9	10
GC-3	89	94
GC-4	104	105
GC-5	107	108
GC-6	120	121
GC-7	126	128 - Rejected
RESPONDENT'S		
R-23	135	137
R-62	140	143

P R O C E E D I N G S

(Time Noted: 9:42 a.m.)

JUDGE MONTEMAYOR: We'll go on the record.

This hearing will be in order. This is a formal trial before the National Labor Relations Board in the case of SEIU Local 1107, that's Service Employees International Union Local 1107, and Javier Cabrera, Case Number 28-CA-209109.

I'm Judge Montemayor. I've been assigned the case. I am assigned to the San Francisco Division of Judges, and any communications should be addressed to that office. Any requests for extension of time should be addressed to the Associate Chief Judge in San Francisco.

We'll begin by having counsel and other representatives state their appearances for the record. For the General Counsel.

MR. ANZALDUA: Your Honor, Fernando Anzaldua, on behalf of the General Counsel.

JUDGE MONTEMAYOR: Charging Party?

MR. MCAVOYAMAYA: Michael Mcavoyamaya, on behalf of the Charging Party.

JUDGE MONTEMAYOR: And the Respondent?

MR. McDONALD: Good morning, Your Honor. Sean McDonald of the Urban Law Firm on behalf of Respondent.

MR. URBAN: And Michael Urban of the Urban Law Firm for Respondent. Our representative here is Grace Vergara Mactal.

She is the executive director of SEIU Local 1107.

MR. McDONALD: Not yet, just a co-trustee, deputy trustee.

MS. MACTAL: Deputy trustee.

MR. URBAN: Deputy trustee.

JUDGE MONTEMAYOR: Thank you. If settlement discussions are desired at any time during the trial, I'll be glad to grant a reasonable recess for that purpose. We had some discussions prior to going on the record regarding settlement, and as I indicated to you, I will offer the opportunity to engage in settlement discussions at any point in the trial. Advise me if you need to take a break to engage in those sorts of discussions. I'll be happy to accommodate you. Again, the opportunity for settlement discussions will be available at all times upon request.

And for the General Counsel, can you introduce the formal papers?

MR. ANZALDUA: Yes, Your Honor. I offer into evidence the formal papers. They have been marked for identification as General Counsel's Exhibits 1(a) through 1(j), Exhibit 1(j) being an index and description of the entire exhibit. This exhibit has already been shown to all parties.

(General Counsel's Exhibit 1(a) through 1(j) marked for identification.)

JUDGE MONTEMAYOR: Any objection from the Respondent?

MR. McDONALD: No objection to the admission of the exhibits on Respondent's side.

JUDGE MONTEMAYOR: You have two copies as well as your copy?

MR. ANZALDUA: Right.

JUDGE MONTEMAYOR: Okay. Those documents identified as GC Exhibit 1(a) through 1(j) will be admitted.

(General Counsel's Exhibit 1(a) through 1(j) received in evidence.)

MR. McDONALD: And, Your Honor, I would also like to invoke the witness sequestration order.

JUDGE MONTEMAYOR: I am getting to that. We'll do the sequestration order, and then we'll talk about other preliminary matters, including the petition to revoke that was filed late last night.

A sequestration order is being issued in this proceeding. This means that all persons who expect to be called as witnesses in this proceeding, other than a person designated as essential to the presentation of a party's case, will be required to remain outside the courtroom whenever testimony or other proceedings are taking place.

The limited exception applies to witnesses who are alleged discriminatees in this matter. They may be present in the courtroom at all times other than when witnesses for the General Counsel or Charging Party are giving testimony

about the same events about which the alleged discriminatee is expected to testify.

The sequestration order also prohibits all witnesses from discussing with any other witness or any possible witness testimony that he or she has already given or will give. Likewise, counsel for a party may not disclose to any witness the testimony of any other witness. Counsel may, however, inform his or her own witness of the content of testimony given by any opposing party's witness to prepare or rebut that witness's testimony. It's the responsibility of counsel to see that they and their witnesses comply with the sequestration rule.

You invoke, too?

MR. URBAN: We do. That, and have been subpoenaed. And so I'm going to show you guys where you get to go.

JUDGE MONTEMAYOR: We'll go off the record momentarily while the witnesses are sequestered.

(Off the record at 9:48 a.m.)

JUDGE MONTEMAYOR: We'll go back on the record to address other matters before we begin with opening statements.

And my understanding is that the only issue outstanding relates to a petition to revoke that was filed late last evening. There has been some discussion between the parties about some of those issues. There has been some indication

that a stipulation has been reached regarding some matters, and other matters are still pending. I'll turn it over to the General Counsel so that you can set forth for the record where we stand in this regard.

(General Counsel's Exhibit 2 marked for identification.)

MR. ANZALDUA: Yes, Your Honor. The parties have reached a stipulation of facts, marking it as General Counsel's Exhibit 2, and I'll make copies right after this, but it's two items, and it's stipulating that Helen Sanders was a supervisor and agent within the meaning of the Act from about April 28, 2017, through at least October 31, 2017. The second item is a stipulation that Barry Roberts was a supervisor and agent within the meaning of the Act from about April 28, 2017, through the date he left his assignment at Respondent's facility, which is a date that the parties intend to adduce through live testimony. I have shown the document to Respondent, and it's signed by Charging Party and Counsel for the General Counsel and Respondent, and I move to admit it into evidence.

MR. McDONALD: The Respondent concurs with General Counsel's statement regarding the stipulation.

JUDGE MONTEMAYOR: General Counsel moves for the admission of GC -- what's been marked as General Counsel's Exhibit 2. No objections from the Respondent?

MR. McDONALD: No objections.

JUDGE MONTEMAYOR: General Counsel's 2 will be admitted.
(General Counsel's Exhibit 2 received in evidence.)
MR. ANZALDUA: Your Honor, I can make copies of that.
JUDGE MONTEMAYOR: I'm sorry. I didn't realize that was the one.
Go off the record here for a moment.
(Off the record from 9:51 a.m. to 9:53 a.m.)
JUDGE MONTEMAYOR: We'll go back on the record.
Again, we're still on preliminary matters before we transition to the opening statements. We'll begin with Respondent. You filed a petition to revoke. Tell us what your position is.
MR. McDONALD: Yes, Your Honor. And do you have a preference if I stand while I address you?
JUDGE MONTEMAYOR: If you're more comfortable sitting, that's fine.
MR. McDONALD: Okay. I just wanted to check to see what was appropriate.
Your Honor, as you're aware, Respondent filed a petition to revoke a subpoena duces tecum that was issued by the General Counsel at a very late date before the hearing in this case. I won't belabor the points that have been addressed in the petition to revoke itself, but I do want to highlight some items for Your Honor's attention.
The first item is the subpoena was grossly untimely. It

had not been issued until February 15th, which was the Friday leading into the last week to prep for the hearing. It was not actually received by the Respondent until February 21st, which I believe was a Thursday. As Your Honor may be aware, there was an intervening holiday that lasts between the 15th and the 21st and, of course, today is February 26th, meaning that as a practical matter, the Respondent only had 2 days to gather -- begin gathering records responsive to the subpoena.

Although we do acknowledge that there is no set period of time imposed by law for the timeliness of a subpoena, the Board's own guidance, however, does generally recognize that subpoenas should be served to allow at least 2 weeks in advance of the hearing to prepare a response to the subpoena. And courts, when they are asked to enforce subpoenas, generally hold that anything less than 2 weeks is presumptively unreasonable because it doesn't allow enough time to respond.

Here, with only 2 formal days to respond after formal service on the Respondent is just simply inadequate when you view the broad categories of the documents. So in light of the grossly untimely nature of the subpoena, we think that that's reason enough to order that it be revoked.

However, if we move aside from the timeliness issue, we then get into the overbreadth and lack of relevance that is attendant to the subpoena, given the unique circumstances of

this case. Context is important in everything, and here it's especially important because this Local Union was placed into a trusteeship which had the effect of essentially wiping out all of the management personnel that had been existing at the Local Union up until the date the trusteeship was imposed on April 28, 2017.

As a consequence, as a general matter, anything that occurred prior to the date of the trusteeship is just something that is not within the knowledge of any of the management personnel who are around, who actually did exercise the decisions and undertook the conduct that led up to Mr. Cabrera's termination.

As a result, we think that that weighs on the lack of relevance for any of those materials because they just simply wouldn't have been in the minds of anybody that was involved in any of the conduct leading up to the termination. And as such --

JUDGE MONTEMAYOR: So remind me or refresh my recollection. What date did receivership or trusteeship begin?

MR. McDONALD: The trusteeship began on April 28, 2017. It was imposed 2 days after the Local Union's executive board invited the imposition of a trusteeship. For a little more context, on the 26th of April, the two senior-most officers of the Local Union, the then president, Cherie Mancini, and

the then executive vice president, Sharon Kisling, had both been removed from office as a result of misconduct.

I won't bear on what those items of misconduct were other than to say that that created a power vacuum that faced the Local Union, which then led the executive board to ask for trusteeship to be imposed. The reason they had to ask for that is there's an affiliation agreement between this Local Union and its International parent that required that a trusteeship be by permission of the local body.

Suffice it to say, the trusteeship was imposed, and all of the personnel, executive board, officers, the president, and executive vice president, had already been removed. By operation of law and under the rules of the trusteeship, they all ceased to have any management role in Local 1107 from that point forward.

Two trustees were appointed. Luisa Blue was the trustee, and she's on our witness list. Martin Manteca was appointed as deputy trustee, and he's been placed under subpoena by the General Counsel to testify here. He's actually the individual who exercised the decision to terminate in this case.

Those two individuals had no involvement with Local 1107 until the date that they were appointed to Local 1107. They never worked for Local 1107. So they're pure outsiders.

JUDGE MONTEMAYOR: And just for clarification, on the

date of their appointment, does that coincide with --

MR. McDONALD: It coincided with the trusteeship, correct. Yeah, we included in our moving papers. The two trustees were appointed on the same day that the trusteeship was imposed. It's the trusteeship order. It's Exhibit 2 to our moving papers and the petition to revoke, and it lays out in somewhat summary terms why the trusteeship was imposed and that the International president, Mary Kay Henry, was appointing a trustee and a deputy trustee, and then it also indicates who those individuals were.

Again, for context, prior to the trusteeship, under the Local's constitution, the president of the Union was vested with supervisory authority over all of the staff that had existed prior to that time. She was removed from her role as president. Subsequently, she has filed legal actions against the International Union and the Local Union, challenging the propriety of her termination. There are other lawsuits that are pending in federal court as well of which Mr. Mcavoyamaya, counsel for the Charging Party, has entered appearances, that bear on the trusteeship, that bear on the discipline that was imposed against Ms. Mancini.

Long story short, essentially Ms. Mancini, among others, are no longer reasonably available to Local 1107, which then turns us to the undue burden that would face our client. Because the personnel who were at Local 1107, going all the

way back to 2015, aren't there anymore, there's a lot of lack of institutional memory that's fresh in current management's minds about what even happened dating all the way back to October 2015, which is as far back as the subpoena reaches.

Since the trustee was imposed, Luisa Blue and Martin Manteca, they have now moved on. They've gone back to their regular jobs, and there are now new trustees that are -- that have succeeded to supervising the trusteeship. Grace Vergara Mactal, who is seated at our counsel table, is one of those co-trustees now. The Local Union is shortly to emerge from trusteeship. They're in the midst of officer elections, which I believe are scheduled to be concluded March 12th, if I'm not mistaken.

MR. URBAN: Correct.

MR. McDONALD: So, again, there's going to be another changeover in personnel. And in order to respond to these broad categories of subpoenas, it's going to require essentially interrogating anybody who was around at the time these things occurred, to even orient ourselves to what exists, what doesn't exist. And that's a significantly burdensome endeavor as you see in the declaration that Grace Vergara Mactal has offered, simply because there's a lack of institutional knowledge.

That's not to say that records don't exist. It's simply to say absent cooperation with the people who actually lived

and worked and created and used these records contemporaneously, the alternative is to just start digging through records haphazardly without any real direction or guidance, and that's a massive burden when you couple it with the fact that the subpoena was issued with only 2 days to respond, in the 11th hour of the hearing, with no rush for it to be served in light of the fact that this charge was issued on November 1 of 2017. So this case has been pending for quite some time before it went to complaint. It's a mountainous burden.

Again, on the relevance, the Board's case is seeking to prove that there was a discriminatory animus harbored against Mr. Cabrera because of his protected concerted activity or because of his status on behalf of the Staff Union that existed. He was the president of the Staff Union, but absent any evidence, absent any showing of fact that the people who were around at the time that the adverse actions were taken even had any knowledge of anything that predated the trusteeship, it's just a non-issue for them. They didn't know it existed. They couldn't possibly have been motivated by any of those prior events.

So we think for that reason, many of the categories of the subpoena are overbroad and purely irrelevant to the items at issue.

One last point that I want to briefly touch on. I

mentioned it already. There are other lawsuits that are pending in other forums that are against the Local Union or against the Local Union and the International Union. Mr. Mcavoyamaya has entered appearances on behalf of plaintiffs in those cases. Our firm is not counsel on any of those cases. The defendants in those cases are represented by separate counsel, and that's just another place that would have to be looked at, in terms of what responsive records they may have gathered in those cases to ensure that there's a full, adequate production under the subpoena, which again bears undue burden.

Furthermore, we're here to try this case. We're not here to try other cases, and producing records under subpoena here, although Counsel for the General Counsel has given me assurances that those materials are going to be shared only with the General Counsel, we have significant concern that there could be an improper circumvention of the discovery rules in those other litigation cases if materials that are produced in response to the subpoena here wind up over there.

So if it is ultimately Your Honor's ruling that the subpoena will stand, we would ask that Your Honor enter a protective order to ensure that the documents that are produced can only be used for the purposes of this case. And I'm not sure if it would be appropriate in terms of a further restriction that they cannot be shared with the Charging

Party's counsel, but we do have that concern, which again is a matter that we're only starting to grapple with in light of the fact that the Charging Party is represented here by counsel today.

If Your Honor has no questions for us, we'll rest our -- and thank you for your attention.

JUDGE MONTEMAYOR: A couple of things. It sounds like, correct me if I'm wrong, it sounds like that you don't have any objection to any requested materials from April 28, 2017, to the present?

MR. McDONALD: We think -- as a general matter, we think that that would be fair game because anything that happened from the trusteeship forward, of course, would have been within the knowledge of the trustees. It would have been foundational. So, yes, as a general matter, we do not have the timeliness concern if the subpoena is limited in such a fashion, and it also would grossly reduce the burden because now we have available to us the individuals who were around during that period of time, and that would greatly reduce the burden in trying to ascertain what records exist, where they are, who has them, so on and so forth.

I will say, however, there are a number of categories of documents that Local 1107 does not expect to have within its possession, custody, or control because they relate to personnel who were assigned by the International Union, and

thus the Local Union doesn't have a right of access to those materials. So to some extent, there are items that are laid out in this subpoena that might actually have to be directed to the International Union instead, simply because we don't have possession, custody, or control over those items. If you'd like, I can give examples, but that's an additional concern.

JUDGE MONTEMAYOR: One other thing that we didn't address was I think in the papers you reference some attorney-client issues.

MR. McDONALD: Oh, yes. This also relates -- we'll do it separately, but I do have an issue. The General Counsel has placed Paul Cotsonis under subpoena to testify in this case. He's an associate attorney with our firm and has acted as outside counsel, as have other attorneys in the firm with respect to Local 1107. We have generally stated concerns that in light of the fact that the General Counsel has now issued a document subpoena asking for documents related to Mr. Cotsonis, that there would be an invasion of attorney-client privileged materials or materials that would be protected by work product doctrine.

With respect to the documents subpoenaed in particular, because he was never in the employ of Local 1107 as an employee, which would be distinct from saying in-house counsel, we don't think that there's any relevance for

materials from Mr. Cotsonis because it would essentially pry our firm's private records, you know, for examination, and we think that there's just no relevance there in any of those materials.

And obviously without having had time to give a critical examination of any materials that might be responsive with respect to Mr. Cotsonis, we haven't even begun to ascertain privileged, not privileged, putting together, you know, a privilege log if appropriate. So we just wanted to alert that we think that the subpoena as to Mr. Cotsonis just has the potential for opening a can of worms that is impermissible. We'll deal with it separately. I've had conversations with Counsel for the General Counsel about Mr. Cotsonis's subpoena to testify. Although we didn't petition to revoke his subpoena, because we do think that there are probably questions that can be asked of that witness that would not invade the privilege, but we just can't know that until the questions are asked.

So we think it's presumptively unreasonable to subpoena outside counsel in a case because of the substantial likelihood that it's designed to infringe on attorney-client privilege and work protect protections and, of course, Board case law has made it abundantly clear the Board does recognize those doctrines, and we think that that just opens a can of worms that is problematic.

JUDGE MONTEMAYOR: Counsel.

MR. ANZALDUA: Your Honor, I would address a couple of the issues in the petition to revoke. In terms of timeliness, you know, the subpoena was mailed on February 15th. It was emailed to Respondent's counsel the same day, and in fact, Respondent's counsel and I discussed narrowing the subpoena and entering into stipulations on February 18th. Therefore, I think it's a little bit disingenuous to kind of claim that Respondent was prejudiced in any way in terms of service of the subpoena duces tecum, especially in light of their timely petition to revoke filed before the hearing.

So I would just argue that, you know, ideally, yes, the Casehandling Manual guidance would say 2 weeks to issue a subpoena duces tecum, but as you know, as well as I do, you know, the administrative delay in certain time periods is significant, and you know, we got it out as soon as we could. And we don't believe that there was any prejudice in terms of the date of the issuance.

In terms of relevancy and burdensome, you know, all the requested items are relevant because it goes towards Respondent's animus, its past practices and change of past practices when the trusteeship came, its disparate treatment of other employees for engaging in similar conduct. To say that, you know, someone was given a written warning a month before the trusteeship, but all of a sudden written warnings

are, you know, weren't given after the trusteeship, you know, to target it, that's not relevant or to say that emails prior to the trusteeship relating to the Staff Union or Mr. Cabrera aren't relevant to show that the Respondent had animus, I think that argument fails as well.

I think they're clearly relevant. The relevancy standard is low to meet in a subpoena contest. Even if the requested documents are still maintained by Respondent, the Local 1107, there's no indication that the International reps came in and destroyed all the personnel documents or deleted all the emails. If that's the case, then they should let us know, but assuming that Respondent still has access and still maintains these documents in the regular course of business, even if there is a change of management, I think it's still relevant to the unfair labor practices alleged.

New management presumably had access to the records when they got there. Respondent cites no cases saying that change in management excuses a party from producing documents pursuant to a subpoena. If they have one, I'd like to see it.

The petition to revoke does not identify any particular paragraphs in the subpoena that are problematic but instead broadly objects to the subpoena without providing any specifics. It's well established that a subpoena will not be revoked based on conclusionary assertions made by the

petitioner.

The petitioner must point out specific documents and records that exceeds the bounds of relevancy. The petitioner has not done that. They haven't identified any class of emails or class of grievances or any class of disciplines that are not relevant or overly burdensome. Instead, you know, they generally claimed that it's irrelevant and overly burdensome, the production of which, absent such specific evidence, the documents must be produced.

Furthermore, a subpoena is proper when it's designed to produce material concerning a defense. Several of the paragraphs go towards Respondent's affirmative defenses, even if that defense may never arise.

The applicable test for determining the merits of a petition to revoke a government subpoena is whether or not the evidence desired by the subpoena is plainly incompetent or relevant, and that burden has not been satisfied here, Your Honor.

If the evidence sought by the subpoena merely relates to or touches upon the matter under investigation, a petition to revoke a subpoena is denied.

And I would just also note that the subpoena is only asking for documents in their control, you know. In the definition section at letter (k), it states that the subpoena applies to documents in your possession, custody, or control.

To the extent that a former supervisor is in their control now, they should request those documents if they need them.

But other than that, Your Honor, General Counsel would ask that the petition be denied.

JUDGE MONTEMAYOR: Okay. Let me just ask you about the attorney-client issues. They raised some attorney-client issues, work product issues. What's your position about that?

MR. ANZALDUA: Yeah. The complaint does allege Mr. Cotsonis is a supervisor and agent of Respondent. I've informed Respondent that's it's not a supervisory theory that the General Counsel is proceeding on but that Mr. Cotsonis acted as an agent of the Union in terms of investigatory meetings or drafting disciplinary documents and in speaking and interrogating employees about events. You know, in terms of attorney-client privilege, you know, I think we should address that if it comes up. I may not need to call Mr. Cotsonis as a witness depending on the other -- the testimony of the other 611(c) witnesses. So it may not be an issue that we need to address now, but I agree that you should be -- he should have raised it to your attention now.

JUDGE MONTEMAYOR: What about the document request? Apparently there are some law firm document requests?

MR. ANZALDUA: Again, you know, if it's -- you know, one of the paragraphs references, you know, the job descriptions,

job postings, appraisals, and all the documents that show the job duties or the authorities of the positions held by and, you know, list the alleged supervisors and Mr. Cotsonis. If it's something relevant that the Respondent has in its possession, that there's an agreement of like what his job was there in terms of working for the Respondent, I think that is relevant to the document request. In terms of whether that's protected by attorney-client privilege, I'm not sure that it is given that it's a --

JUDGE MONTEMAYOR: Well, I'm just trying to figure out as a practical matter how we address the document and attorney-client privilege issues because there's no privilege log. I mean you want to --

MR. ANZALDUA: I would agree, Your Honor.

JUDGE MONTEMAYOR: -- reserve that or hold off until we get further along? I don't know.

MR. MCAVOYAMAYA: I'd like to just add to that, it would be an at issue waiver if Mr. Cotsonis was the attorney at the initial grievance hearings. So I think his, you know, this, you know, issue is about, you know, their animus and also, you know, what they failed to do. In the grievance procedure Mr. Cotsonis was representing, I think it's an at issue waiver of attorney-client privilege.

Additionally, I just want to clarify some things or clear up some representations that were made by the defending

party here.

Number one is access to individuals that were in leadership positions prior to trusteeship. They absolutely have access. One such person is Brenda Marzan. She was assistant trustee. She retains her position as a chief steward of account. She is currently running with the current trustee, to run the Union in the upcoming election. So the notion that they do not have access to individuals who were in leadership positions at that time is patently false.

Additionally, Ms. Vergara, who is the deputy trustee right now, who is running for executive director of the Union in this coming election, was also at the Union and an employee working on -- with Local 1107 on behalf of the International well prior to the imposition of the trusteeship. I think that those issues are relevant and should be cleared up now with regards to the subpoena.

MR. McDONALD: If, Your Honor, if I might. What counsel for the Charging Party has just indicated, none of that is true. Ms. Marzan was never appointed as a trustee over Local 1107 during the pendency of the trusteeship. She, as a steward, would not have exercised any supervisory authority over any of the staff, certainly not Mr. Cabrera. So, you know, those remarks just aren't true. She was a member of the executive board prior to the imposition of the trusteeship, but she has not held any management roles in the

Union, as such, other than her membership on a multi-member collegial body which was disbanded as a result of the trusteeship. So Ms. Marzan just seems to have absolutely no relevance to any of the items that are at play here.

In terms of, if I might, just a couple of brief points in rebuttal.

With respect to Mr. Cotsonis, the subpoena requested four categories of documents that touched upon him. It asked for job descriptions, job postings, appraisals, or other documents that showed job duties or authorities for him; documents that showed wages, benefits, or other compensation paid to him; the complete personnel and employment files relating to him; documents that indicate or reflect involvement or participation, including recommendations by the individuals identified in paragraph 3 of which Mr. Cotsonis is one, of actions concerning the traditional indicia of supervisory authority.

Because Mr. Cotsonis is not an employee of Local 1107 and never has been, and in fact, he's an employee of the Urban Law Firm, Local 1107 will not likely have in its custody any documents with respect to items 3, 4, and 5 on the list. There wouldn't be any employment files because they didn't hire him as an employee. They hired a law firm as outside counsel. Wages, benefits, or anything paid to him that would be material, that would be within the custody of

the Urban Law Firm, not Local 1107. Moreover, I don't see any relevance in going on a fishing expedition in terms of invoices that have been issued by the Urban Law Firm which would have been paid by 1107.

JUDGE MONTEMAYOR: Let me briefly touch on that. Is there some dispute about this person is a supervisor or not? Is that a matter that's in dispute?

MR. ANZALDUA: Yeah, they denied that he was a supervisor and agent of Respondent in their answer.

MR. McDONALD: So I was heartened to hear, and we did have a conversation prior to the hearing among Counsel for the General Counsel, about the supervisory status element as to him. If the General Counsel is abandoning that theory, then that resolves supervisory status.

However, agency presents a number of separate problems. Although an attorney would generally be considered an agent of his client, Local 1107, we think the mark is missed in the context of a Board action, and particularly in a ULP, is agency has to bear on acting in the interest of an employer, and when you have a lawyer who is acting as outside counsel to an employer, just because he's a lawyer for the employer doesn't necessarily mean he had any agency status on behalf of that employer.

Mr. Cotsonis did not have any individual interaction with the Charging Party or with the Staff Union. If he did

have interaction in the events that gave rise to this charge, he was always accompanying another management member of SEIU Local 1107, and you know, we haven't been able to indicate any case that indicates an attorney, for purposes of Board proceedings, would be considered to be an agent.

If Your Honor starts opening that --

JUDGE MONTEMAYOR: Let me just interrupt you by saying, it sounds to me like those are back to our legal issues that are in dispute, but it also seems that that's one of these things where if you could -- if you all were able to stipulate, enter into some stipulation regarding that, you know, you would be able to address 4 hours of trial.

MR. McDONALD: I mean --

JUDGE MONTEMAYOR: So that's something that I think is an issue. I think it's at dispute. There are some disputed facts and legal questions there that you all haven't resolved.

MR. ANZALDUA: I think that's true, Your Honor. I think -- but, you know, at this point, we may not need to resolve them. You know, I said earlier, we may not need to call him to testify.

JUDGE MONTEMAYOR: Well, I'll let you sort of work that out and see if there's some room for you to address that or not, but at the present time, my inclination is to deny the petition to revoke, although I am not -- I'm not entirely in

disagreement with you regarding the trusteeship and the time frames. There are the issues of past practice. There are issues -- I would have to make -- it would sort of require that I make these findings in order to get there, which I'm not prepared to make at this point in time, findings relating to past practices, findings relating to whether there were communications between people who are currently there and people who were previously there. There are all sorts of issues that -- factual questions that could arise in that regard.

And so as far as attorney-client privilege issues are concerned, given the nature of the discussions and the lack of protective order, as a practical matter, I think we have to take that as it comes. I'm not going to rule on it one way or the other. If we get to the privilege issue, you'll have to raise it piece by piece, on a case by case, whether it's through the testimony or some documentary issues that you have. Without a privilege log, I can't -- or presume what might or might not be privileged, specially in these cases where there may be no inquiry whatsoever or no interest in inquiry regarding privileged matters and so on. I'll leave it at that.

MR. MCAVOYAMAYA: I did also want to note one more thing. The Respondent or the defending employees, they produced 261 pages of documents in regards to termination of

likely Debbie Miller, which is, you know, relates to their defenses here.

Actually, no, I take that back. This was a request for information for Mr. Cabrera. It has to do with the Together We Rise campaign. That was one of the requests that General Counsel requested. They've already searched through those documents, and they've produced 261 pages to me before we went through that grievance procedure already. So the notion that they haven't already been searching is a little disingenuous in my opinion. Okay. I just wanted to note that.

MR. McDONALD: Again, Your Honor, unfortunately, I have to correct some factual errors. First, I'll note Ms. Miller is a plaintiff in lawsuits against Local 1107 and other administrative proceedings, although as far as I'm aware no Board proceedings. To my knowledge, she has been represented by Mr. Mcavoyamaya as well. So we have yet again the same mixing of discovery, using items from one case in another case, but I have to correct the statement that she was, in fact, not terminated. There has been a finding in another administrative agency that she was not terminated.

As far as whether any of those documents we intend to use as part of our defense, I -- some items were produced during the investigation of this charge to the General Counsel, to the Board, during the investigatory phase. Of

course, items that have already been produced, the General Counsel already has. Whether there are additional records that bear on defenses or responsive to the subpoena, that's, of course, something we would deal with in terms of our return on the subpoena.

I'm sympathetic, of course, to the issue on revoking the subpoena if there's no narrowing of time. Of course, there's going to be a lot of effort that's going to be required to start gathering those records. As I mentioned earlier, this firm doesn't represent any of those clients in any of those other legal actions, which means there are going to have to be coordination among counsel for all those cases so we can look at what may have been discovered by them and produced. And I'm, you know, expecting that there may be mountains of items that fall within the scope of this subpoena that are with the other law firms, and I'm concerned that when they are able to produce those to the General Counsel, General Counsel, of course, is not going to have had an opportunity to review any of them, and you know, I'm curious if that now means, you know, there's a need to continue the hearing simply because General Counsel won't have had any opportunity to looked at any documents that are going to be produced.

I can tell you that we're prepared to make a partial production today of items that were responsive to the subpoena on the basis of items that were ready available and

were readily ascertainable, but if Your Honor isn't going to limit the scope of time, you know, while we're sitting here at the hearing is time that's not available to us to continue to search for the records under the subpoena. And I certainly don't want to put General Counsel at a disadvantage in prosecuting this case, but he just won't have had access to any of those records under the subpoena. I guess I'm curious as to what General Counsel's position is on how that may affect how we proceed forward?

MR. MCAVOYAMAYA: Just a misunderstanding. It was not Debbie Miller. It was the request for information on Javier's grievance. So it was not Debbie Miller.

JUDGE MONTEMAYOR: Let's address that question. What's your position? Are you going to be able to move forward today?

MR. ANZALDUA: Yes, Your Honor. The General Counsel will move forward. I would, you know, I would just say that the, you know, there was never a ruling on our petition to revoke prior to the hearing. So Respondent had the obligation to produce what it could, you know, at the start of this hearing, and that that continues on an ongoing basis, and I would seek adverse inferences for anything that it comes out that there's documents out there that haven't been produced.

MR. McDONALD: I think an adverse inference is just way

too mature. I mean 2 days --

JUDGE MONTEMAYOR: We haven't -- we're not anywhere near that. They have to have an opportunity to produce the information.

Another part about this is just for future reference, and it makes a lot of sense to try to have all these issues addressed before the hearing. Trying to absorb the -- and the first time I saw the petition to revoke was when I walked in this morning, and we've spent a good amount of time on the record here, good hearing time that we could be swearing in witnesses and taking witnesses. So for future reference, the preference is to try to have the petitions and the responses and everything in before we get to trial versus the night before, okay.

MR. McDONALD: We would certainly agree with Your Honor's admonition on that point. Of course, when a subpoena is served actually at a late hour, that ties our hands.

JUDGE MONTEMAYOR: I understand where we are in this case. It's just for future reference, okay.

MR. McDONALD: Duly noted.

JUDGE MONTEMAYOR: Okay. You all will be practicing in this area, this arena for many years to come. And it is in everybody's interest to try and address these issues before we get to trial. We're part way through the morning.

We're going to go off the record here.

(Off the record from 10:32 a.m. to 11:33 a.m.)

JUDGE MONTEMAYOR: We're back on the record.

While we were off the record, Counsel for the General Counsel had an opportunity to look over the documents that were turned over pursuant to the subpoena. Any comment about that before we move to opening statements, counsel?

MR. ANZALDUA: Your Honor, I think I can address them as the testimony develops as to what was and wasn't produced. At this point, I don't see the need to call the custodian of records to interrogate her about the production at this point.

We're ready to proceed with our opening statement and witnesses.

JUDGE MONTEMAYOR: Okay. You may begin.

OPENING STATEMENT

MR. ANZALDUA: All right. Your Honor, this case is about an employer, which happens to be the Service Employees International Union Local 1107 that prides itself on advancing workers' rights and organizing employees to better their working conditions. The SEIU and this Local have a long history of protecting employee rights.

However, that objective seems to stop when it comes to their own employees exercising the rights to engage in union activity.

Certain employees at Local 1107 are represented by the

Nevada Service Employees Union Staff Union. The SEIU Local 1107 and the Staff Union had a collective bargaining agreement, and the Charging Party, Javier Cabrera, was the president of the Staff Union.

As the testimony and documentary evidence will show, Mr. Cabrera was a longtime union organizer spanning a 27 year career. He was also a longtime employee of SEIU Local 1107 and a longtime protector of his coworkers' rights and working conditions. He served as the Staff Union president for over 9 years until he was discharged on October 20 of 2017.

As the evidence will show, SEIU Local 1107 discharge of Mr. Cabrera was based on an overzealous investigation into Cabrera's job performance, resulting in disparate treatment in terms of discipline and the failure to abide by any progressive disciplinary procedure as stated in its collective bargaining agreement.

This will be unsurprising as the testimony and evidence will show that SEIU Local 1107 management, which was under trusteeship at the time, bore significant animus towards Cabrera and the Staff Union for being an obstacle in management's way. Martin Manteca, the deputy trustee, was the driving force behind this anti-union crackdown.

Cabrera would not have been discharged if he had not been such an advocate for the Staff Union and his coworkers. Cabrera filed numerous grievances on behalf of members

leading up to his discharge, and it was because of this protected union activity that Cabrera was fired, not because of his minor infractions, trumped up by SEIU Local 1107.

The General Counsel asks that you grant the relief requested in the complaint in this matter, and remind SEIU Local 1107 that while it attempts to organize other workplaces, it cannot retaliate against its own employees for engaging in union activities.

Thank you.

JUDGE MONTEMAYOR: Anything from Respondent?

MR. McDONALD: If it pleases, Your Honor, the Respondent would like to reserve its opening statement until the General Counsel's case has rested.

JUDGE MONTEMAYOR: Okay. Go off the record for just a moment.

(Off the record at 11:37 a.m.)

JUDGE MONTEMAYOR: Back on the record.

Off the record, we just had a short discussion regarding witness and logistics and lunch timing. We're back on the record and, counsel, the floor is yours.

MR. ANZALDUA: General Counsel calls Barry Roberts.

JUDGE MONTEMAYOR: Remain standing for the oath. Raise your right hand.

(Whereupon,

BARRY ROBERTS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:)

JUDGE MONTEMAYOR: Please have a seat. We're going to begin by having you state and spell your name for the record, please.

THE WITNESS: It's Barry Roberts. It's B-a-r-r-y R-o-b-e-r-t-s.

JUDGE MONTEMAYOR: Sir, you may begin.

DIRECT EXAMINATION

Q. BY MR. ANZALDUA: Good morning, Mr. Roberts. My name is Fernando Anzaldua. I'm an attorney with the National Labor Relations Board, and I'll be asking you some questions here today.

A. Okay.

Q. Who's your current employer?

A. National Nurses United.

Q. Are you familiar with SEIU Local 1107?

A. Yes.

Q. And how so?

A. I was stationed here working with the International Union for probably 11 months.

Q. And do you know about what time period that was?

A. It would have been between 2017 to '18. So I got here October -- hang on, October 2016, and I left in October of

2017.
Q. Okay.
A. Sorry.
JUDGE MONTEMAYOR: So October 2016 to October 2017?
THE WITNESS: Yes.
Q. BY MR. ANZALDUA: And what was your job title during that time period?
A. I was a senior organizer.
Q. And what were your job duties as a senior organizer during that time period with the Local?
A. Well, I was overseeing three of the local staff for their -- on their daily duties.
Q. Who did you report to at that time?
A. I reported to Martin Manteca. He was the deputy trustee.
JUDGE MONTEMAYOR: Can you spell his name?
THE WITNESS: It's M-a-r-t-i-n, Manteca, it's M-a-n-t-e-c-a, I think.
Q. BY MR. ANZALDUA: And so the Local was put into trusteeship around April, end of April 2017?
A. Yes.
Q. And prior to the trusteeship, did you ever have any interactions with Martin Manteca?
A. No.
Q. After the trusteeship, did you?

A. Yes.
Q. And would you regularly communicate with him, or how often was it? Once a week, every day? Did you see him at the office, or how did that go?
A. It was daily. In the first beginning, it was every evening. Then it became probably more of an every other day, two, about three times a week, twice a week. Sorry.
Q. And when you would meet with him, would you meet in a group with other staff, or would it be one-on-one meetings?
A. Group with other staff. It was myself, Davere Godfrey, and Helen Sanders.
Q. And where would you guys usually meet?
A. We would normally meet in his office.
Q. Did you ever meet in any of the conference rooms?
A. Yes.
Q. Is there more than one conference room?
A. There's two. There's one big conference room, and then there's a little conference room off to the side.
Q. And do you recall what job responsibilities or duties, if any, did Manteca give you after the trusteeship was imposed?
A. Yes. I was to oversee, I think what -- I had three staffers which was Javier was one, Susan was my second, and LaNita was my third.
Q. Was that Susan Smith?

A. Yes.
Q. And is that LaNita Troyano?
A. Yes.
Q. And during these meetings with Manteca, did he provide any directives to you and others present about staffing issues?
A. Yes.
Q. What directives did he -- what, if anything, did Manteca say in regards to Javier Cabrera?
A. In the first -- when the trusteeship first took place, it was my first day back after my weekend rotation. Martin had the International staff into the big conference room, and his orders were to -- that he needed to figure out a way to get rid of Javier because he was the Local -- he was the staff president, LaNita Troyano because she was the leader of the pack, Debbie Smith -- Debbie Miller because she was close to -- she used to work with Cherie Mancini who was the former president of the Local, and Gloria Madrid because he didn't trust her.
Q. Did he tell you who gave him these instructions or why he wanted to do that?
A. That was -- no, he never gave a reason. He just said that was what needed to be done.
Q. And what did you do in response to that?
A. I just, you know, never said a word, you know, because I

have worked with all four of these people for 6 months prior before that.

Q. Did anyone else in the room at the time say anything in response to that?

A. Uh-uh.

JUDGE MONTEMAYOR: No? You just shook your head and --

THE WITNESS: No. Sorry.

Q. BY MR. ANZALDUA: Did you take this as a directive to find a reason to fire these individuals?

A. Yes.

Q. Did you do anything to further that directive?

A. No.

Q. Do you know of others who did?

A. Yes.

Q. Who are those?

A. Davere Godfrey. He was the only one.

Q. And to what extent, if you know, did he try to further that directive for Manteca?

A. Well, every -- I don't know, at least once a week, Manteca would talked to -- pulled Davere, Helen, and myself into his office and he would say, what have you found? Have you got anything? You know, what's the story? What's -- why's this taking so long, and the closer it got to the end of our I guess time frame at being at the Local, he kept bearing down. He was like before you leave, he gave Davere

Godfrey or Arthur Godfrey a directive. Before you leave to go to your next assignment, you had to figure out a way to get rid of Javier.

Q. Do you remember what Godfrey's response was?

A. He never responded.

Q. Early on in the trusteeship, did Mr. Cabrera ever approach you and ask you about a conversation he overheard?

A. Yes.

Q. And what did he ask you?

A. He asked me, and he overheard -- I guess he overheard the conversation that I had been in the conference room about Martin Manteca threatening those people.

Q. And what did he ask you about it?

A. He asked me if it was -- he asked me was I in the room, for one? I told him, yes, I was in the room. Then he asked, you know, what was said?

Q. And did you confirm what was said?

A. I just -- yes, when he asked me -- when he repeated back what was said, he asked me if that was what Martin had said in that conference room, and I just confirmed yes, with no other details.

Q. Did you speak to any other employees, non-supervisory employees about the directive that Manteca gave you?

A. No.

Q. Did you speak to anyone else that you haven't mentioned,

management personnel, about what Manteca told you?
A. No.
Q. Did you speak to anyone from the International about it?
A. Yes. No. Technically no. The guy I talked to no longer works for the International anymore.
Q. And who was that?
A. Ed Burke.
Q. Now, in your experience with working with Manteca, was it surprising that he said this about the individuals he named?
A. Was it surprising?
Q. To you?
A. Not really.
Q. Why is that?
A. Because normally under a trusteeship, they normally wipe out the entire staff. They normally take them all out, and for -- and he was just cherry picking on which staff he wanted to keep in place to I guess operate in his style of the Union.
MR. ANZALDUA: Your Honor, may I have a moment?
JUDGE MONTEMAYOR: Yes, you may.
(Pause.)
Q. BY MR. ANZALDUA: Why did you leave your employment with SEIU Local 1107?
A. I just -- so I could be closer to home.

MR. ANZALDUA: No further questions, Your Honor.

JUDGE MONTEMAYOR: Before I turn it over, just one question. In your testimony you referenced Javier, the individual Javier. There may be more than one Javier in the workplace. Can you address Javier who?

THE WITNESS: I can't even say his last name. Cabrera.

UNIDENTIFIED SPEAKER: Cabrera.

THE WITNESS: Cabrera. Sorry.

UNIDENTIFIED SPEAKER: Thank you.

JUDGE MONTEMAYOR: Anything further?

MR. ANZALDUA: Your Honor, just quick follow-up questions.

Q. BY MR. ANZALDUA: During your time when you were working with SEIU Local 1107, did you work on the Together We Rise campaign at all?

A. Yes.

Q. And what was your involvement with that campaign?

A. I was to help make sure that we got the numbers that we needed to make the campaign I guess work, you know. We were doing -- getting people to resign membership cards, getting people to sign up. We were giving everybody a contract, but every member or every bargaining unit person, we made sure that each person had a copy of their collective bargaining agreement. So that was one -- those were the two things that I can remember under the Together We Rise campaign.

you mean?

THE WITNESS: I had called a friend of mine. He does trusteeships, and when -- in the first beginning, I asked him, which is Ed Burke, he was a former SEIU International employee, I asked him what was the protocol like when they trusteed locals, did they wipe out the entire staff or did they keep certain staff, how did that process work. And he informed me that, you know, they take out the head honchos first thing first, and then they normally interview each of the staff and figure out who they want to keep, who they don't.

JUDGE MONTEMAYOR: Counsel.

MR. ANZALDUA: I have just a few follow-up questions.

REDIRECT EXAMINATION

Q. BY MR. ANZALDUA: Did you fear any kind of retaliation or retribution if you had gone and reported this to someone else, like an International or went above Manteca's head?

A. Yes.

Q. Why was that?

A. Because I was just an organizer for the International. I was like the lowest of the -- I guess I was just a small worker, and it was like if you report that up, it's like you're trying to push a boulder uphill, and you just ain't got -- it's just going to come right back down and, you know, they would have ejected me out of the -- away from Local

quickly.
Q. And you mentioned Davere Godfrey and statements he made to you about checking on some people. Did he mention Javier Cabrera specifically?
A. Yes, he would go to the Southern Nevada Health District. He was there a couple of times. He would drive over to see if Javier was there working.
Q. And did he tell you that he did that with anyone else, or was it mainly Javier Cabrera?
A. Mainly Javier. I don't recall him visiting or going to any other sites besides Javi.
MR. ANZALDUA: Just a moment, Your Honor.
Q. BY MR. ANZALDUA: Were you aware that there was a collective bargaining agreement between the Local 1107 and Staff Union?
A. Yes.
Q. Do you know if Martin Manteca was aware of that?
MR. McDONALD: Objection. Speculation.
THE WITNESS: I don't know. In the beginning, I don't know.
JUDGE MONTEMAYOR: Foundation -- I'll sustain the objection. You can lay a foundation.
MR. ANZALDUA: If you know -- I'll rephrase the question.
Q. BY MR. ANZALDUA: Did Martin Manteca ever mention the

collective bargaining agreement to you?
A. Yes.
Q. And what did he say about it?
A. He asked me if I had a copy of the collective bargaining agreement.
Q. Did he say anything else that you recall?
A. Not that I can recall, no.
MR. ANZALDUA: No further questions, Your Honor.
MR. McDONALD: Just a quick couple threads.

RECROSS-EXAMINATION

Q. BY MR. McDONALD: He asked if you had a copy of the Staff Union collective bargaining agreement, correct?
A. Correct.
Q. Did you take that as an indication that he wanted to make sure you were familiar with it?
MR. ANZALDUA: Objection, Your Honor. It goes on personal knowledge as to what Manteca intended.
MR. McDONALD: I'm asking what he understood by him being supplied a copy, what he understood, what he took from it, not what Manteca thought about it.
JUDGE MONTEMAYOR: I'll sustain the objection and allow you to lay the foundation about his knowledge.
MR. McDONALD: Well, I'm not asking for Manteca's knowledge. I'm asking for this witness's knowledge about what he took from --

JUDGE MONTEMAYOR: I'll let you rephrase the question so that it's clear what you're asking.

Q. BY MR. McDONALD: Did you form an understanding -- did you have any thoughts in reaction to Manteca making sure that you had a copy of the Staff Union contract?

A. Yes.

Q. What did you think?

A. For the reasoning of days off, weekend work, he wanted to make sure that we were all aware of what the contract laid out for days off, weekend work.

Q. So you understood it to be that he wanted to make sure the staff -- the management were familiar with the staffing CBA?

A. Yes.

Q. And then one last thing. I believe you testified on the first round of questioning that the Local Union didn't have any authority to discipline you, correct?

A. Correct.

Q. So you'd have no reason to be worried about the Local Union retaliating against you, would you?

A. No, not the Local, no.

MR. McDONALD: Nothing further.

JUDGE MONTEMAYOR: Okay. Thank you. You're excused. Appreciate your participation.

(Witness excused.)

JUDGE MONTEMAYOR: Go off the record.

(Whereupon, at 12:23 p.m., a lunch recess was taken.)

A F T E R N O O N S E S S I O N

(Time Noted: 1:48 p.m.)

JUDGE MONTEMAYOR: Would you raise your right hand?

(Whereupon,

MARTIN MANTECA

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:)

JUDGE MONTEMAYOR: Please have a seat. We're going to begin today by having you state and spell your name for the record please.

THE WITNESS: Martin Manteca, first name, M-a-r-t-i-n, Manteca, M-a-n-t-e-c-a.

JUDGE MONTEMAYOR: Counsel.

DIRECT EXAMINATION

Q. BY MR. ANZALDUA: Mr. Manteca, my name is Fernando Anzaldua. I'm an attorney with the National Labor Relations Board. I'm going to be asking you some questions this afternoon.

A. Yes, sir.

JUDGE MONTEMAYOR: Just a minute before we go any further. You have a notebook or something that's opened that you're looking at.

THE WITNESS: Or I could just put it --

JUDGE MONTEMAYOR: You're not --

THE WITNESS: Okay. No problem.
JUDGE MONTEMAYOR: -- you're not allowed to testify with a notebook there.
Counsel.
Q. BY MR. ANZALDUA: Mr. Manteca, who's your current employer?
A. SEIU Local 721.
Q. Are you familiar with SEIU Local 1107?
A. Yes.
Q. How so?
A. I was appointed deputy trustee to 1107.
JUDGE MONTEMAYOR: You need to speak up, okay.
THE WITNESS: I was appointed deputy trustee to Local 1107. Is that better?
JUDGE MONTEMAYOR: That's better. I wear a hearing aid, so I need you to speak louder.
THE WITNESS: Yes, I will speak up.
Q. BY MR. ANZALDUA: From what dates were you the deputy trustee with Local 1107?
A. I was appointed on April 28, 2017, and I departed I believe it was June 15, 2018, give or take.
Q. And throughout that time period, you were a deputy trustee for the 1107?
A. Yes.
Q. Did you hold any other positions or roles in that time?

A. Deputy trustee.
Q. That's it?
A. That was my position.
MR. ANZALDUA: Your Honor, I request permission to proceed with this witness under Rule 611(c) of the Federal Rules of Evidence.
JUDGE MONTEMAYOR: You may proceed.
Q. BY MR. ANZALDUA: If you know, what does it mean to -- when a local like 1107 is put into trusteeship by the International?
A. That means that the International president decided to put the Local into trusteeship, which means the board is suspended and all officers are suspended.
Q. Generally, do you know which reasons why a local would be put in trusteeship?
A. The Local 1107?
Q. Just locals in general, if you know.
A. It could be for several reasons. Violations of the International bylaws and so on.
Q. Violation of the International bylaws and what else?
A. It could be varied. It could be so many things, unlawful conduct by officers, mismanagement, not representing the best interest of the members.
Q. When did you first become aware that Local 1107 would be placed in trusteeship?

A. I became aware about a week before it was going to go into trusteeship that it might be going into trusteeship.
Q. Who told you that?
A. I was -- I had a conversation with Deedee, I believe is her name. She's a national chief of staff.
Q. And did you play any role in making the decision to -- for the Local to go into trusteeship?
A. No.
Q. When were you informed that you would be the deputy trustee for Local 1107?
A. I was given a letter on April 28th for my appointment to deputy trustee.
Q. Was that letter specifically addressed to you or to more people than you?
A. It was a letter appointing me as the deputy trustee and Luisa Blue as a trustee. It was a formal letter that the International president provided.
Q. And that letter, that was the first time that you knew that you were going to become the deputy trustee for the Local?
A. I was asked if I was willing and able to -- if appointed by the International president, would I take on the duties of deputy trustee the week before that.
Q. And that's from Deedee you said?
A. Yeah, Deedee, yeah, Deedee, I think her name is -- last

name is Fitzgerald [sic].
Q. And did you have any -- were you informed of any -- the reasons why the Local was being put into trusteeship?
A. No.
Q. Ms. Fitzgerald didn't inform you?
A. No, not at the time.
Q. Did you find out later?
A. I did.
Q. And who told you that?
A. Well, I read the -- I was told by Ms. Fitzgerald herself.
Q. About when was that?
A. That was after -- I believe there was a Wednesday meeting, the 26th. April 26th, there was a meeting with the members of the board asked to be put on the trusteeship, for the trusteeship. So on the 27th, the next day, I was notified that the Local might be going into trusteeship the following day.
Q. And did you know the reason why at that time on the 27th?
A. As I recall, it was a complete crisis in the Local leadership. The president and vice president had been removed from their positions, and the board had asked that the International intervene on behalf of the well-being of the Local and the members and be put into trusteeship.

Q. What did you understand your goal to be as the deputy trustee, you know, after you were informed that you were going to be the trustee?
A. To oversee the day-to-day business of the Union with constant consultation with Luisa Blue, who was the trustee of the Local.
Q. So you said, you know, this -- the Local was in crisis at the time. Was your role just to continue with the crisis or was your -- did you have a directive on, you know, to fix something, or what else was your goal?
A. My directive as a deputy trustee would be to address the crisis, refocus the Local on the work of the members, meaning building a stronger union by addressing the issues that the members have on a day-to-day basis and -- so, yeah, build a stronger Local.
Q. And did you anticipate addressing staffing issues?
A. I always address staffing issues at all my jobs. I'm a manager.
Q. Did you know -- did you have individuals in mind on who you were going to try to remove from office or employment with the Local?
A. There was nobody in the office at the time. They had been suspended by the --
Q. What about the non-officers, the rank and file employees?

A. The employees of 1107?
Q. Yeah.
A. I had never met any of the employees prior to April 28th.
Q. So your testimony is that on April 28th, you didn't have anyone in mind to remove from office or employment from the Local?
A. No.
Q. You mentioned that part of your directive was to address the crisis and refocus the Local. How did you intend to do that?
A. Well, just as an organizer, my job's pretty much is as external organizer, and I also oversee internal organizing, refocus the members into, you know, as we're a right to work state here, to recommit themselves to the Union, building a stronger union. We have 14 contracts I believe in Nevada. I believe about nine of them were open, and some of them, the county contract, the county was in danger of expiring, and members, you know, were in danger of losing thousands of dollars out there I believe beginning July 1st. So that was my number one goal, to look at how do I get -- close these contracts, make sure members are not working without contract, and then again to recommit themselves to forming a stronger union.
Q. When did you actually arrive at the Local 1107 facility?

A. On the morning of April 28th.
Q. What did you do? Did you have any meetings?
A. On the morning of April 28th, 7 a.m., we took control of the Union. We pretty much secured the assets of the Union.
Q. And when you say "we," who does that include?
A. Luisa Blue and the staff that was assigned to work with us.
Q. So my question was did you have any meetings that day?
A. I had -- yeah, I had meetings.
Q. And who do you recall meeting with that day?
A. With Deedee Fitzgerald, with Kathy Eddy, with Luisa Blue. I don't know if Steve Ury was there, but Steve Ury, just the staff that was assigned to secure the facility and the files and the accounts for the Local.
Q. And those people were from the International?
A. Yes.
Q. Did you meet with any of the employees of 1107?
A. No.
Q. Did you eventually meet with any of the employees from the 1107?
A. Yes.
Q. When was that?
A. I believe we met with them, it had to be either -- it had to be Monday and Tuesday of the following week. So I believe it was the 1st and 2nd of May, something like that.

Or Tuesday or Wednesday, but it was immediately after that.
Q. And what did you inform them?
A. We informed them of the Local having been placed under trusteeship, and we asked them to describe for us the work that they did at the Local.
Q. Are you familiar with Davere Godfrey?
A. Yes.
Q. Who's that?
A. He's an International coordinator.
Q. And at the time of the trusteeship, was he part of that transition?
A. He was not here yet.
Q. When did he get there?
A. He arrived at the Local I believe -- I asked for him to be assigned here, and I think he was assigned 2 or 3 weeks later.
Q. Are you familiar with Barry Roberts?
A. I am familiar with Barry Roberts.
Q. And who was that?
A. He was I believe a senior organizer with the International also.
Q. And what about Helen Sanders?
A. She was also lead organizer with the International.
Q. And were both of them, Roberts and Sanders, present during the transition of the trusteeship?

A. They arrived also later. They were not the initial team that arrived.
Q. When did they arrive?
A. I think it was a month or a couple of months afterwards.
Q. A couple of months after the trusteeship?
A. It's been a while. So it was like a month I think after the trusteeship.
Q. So is it your testimony that Mr. Roberts wasn't already at the -- working at the Local when you arrived?
A. Not when I walked in on April 28th.
Q. But he came a couple of months later?
A. Either a month or 2 months later.
Q. So the team you mentioned in the transition, you know, the week after or the week or two after the Local 1107, did you hold meetings with them, just that group from the International?
A. Yes, we had constant meetings. We had several meetings throughout the day. We took over on the 28th. We had meetings that Saturday, that Sunday, that Monday. It was constant meetings.
Q. And where did those meetings take place?
A. Those meetings would take place at the Local.
Q. Where at in the Local?
A. Several rooms. There are several meeting rooms.
Q. Is there a conference room?

A. Yeah, there's three -- I believe two conference rooms, three conference rooms. So we, you know, whenever we had to, we used one of the conference rooms.
Q. And did you have an office at the Local now?
A. Now?
Q. No, at that time.
A. No, I didn't have an office at the Local. I was just using, you know, open spaces.
Q. So in these meetings that you had in the couple of weeks after the trusteeship, did anyone discuss staffing issues?
A. No, we did not go into staffing issues other than we need to inform the staff when they return on the 2nd, I guess when we met with them, of the trusteeship, and just to understand what their day-to-day work and, you know, what the work they did on a day-to-day basis.
Q. Are you familiar with Robert Clark?
A. Yes, I'm familiar with Robert Clark.
Q. Who's that?
A. He was I believe -- I don't really recall his title, but I think he was a chief financial officer with the Local when I arrived.
Q. And he was still there?
A. He was still there.
Q. And do you know -- did you -- were you involved in any disciplinary action against him or termination?

A. I was involved in his termination.
Q. When was that?
A. I think it was the following week. It was, it was pretty quickly after we arrived that he was terminated.
Q. So earlier you said within the first -- the next 2 weeks, you didn't discuss -- you didn't have any meetings about staffing, but now you're saying that you discharged this man the week after the trusteeship?
A. He was management. I think you were referring to the Union staff, but you're correct. In fact, we did have discussions in addition to management.
Q. And who else was discussed?
A. I believe her first name was Dana. She was a communications person, and also Peter, Peter Nguyen I believe is his name, who was the organizing director.
Q. And all three of those individuals were terminated?
A. Yes.
Q. Who made the decision to do that?
A. Luisa and I conferred about their positions, and we determined that we wanted to go in a different way in terms of how the Local was being run. So we terminated them.
Q. In a different way, what do you mean by that?
A. Out of the crisis, to actually do the work and business of the members.
Q. What would be different about it?

A. Well, bargaining contracts, seeking contracts, representing people faithfully, answering calls from the members, increasing the membership, things like that.
Q. All right. During your time as a deputy trustee, did you ever discuss staffing issues for any of the bargaining unit employees?
A. Can you repeat that again?
Q. During your time as a deputy trustee, did you discuss staffing issues for any of the rank and file bargaining unit employees?
A. Yes, we made assessments.
Q. And when did you start doing those assessments?
A. Well, we do it on a weekly basis, assessments.
Q. So you became the deputy trustee, and that week you started making assessments or --
A. Yes, you know, as soon as the rank and file, the staff came back, we conduct daily debriefs, daily check-ins, weekly meetings. So it is our job as managers to, you know, conduct assessments on the work of the rank and file.
Q. So around the time when Mr. Godfrey and Ms. Sanders were at the Local with you, did they report to you?
A. They reported to -- mostly to Davere, but I had management meetings with them.
Q. I said Mr. Godfrey and Ms. Sanders, so them two reported to you?

A. No, Helen reported to Davere on a day-to-day basis.
Q. And what about Barry Roberts?
A. Barry reported to Davere on day-to-day basis.
Q. And then Davere Godfrey reported to you?
A. He reported directly to me.
Q. And did you have meetings with you, Mr. Godfrey, Mr. Roberts, and Ms. Sanders?
A. As I stated, we had many meetings.
Q. How often did those occur?
A. We would like to conduct those on a weekly basis.
Q. Was there a specific day of the week?
A. Sometimes -- yeah, Mondays. Mondays would be the day that I prefer to have those meetings.
Q. Were they first thing in the morning, late at night, or --
A. First thing in the morning, we would meet with the entire staff, and then after that, we would have the managers meeting. We would also have like half an hour before the managers meeting -- before the regular meeting, we will have preparation for the meeting for when people came in. So let's say 9 a.m. we meet with the staff. We will meet at 8:30 to make sure we were on the agenda, what the purpose of the meeting was, and then after we had the meeting, we debrief the meeting, and we would look for, you know, like what the work plan is for the week.

P R O C E E D I N G S

(Time Noted: 9:42 a.m.)

JUDGE MONTEMAYOR: Good morning.

MR. GODFREY: Good morning.

JUDGE MONTEMAYOR: Please raise your right hand.

(Whereupon,

DAVERE GODFREY

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:)

JUDGE MONTEMAYOR: Please have a seat. We're going to begin by having you state and spell your name for the record please.

THE WITNESS: All right. Davere Godfrey, D-a-v-e-r-e, Godfrey, G-o-d-f-r-e-y.

JUDGE MONTEMAYOR: You may begin, counsel.

DIRECT EXAMINATION

Q. BY MR. ANZALDUA: Mr. Godfrey, my name is Fernando Anzaldua. I'm an attorney with the National Labor Relations Board. I'm going to be asking you a few questions this morning.

A. Okay.

Q. Did you review any notes or documents in preparation for your testimony here today?

A. Yes.

Q. What did you review?
A. The termination letter and my emails.
Q. And what -- do you remember the dates of the emails that you reviewed?
A. October 26th I think, October 26, 2017.
JUDGE MONTEMAYOR: I have to ask you to --
THE WITNESS: October 26th I think.
JUDGE MONTEMAYOR: Please speak up. I wear a hearing aid.
THE WITNESS: Okay.
JUDGE MONTEMAYOR: So it's a little difficult for me. If you would speak up, okay.
THE WITNESS: Yes, sir. October 26th.
Q. BY MR. ANZALDUA: Thank you. And the termination letter you referenced is the one for Javier Cabrera?
A. Correct.
Q. Are you familiar with the SEIU Local 1107?
A. Yes, I am.
Q. How so?
A. I worked there for a temporary time, and I was assigned there from the International in 2017.
Q. When did you arrive at SEIU Local 1107 to start working there?
A. May of 2017.
Q. Do you recall the date?

A. I do not.
Q. Was it early May?
A. Early May, very early May. April 29th or April 30th or May 1st.
Q. Do you remember if it was a Monday or a Sunday?
A. I do not.
Q. And when did you find out that you were going to be assigned to work SEIU Local 1107?
A. A couple days before I arrived.
Q. Where were you stationed, or what was your work assignment before that?
A. Before that, I was working on a external campaign in California.
Q. And who told you that you were going to have that assignment at SEIU Local 1107?
A. Nicki Lee (ph.) and Martin Manteca.
Q. And when did you leave SEIU Local 1107?
A. November -- like the first week of November 2017.
MR. ANZALDUA: Your Honor, I request to proceed with this witness under Rule 611(c) of the Federal Rules of Evidence when necessary.
JUDGE MONTEMAYOR: You may proceed in that fashion.
Q. BY MR. ANZALDUA: And are you familiar with Martin Manteca?
A. Yes.

Q. How so?
A. I worked with him at 1107 and different times in the Union.
Q. And different times in the Union. So how far back does your working relationship go back with him?
A. July 2014, 2015.
Q. And he was your supervisor?
A. At 1107, yes.
Q. And since 2014, have you ever worked with Martin Manteca in trusteeships?
A. No.
Q. This was the first time you were working with him in relation to a trusteeship?
A. Yes.
Q. Have you ever been part of any other trusteeships?
A. Yes.
Q. About how many?
A. Three or four.
Q. Three or four?
A. Um-hum.
Q. And when did you -- when was the first time you started working on a trusteeship?
A. 2009.
Q. And your experience with these trusteeships, what is the purpose of a trusteeship?

A. The purpose is we are able to restore business to the Local, correcting the issues that may be going on in terms of just the overall structure. So when it comes down to the government, the administration, making sure that all things are put back on track.
Q. And the other three or four trusteeships that you worked on, did they have staff unions?
A. Yes.
Q. All of them?
A. Yes.
Q. Were you involved in any discharges at the 1107?
A. At 1107?
Q. Yes.
A. Yes.
Q. Whose?
A. Javier.
Q. Were you involved in any discharges in the other trusteeships that you participated in?
A. Yes, Chicago and maybe one -- maybe one in UHW.
Q. What was your job title while you were at the SEIU Local 1107?
A. I was -- at the time I was a coordinator with the International, and I was government -- I'm sorry. I was over the field, over the field during my time with the 1107. So I was the field coordinator.

Q. Did you have direct reports?
A. Yes.
Q. Who were they?
A. Barry and Helen.
Q. Barry Roberts?
A. Barry Roberts and Helen Sanders. Helen Sanders.
Q. When did Barry Roberts arrive at SEIU Local 1107?
A. I would say mid May 2017.
Q. So sometime after you?
A. Yes.
Q. What about Helen Sanders?
A. It was around the same, maybe 2 weeks after.
Q. Two weeks after you?
A. Um-hum.
JUDGE MONTEMAYOR: Um-hum.
THE WITNESS: Yes, maybe 2 weeks after I arrived, Helen arrived.
JUDGE MONTEMAYOR: Yeah, um-hum is difficult for the court reporter to pick up.
Q. BY MR. ANZALDUA: And you participated in an investigatory meeting on August 2, 2017, with Javier Cabrera, correct?
A. August 2nd?
Q. Related to a recording?
A. Oh, yes.

Q. And you participated in an investigatory meeting on October 26, 2017, correct?
A. Correct.
Q. How many investigatory meetings did you participate in while you were at 1107?
A. Maybe three or four.
Q. Including the two with Javier Cabrera?
A. Yes.
Q. And who were the other one or two?
A. It was LaNita and maybe one other. I know LaNita was and maybe another one. Was it John? Was it John? But I know those two for sure.
Q. LaNita Troyano?
A. Correct.
Q. Okay. And maybe another one you mentioned, John?
A. John Archer.
Q. And you had the investigatory meeting with LaNita Troyano on the same day as you had it with Javier Cabrera on August 2nd, correct?
A. I don't remember what day it was. I do not remember what day it was.
Q. Do you recall whether it was on the same day as Javier Cabrera's?
A. I do not.
Q. And these three or four investigatory meetings, how many

of those was Local 1107 counsel present for?
A. I think the one he may have been there, the one with Javier for sure. And I'm not sure if he was there with LaNita.
Q. What about John Archer?
A. No, it was a totally lower level.
Q. What do you -- when you say lower level, what does that mean?
A. No, because it was just about we had to talk to him about his goal.
Q. I'm sorry. I didn't --
A. About his goal. It was about meeting the goals in the field.
Q. And was that an investigatory meeting?
A. Yes.
Q. Who else was present in that one?
A. Myself, I think there may have been Helen -- myself, Helen, John Archer, and maybe Susan.
Q. Susan Smith?
A. Susan Smith.
Q. And that meeting was about meeting goals in the field?
A. Yeah. Yes.
Q. As a result of that investigatory meeting with John Archer, was there any discipline issued?
A. Just a counseling.

Q. And when you say meeting goals in the field, does that mean in relation to collecting cards or --
A. That's in relation to collecting cards, conversations with member leaders.
Q. Conversations with member leaders?
A. Yes.
Q. And is that something that they would put on their debrief sheets?
A. Yes, they would note them.
Q. Both of those would be indicated on debrief sheets?
A. What do you mean by both?
Q. Conversations -- card collections and conversations with member leaders, would they indicate that --
A. Yes.
Q. -- on their debrief sheets?
A. Yes.
Q. And LaNita Troyano, what was that investigatory meeting about?
A. It was about a -- it was referring to a card that had been -- that we had been notified about from the hospital that one of the members found wasn't -- they didn't complete however. So that was why we wanted an investigation.
Q. That they didn't complete the card?
A. That they didn't actually complete the card.
Q. So I'm sorry. I'm a little bit lost. So the member

came to you?
A. The hospital notified us that a member came to them, that they had become a member unknowingly.
JUDGE MONTEMAYOR: You said cards. Which cards?
THE WITNESS: Membership card.
JUDGE MONTEMAYOR: Membership cards.
Q. BY MR. ANZALDUA: So when the hospital notified you, who did they notify from the Union, SEIU Local 1107?
A. They sent it over I think it was in an email to myself and Martin, and I think Joan Reich (ph.) had also called Martin as well.
Q. And then who told you to do an investigatory meeting?
A. Martin.
Q. What did he say about it?
A. This was later when we was doing the investigatory meeting on this immediately. So I immediately notified LaNita and started going through the information.
Q. And so before this meeting, it was your -- you thought it was possible that LaNita had falsified a membership card?
A. Correct.
Q. Meaning that she had signed a member's name on the card?
A. Yes.
Q. And did you discuss that issue at that investigatory meeting with her?
A. Yes, we did.

Q. And what was the result of the investigation?
A. As a result, we couldn't -- it was basically insufficient. We couldn't figure out -- the card came in from another member. So from another member. So we couldn't really trace how -- we couldn't trace it.
JUDGE MONTEMAYOR: I'm not sure I understand what you mean.
THE WITNESS: The card, the card -- we found that the card was collected through another member who also worked at Sunrise Hospital. So with that, LaNita never actually did the card. LaNita didn't falsify the card. She collected the card.
JUDGE MONTEMAYOR: So did you find that she did not engage in wrongdoing? Is that what you're saying?
THE WITNESS: Yes, she did not engage in wrongdoing.
JUDGE MONTEMAYOR: Okay.
Q. BY MR. ANZALDUA: And based on that determination, was she issued any discipline?
A. No, she was not.
Q. Is it appropriate for a union organizer to let other members submit cards on behalf of other members?
A. Yes, that's the practice.
Q. So an organizer can pass out cards to employees and then never see them again, and they'll just get submitted to the employer?

A. No, they actually collect them. The organizer will collect the cards.
Q. Okay. So LaNita collected this card at issue?
A. Say that again. I didn't understand.
Q. Did LaNita collect that card at issue, the one that was allegedly falsified?
A. Yes.
Q. She collected it from a different member?
A. Yes.
Q. From the person that was on the card?
A. Correct.
Q. And then turned -- and then did what with that card?
A. She submitted it to us.
Q. To the Union?
A. Yes.
Q. And did the result of the -- during this investigatory meeting, did you -- was a determination made because of what LaNita told you during that meeting?
A. From what -- just through the investigation period.
Q. And what was -- besides that meeting, what else was investigated? What else did you review?
A. Besides that, we also reviewed the contact sheets. We talked to another -- we went and talked to -- tried to find out which members. We also went and tried to talk to the members at Sunrise as well, and it was just -- because they

had also had a meeting that day. So it was hard to figure out how it came through.
Q. So to this date, you don't know who signed that card?
A. No. So we just removed the card.
Q. Did this expose the Local to any legal liability that you know of?
A. No, we did not.
Q. It didn't?
A. Not to my knowledge. And we removed the card. So -- removed the card, removed the membership.
Q. You don't think collecting a falsified membership card would expose the Local to any legal liability?
A. At the time we didn't know -- Sunrise wasn't held accountable. We knew that we may be. So we made sure. We took it serious and investigated it, and tried to rectify it with the member.
Q. But legal counsel was involved in that?
A. In this -- legal counsel was involved in the steps to make sure that the member was rectified, but I don't think it was -- it wasn't in the actual -- in the conversation with LaNita, I know in -- I don't think with the first meeting with LaNita.
Q. And during these three or four investigatory meetings that you participated in, did you take notes?
A. At times, yes.

Q. What times? Do you recall?
A. I do not recall, but especially like the one with -- depending on -- if I had someone else with me, I'd normally be asking the questions and someone else took the notes.
Q. Do you recall who -- do you remember anyone else taking notes during any of these meetings?
MR. McDONALD: Objection. Vague as to meetings.
Q. BY MR. ANZALDUA: Any of the three or four investigatory meetings?
A. I think maybe one, Helen may have taken notes in one of them. And I think I may have took notes, I may have took the notes in the LaNita investigatory.
Q. Did you type your notes?
A. No, I did not.
Q. So if there are written notes from the LaNita Troyano investigatory meeting, do you know who wrote those?
A. No, I don't remember.
Q. Is your practice to write notes and then type them up later?
A. No.
Q. Do you recall anyone taking notes on -- during LaNita Troyano's investigatory meeting?
A. Like I said, I believe it was probably myself.
Q. Anyone else?
A. Not that I remember.

Q. During that meeting, do you recall telling LaNita Troyano not to discuss HR or personnel matters with other staff members or the Union?
A. Yes.
Q. And is that your normal practice to tell employees that during investigatory meetings?
A. To not to have the conversation?
Q. Yeah.
A. Yes, especially while we're in the investigation process.
Q. What did you do with the notes that you took during LaNita Troyano's meeting?
A. I honestly don't remember where the notebook is. It's been quite a time -- quite some time.
COURT REPORTER: I'm sorry. Could you repeat that?
THE WITNESS: I don't know where the notebook is. It's been quite a while since the meeting.
COURT REPORTER: Thank you.
Q. BY MR. ANZALDUA: But it was in a notebook?
A. Yes.
Q. Like one of those leather-bound notebooks?
A. Not leather. Like a hard small -- almost like a journal notebook.
(General Counsel's Exhibit 8 marked for identification.)
Q. BY MR. ANZALDUA: I'm going to hand you what's being

marked as General Counsel Exhibit 8. Can you review that document and let me know when you've finished?
A. (Reviews document.)
Q. Was that your notes?
A. I think the contents came from my notes.
Q. Okay. So this -- you recognize the content as the notes that you took on August 2, 2017, in that meeting with LaNita Troyano?
A. Correct.
Q. But you didn't actually type this up?
A. I don't think I typed it, but I did write the notes.
Q. Do you recall who would have typed it up?
A. Probably Melody at the time.
Q. Who's that?
A. Melody Rash. She was -- at the time she was working the front desk. She was the receptionist at the Local.
Q. Do you recall handing your notes to her to type up?
A. Or having her come in to type them. I don't know if I handed them, but I know I had her come in and type them.
Q. Okay.
A. But we need to put this on her -- we needed the document.
Q. And this was placed in her personnel file, correct?
A. Yeah.
MR. ANZALDUA: Your Honor, I move to move into evidence

what has been marked as General Counsel's Exhibit 8.

JUDGE MONTEMAYOR: Any objection to 8?

MR. McDONALD: No objection.

JUDGE MONTEMAYOR: 8 will be admitted.

(General Counsel's Exhibit 8 received in evidence.)

MR. ANZALDUA: Can I just have one second, Your Honor.

Q. BY MR. ANZALDUA: Now, the issue with LaNita Troyano was a membership card, correct?

A. Yes.

Q. And that's different than a Together We Rise card?

A. Correct.

Q. And what's the difference? Can you explain that?

A. The membership card is what we send over to the employer to verify membership, union membership.

Q. You send it to the employer?

A. Um-hum. And we keep it on file. We keep it on file as well.

Q. And what about TWR cards?

A. We keep them on file. At that time the TWR cards were to make sure we were actually able to obtain the correct contact information. And so we file them as well.

Q. And you guys would keep them on file meaning in the Local 1107?

A. Correct.

Q. And explain that. Is there like a roomful of file

cabinets with every member?
A. Well, every member that signs, because every member that signs we were keeping on file in order to update how we were able to contact them, methods to contact them as well.
Q. In their physical files, or are they also computer files?
A. I think it's the physical file.
Q. So for a member who signed a membership card and a TWR card, there's a file for them, and are both of them in there?
A. No, it would probably be in a different -- they were probably kept in different files at the time.
Q. About when did the Local start using or collecting TWR cards?
A. I would say around September, in September.
Q. Of 2017?
A. 2017.
Q. And when did it end at the Local?
A. I'm not sure when it ended. It was still going when I left.
Q. So as of November 2018, it was still going?
A. As of November.
Q. Or November of 20 --
A. 2017.
Q. -- 2017, it was still going on?
A. Um-hum.

Q. And I'm assuming there were a lot of materials related to the TWR campaign that you provided to staff?
A. Yes.
Q. Was there like training for it or --
A. There were trainings.
Q. Was it -- was that training developed by the International?
A. It was trainings designed by the International as well as by the Local.
Q. And these were written training documents?
A. Yes. And some of them were done on flipcharts.
Q. About how many trainings did you personally participate in with TWRs?
A. With TWR? From July -- at least five. The ones we did in collaboration with the International, at least about four or five.
Q. From September to November?
A. No, are we just talking the TWR cards or TWR trainings?
Q. Just the TWR trainings first?
A. Just the training, probably two.
Q. And those trainings were with management and staff at the Local 1107?
A. Correct.
Q. And who conducted the training?
A. One of them, I know, September 27th, was myself, one of

the members on staff, and also one of the members on staff actually helped to facilitate that training, the one that we did on like -- the one in mid-September.

Q. All right. What about the other training that you did?

A. The other training was probably done by myself.

Q. And about how many staff attended these trainings? Do you remember?

A. The very first one, it was actually done with the entire staff. The second one was done with just the field staff, but the first day was launched to the entire staff in all departments.

Q. And about how many employees would you say the entire staff was at that time?

A. Twenty.

Q. And what about the field staff one?

A. Nine or ten, including all of them.

Q. And can you name everyone who attended these meetings? I'm not asking you to, but could you?

A. Yes, in a random way, give or take a few, yes, I could.

Q. Did you have sign-in sheets?

A. I believe we did.

Q. For both?

A. Yes, I believe we were required to have them.

Q. What did you do with the sign-in sheets?

A. I believe we would have them maybe at the office.

Q. Was there any written rules about filling out the cards, the TWR cards?
A. I don't recall if there were written rules, but there were -- everything was displayed about the conversation and also there was -- everything was displayed on the walls --
Q. My question was whether there was written rules about how to fill out the TWR cards?
A. I can't -- I don't remember if there was any.
Q. I want to turn your attention to the investigatory meeting on August 2nd with Javier Cabrera regarding the recording. What was your involvement in that investigation?
A. To help with the investigation or the process, especially with the notice that we received from LVCVA.
Q. And did you see the notice you received from them?
A. Yes.
Q. It was a letter?
A. We got a letter, and then we got a phone call as well.
Q. Did you speak to anyone from LVCVA on the phone?
A. No, I did not.
Q. And did Martin Manteca direct you to start the investigation?
A. Yes.
Q. Was anyone else around when he told you to do the investigation?
A. I don't remember if anybody else was around.

Q. Do you recall what he told you?
A. That we received a call from LVCVA and that Javier had recorded one of the conversations during I think a disciplinary meeting or a grievance, like a grievance meeting or something to that degree.
Q. And then what did you do? How did you start the investigation?
A. I think we immediately notified Javier and took his account of the incident.
Q. And who was present at that meeting?
A. That was -- the investigatory, I think it was myself, Martin, him, and maybe Susan.
Q. And what do you recall from that meeting? What was said and by whom?
A. He had -- he notified us about where the meeting -- how the meeting started, where he came from, and at that time, he notified us that he had already -- he had a verbal from his previous supervisor.
Q. And who was that?
A. It was Peter Nguyen.
Q. Did you work with Peter Nguyen at all?
A. No.
Q. He wasn't there when you started --
A. No.
Q. -- at 1107? Isn't it true that he told you it was an

informal, verbal warning?
A. I don't remember if he told me it was informal. He told me it was a verbal. He received a verbal.
Q. You don't remember if he said either way or --
A. I remember that it was a verbal. That's just what I remember, that he had received a verbal regarding the matter, because the way it was notified to us, it seemed as though it had just occurred. So that's why we --
Q. So even after he told you that he had previously been given this discipline, did you proceed with the investigatory meeting?
A. I think we, I think we continued to figure out how did it happen. I don't think we continued. I think we figured out how did it happen, the timeline. We figured out the timeline.
Q. So after he told you he had already been disciplined, you asked him more questions about what happened?
A. No, I mean we verified -- we made sure we verified the timeline of it because he said it happened before, and we thought it happened -- it was more recent, so --
Q. And how did you verify the timeline? Did you ask him questions?
A. Before we asked him more, we verified it with the LVCVA on the dates, to find out the date.
Q. After the meeting concluded, did you have conversations

with Martin Manteca about it?
A. I'm sure, yes.
Q. Do you recall coming to a decision about what to do?
A. He just wanted to make sure we didn't have that again, and he wanted to make sure we notified LVCVA that we were, that we were taking the incident seriously, and we wanted to make sure it didn't happen again because we also understood that it was illegal and everything.
Q. What did he say in regards to any discipline or discipline, if any, with regards to Javier Cabrera?
A. Just make sure that it was documented that he couldn't -- that it wasn't -- that we didn't permit him to record the incident, that he didn't have permission.
Q. Anything else?
A. Not anything further.
Q. Not about Javier Cabrera?
A. Not to my knowledge.
Q. Did you draft a document?
A. Yes.
Q. About this incident?
A. Yes.
Q. I want to -- it should be in that stack right there. It's on the bottom right-hand corner. It's General Counsel Exhibit 3. Can you look through that? Do you recognize this document?

A. Yes, I do.
Q. And what is it?
A. This was the letters to document the verbal that he received from the -- for the LVCVA incident.
Q. Did you type this up?
A. Did I?
Q. Yes.
A. Yes.
Q. Did you type this up after you had conversations with Martin Manteca?
A. Yes.
Q. Was that yes?
A. Yes.
Q. The last sentence it says, "Mr. Cabrera was further advised that future infractions and/or misconduct may result in further progressive discipline up to and including termination." Did you add that, or was that from Martin Manteca?
A. I'm not sure how it was notified. It probably was done once we made sure that counsel verified it legally.
Q. So you drafted this and then sent it to counsel?
A. We had everything -- at that time we had everything checked through legal. We was in the middle of -- that was when the -- during the trusteeship.
Q. So they reviewed this?

A. Yes.
Q. And you're saying counsel added that?
A. I'm not saying that they added it. I just -- I don't remember how we came to, but it was --
Q. You don't recall a conversation with Martin Manteca specifically about that language?
A. No, not in particular about the language.
Q. And this went in his personnel file, correct?
A. Correct.
Q. And you participated in an investigatory meeting on October 26, 2017, with Javier Cabrera, correct?
A. October 26th, yes.
Q. And one of the issues that you discussed was a no call-no show?
A. Correct.
Q. And when was that supposedly? Was that October 17 was the date of the no call-no show?
A. October 17th I believe.
Q. All right. And you're aware that he had emailed Grace Vergara about a dental appointment that morning, correct?
A. That he had a dental appointment that morning, the 17th?
Q. Yeah.
A. Yes.
Q. And you're aware that Ms. Vergara excused him at least for that dental appointment, correct?

A. For the dental appointment.
Q. All right. And did you have any email communications with Javier Cabrera about missing that day or leading up to that day?
A. I don't know that I had any conversations in an email with him about missing the day, about missing that day at that time.
Q. In your experience at 1107, had there been other no call-no shows?
A. We never had that. We never had a no call-no show.
Q. Never?
A. Not in my time that someone just didn't show.
Q. But it's not like he didn't communicate with you guys before not showing up, correct?
A. He didn't communicate that he wasn't showing up, not to my knowledge. He didn't communicate that he wasn't showing up.
Q. We just earlier referenced the dental appointment.
A. Oh, the dental appointment, he was -- yes, I understood that he was excused for the dental appointment. He was not -- it was very clear that he was not excused for the whole day.
Q. So it was like half of a no call-no show for half a day?
A. He didn't show up though for the -- for his -- for the site meeting and phone banking, for sure, for the day. There

was no call, no notice or anything.
Q. For half the day?
A. Yeah.
Q. And you referenced phone banking. Is that -- in your experience, can organizers do phone banking at various times during the week?
A. Can they do it at various times during the week?
Q. Yeah, can they -- did they schedule it -- are there set days that they schedule it, or can they just kind of fill in their calendars, you know, when there's an empty spot?
A. You can fill it in, unless it's one that we all have a schedule to do, then those people -- then during those times, everybody comes and we have to do the phone banks.
Q. Okay.
A. We have a start time and an end time for the phones.
Q. And then there's other times where organizers can fill it in on their calendar, if there's like a few hours free, they'll fill it in on the calendar?
A. Yeah, unless you want -- if they want to phone through a list, yes.
Q. Is there a requirement for hours of phone banking that you have?
A. Is there a requirement for hours? No, it's not a, it's not a -- but you have to do so many, you know, phone time. There's the ones that we schedule like that there.

Q. So there's not a requirement for the number of hours that you have to phone bank for the organizers?
A. Independently.
Q. What does that mean?
A. Independently, people should be phone banking throughout. They should be phone banking throughout the week to meet whatever their goals are, for whatever their goals are, but there are also phone banks that are -- that we do in groups to make sure that we track and make sure we reach our goals.
(General Counsel's Exhibit 9 marked for identification.)
Q. BY MR. ANZALDUA: Okay. I'm going to hand you what's being marked as General Counsel Exhibit 9.
A. (Reviews document.)
Q. Do you recognize this document?
A. I kind of remember some of this.
Q. I'm sorry. I can't hear you.
A. Yes.
Q. Okay. And when this says -- say the first page it says, you know, Grace Vergara. Under that it says, "to Javier, me." Is the "me" referred to in these emails your email account?
A. It may be me, yes.
Q. Okay. So the first part of it is from Grace Vergara to Javier and yourself, and it says, "Susan and Debbie are

going. Please inform their leaders." Is that correct?
A. Yes.
Q. Okay. And then the first two pages of this document, that's page number 70 and 71, those are email communications from October 16th, correct?
A. Correct.
Q. And then the following pages are email communications from October 17th, correct?
A. Yes.
MR. ANZALDUA: Your Honor, I move to admit what's been marked as General Counsel Exhibit 9.
JUDGE MONTEMAYOR: Any objection to 9?
MR. McDONALD: No objection.
JUDGE MONTEMAYOR: 9 will be admitted.
(General Counsel's Exhibit 9 received in evidence.)
Q. BY MR. ANZALDUA: So on the second page, the second -- yeah, about -- right above -- halfway above the page it says to Grace and me, and that's an email from Javier Cabrera informing you and Grace about his dental appointment the following day?
A. Yes.
Q. So what did you do when he informed you about the dental appointment?
A. Then we tried to find -- tried to figure how to fill the hole for the morning shift.

Q. And did you do that?
A. I think we did, yes.
Q. So that event proceeded?
A. The --
Q. That event took place.
A. The first one.
Q. And were the other events that Javier was scheduled for that afternoon?
A. Yes, one of -- I think like the public defender, one of the --
Q. And that event took place, too, correct?
A. I don't think he -- that event took -- yes, yes.
Q. It took place.
A. Yes. We ended up having like a smaller table. Yeah, it didn't really work out, but we had it.
Q. And did the phone banking take place that afternoon?
A. Yes, we did. As a group, we did the phone banking.
Q. As a group?
A. Um-hum.
Q. So none of the events on October 17th were canceled as a result of Mr. Cabrera's absence?
A. No, because we --
Q. And on October 16th, the day before, he had left early that day, correct?
A. I think he may have left early. I'm not sure if he left

early that day.
Q. Or he just -- he didn't work that day.
A. Yeah.
Q. And he informed you -- so the first page, it says, "I texted Davere yesterday to let him know I'm not coming back to work today." And that was October 16th at 8:12 a.m., correct?
A. Yeah, at 8:12, he sent that email on the 16th.
Q. So on the 15th, you had a conversation with him about his toothache?
A. So on the 15th, I guess he was saying he wasn't coming to work on the 16th.
Q. Do you recall him telling you that on the 15th?
A. I mean no -- yeah. I remember he had the tooth around that time, a toothache issue. Specifically, no.
Q. So around this time period, the 15th, 16th, 17th, you were aware that he had a medical condition with his tooth?
A. On the -- when he notified us that he had a doctor's appointment, we moved forward.
Q. So you were aware of the toothache condition he was going through at the time?
A. I --
Q. Was that a yes?
A. I knew about the -- he notified me that he had a toothache.

Q. Okay. And you considered having -- knowing that he was dealing with a toothache, knowing that he had emailed you and Grace regarding the toothache, you still considered it a no call-no show?
A. For the -- not the 16th, just the 17th.
Q. The 17th?
A. Right.
Q. The afternoon of the 17th?
A. The day of the 17th -- afternoon of the 17th.
Q. The afternoon of the 17th?
A. Yes.
Q. And is that a recommendation that you made to anyone? Did you inform Martin Manteca about that?
A. I'm sure, yeah.
Q. But you don't recall specifically informing him about it?
A. I mean I definitely, I definitely notified him that the incident happened because of the way that the events occurred when we arrived at the site, because I don't think I was scheduled to actually go to that site, but since we weren't able to reach out, yeah, I know I needed -- I ended up having to come back out of the office to go to the other site, which I wouldn't have.
Q. In the afternoon?
A. Yes.