IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CLARKE, an individual, Appellant, v. SERVICE EMPLOYEES INTERNATIONAL UNION, et al., Respondents.	Supreme Court No. 80520 District Case No. A764942
SERVICE EMPLOYEES INTERNATIONAL UNION, an unincorporated association; and NEVADA SERVICE EMPLOYEES UNION A/KA CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, SEIU 1107, a non-profit cooperative corporation, Appellants, v. DANA GENTRY, AN INDIVIDUAL; and ROBERT CLARKE, an individual, Respondents.	Supreme Court No. 81166 District Case No. A764942

JOINT OPENING/ANSWERING BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION A/K/A SEIU LOCAL 1107

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DISCLOSURE STATEMENT

Pursuant to Nevada Rules of Appellate Procedure 26.1, Service Employees International Union ("SEIU") discloses the following. SEIU does not have a parent corporation. No publicly held company owns 10% of more of stock in SEIU. The following law firms have appeared and/or are expected to appear in this Court on behalf of SEIU: Rothner, Segall & Greenstone and Christensen James & Martin (as local counsel).

Clarke County Public Employees Association a/k/a SEIU 1107 ("Local 1107") discloses the following. Local 1107 does not have a parent corporation. No publicly held company owns 10% of more of stock in Local 1107. The following law firms have appeared and/or are expected to appear in this Court on behalf of Local 1107: Christensen James & Martin.

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JURISDICTIONAL STATEMENT

SEIU and Local 1107 agree with Robert Clarke's jurisdictional statement regarding Docket No. 80520.

Regarding Docket No. 81166, a post-judgment order concerning attorneys' fees is appealable under NRAP 3A(b)(8), which permits appeal from "[a] special order entered after final judgment, ..." *See Campos-Garcia v. Johnson*, 130 Nev. 610, 612 (2014). The appeal in Docket No. 81166, filed on May 11, 2020, is timely because the district court's order denying SEIU's and Local 1107's motions for attorneys' fees was entered on April 14, 2020. *See* NRAP 4(a)(1).

ROUTING STATEMENT

SEIU and Local 1107 agree with Robert Clarke that Docket No. 805020 is presumptively retained for the Supreme Court because it raises a question of first impression involving the United States Constitution, namely, whether, pursuant to the Supremacy Clause, U.S. Const., art. IV, cl. 2, the federal Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq*. ("LMRDA") preempts breach of contract, wrongful termination and related claims brought against a labor union by policymaking and/or confidential staff. *See* NRAP 17(a)(11).

Docket No. 81166 involves an appeal from a post-judgment order in the same case, and is not presumptively retained for the Supreme Court. However, it has been consolidated with Docket No. 80520, and is thus properly before this Court.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly grant summary judgment in favor of SEIU on Robert Clarke's claims for breach of the covenant of good faith and fair dealing and wrongful termination, where Clarke failed to show he was employed by, or had an employment contract with, SEIU?

2. Did the district court correctly grant summary judgment in favor of SEIU on Clarke's claim for interference with contract, where he failed to present evidence that SEIU took action designed to interfere with his employment contract with Local 1107?

3. Did Clarke waive his alter ego allegation, where he failed to plead the allegation in his complaint, raised it for the first time in opposition to summary judgment, and failed to object when the district court declined to make any findings on the issue? If not, did Clarke show SEIU and Local 1107 were alter-egos?

4. Did the district court correctly determine Clarke's claims against SEIU and Local 1107 were preempted by the LMRDA?

5. Did the district court err by denying SEIU's and Local 1107's motions for attorneys' fees, where the plaintiffs rejected the unions' joint offers of judgment and failed to recover anything in their lawsuit?

STATEMENT OF THE CASE

In November 2017, Robert Clarke and Dana Gentry filed their action against SEIU, Local 1107 and individual defendants, including SEIU President Mary Kay Henry and Local 1107 Trustees Luisa Blue and Martin Manteca. Clarke and Gentry alleged identical claims for breach of contract, breach of the covenant of good faith and fair dealing, wrongful termination, negligence, and intentional interference with contract. Gentry also alleged a defamation claim against Local 1107 and former Local 1107 officer Sharon Kisling, a matter not appealed.

On January 3, 2020, the district court granted summary judgment in favor of all defendants. The district court ruled most of plaintiffs' claims were preempted by the LMRDA, plaintiffs failed to establish a genuine issue of material fact regarding their claims against SEIU and Henry, and Gentry's defamation claim was preempted. Clarke appealed the order granting summary judgment in favor of the unions (Docket 80520). Gentry did not appeal.

SEIU and Local 1107 moved for attorneys' fees under NRCP 68 based on their previous, unaccepted joint offers of judgment. On April 10, 2020, the district court denied their motion, ruling that, although the joint offers of judgment were reasonable in amount and timing, it was not grossly unreasonable for the plaintiffs to reject the offers. SEIU and Local 1107 filed a joint notice of appeal (Docket 81166), which was consolidated with Clarke's appeal.

INTRODUCTION

Service Employees International Union ("SEIU") and Clarke County Public Employees Association a/k/a SEIU 1107 ("Local 1107") (collectively, "Unions"),[1] respectfully request affirmance in full of district court's order granting them summary judgment (Docket 80520), and reversal of the district court's order denying them attorneys' fees (Docket 81166).

Robert Clarke was Director of Finance and Human Resources for Local 1107, a labor union. Local 1107 is affiliated with SEIU, an international labor organization. Citing evidence of widespread disarray at Local 1107, in April 2017 SEIU imposed a trusteeship over Local 1107, removed its officers and executive board, and appointed trustees to oversee the union.

Shortly thereafter, the trustees terminated Clarke's employment. Clarke and co-plaintiff Dana Gentry, former Local 1107 Director of Communications whom the trustees also terminated, sued the Unions and individual defendants for wrongful termination, breach of contract, intentional interference with contract, and related claims. The district court granted summary judgment in favor of the Unions, and only Clarke appealed.

The district court correctly granted summary judgment in favor of the

[1] SEIU and Local 1107 are appellants in Docket No. 81166, and respondents in Docket No. 80520. Pursuant to the Court's September 9, 2020 order, they hereby file a joint opening/answering brief.

Unions. Clarke failed to show he was employed by, or had an employment contract with, SEIU. Nor did he show SEIU intentionally interfered with his employment contract with Local 1107.

Although Clarke argues SEIU and Local 1107 were alter-egos, he never plead that allegation in his complaint, and raised it only in opposition to summary judgment. The issue was therefore waived, and the district court correctly refused to reach it. Regardless, Clarke failed to show the Unions were alter-egos.

Additionally, the district court correctly ruled Clarke's claims against the Unions were preempted by the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.* ("LMRDA"). Persuasive precedent from California and other jurisdictions, including Montana, Michigan, New Jersey, and Colorado, establishes the LMRDA preempts wrongful termination and related claims by former policymaking and/or confidential employees of a union. Such cases rest on the premise union leaders have a right to select their own administrations, *see Finnegan v. Leu*, 456 U.S. 431 (1982) ("*Finnegan*"), and wrongful termination and related claims by former policymaking and/or confidential staff conflict with that right, *see Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990) ("*Screen Extras Guild*").

Clarke's arguments against preemption have been rejected by other courts and he fails to explain why this Court should depart from that persuasive

precedent. If anything, the facts of this case—Clarke was hostile to the trusteeship from the outset—perfectly illustrate why such precedent exists, namely, to prevent union leaders from being stuck with policymaking and confidential staff who could thwart implementation of the policies and programs the union's leaders advanced.

The district court erred, however, by denying the Unions' motions for attorneys' fees. The Unions made joint offers of judgment to plaintiffs pursuant to Nevada Rule of Civil Procedure ("NRCP") 68. Because plaintiffs did not accept those offers but failed to recover anything in their lawsuit, the Unions moved for attorneys' fees under NRCP 68.

The district court found the Unions' joint offers of judgment were reasonable in timing and amount. However, it found plaintiffs were not grossly unreasonable in rejecting the offers, because, notwithstanding differences among the defendants' potential liability, the offers required plaintiffs to settle all claims with all defendants. Because NRCP 68 expressly permits such offers of judgment, and the Unions' offers were reasonable, the district court's denial of the Unions' motions for attorneys' fees was an abuse of discretion.

STATEMENT OF FACTS

I. The Parties.

SEIU is an international labor union headquartered in Washington, D.C. and Mary Kay Henry is its President. Respondents' Appendix ("Appx.") IV:587 ¶ 3.[2]

Local 1107 is headquartered in Las Vegas, Nevada. Appx. IV:587 ¶ 5. It represents public and private sector workers in Nevada. *Id*. Local 1107 is affiliated with SEIU, and has its own charter. *Id*. Except when it was under trusteeship, Local 1107 is governed by its own constitution and bylaws and has its own elected officers. *Id*.

Prior to her removal from office, Sharon Kisling was Local 1107 Executive Vice President. Appx. IV:588 ¶ 8. Luisa Blue was Local 1107 Trustee, and Martin Manteca was Local 1107 Deputy Trustee, following SEIU's imposition of the trusteeship over Local 1107. Appx. IV:588 ¶ 10.

Gentry was Local 1107's Director of Communications. Appx. III:419, 471. Clarke was Local 1107's Director of Finance and Human Resources. Appx. III:506, 552.

II. Gentry's Duties as Director of Communications.

Local 1107 hired Gentry in April 2016. Appx. III:471. Local 1107

[2] Citations to Respondents' Appendix or Clarke's Appendix ("Clarke Appx.") will indicate the volume number and page number, followed by paragraph or line number where applicable.

President Cherie Mancini and Gentry entered into an employment contract specifying the terms of Gentry's employment with Local 1107. Appx. III:419, 428, 471.

Gentry was the primary individual at Local 1107 responsible for developing and implementing internal and external communications strategy to achieve the union's campaign goals.[3] Appx. III:434. That included advising the union's leadership about her strategic communications plans, and writing speeches for the union's leaders. Appx. III:432–438; 446–448. Gentry was also Local 1107's spokesperson in the newspaper and radio (Appx. III:420, 425–427, 480–484), developed media strategy with community allies (Appx: III:452–454), and cultivated relationships with the press to obtain positive coverage (Appx. III:439–441, 450–451). Gentry even advised Local 1107 regarding its legislative strategy. Gentry Depo. Appx. III:451–452.

Gentry's direct supervisor was Local 1107 President Mancini. Appx. III:421, 430, 489. Gentry attended a weekly manager's meeting with Mancini other Local 1107 managers, including the Director of Organizing and co-plaintiff Clarke, Director of Finance and Human Resources. Appx. III:442–443.

[3] Gentry's job description, which she agreed accurately described her duties, described a broad range of duties relating to the development and implementation of Local 1107's strategic communications plans. Appx. III:431–432, 487–488, *see also* 489–492.

III. Clarke's Duties as Director of Finance and Human Resources.

Local 1107 hired Clarke in August 2016. Appx. III:506; 532. Local 1107 President Mancini and Clarke entered into an employment contract specifying terms of his employment with Local 1107. Appx. III:532.

According to his job description, which he agreed accurately described his duties, Clarke was responsible "for the financial health of [Local 1107] and [was] directly responsible for financial management, general office administration, personnel systems, technology, legal compliance, and reporting." Appx. III:553; 516–517. His financial management duties included preparing monthly financial statements, monitoring accounts payable and receivable, processing payroll and benefits, advising on revenue projections, leading in budget planning for the union's Finance Committee and Executive Board, maintaining political action committee accounts, and overseeing tax and reporting obligations. Appx. III:553. Clarke was also responsible for overseeing legal compliance related to campaign finance and lobbying activity. Appx. III:554. Clarke had access to all of Local 1107's financial records. Appx. III:517.

Clarke was also the Human Resource Manager for Local 1107. Appx. III:554. In that capacity, he maintained personnel records, tracked employee time and attendance, maintained records related to employee benefits, and "all other matters pertaining to personnel administration." *Id.*

Clarke's direct supervisor was Local 1107 President Mancini. Appx. III:512. Clarke also attended the weekly manager's meetings. Appx. III:518.

IV. SEIU Places Local 1107 Under Trusteeship.

In October 2016, SEIU President Henry assumed jurisdiction over internal disciplinary charges and countercharges filed by Local 1107 members and officers. Appx. IV:588 ¶ 8. Following a hearing, on April 26, 2017, a hearing officer issued a report recommending discipline against Local 1107 President Mancini and Executive Vice President Kisling. *Id*.; 748–774. SEIU President Henry adopted the report and removed them from office that same day. Appx. IV:588 ¶ 8.

In a different report, the hearing officer recommended SEIU President Henry place Local 1107 under emergency trusteeship.[4] Appx. IV:588 ¶ 9; 776–789. Local 1107's executive board then voted in favor of a trusteeship. Appx. IV:588 ¶ 10. On April 28, 2017, SEIU President Henry placed Local 1107 into trusteeship, suspended Local 1107's bylaws, and removed its officers and executive board. *Id.* ¶ 10; 791–794. President Henry's trusteeship order cited, among other things, "an

[4] Article VIII, Section 7(a) of the SEIU Constitution authorizes SEIU's president to place a local union into trusteeship in certain enumerated circumstances. Appx. IV:611. The Honorable Andrew P. Gordon granted summary judgment to the Unions in consolidated proceedings challenging the trusteeship. *See Garcia v. Serv. Employees Int'l Union*, No. 2:17-cv-01340-APG-NJK, 2019 WL 4279024 (D. Nev. Sept. 10, 2019); *Garcia v. Serv. Employees Int'l Union*, No. 2:17-cv-01340-APG-NJK, 2019 WL 4281625 (D. Nev. Sep. 10, 2019). Appeals are pending.

on-going and serious breakdown in internal union governance and democratic procedures;" "[l]eadership conflicts and in-fighting in Local 1107;" "failure to communicate adequately with Local membership;" and a "communication breakdown in the Local [which] impeded staff oversight . . . ." Appx. IV:792–793.

SEIU President Henry appointed Blue as Trustee, and Manteca as Deputy Trustee, of Local 1107. Appx. IV:588 ¶ 10. Under Article VIII, Section 7(b) of SEIU's Bylaws, the Trustees were authorized to assume control over the affairs of Local 1107, including the removal of employees or agents of the union. Section 7(b) provides, in part:

> The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union or affiliated body and its related benefit funds, to *remove any of its employees, agents and/or trustees* of any funds selected by the Local Union or affiliated body and appoint such agents, employees or fund trustees during his or her trusteeship . . . .

Appx. IV:611 (emphasis added).

V. Clarke and Gentry Were Hostile to the Trusteeship.

Clarke and Gentry were hostile to the trusteeship. For example, Clarke questioned the legitimacy of the trusteeship, and did not want to work for a union he believed was illegitimately placed into trusteeship.[5] Appx. III:523–525; 526.

[5] Upon learning of the identity of Deputy Trustee Manteca, Clarke concluded Manteca had a reputation as a "tyrant" and "bully." Appx. III:527–529. Clarke maintained that same opinion through the time he was terminated. *Id*.; 530.

Clarke displayed hostility to the trusteeship in his text messages with staff. Clarke described the vote of Local 1107's executive board in favor of trusteeship as a "self inflicted" injury, and stated, referring to Local 1107's former officers, "[y]ou would have to be a fucking idiot to vote to trustee." Appx. III:558–559; 531–533; *see also* 533 ("I didn't think that they were really – you know, from what I could tell at that time, I didn't believe there were any grounds for the trusteeship.").

In a text message to Local 1107 Director of Organizing Peter Nguyen, Clarke celebrated Nguyen's anticipated lawsuit against the Unions, stating, "Peter Inc. – doing what Wall Street does, but with a personal touch. Taking money from stupid assholes." Appx. III:564; 534–536. Worse, knowing that his hostile text messages could jeopardize his job, Clarke urged his colleagues, including Gentry, to delete their messages before the Trustees could find them. Appx. III:581–582; 537–540.

Last, less than two weeks after they were terminated, Appx. II:397–399, Clarke, Gentry, and others, including former Local 1107 President Mancini, prepared a nationwide press release condemning the trusteeship and accusing SEIU of "an illegitimate take over." Appx. III:500–501; 546:18–23; 547:17–548:5; 459:21–460:14; 461:2–11; 462:21; 463:4; 464:2–11; 465:1–3; 466:19-23.

VI. Trustees' Decision to Terminate Clarke and Gentry.

Given the disarray described in the trusteeship order, the Trustees believed it was necessary to manage the union themselves and not with Local 1107's former management team, at least until they could fill management positions with individuals whom they could be confident would carry out the union's programs and policies. Appx. II:390 ¶ 5; 397–399; 402 ¶ 5. On May 4, 2017, Clarke and Gentry were provided termination letters informing them as follows:

> As you know, Local 1107 has been placed under trusteeship by [SEIU]. The Trustees of Local 1107 have been charged with the restoration of democratic procedures of Local 1107. In connection with formulating a program and implementing policies that will achieve this goal, going forward the Trustees will fill management and other positions at the Local with individuals they are confident can and will carry out the Local's new programs and policies. In the interim, the Trustees will largely be managing the Local themselves with input from member leaders. [¶] For these reasons, the Trustees have decided to terminate your employment with Local 1107, effective immediately.

Appx. II:397–399.

VII. Proceedings in the District Court.

A. The First Amended Complaint.

Clarke and Gentry filed a complaint in November 2017 (Appx. I:1–16), and a first amended complaint in March 2019 (Appx. II:327–342). They alleged claims for breach of contract, breach of the covenant of good faith and fair dealing,

wrongful termination, negligence, and intentional interference with contract.[6] *Id*. All the claims arose primarily from the same allegation: Plaintiffs' contracts with Local 1107 required they be terminated for cause, and Local 1107 terminated them without cause. *See id*. Neither the initial nor amended complaint alleged the Unions were alter egos. *See* Appx. I:1–16; II:327–342.

B. District Court Grants Summary Judgment to Defendants.

In September 2018, plaintiffs moved for partial summary judgment, and the Unions cross-moved for summary judgment. Appx I:28; 32–50; Appx. II:218–231. Among other things, the Unions asserted plaintiffs' claims were preempted by the LMRDA. Appx. I:43–46; Appx. II:226–227. The district court denied the motions without prejudice.

The Unions thereafter took the depositions of plaintiffs and their damages expert. Appx. VI:1205 ¶ 2. According to plaintiffs' expert, Clarke's and Gentry's economic damages were $92,305.00, and $107,391.00, respectively. *Id*.; 1210–1211; 1223–1224. Based on this discovery, the Unions made joint offers of judgment pursuant to NRCP 68 to Gentry and Clarke in the amount of $30,000 each. Appx. VI:1205 ¶ 3; 1237–1238. The offers of judgment were conditioned on plaintiffs settling all claims with all defendants. Appx. VI:1237–1238.

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[6] Gentry also alleged a defamation claim against Local 1107 and Kisling. Because Gentry did not appeal, the district court's dismissal of that claim is not at issue.

Plaintiffs did not accept those offers. Appx. IV:1205 ¶ 3.

Following discovery, the Unions again moved for summary judgment and plaintiffs again moved for partial summary judgment. Appx. II:357–387; Appx. IV:795–815; Clarke Appendix II:378–410; III:515–537. In opposing SEIU's motion, plaintiffs argued the Unions were alter-egos (Clarke Appendix III:520–532), even though they had not plead that allegation in the complaint or amended complaint.

On January 3, 2020, the district court granted summary judgment in favor of all defendants on all claims. Appx. VI:1147–1152. It ruled most of plaintiffs' claims were preempted by the LMRDA, relying on *Screen Extras Guild*. Appx. VI:1148–1151. The court further held plaintiffs failed to raise a genuine issue of material fact on their claims against SEIU and Henry because plaintiffs were not employed by, and had no employment contracts with SEIU or Henry. Appx. VI:1151. The court also ruled plaintiffs failed to raise a genuine issue of material fact regarding their claims against SEIU and Henry for interference with contract. *Id*. The court declined to rule on plaintiffs' belated alter-ego argument, and Clarke did not object. *See* Clarke Appendix II:328:6–17. Clarke appealed the summary judgment ruling.[7] Clarke Appendix II:363. Gentry did not appeal.

[7] Clarke did not appeal the dismissal of defendants Henry, Blue, or Manteca, or name them as respondents in his appeal.

C. District Court Denies Motions for Attorneys' Fees.

The Unions moved for attorneys' fees pursuant to NRCP 68 based on their rejected joint offers of judgment. Appx. VI:1161–1172; 1193–1202. The court denied the motions. Appx. VII:1379–1383.

The court ruled the Unions' offers of judgment were reasonable in timing and amount, but it was not grossly unreasonable for plaintiffs to reject the offers, which required "a global resolution of all claims against all Defendants." Appx. VII:1381–1382. Because the offers "required a global resolution, it is not clear to the Court how the Plaintiffs could have properly analyzed the" offers of judgment. Appx. 1382. In explaining its conclusion during the hearing, the court found that, because the offer of judgment required resolution of all claims against all defendants, the plaintiffs were unable to settle individually with any defendants based on their separate evaluation of each defendants' potential liability. Appx. VII:1370:2–1371:2; *see also id.* 1359:6–1360:4. The Unions jointly appealed that order. Appx. VII:1384–1385.

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment to SEIU because Clarke was neither an employee of, nor had an employment contract with, SEIU, essential elements of his claims for breach of the covenant of good faith and fair dealing and wrongful termination. Clarke also failed to show SEIU took action

designed to interfere with his employment contract with Local 1107, an essential element of his interference with contract claim. Nor was it sufficient to show that SEIU appointed the trustees, who later terminated his employment. Under well-established precedent, the trustees acted on behalf of Local 1107, not SEIU.

Clarke unconvincingly tries to overcome some of these deficiencies with his unplead assertion that SEIU was the alter-ego of Local 1107. Clarke waived that allegation by failing to plead it in his complaint. He also waived the issue on appeal by failing to object to the district court's decision not to make findings related to the eleventh-hour assertion. Regardless, his argument fails on the merits.

Additionally, the district court correctly ruled Clarke's claims against the Unions were barred by conflict preemption. An overriding objective of the LMRDA was to ensure union administrations are responsive to the will of union members. *See Finnegan*, 456 U.S. at 441. The ability of union leaders to select their own administration is an integral part of that objective. *Id*. Thus, *Screen Extras Guild* and cases following it—including decisions from Montana, Michigan, New Jersey, and Colorado—held lawsuits by former policymaking and/or confidential staff of a union challenging their terminations conflict with that statutory goal, and are thus preempted by the LMRDA. *See Screen Extras Guild*, 51 Cal. 3d 1017. Based on this persuasive precedent, the district court correctly ruled that, because Clarke was a former policymaking and/or confidential manager

at Local 1107, his claims were preempted.

Clarke's arguments against preemption are foreclosed by persuasive precedent and he offers no convincing reason this Court should depart therefrom. Indeed, this Court should join other courts that have adopted *Screen Extras Guild*.

Last, the district court erred by denying the Unions' motions for attorneys' fees. The court concluded it was not grossly unreasonable for plaintiffs to reject the Unions' joint offers of judgment, because the offers prevented plaintiffs from settling with individual defendants. But NRCP 68 expressly permits defendants to make joint offers of judgment, and it contravenes that rule to deny attorneys' fees on that basis. Moreover, *Beattie v. Thomas*, 99 Nev. 579 (1983), requires the court to consider several factors in resolving motions for attorneys' fees, and no one factor is determinative. By elevating one factor—whether plaintiffs were grossly unreasonable in rejecting the offers—over the rest, the court compounded its error.

STANDARDS OF REVIEW

This Court reviews questions of federal preemption de novo. *See Dancer v. Golden Coin, Ltd*., 124 Nev. 28, 32 (2008). "The standard of review of an appeal from a summary judgment is de novo." *Nicholas v. State*, 116 Nev. 40, 43 (2000). This Court generally reviews the denial of attorneys' fees for an abuse of discretion. *See Albios v. Horizon Comms., Inc.*, 122 Nev. 409, 417 (2006). Where the denial of attorneys' fees presents a question of statutory interpretation, this

Court conducts de novo review. *See id*.

ARGUMENT

I. The District Court Correctly Ruled Clarke, Who Was Not Employed by and Had No Contract with SEIU, Failed to Support His Contract and Wrongful Termination Claims.

Clarke's opening brief focuses on whether the LMRDA preempts his claims against the Unions. However, in addition to granting summary judgment on that ground, the district court correctly granted summary judgment to SEIU for a separate, basic reason ignored by Clarke: Clarke was not employed by, and had no employment contract with, SEIU. Appx. IV:1159. Preemption notwithstanding, summary judgment in favor of SEIU on Clarke's wrongful termination and contract-based claims should therefore be affirmed in full.[8]

A. The District Court Correctly Granted Summary Judgment in Favor of SEIU on Clarke's Claim for Contractual Breach of the Covenant of Good Faith and Fair Dealing.

"As a general rule, none is liable upon a contract except those who are parties to it." *Clark County v. Bonanza No. 1*, 96 Nev. 643, 648-49 (1980). That principle applies equally to a claim for breach of the implied covenant and good faith and fair dealing. Thus, "[w]here the terms of a contract are literally complied

[8] Clarke did not plead the second cause of action for breach of contract (Appx. II:331–332 ¶¶ 29–34), the ninth cause of action for "Wrongful Termination-Breach of Continued Employment Contract" (Appx. II:337 ¶¶ 73–77), or fourteenth cause of action for negligence (Appx. II:339–340 ¶¶ 94–100), against SEIU.

with *but one party to the contract* deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." *Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232 (1991) (emphasis added).

Clarke's claim for "Breach of Implied Covenant of Good Faith and Fair Dealing – Contractual Breach" is based on a contract between him and Local 1107, not SEIU. *See* Appx. II:333 ¶ 43 ("Plaintiff Clarke entered into a valid and binding Employment Contract *with Local 1107*.") (emphasis added). The only parties identified in Clarke's employment contract are Clarke and Local 1107 (Appx. III:552); only he and Local 1107 President Mancini signed the contract (*id.*); and Clarke admitted Mancini never informed him she entered into the contract on behalf of another entity, such as SEIU (Appx III:510:2–18).

The decision in *Burnick v. Office and Professional Employees International Union*, No. 14-C-1173, 2015 WL 1898310 (E.D. Wis. April 27, 2015), is instructive. The plaintiff, a former employee of a local union, alleged the local union promised to provide her with lifetime insurance benefits. *Id*. at *1. Thereafter, the international union placed the local union into trusteeship. *Id*. The plaintiff sued the local and international union alleging both unions breached the agreement to provide her insurance benefits. *Id*. at *2.

In dismissing the international union, the court emphasized that, like here,

the obligation arose prior to the trusteeship, and there was no evidence the local union entered into the agreement with the plaintiff on behalf of the international union. *See id*. at *3. The court also rejected the argument that because the international union placed the local into trusteeship, it implicitly assumed the obligations of the local union. *See id*. at *3-4.

As in *Burnick*, SEIU was not a party to Clarke's employment contract, Local 1107 did not enter into Clarke's contract on behalf of SEIU, and SEIU did not assume Clarke's contract. Because Clarke failed to show any contract between him and SEIU, the court correctly granted summary judgment for SEIU on this claim. *See Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111 (1992) ("Where an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper.").

B. The District Court Correctly Granted Summary Judgment in Favor of SEIU on Clarke's Claim for Tortious Breach of the Covenant of Good Faith and Fair Dealing.

"[T]he covenant of good faith and fair dealing implied in an employment contract for indefinite future employment could, under certain limited circumstances, be the basis for tort liability in a manner comparable to the tort liability incurred by insurance companies when they deal in bad faith with their policyholders." *D'Angelo v. Gardner*, 107 Nev. 704, 717 (1991). Where the "employer-employee relationship becomes analogous to or approximates the kind

of 'special reliance,' trust and dependency that is present in insurance cases . . . betrayal of this kind of relationship may go well beyond the bounds of ordinary liability for breach of contract and may result in the offending party's being held tortuously liable for such perfidy." *Id*. (internal quotations and citations omitted). However, "mere breach of an employment contract does not of itself give rise to tort damages and that the kind of breach of duty that brings into play the bad faith tort arises only when there are special relationships between the tort-victim and the tort-feasor . . . ." *Id*. (internal quotations and citation omitted).

No such special relationship existed in *D'Angelo* where, "[a]lthough Jones had been designated as a 'permanent employee' at the time of his dismissal, he had worked less than two years." *Id*. *D'Angelo* contrasted Jones' employment with that of the plaintiff in *K Mart Corp. v. Ponsock*, 103 Nev. 39 (1987), who had "been a faithful employee for almost ten years with every expectation of continuing his employment for an indefinite period of time and at least until he became eligible for a retirement position," and whose "contract of continued employment was not only terminated arbitrarily but by artifice and fraud." *Id*.

Similarly, in *Clements v. Airport Auth. of Washoe Cty*., 69 F.3d 321 (9th Cir. 1995), the court, applying Nevada law, affirmed summary judgment against the plaintiff on her claim for breach of the covenant where she "pointed to no facts which give rise to the inference that such a special relationship existed" and

observed that "[s]omething beyond the ordinary civil service relationship must be present." *Id*. at 336.

The district court correctly granted summary judgment to SEIU on Clarke's claim for "Breach of Covenant of Good Faith and Fair Dealing – Tortious Breach." *See* Appx. II:335 ¶¶ 55–60. Again, Clarke's claim was based on an employment contract between him and Local 1107, not SEIU. *Id.* ¶ 56 ("That Plaintiff Clarke entered into an employment contract *with Local 1107*.") (emphasis added).

Moreover, Clarke demonstrated neither an employment relationship, let alone a "special relationship," with SEIU. Nor was his employment *with Local 1107* lengthy; he worked there for less than nine months. *See Clements*, 69 F.3d at 336 (noting that "[t]he Nevada court looks for facts such as promise of employment 'until retirement,' [or a] lengthy duration of employment").

Last, Clarke failed to show his termination was characterized by deception. *See Clements*, 69 F.3d at 336 (noting Nevada courts "look for facts such as . . . termination characterized by 'deception,' 'perfidy,' and 'betrayal'"). Rather, the Trustees transparently conveyed the reason for terminating employment: They intended to manage the union themselves until they could find managers whom the Trustees were confident would carry out Local 1107's policies and programs.

C. The District Court Correctly Granted Summary Judgment to SEIU on Clarke's Claim for Wrongful Termination–Bad Faith Discharge.

Martin v. Sears, Roebuck and Co., 111 Nev. 923 (1995), described the tort of bad faith discharge in terms identical to those described above:

> For this cause of action to apply, specific elements must exist. First, there must be an enforceable contract. Second, there must be a special relationship between the tortfeasor and the tort victim, such as the relationship that exists between an insured and an insurer, that is, a relationship of trust and special reliance. [*K Mart Corp. v. Ponsock*, 103 Nev. 39, 49 (1987)]. Third, the employer's conduct must go "well beyond the bounds of ordinary liability for breach of contract." *Id*. at 48, 732 P.2d at 1370.

Martin, 111 Nev. at 928–29; *see also Beales v. Hillhaven*, 108 Nev. 96, 100 (1992) ("We have previously restricted the bad faith discharge tort to those 'rare and exceptional cases that the duty is of such a nature as to give rise to tort liability'") (quoting *Ponsock*, 103 Nev. at 49).

For the reasons described above—no employment, no contract, and no special relationship with SEIU—Clarke failed to establish the necessary elements of his claim for "Wrongful Termination-Bad Faith Discharge." *See* Appx. II:338 ¶¶ 83–87.

D. The District Court Correctly Granted Summary Judgement to SEIU on Clarke's Claim for Tortious Discharge

To prevail on a cause of action for tortious discharge, "the employee must be able to establish that the dismissal was based upon the employee's refusing to

engage in conduct that was violative of public policy or upon the employee's engaging in conduct which public policy favors (such as, say, performing jury duty or applying for industrial insurance benefits)." *Bigelow v. Bullard*, 111 Nev. 1178, 1181 (1995). "The essence of a tortious discharge is the wrongful, usually retaliatory, interruption of employment by means which are deemed to be contrary to the public policy of this state." *D'Angelo*, 107 Nev. at 718.

In addition to failing to establish SEIU employed him, *see D'Angelo*, 107 Nev. at 718 (observing that "a public policy tort cannot ordinarily be committed absent the employer-employee relationship"), Clarke also failed to establish he was terminated in violation of any public policy. As discussed *infra*, Local 1107 terminated Clarke *consistent* with public policy, namely, federal labor policy authorizing union leaders to select their own administrations. *See Screen Extras Guild*, 51 Cal.3d 1017. Allowing Clarke's claim for "Tortious Discharge" (Appx. II:339 ¶¶ 91–93) to proceed would turn public policy on its head, not vindicate it.

II. The District Court Correctly Granted Summary Judgment in Favor of SEIU on Clarke's Claim for Interference with Contract.

"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). Thus, a plaintiff must show the defendant took some action with "an improper objective of harming Plaintiff or wrongful means that in fact caused injury to Plaintiff's contractual" relationship. *Id*. at 815.

The district court correctly granted summary judgment to SEIU on Clarke's claim for interference with contract (*see* Appx. II:335–336 ¶¶ 61–67) because Clarke failed to show SEIU took action designed to disrupt his employment contract with Local 1107. *See J.J. Indus., LLC*, 119 Nev. at 274. The undisputed evidence established *the Local 1107 Trustees*, not SEIU, made the decision to terminate Clarke's employment. Appx. II:390 ¶ 5; 402 ¶ 5; 409–11.

Clarke's claim hinged on the misconception the Trustees were "third parties" acting on behalf of SEIU in terminating his employment contract. Appx. II:336 ¶ 63. To the contrary, "[a]s 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." *Dillard v. United Food & Commercial Workers Union Local 1657*, No. CV 11-J-0400-S, 2012 WL 12951189, at *9 (N.D. Ala. Feb. 9, 2012), *aff'd*, 487 F. App'x 508 (11th Cir. 2012); *see also 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."); *Perez v. Int'l Bhd. of Teamsters, AFL-CIO*, No. 00-civ-1983-LAP-JCF, 2002 WL 31027580, at *5 (S.D.N.Y. Sep. 11, 2002); *Fields v. Teamsters Local Union No. 988*, 23 S.W.3d 517, 525 (Tx. Ct. App. 2000); Appx. IV:589 ¶ 11 ("As Trustees, Blue and Manteca stood in the place of SEIU Local 1107's former officers . . . .").

Moreover, courts have rejected tortious interference claims like Clarke's based on a trustee's authority to select union staff. For instance, in *Pape v. Local 390 of Int'l Bhd. of Teamsters*, 315 F. Supp. 2d 1297, 1318 (S.D. Fla. 2004), the court held that, "[b]ecause the trustee is empowered by the International Constitution to remove officers, Plaintiff could not have been wrongfully removed from office." *Id*. (citing *Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D. Mich. Sept. 18, 1989)).

In *Pape*, the international union placed the local union into trusteeship, and the trustee terminated the plaintiff, the president of the local union. *Id*. at 1303. The plaintiff alleged she had a right under the local's bylaws to continued employment with the local, and the international union interfered with that right when it terminated her after the trusteeship. *See id*. at 1318. In granting summary judgment for defendants on the plaintiff's tortious interference claim, the court held the plaintiff's right to continued employment "could not be sustained in

conflict with the International Constitution." *Id*. at 1318 (emphasis added). Like SEIU's Bylaws, the international union's bylaws provided that "[t]he trustee shall be authorized and empowered . . . to remove any and all officers . . . ." *Id*. at 1307; *see* Appx. IV:611, § 7(b) ("The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union . . . to remove any of its employees[or] agents . . . .").

Likewise, in *Dean*, the court ruled a trustee was not liable for tortious interference with contract for terminating plaintiff, a former business agent of the local union, following a trusteeship. *See Dean*, 1989 WL 223013. As here, the plaintiff alleged he was hired by the local's former officers; they promised he would be terminated only for cause; and, following imposition of a trusteeship, the trustee terminated him without cause. *See id*. at *1-3. Like *Pape*, the court ruled the trustee "possessed authority to take whatever steps he chose to restore Local 406 to financial stability," and "[t]he decision as to which business agents he should discharge and which agents he should retain in obtaining this objective was certainly his to make." *Id*. at *8. As here and in *Pape*, the international union's constitution authorized the trustee to remove officers of the local union upon imposition of the trusteeship. *See id*. at *6.

Thus, even if the former Local 1107 president was authorized to enter into a for-cause employment contract with Clarke, such authority was always subject to,

and limited by, SEIU's bylaws, which authorize a trustee to remove employees in the event of a trusteeship. *See* Appx. IV:623, Art. XV § 3 ("[T]he Constitution and Bylaws of all Local Unions and affiliated bodies shall at all times be subordinate to the Constitution and Bylaws of the International Union as it may be amended from time to time."); 611, Art. VIII § 7(b) ("The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union and . . . to remove any of its employees . . . ."); *Pape*, 315 F. Supp. 2d at 1318 ("Plaintiff cannot state a claim for tortious interference because she has failed to establish existence of a legal right."); *Dean*, 1989 WL 223013, at *6 ("[I]n light of the explicit provisions of the [international] constitution and bylaws, [the plaintiff] could not reasonably believe that his employment as a business agent was secure for a three year term and terminable only for good cause, regardless of whether or not Crane and Viviano continued in office during that time.").

III. The LMRDA Preempted Clarke's Claims.

Clarke contends the district court incorrectly ruled his claims against the Unions were preempted by the LMRDA. That argument runs headlong into the conclusions of a consensus of courts—including in California, Montana, Michigan, New Jersey, and Colorado, as well as federal district courts applying California and Oregon law—that LMRDA preemption applies here. None of Clarke's arguments warrants departing from that persuasive precedent.

A. Conflict Preemption.

"The preemption doctrine, which provides that federal law supersedes conflicting state law, arises from the Supremacy Clause of the United States Constitution." *Nanopierce Techs., Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 370 (2007); *see* U.S. Const., art. IV, cl. 2. "Thus, when a conflict exists between federal and state law, valid federal law overrides, *i.e.*, preempts, an otherwise valid state law." *Nanopierce Techs., Inc.*, 123 Nev. at 370. "Whether a federal enactment preempts state law is fundamentally a question of congressional intent—did Congress expressly or impliedly intend to preempt state law?" *Id*.

"When Congress does not include statutory language expressly preempting state law, Congress's intent to preempt state law nonetheless may be implied in two circumstances known as field preemption and conflict preemption." *Id*. at 371. Conflict preemption "is implied to the extent that federal law actually conflicts with any state law." *Id*. Thus, "[c]onflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objective." *Id*. at 371–72.

B. The LMRDA Protects the Right of Union Leaders to Select Their Administrations.

The LMRDA, enacted in 1959, is a comprehensive federal statute regulating

the internal affairs of unions. The statute "was the product of congressional concern with widespread abuses of power by union leadership." *Finnegan v. Leu*, 456 U.S. 431, 436 (1982); *see* 29 U.S.C. § 401 (describing congressional purpose in enacting LMRDA). The statute, among other things, establishes a bill of rights for union members, *see* 29 U.S.C. §§ 411–15 ("Title I"); imposes reporting requirements on unions, *see* 29 U.S.C. §§ 431–41 ("Title II"); regulates the imposition of trusteeships over local unions, *see* 29 U.S.C. §§ 461–66 ("Title III"); regulates union officer elections, *see* 29 U.S.C. §§ 481–83 ("Title IV"); and establishes fiduciary duties and bonding requirements for union officers, and bars individuals from holding office if they have committed enumerated crimes, *see* 29 U.S.C. §§ 501–04 ("Title V").

In *Finnegan*, the U.S. Supreme Court examined whether the discharge of a union's appointed business agents by the union president, following his election over the candidate supported by the business agents, violated the LMRDA. *See id*. at 432. Plaintiffs, former appointed business agents and members of the union, alleged their terminations infringed their right to free expression under Title I. *See id*. at 440.

In rejecting that claim, the Court emphasized that Title I "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own," but left open the question whether the result would be

different for "nonpolicymaking and nonconfidential employees." *Id*. at 441 & n.11. In fact, the Court noted that it was "virtually inconceivable that Congress would have prohibited the longstanding practice of union patronage without any discussion in the legislative history of the [LMRDA]." *Id*. n.12. The Court concluded as follows:

> [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. Far from being inconsistent with this purpose, *the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.*

Id. at 441 (emphasis added). After noting the union's bylaws granted the president authority to discharge business agents, the Court concluded that "[n]othing in the [LMRDA] evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies." *Id*. at 442. As the Court summarized, "in enacting Title I of the [LMRDA], Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff." *Id*.

C. *Screen Extras Guild* Held that the LMRDA Preempts Claims Against Unions by Confidential and/or Policymaking Staff.

The principal case the court relied on in concluding Clarke's claims were

preempted is *Screen Extras Guild*.[9] The case involved claims by the plaintiff, a union business agent terminated for dishonesty and incompetence, who sued the union for wrongful discharge in breach of an employment contract, and related torts. *See* 51 Cal. 3d at 1020.

The California Supreme Court concluded the plaintiff's claims conflicted with, and were therefore preempted by, the LMRDA, and directed the trial court to enter judgment for defendants. *See id*. 1024-33. The court held "to allow [wrongful discharge] actions to be brought by former confidential or policymaking employees of labor unions would be inconsistent with the objectives of the LMRDA and with the strong federal policy favoring union democracy that it embodies." *Id*. at 1024.

Relying on *Finnegan*, the court reasoned that "[e]lected union officials must necessarily rely on their appointed representatives to carry out their programs and policies. As a result, courts have recognized that the ability of elected union officials to select their own administrators is an integral part of ensuring that administrations are responsive to the will of union members." *Id*. at 1024-25. Based on that federal policy, the court concluded "allowing [wrongful discharge

[9] The Unions are not aware of a Nevada case adopting *Screen Extras Guild*. Because this appears to be a matter of first impression in Nevada, this Court may look to persuasive authority for guidance. *See, e.g.*, *Whitemaine v. Aniskovich*, 124 Nev. 302, 311 (2008) ("As this is an issue of first impression in Nevada, we look to persuasive authority for guidance.")

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).

The court also rejected the argument that because the plaintiff was terminated for dishonesty and incompetence, not disagreement with policy goals of the union leadership, her claims did not implicate the LMRDA. *See id*. at 1027-28. The court ruled that permitting even "garden variety" wrongful discharge actions would implicate union democracy concerns of the LMRDA. *Id*. at 1027. The court also observed that "[r]eplacement of business agents by an elected labor union official is sanctioned by the [LMRDA] and allowance of a claim under state law would interfere with the effective administration of national labor policy." *Id.* (internal quotation marks and citations omitted). As the court explained, "[t]he expense of litigating wrongful discharge claims, as well as the risk of liability should a discharge ultimately be deemed 'garden variety,' would surely have a chilling effect on all discharges. But, as we have seen, Congress intends that elected union officials shall be free to discharge management or policymaking personnel." *Id.* at 1028.

Screen Extras Guild is a foundational case regarding LMRDA preemption in this context. Relying on *Screen Extras Guild*, California courts have routinely held

the LMRDA preempts common law torts and breach of contract claims by discharged union employees.[10] Federal district courts have also applied *Screen Extras Guild* in construing California and Oregon law.[11] Finally, state courts in Montana, Michigan, New Jersey, and Colorado have adopted the reasoning of *Screen Extras Guild*.[12]

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[10] *See Thunderburk v. United Food & Commercial Workers' Union, Local 3234*, 92 Cal. App. 4th 1332 (2001) (LMRDA preempted wrongful discharge action by former union secretary); *Hansen v. Aerospace Defense Related Indus. District Lodge 725*, 90 Cal. App. 4th 977 (2001) (LMRDA preempted claims for wrongful discharge in violation of public policy by former business agent); *Ramirez v. Butcher*, No. B182958, 2006 WL 2337661 (Cal. Ct. App. 2006) (LMRDA preempted claims for breach of contract, covenant of good faith and fair dealing, defamation and contract interference by former union field representative); *Burrell v. Cal. Teamsters, Public Professional and Medical Employees Union, Local 911*, No. B166276, 2004 WL 2163421 (Cal. Ct. App. 2004) (LMRDA preempted claims for breach of implied contract and covenant of good faith and fair dealing, emotional distress, and defamation by former union office manager and bookkeeper); *see also Tyra v. Kearney*, 153 Cal.App.3d 921 (1984) (predating *Screen Extras Guild*; LMRDA preempted wrongful termination claim by former union business agent).

[11] *See, e.g., Hurley v. Teamsters Union Local No. 856*, No. C-94-3750 MHP, 1995 WL 274349 (N.D Cal. May 1, 1995) (LMRDA preempted California claims for breach of implied covenant of good faith and fair dealing by former union business representative); *Womack v. United Service Employees Union Local 616*, No. C-98-0507 MJJ, 1999 WL 219738 (N.D. Cal. 1999) (LMRDA preempted California claims for breach of contract and covenant of good faith and fair dealing, interference with economic advantage, infliction of emotional distress and defamation by former union executive director); *Sw. Reg'l Council of Carpenters v. Limon*, No. CV 17-6582 DSC (MRWx), 2018 WL 6003589, at *11–13 (C.D. Cal. May 17, 2018) (LMRDA preempted Oregon state law claims for wrongful discharge and whistleblower retaliation).

[12] *See Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 75 P.3d 1250, 1256 (Mont.

D. The District Court Correctly Ruled that *Screen Extras Guild* Applies to Clarke's Claims.

1. The District Court Correctly Applied Conflict Preemption Principles in Granting Summary Judgment

Against the weight of authority described above, Clarke begins his argument by discussing inapposite Nevada preemption cases. *See* Clarke Opening Brief ("Br.") 4–9. Unlike *Screen Extras Guild*, none of the preemption cases he cites at pages 4–9 of his brief addresses conflict preemption under the LMRDA, thus offering little guidance here.[13] Br. 4–9.

Sup. Ct. 2003) (LMRDA preempted business agent's wrongful termination claim); *Packowski v. United Food & Commercial Workers Local 951*, 796 N.W.2d 94, 101–02 (Mich. Ct. App. 2010) (LMRDA preempted union organizer's claim he was terminated without just cause); *Dzwonar v. McDevitt*, 791 A.2d 1020, 1024–26 (N.J. App. Div. 2002) (LMRDA preempted claims by union arbitration officer who was "not merely a clerical employee" but instead had "significant responsibilities of a confidential and policy-making nature"), *aff'd on other grounds*, 828 A.2d 893 (N.J. Sup. Ct. 2003); *Montoya v. Local Union III of Int'l Bhd. of Elec. Workers*, 755 P.2d 1221, 1223–24 (Colo. Ct. App. 1988) (LMRDA preempted wrongful discharge claims by union's assistant business manager).

[13] *Dancer* concerned preemption of Nevada's minimum wage law by the Fair Labor Standards Act, which includes a savings clause allowing states to "establish a minimum wage higher than the minimum wage established" under federal law. 124 Nev. at 33. *Western Cab Co. v. Eighth Judicial District Court* concerned preemption under the National Labor Relations Act and Employee Retirement Income and Security Act, federal statutes with unique preemption caselaw inapplicable here. *See* 133 Nev. 65, 68–73 (2017); *see also Rosner v. Whittlesea Blue Cab Co.*, 104 Nev. 725 (1988) (addressing NLRA preemption). *MGM Grand Hotel-Reno, Inc. v. Insley* addressed preemption under the Labor Management Relations Act, yet another federal statute with a unique preemptive scope. *See* 102 Nev. 513, 517–18 (1986).

For example, Clarke quotes this Court's conclusion that "labor law 'preemption should not be lightly inferred . . . since the establishment of labor standards falls within the traditional police power of the state,'" Br. at 5 (quoting *W. Cab Co.*, 133 Nev. at 68), but he omits from the quoted passage that the case concerned preemption under the National Labor Relations Act ("NLRA"), not the LMRDA. *See W. Cab Co.*, 133 Nev. at 68 ("[P]re-emption should not be lightly inferred [under the NLRA], since the establish of labor standards falls within the traditional police power of the State." (brackets in original)).

Similarly, Clarke quotes this Court's conclusion that Congress did "'not intend to disturb state laws in existence that set minimum labor standards,'" Br. at 7 (quoting *Insley*, 102 Nev. at 518); *see also* Br. 14, but he ignores that the case this Court relied on for that proposition, *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), addressed considerations unique to NLRA preemption.[14] *See Metropolitan Life Ins. Co.*, 471 U.S. at 756 ("[T]here is no suggestion in the legislative history of the [National Labor Relations] Act that Congress intended to disturb the myriad state laws then in existence that set

[14] Clarke repeats this error at pages 34–35 of his brief, citing a series of NLRA preemption cases addressing considerations unique to that statute. *See Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53 (1966); *United Automobile Workers v. Russell*, 356 U.S. 634 (1958); *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). These cases do not concern the legislative purpose of the LMRDA, or the types of state laws that conflict with it.

minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization."). Moreover, Clarke's claims are not based on a minimum labor standard like a minimum wage law; they are common law contract and tort claims that conflict with the LMRDA.

If anything, Clarke's discussion of inapposite cases obscures that the district court applied settled conflict preemption principles described in *Nanopierce Technologies, Inc.*, 123 Nev. at 371–72. Appx. VI:1156. Nor does Clarke convincingly argue that the conflict preemption principles discussed in *Screen Extras Guild* conflict with Nevada law. *See* Br. 11–15. California and Nevada apply the same conflict preemption principles. *Compare Screen Extras Guild*, 51 Cal. 3d at 1023 ("Our task is simply to determine whether there is an actual conflict between permitting Smith to pursue her state law causes of action and federal labor policy as embodied in the LMRDA."), *with Nanopierce Techs, Inc.*, 123 Nev. at 371–72 (holding conflict preemption examines whether "in light of federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives"). The district court thus rightly rejected this argument when Clarke raised it below.[15] Clarke Appx. II:302:5–8.

[15] Although Clarke argues that *Screen Extras Guild* applied a "novel 'substantive preemption' doctrine," Br. 12–13, the analytical distinction between jurisdictional and substantive preemption discussed in *Screen Extras Guild*, *see* 51 Cal. 3d at 1023, is grounded in U.S. Supreme Court precedent, *see, e.g., Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union, Local 54*, 468 U.S. 491 (1984)

2. The LMRDA Savings Clauses Do Not Apply Here.

Clarke argues several provisions of the LMRDA establish his claims are not preempted. His reliance on those provisions is misplaced.

At the outset, Clarke asserts "[p]reemption can only be found to the express degree Congress intended when there is express preemption language in the statute . . . ." Br. 17 (citing *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990)); *see also* Br. 29. We understand this assertion to mean that if a statute has an express preemption provision, the statute cannot also impliedly preempt state law. This is incorrect. While Congress' intent is the touchstone of preemption, its intent "may be either express *or implied*," and thus preemption exists "whether Congress' command is explicitly stated in the statute's language *or implicitly contained in its structure and purpose*." *Holliday*, 498 U.S. at 56–57 (emphasis added). No case cited by Clarke supports his claim that a statute cannot both expressly and impliedly preempt state law.[16]

("If the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right."). Nor is the preemption analysis in *Screen Extras Guild* an "outlier." *See* Br. 13. The number of jurisdictions adopting *Screen Extras Guild* makes Clarke's argument the outlier.

[16] Clarke cites *Gade v. Nat'l Solid Waste Mgt. Ass'n*, 505 U.S. 88 (1992), and *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Br. 16–17, 29, but neither case supports his either-or view of preemption. Rather, *Gade* recognized the "ultimate task in any pre-emption case is to determine whether state regulation is consistent *with the structure and purpose of the statute*

Nor do the LMRDA provisions Clarke cites undermine preemption here. The first two provisions he cites, 29 U.S.C. §§ 413 and 523(a), preserve state actions involving the rights of union *members*, not actions seeking to vindicate the rights of union *employees*. *Screen Extras Guild*, 51 Cal. 3d at 1030 n.10 (concluding that Sections 413 and 523(a) "save only causes of action enjoyed by union members"); *Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356, 1360 (9th Cir. 1986) ("Sections 413 and 523(a), however, 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)). Here too, Clarke's claims concerned his rights as a former employee, not as a union member.[17]

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as a whole." 505 U.S. at 98 (emphasis added). It did not hold implied preemption is impossible where a statute contains an unrelated express preemption provision. And *Chevron* does not concern preemption at all; it concerns an administrative agency's construction of a statute. *See* 467 U.S. at 840.

[17] For the same reason, Clarke's reliance on *Int'l, Union, Security, Police and Fire v. United Gov't Security Officers of Am*., No. Civ A-04-2242-KHV, 2004 WL 3019430 (D. Kan. Dec. 30, 2004), which concerned a suit by a union to vindicate various membership rights, is misplaced. *See* Br. 20-21. Clarke's reliance on *Casumpang v. ILWU, Local 142*, 13 P.3d 1235 (Haw. Sup. Ct. 2000), is also misplaced. *See* Br. 22–23. There, the plaintiff sued a union for unpaid vacation benefits, and, unlike Clarke's lawsuit, "ha[d] disclaim[ed] any challenge to his discharge" from the union. *See* 13 P.3d at 1245; *see also id.* at 1246 ("The only relief that Casumpang seeks in the pending state court action is the payment of vacation benefits that he is allegedly owed").

Clarke's reliance on 29 U.S.C. §§ 466 and 523(b) is equally misplaced.[18] Section 466 states the "rights and remedies provided by [Title III of the LMRDA]" do not preempt state law claims challenging a trusteeship. *See* 29 U.S.C. § 466. But this action does not challenge the lawfulness of SEIU's trusteeship over Local 1107. Section 523(b) is also inapposite, as it addresses rights and remedies under the Railway Labor Act and NLRA, which have no bearing on Clarke's claims. *See* 29 U.S.C. § 523(b).

In connection with his discussion of these provisions, Clarke cites two distinguishable U.S. Supreme Court cases which, in part, relied on certain anti-preemption provisions of the LMRDA. In *DeVeau v. Braisted*, 363 U.S. 144 (1960), a plurality held the LMRDA did not preempt a New York statute barring those convicted of a felony from "solicit[ing], collect[ing] or receiv[ing]" union dues. Appellant contended the LMRDA provision imposing similar restrictions on holding union office, 29 U.S.C. § 504(a), supported the conclusion the state law was preempted. *See id*. at 155–56.

Clarke highlights that the plurality noted "[w]hen Congress meant pre-

[18] Clarke's reference to the LMRDA's legislative history fares no better. He simply notes that the term "preemption" appears throughout the statute's legislative history, but fails to explain anything more. *See* Br. 28. As the Seventh Circuit observed, "[j]udges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Nor must they hunt through legislative history for relevant excerpts.

emption to flow from the [LMRDA] it expressly so provided;" and further that the statute "did not leave the solution of questions of pre-emption to inference." *Id*. at 156. But the plurality further emphasized the statute later became a compact between New York and New Jersey, *which was approved by Congress*. *See id*. at 149 ("[T]he compact was submitted to the Congress for its consent, and it was approved"). The plurality's holding thus followed from Congress's express approval of the state compact, not merely the anti-preemption provisions of the LMRDA. *See id*. at 156.

That same consideration underscored the Court's conclusion in *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union, Local 54*, 468 U.S. 491 (1984). There, the Court concluded the NLRA, and in particular, the right of employees freely to select a bargaining representative, *see* 29 U.S.C. § 157, did not preempt a New Jersey statute imposing qualification criteria for union officials representing casino employees. The Court again emphasized Congress's approval of the compact in *DeVeau* indicated its intent that such laws were not preempted. *See id.* at 509 ("In its enactment of LMRDA and *its awareness of New York's comparable restrictions when approving the bistate compact*, Congress has at least indicated . . . that certain state disqualification requirements are compatible with [29 U.S.C. § 157]." (emphasis added)).

Neither *DeVeau* nor *Brown* is apt here. This case does not concern a conflict

between the right of employees to select a bargaining representative and state criminal law. Nor is preemption here undermined by express congressional action. Last, no case cited by Clarke applied *DeVeau* or *Brown* in this context to conclude the LMRDA does not preempt state law.

3. The Conflict Between the LMRDA and Clarke's Claims is Clear.

a. *Screen Extras Guild* Correctly Identified a Conflict Between the LMRDA and Suits by Former Union Policymaking/Confidential Staff.

Clarke appears to argue none of the cases discussed by *Screen Extras Guild* supports the existence of conflict preemption. *See* Br. 30–37.

To the contrary, *Finnegan*, which *Screen Extras Guild* relied on, concluded the LMRDA's "overriding objective was to ensure that unions would be democratically governed," and that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Finnegan*, 456 U.S. at 441. As the Court found, "[n]othing in the [LMRDA] evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies." *Id*. at 442; *see also id*. at 441 n.12.

Given the "overriding objective" identified in *Finnegan*, *id*. at 441, *Screen Extras Guild* correctly recognized the conflict between the LMRDA and state law

claims, like Clarke's, which interfere with a union leader's right to select members of the union's administration. *See Screen Extras Guild*, 51 Cal. 3d at 1025 ("Congress must have intended that elected union officials would retain unrestricted freedom to select business agents, or, conversely, to discharge business agents with whom they felt unable to work or who were not in accord with their policies."); *see Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 354–55 (1989) ("[T]he basis for the *Finnegan* holding was the recognition that the newly elected president's victory might be rendered meaningless if a disloyal staff were able to thwart the implementation of his programs."). Such a conflict supports preemption here. *See Nanopierce Techs, Inc.*, 123 Nev. at 371–72 (holding that conflict preemption examines whether "in light of federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives"). That so many cases following *Screen Extras Guild* also relied on *Finnegan* for its identification of the source of the conflict on which preemption is based undermines Clarke's position. *See supra* notes 10–12.

Relatedly, Clarke contends because neither "the language nor the legislative history of the [LMRDA] suggests that it was intended even to address the issue of union patronage," *Finnegan*, 456 U.S. at 441, there cannot be a conflict between the LMRDA and "state law affecting the union-employer/union-employee relationship." Br. 45. This oversimplification of *Finnegan* ignores the Court's

conclusion that the ability of union leaders to select their administrators "is an integral part of ensuring a union administration's responsiveness to the mandate of the union election," the statute's "overriding objective." *Finnegan*, 456 U.S. at 441. Permitting Clarke to pursue his action, which seeks to impose liability based on Local 1107's decision to terminate his employment, conflicts with that objective. *See Packowski*, 796 N.W. 2d at 101–02 ("The democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge."); *Tyra*, 153 Cal. App. 3d at 923 (holding "allowance of claim under state law [by discharged business agent] would interfere with the effective administration of national labor policy").

b. The Trustees had Authority to Terminate Clarke.

Clarke argues that, even assuming conflict preemption applies to the LMRDA, unlike in *Screen Extras Guild* there is no conflict between the LMRDA and *his* state claims. *See* Br. 37–53.

He first argues that Local 1107 had a for-cause employment contract with Clarke, and Local 1107's bylaws did not grant Local 1107's leaders authority to terminate staff. *See* Br. 38–40. This argument overlooks two dispositive points. Local 1107's bylaws were suspended upon implementation of the trusteeship, before Clarke's termination. *See* Appx. IV:588 ¶ 10; 793 (trusteeship order suspending Local 1107 bylaws). Also, as in *Finnegan*, SEIU's bylaws, which

prevail over Local 1107's, authorize a trustee to terminate union staff during a trusteeship. *See* Appx. IV:623, Art. XV § 3 ("[T]he Constitution and Bylaws of all Local Unions . . . shall at all times be subordinate to the Constitution and Bylaws of the International Union . . . ."); 611, Art. VIII § 7(b) ("The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union and . . . *to remove any of its employees* . . . ." (emphasis added)). Thus, Clarke's employment was always subject to, and limited by, the authority of a trustee pursuant to SEIU's bylaws. *See, e.g., Pape*, 315 F. Supp. 2d at 1318; *Dean*, 1989 WL 223013 at *8.

Next, Clarke argues the conflict identified in *Screen Extras Guild* was too "abstract and indefinite" to support preemption, based on the mere possibility policymaking and/or confidential staff could thwart a union's policies. *See* Br. 48–50. Such a conflict was not speculative *here*. Clarke was "critical" of the trusteeship and questioned its legitimacy; sent text messages to other managers displaying hostility to the trusteeship, and then, to hide his hostility, urged them to delete the messages; and last, shortly after his termination, helped prepare a nationwide press release condemning the trusteeship. The likelihood that Clarke would have undermined the trustees was palpable.[19]

[19] Clarke acknowledges "a business agent's thwarting of a supervising elected official's policy would clearly be a for-cause basis to justify termination." Br. 48. Given his hostility to the trusteeship, such cause existed here. The evidence of

c. The Rationale of *Screen Extras Guild* Applies to Appointed Trustees.

Clarke argues *Screen Extras Guild* does not apply here because the Trustees were appointed by SEIU President Henry, not elected by Local 1107's membership. *See* Br. 53–54.

This argument ignores that the appointment of the Trustees was itself the product of democracy at Local 1107. Prior to the trusteeship, Local 1107's executive board, the elected governing body of the union, voted in favor of the trusteeship. Appx. IV:588 ¶ 10; 793 (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 Local 1107's executive board's vote to transfer management of the union to the Trustees.[20]

Furthermore, several courts have held *Finnegan* supports the right of

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Clarke's hostility to the trusteeship also defeats his argument that he "never expressed any opposition to the trusteeship, the incoming unelected trustee, nor the trustee's plan or policies." Br. 54.

[20] SEIU President Henry, who appointed the Trustees, is an elected officer of SEIU. Appx. IV:587 ¶ 3. Thus, like the vote of Local 1107's Executive Board authorizing the trusteeship, President Henry's appointment of the Trustees was pursuant to her electoral mandate.

unelected union leaders to select their own administrators. In *Vought v. Wisconsin Teamsters Joint Council No. 39*, 558 F.3d 617 (8th Cir. 2009), union representatives filed internal charges against one another. *See id*. at 619–20. The union's parent body held a hearing on the charges and removed the union's secretary-treasurer. *Id*. at 619. The union's president then became the acting secretary-treasurer and fired the plaintiff, an appointed business representative. *Id*.

Relying on *Finnegan*, the court affirmed summary judgment in favor of the union on the business representative's LMRDA claim. *See id*. at 621-23. Although the court acknowledged, unlike in *Finnegan*, the acting secretary-treasurer was not elected, it concluded that *Finnegan* required dismissal of the plaintiff's LMRDA claim nonetheless. *See id*. at 622-23. "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 *Finnegan* authorizes unelected union leaders to terminate appointed management or policymaking staff. *See English v. Serv. Employees Int'l Union, Local 73*, No. 18-c-5272, 2019 WL 4735400, *4 (N.D. Ill. Sep. 27, 2019) (holding "*Finnegan* applies just the same" to the authority of an unelected trustee to terminate union staff); *Dean*, 1989 WL 223013 at *5 (holding *Finnegan* supported trustee's authority to terminate plaintiff,

noting "[t]he obstruction of union democracy which can occur by leaving an elected president with his hands tied by appointed business agents, whom he could not discharge, is no less capable of occurring" during trusteeship).

Finally, the LMRDA authorizes an international union to place a local union into trusteeship. *See* 29 U.S.C. § 462. It would make little sense for the statute to authorize a trusteeship over a local union—where a trustee steps into the shoes of the former elected officers, *see Campbell*, 69 F. Supp. 2d at 385—and yet deprive trustees of the same authority as the elected officers they replace. *See Lynn*, 488 U.S. at 357 ("[A] trustee's authority under Title III ordinarily should be construed in a manner consistent with the protections provided in Title I"). Indeed, Clarke's theory would confer protected status for policymaking and confidential staff who oppose a trusteeship, a result clearly at odds with the LMRDA.

d. Clarke Was a Policymaking and/or Confidential Employee.

In a last-ditch effort to avoid preemption, Clarke contends he was not a policymaking and/or confidential employee akin to the business agent in *Screen Extras Guild*.[21] *See* Br. 56–57.

Undisputed evidence supports the opposite conclusion. Clarke admits he

[21] Clarke appears to distinguish between appointed and hired staff, Br. 55, but that distinction, if it is one, is irrelevant here. In either case, the staff person is not *elected* and thus subject to the reach of *Finnegan* and *Screen Extras Guild*.

was a manager of the union, itself a reason *Screen Extras Guild* applies.[22] *See Screen Extras Guild*, 51 Cal.3d at 1028 (concluding "Congress intends that elected union officials shall be free to discharge *management* or policymaking personnel.") (emphasis added); *see id*. at 1031 ("Smith herself acknowledges . . . she was considered a management employee.").

Moreover, Clarke's job duties demonstrate his widespread responsibility over, and unencumbered access to, the day-to-day financial and legal affairs of the union. Appx. III:553–54; 516:25–17:19. Like the plaintiff in *Screen Extras Guild*, Clarke had significant decision making responsibility for the implementation of union policy. *See* 51 Cal. 3d at 1031.

Last, Clarke's unrestricted access to the union's financial and legal affairs establishes he was also a confidential employee subject to *Screen Extras Guild*. *See, e.g.*, *Thunderburk*, 92 Cal. App. 4th at 1343 (holding union's executive secretary was confidential employee under *Finnegan* where she "had access to confidential union information, which, if disclosed, could have thwarted union policies and objectives"); *Burrell*, 2004 WL 2163421, *4 (holding union office

[22] *See* Appx. I:31 ("It cannot be disputed that Ms. Gentry and Mr. Clarke *were hired to their management positions* with Local 1107 by former Local 1107 President Cherie Mancini." (emphasis added)); Appx. II:326 (stating Gentry and Clarke were "*management employees* that answered to [Local 1107's former president]." (emphasis added)); Appx. III:518:10–24 (discussing attendance at weekly manager's meetings).

manager was confidential employee under *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 under *Finnegan* where she had "wide-ranging . . . access to sensitive material concerning vital union matters").

IV. Clarke's Alter-Ego Claim Fails.

Clarke contends the district court erred by failing to rule the Unions were alter-egos. Br. 57–68. He waived this allegation by failing to plead it, and by failing to object to the district court's decision not to make findings related to it. Regardless, the contention fails on the merits.

A. Clarke Waived His Alter-Ego Claim.

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." *W. States Constr. v. Michoff*, 108 Nev. 931, 936 (1992). Hence, "the 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." 1 Nevada Civil Practice Manual, § 19.08[1] (T. DiFillippo et al. eds. 2019); *see, e.g.*, *Wasco Prod., Inc. v. Southwall Techs., Inc.*, 435 F.3d

989, 992 (9th Cir. 2006); *Kimura v. Decision One Mortg. Co., LLC*, No. 2:09-cv-01970-GMN-PAL, 2011 WL 915086, *4 (D. Nev. March 15, 2011) ("[A] party cannot oppose summary judgment on grounds not in issue under the pleadings.").

These due process protections apply to alter-ego allegations. *See Callie v. Bowling*, 123 Nev. 181, 185–86 (2007) (requiring party asserting alter-ego allegations to do so "with the requisite notice, service of process, and other attributes of due process"). Thus, a plaintiff may not oppose summary judgment by raising an alter ego allegation not plead in the operative complaint. *See Marshall v. Anderson Excavating & Wrecking Co.*, 901 F.3d 936, 942–43 (8th Cir. 2018) (holding district court erred in applying alter ego liability where "plaintiffs never pleaded an alter ego theory in their complaint"); *Garcia v. Village Red Rest. Corp*., 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 party may not "resist summary judgment by relying on alter-ego theory" not raised in pleadings).

Having failed to plead his alter ego allegation, Clarke was barred from raising it in opposition to summary judgment. The district court thus correctly declined to reach the issue. *See* Clarke Appx. 328:6–13.

Moreover, when the district court declined to make findings related to

Clarke's belated alter-ego allegation, Clarke did not object. *See* Clarke Appendix II:328:6–18. Clarke thus waived any argument on appeal regarding the issue. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53 (1981).

B. Clarke's Failed to Show SEIU and Local 1107 Were Alter-Egos.

Even if Clarke did not waive his alter-ego allegation, he fails to justify reversing summary judgment in favor of SEIU on that ground.

"[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) (internal quotation marks and citation omitted). To demonstrate alter-ego status, "[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." *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 95 Nev. 463, 466 (1979).

Clarke was required to demonstrate the following alter-ego elements by a preponderance of evidence:

> (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 fraud or promote injustice.

Polaris Indus. Corp. v. Kaplan, 103 Nev. 598, 601 (1987). As discussed below,

Clarke failed to demonstrate these elements.

1. Clarke Failed to Establish the First Alter-Ego Factor.

Clarke contends the first factor is met because SEIU placed Local 1107 in trusteeship, suspended its bylaws, and appointed the Trustees.[23] *See* Br. 60–61.

Clarke's reliance on these facts reflects a fundamental misconception about the nature of trusteeships. As noted earlier, the Trustees' role was to act on behalf of Local 1107, not SEIU. *See Dillard*, 2012 WL 12951189, at *9; *Perez*, 2002 WL 31027580, at *5; *Campbell*, 69 F. Supp. 2d at 385. These facts thus fail to support Clarke's argument SEIU "dominated Local 1107's operations," Br. 60, or Local 1107 was "controlled and directed" by SEIU,[24] Br. 62. *See Herman v. United Bhd. Of Carpenters and Joiners of Am., Local Union No. 971*, 60 F.3d 1375, 1383–84 (9th Cir. 1995) (noting power "to impose trusteeships over locals and control their affairs" is common feature of union constitutions and did not evidence control over day-to-day operations necessary to demonstrate single-employer status); *Campbell*,

[23] Clarke contends Deputy Trustee Manteca was "an SEIU International employee." Br. 63. The evidence he cites does not support that claim. Rather, it shows only that SEIU appointed Manteca to the position. Clarke Appx. I:41.

[24] Even if, as Clarke argues, the SEIU bylaws provide the Trustees' actions are subject to "supervision and direction" of SEIU's President, Br. 62, he fails to show SEIU President Henry directed his termination or, for that matter, any of the Trustees' day-to-day decisions. *See Herman v. United Bhd. Of Carpenters and Joiners of Am., Local Union No. 971*, 60 F.3d 1375, 1383–84 (9th Cir. 1995).

69 F. Supp. 2d at 386 ("[P]laintiff cannot assert that [International Brotherhood of Teamsters] and Local 918 were single employers solely on the basis that IBT appointed a trustee who terminated plaintiff's employment."); *Fields*, 23 S.W. 3d at 525 ("It is insufficient to assert that an international union had control when the trustee made employment decisions and was appointed by the international union").

Clarke also argues two email chains show SEIU "direct[ed]" Clarke's termination. Br. 64. This grossly mischaracterizes the evidence. The first emails show that *the day after* the Trustees terminated Clarke's and Gentry's employment, Trustee Blue reported the terminations to then-SEIU Deputy Chief of Staff Deirdre Fitzpatrick, who then exchanged emails about the terminations with SEIU President Henry. *See* Clarke Appendix I:13–14. Those emails, occurring *after* the terminations, do not establish SEIU directed, or even influenced, Clarke's termination.[25] Fitzpatrick's deposition testimony regarding the emails makes that point clear. *See* Appx. VI:1098:5–6; 1103:11–04:4; 1105:7–06:1. Nor is Blue's report to SEIU about the terminations exceptional. *See In re W. States Wholesale*

[25] Clarke notes that SEIU President Henry observed that Trustee Blue was "on the program to get rid of staff quickly." Br. 64–65; *see* Clarke Appx. I:13. Fitzpatrick testified no such "program" existed, Appx. VI:1099:5, and Henry was never deposed. Thus, Clarke's assertions about the existence of such a "program," let alone whose program it was, Blue's or SEIU's, based on a single, inconclusive email between Fitzpatrick and Henry, amount to conjecture and speculation.

Natural Gas Antitrust Litigation, No. 2:03-CV-01431-PMP-PAL, 2009 WL 455653, *12 (D. Nev. Feb. 23, 2009) (rejecting alter-ego status between parent and subsidiary despite evidence parent "monitor[ed] [subsidiaries'] performance" and subsidiary engaged in "daily reporting" to parent); *cf. Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. 368, 380 (2014) (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").

The second email Clarke relies on is unavailing for the same reasons. The email from Fitzpatrick to Blue shows SEIU wanted to know if the Trustees asked other SEIU-affiliated local unions for staffing assistance. Clarke Appx. I:12. Such evidence falls well short of showing SEIU directed Clarke's termination or played a role in the day-to-day affairs of Local 1107. *See In re W. States Wholesale Natural Gas Antitrust Litigation*, 2009 WL 455653, *12 (rejecting alter-ego status where "[n]o evidence suggests [parent company] gave daily control commands to [subsidiaries]."). Rather, Fitzpatrick's deposition testimony established SEIU simply wanted to be aware when a local under trusteeship sought resources from another local union. Appx. VI:1108:9–09:14.

Finally, Clarke incorrectly contends SEIU presented "no evidence" to rebut his claim SEIU made "staffing decisions for Local 1107" and gave "marching orders to terminate staff quickly." Br. 68. Not only are those assertions

unsupported by Clarke's evidence, Fitzpatrick's testimony made clear SEIU played no role in the day-to-day affairs of Local 1107, including hiring and firing staff. *See* Appx. VI:1100:18–20 ("The International union doesn't advise or direct in [any] way around staff contract and management of the decision-making around staff."); 1107:16–17 ("It is our practice not to advise locals, period. Locals employ staff."); 1112:6–8 ("The trustees of the local union make determinations about how to handle all of their contracts and staffing."); 1114:14–18 ("[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."); Appx. IV:587–88 ¶ 6 ("SEIU is not now, nor has it ever been, responsible for the day-to-day operations of SEIU Local 1107. SEIU is not now, nor has it ever been, responsible for hiring, training, supervising or disciplining Local 1107 employees.").

2. Clarke Failed to Establish the Second and Third Alter-Ego Factors.

Clarke also failed to establish the other two necessary factors for alter-ego status. First, Clarke fails to point to any evidence of the traditional unity-of-interest factors, *i.e.*, comingling of funds, shared operations; shared headquarters; shared bank accounts; or failure to observe corporate formalities. *See, e.g., Truck Ins. Exchange*, 124 Nev. at 637; *Bonanza No. 2*, 95 Nev. at 467.

Second, Clarke fails to explain how adherence to corporate separateness

would sanction a fraud or promote injustice. *See* Br. 62. "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. v. Triple Seven Promotional Prods., Inc.*, No. 2:11-cv-01406-APG-CWH, 2014 WL 4828874, *3 (D. Nev. Sep. 30, 2014); *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").

There is no evidence the trusteeship was a ruse to commit tortious conduct or perpetuate fraud. Just the opposite: In proceedings challenging the trusteeship, the federal district court rejected the argument the trusteeship was imposed in bad faith and instead concluded SEIU lawfully imposed the trusteeship to prevent Local 1107 from spiraling into further disarray. *See Garcia*, 2019 WL 4279024, *13.

V. The District Court Erred by Denying the Unions' Motions for Attorneys' Fees.

A. NRCP 68.

NRCP 68(a) permits any party to "serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions." Nev. R. Civ. P. 68(a). "Unless otherwise specified, an offer made under this rule is an offer to

resolve all claims in the action between the parties to the date of the offer . . . ." *Id.* NRCP 68(c)(1) provides that "[a] joint offer may be made by multiple offerors." *Id.*, 68(c).

If the offeree rejects an offer and fails to obtain a more favorable judgment, the district court has discretion to award attorneys' fees incurred by the offeror from the time of the offer. *See id.*, 68(f)(B). Thus, NRCP 68 "reward[s] a party who makes a reasonable offer and punish[es] the party who refuses to accept such an offer." *Dillard Dept. Stores, Inc. v. Beckwith,* 115 Nev. 372, 382 (1999).

To determine whether to award attorneys' fees, a court must consider the following factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. at 588-89; *Yamaha Motor Co. v. Arnoult,* 114 Nev. 233, 251 (1998). "After weighing the foregoing factors, the district judge may, where warranted, award up to the full amount of fees requested." *Beattie*, 99 Nev. at 589. "No one factor under *Beattie* is determinative" and the district court "has broad discretion to grant the request so long as all appropriate factors are considered." *Yamaha Motor Co*., 114 Nev. at 252 n.16.

B. The District Court Erred by Denying Attorneys' Fees Because the Offers of Judgment Were Jointly Made.

The court found the Unions' joint offers of judgment were reasonable in timing and amount. Appx. VII:1381–1382; *see* 1376:15–17. However, the court ruled plaintiffs were not grossly unreasonable in rejecting the Unions' offers of judgment. Appx. VII:1382; *see* 1370:2–1371:2. In particular, the court concluded that because the joint offers required settlement with all defendants—"a global settlement"—plaintiffs were prevented from accepting the offers of judgment with an individual defendant. *See* Appx. VII:1370:2–1371:2; 1358:18–1360:4 Implicit in the court's reasoning is the conclusion that the strength of plaintiffs' claims varied with each particular defendant, and plaintiffs were not unreasonable in deciding not to forego all claims against all defendants. *See id*.

The court's ruling constituted an abuse of discretion. First, it conflicted with NRCP 68(c)(1), which permits that "[a] *joint offer* may be made *by multiple offerors*." (emphasis added); *see Chavez v. Sievers*, 118 Nev. 288, 296 (2002) ("NRCP 68 . . . provide[s] for multiple parties making a joint offer of judgment."). The Unions made precisely such offers here, jointly offering $30,000 each to Clarke and Gentry to settle all claims against all defendants. Thus, the district court could not deny attorneys' fees solely because the potential liabilities among the defendants differed. *See* 1 Nevada Civil Practice Manual, *supra*, § 18.04[5] (noting that under NRCP 68 defendants "may joint serve an offer to a single

plaintiff regardless of whether . . . the clams made against the defendants share a common theory of liability"). Were that sufficient to justify denial of attorneys' fees, NRCP 68(c)(1) would rarely, if ever, permit the award of attorneys' fees following the rejection of a joint offer by multiple defendants.

Second, Rule 68(a) states that an offer of judgment is to resolve "all claims in the action between the parties," and Rule 68(b) states that an offer "may be conditioned upon the acceptance by all parties to whom the offer is directed." The Unions' offers sought to do just that, but the court concluded that "it was not grossly for the Plaintiffs to reject the Offer of Judgment" because it "required a global resolution of all claims against all Defendants." Appx. VII:1382. The court's ruling is thus contrary to Rule 68's language, which permitted the Unions' offers.

If anything, this case was particularly well-suited to the Unions' joint offers to resolve all claims, as the court appeared to acknowledge. *See* Appx. VII:1370:9–11. Plaintiffs brought their claims in a single lawsuit, and their claims against all defendants were nearly identical. So too were the facts and circumstances from which those claims arose. Furthermore, LMRDA preemption, a key issue in the action, applied equally to nearly all defendants and was determinative of almost all claims in the lawsuit. The Unions' joint offers thus reflected the significant uniformity in the plaintiffs' claims and the manner in

which they pursued them.

The district court's error was compounded by its elevation of one *Beattie* factor—whether plaintiffs' rejection of the offers was grossly unreasonable—over the others, making it outcome determinative. Indeed, the court found the Unions' offers of judgment "pretty much passed all the other aspects of the test . . . ." Appx. VII:1370:22–26. Because no *Beattie* factor is determinative, *Yamaha Motor Co.*, 114 Nev. at 252 n.16, *see also Frazier v. Drake*, 131 Nev. 632, 644 (2015), the court should not have denied the Unions' motions for attorneys' fees based solely on whether the plaintiffs' rejection of the offers was unreasonable.

That is especially so where the overall assessment of the parties' comparative good faith favored the Unions. *See Frazier*, 131 Nev. at 642 ("three of the four *Beattie* factors require an assessment of whether the parties' actions were undertaken in good faith"). The Unions raised the preemption defense early in the litigation, allowing plaintiffs ample time to evaluate it. *See* Appx. I:43–46; Appx. VII:1381:27–1382:2; *see LaForge v. State of Nev.*, 116 Nev. 415, 424 (2000) (affirming award of attorneys' fees where "[a]ppellant had just as much information about" the issue preclusion defense as respondent). By the time of the joint offers, plaintiffs had conducted significant discovery and could therefore evaluate settlement in light of the facts adduced. Appx. VII:1352:1–8; 1376:15–17; *cf. Trustees of Carpenters for S. Nev. Health and Welfare Trust v. Better*

Building Co., 101 Nev. 742, 746 (1985) (affirming denial of attorneys' fees where offer of judgment was made nine months before production of key documents). And the offers were reasonable in amount given that the claims were disputed factually and legally, and when compared to the damages determined by plaintiffs' expert witness. Appx. VII:1381:24–27. Finally, even assuming *arguendo* plaintiffs initiated their claims in good faith, their refusal to settle when faced with significant persuasive authority establishing their claims were preempted, forcing the Unions to endure additional expensive litigation, undermined that good faith.

In light of these considerations, the purposes of Rule 68—to save time and money for the court, the parties and taxpayers, and to penalize the party that refuses to accept a reasonable offer, *see Beckwith*, 115 Nev. at 382—were not served.

CONCLUSION

For the foregoing reasons, the Unions respectfully request that summary judgment in their favor be affirmed in full, and that the district court's order denying them attorneys' fees be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 pt. Times New Roman type style.

This brief is approximately 14,722 words, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), and therefore is 722 words over the type-volume limitation of NRAP 32(a)(7)(A)(ii). However, SEIU and Local 1107 have filed a motion for permission to exceed the type-volume limitation.

I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 7, 2020

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CERTIFICATE OF SERVICE

Clarke v. Service Employees International Union, et al.
Supreme Court No. 80520 and 81166
Case No. A-17-764942-C

I hereby certify that on this date 7th day of October, 2020, I submitted the foregoing **JOINT OPENING/ANSWERING BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION A/K/A SEIU LOCAL 1107** for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will automatically be sent to the following:

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