IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CLARKE, an individual, Appellant, v. SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; and CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, A/K/A SEIU 1107, a non-profit cooperative corporation, 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

APPENDIX OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION A/K/A SEIU LOCAL 1107, VOLUME 7

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APPENDIX, VOLUME 7

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-17-764942-C

Dept. 26

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

Introduction

Service Employees International Union (SEIU) and Mary Kay Henry (Henry) hereby reply in support of their motion for attorneys' fees pursuant to Nevada Rule of Civil Procedure 68.

Despite their opposition brief, it remains clear that Plaintiffs Robert Clarke and Dana Gentry (Plaintiffs) did not have a good faith basis to reject defendants' Rule 68 offers of judgment. It is undisputed that neither Clarke nor Gentry had an employment contract with SEIU or Henry. It is likewise undisputed that neither Clarke nor Gentry worked for SEIU or Henry. The absence of those essential facts –obvious to Clarke and Gentry from the start and which no amount of discovery could change – made their lawsuit for breach of contract and wrongful termination against SEIU and Henry groundless. For the same reason, their rejection of defendants' offers of judgment was grossly unreasonable.

Plaintiffs raise several responses to SEIU's and Henry's motion for attorneys' fees. First, they argue that defendants' offers of judgment did not comply with Rule 68. To the contrary, the terms of defendants' offers were expressly authorized by Rule 68.

Second, Plaintiffs argue that they reasonably rejected defendants' offers because the Nevada Supreme Court has not yet adopted the holding of *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal.3d 1017 (1990), pursuant to which this Court found federal preemption of Plaintiffs' claims. But this Court granted summary judgment to SEIU and Henry for an additional reason – there was never a contractual or employment relationship between Plaintiffs and SEIU or Henry. Plaintiffs' claims against SEIU and Henry were therefore baseless notwithstanding the preemption issue.

Moreover, even if the federal preemption issue was a matter of first impression in Nevada, it was settled law in several other jurisdictions, including California. Plaintiffs therefore knowingly risked the possibility that this Court would follow those jurisdictions, and they lost. They have only themselves to blame for that miscalculation.

In short, Plaintiffs' refusal to accept defendants' offers of judgment pursuant to Rule 68 warrants an award of reasonable attorneys' fees to SEIU and Henry.

Argument

I. Defendants' Offers of Judgment Were Sufficient to Invoke the Penalties of Rule 68.

Plaintiffs argue that defendants' offers of judgment to Plaintiffs were invalid for purposes of invoking Rule 68. Opp. 3–7. Their arguments should be rejected.

First, Plaintiffs mistakenly rely on *Parodi v. Budetti*, 115 Nev. 236 (1999). That case held that "[a] joint, unapportioned offer of judgment is invalid for the purpose of determining a prevailing party under NRCP 68 and NRS 17.115." *Id*. at 175. But *Parodi* was superseded by statute. *See RTTC Comms., LLC v. Saratoga Flier, Inc*., 112 Nev. 34, 41-42 (2005) ("Prior to 1998, joint unapportioned offers of judgment were invalid for an award of attorney fees under . . . NRCP 68 . . . . However, NRCP 68 was amended in 1998 . . . to permit an award of fees when there has been an unapportioned offer of judgment, under certain circumstances."). Indeed, subsection (c) of Rule 68 is titled "Joint Unapportioned Offer," and describes the circumstances in which such offers are permissible. Subsection (c)(1), titled "Multiple Offerors," provides that "[a] joint offer may be made by multiple offerors." NRCP 68(c)(1). Here, defendants SEIU and Service Employees International Union, Local 1107 (Local 1107), multiple offerors, made a joint offer to each plaintiff. *See* Cohen Decl. in Support of Motion for Attorneys' Fees (Cohen Decl.), Ex. B, 34–35. Thus, to the extent that defendants' offers of judgment were unapportioned, Rule 68(c)(1) permitted such offers.[1]

Next, Plaintiffs contend that the offers of judgment did not indicate that they "would resolve all the claims in the action, as required by NRCP 68(a)." Opp. at 5. This is incorrect as a factual matter, because the offers of judgment explicitly stated that SEIU and Local 1107 "hereby offer to allow judgment to be taken against them *to resolve all claims against all of the Defendants* . . . ." Cohen Decl., Ex. B, 34 (emphasis added). In any event, even if Plaintiffs were factually correct about the nature of defendants' offers (they are not), it would be immaterial: Rule 68 does not require that an offer of judgment "resolve all the claims in the

[1] SEIU and Henry do not concede that their offers of judgment were authorized only by Rule 68(c)(1). In fact, Rule 68(b) provides that "[a]n apportioned offer of judgment to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed." SEIU and Local 1107 made such offers here. *See* Cohen Decl., Ex. B, 34–35.

action" as Plaintiffs suggest. Rather, the statute provides that any party "may serve an offer in writing to allow judgment *to be taken in accordance with its terms and conditions. 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 . . . ." Nev. R. Civ. P. 68(a) (emphasis added). Thus, Rule 68 permits a party to make an offer of judgment that does not resolve all claims in the action.

Last, Plaintiffs argue that the conditions of Rule 68(c)(3) were not satisfied here. Opp. at 6. That section concerns "[a]n offer made to multiple plaintiffs" and provides that such an offer will invoke the penalties of the rule only if "(A) the damages claimed by all the offeree plaintiffs are solely derivative . . . . and (B) the same entity, person, or group is authorized to decide whether to settle the claims of the offerees." Nev. R. Civ. P. 68(c)(3). By its terms, that section applies to a *single offer* made to *multiple plaintiffs*. *See id*. ("*An offer* made to *multiple plaintiffs* . . . .") (emphasis added). For example, it would have applied had SEIU and Local 1107 offered a single unapportioned sum to Clarke and Gentry. But SEIU and Local 1107 made a joint offer to *each individual plaintiff*, *i.e.*, SEIU and Local 1107 offered to pay $30,000 to Clarke, and SEIU and Local 1107 offered to pay $30,000 to Gentry. *See* Cohen Decl., Ex. B, 34–35. Thus, Rule 68(c)(3) does not apply here.

In sum, Plaintiffs fail to show that the Rule 68 offer at issue here was invalid.

II. The *Beattie* Factors Favor an Award of Attorneys' Fees.

Plaintiffs argue that the factors identified by *Beattie v. Thomas*, 99 Nev. 579, 588–89 (1983), do not favor an award of attorneys' fees to SEIU and Henry. None of their arguments is convincing.

A. Plaintiffs' Claims Against SEIU and Henry Were Not Brought in Good Faith.

The first *Beattie* factor addresses "whether the plaintiff's claim was brought in good faith." *Beattie*, 99 Nev. at 588–89. Plaintiffs' breach of contract and wrongful termination claims against SEIU and Henry were not brought in good faith, because they did not have employment contracts with SEIU or Henry, and they did not work for SEIU or Henry. Nothing

in Plaintiffs' opposition brief overcomes those glaring and undisputed facts.

i. Plaintiffs' Contract Claims Against SEIU and Henry Were Frivolous

Plaintiffs contend they brought their claims in good faith because they "have proven the merits of their breach of contract claims under Nevada law . . . ." Opp. at 7:16. In a similar vein, they argue that it was undisputed that "Plaintiffs' for cause contracts were breached." Opp. at 2:14; *see also id*. at 8:19–20.

This is patently false for several reasons. First, the Court made no such finding in its order granting summary judgment in favor of defendants, or in any other ruling.

Second, no defendant has admitted that Plaintiffs' employment contracts were breached. To the contrary, all defendants have asserted throughout this litigation that the Trustees had authority under the SEIU Constitution and federal law to terminate the Plaintiffs' employment.

Last, even assuming for the sake of argument that the employment contracts were breached, it is irrelevant to Plaintiffs' claims against SEIU or Henry. *It is undisputed that Plaintiffs' employment contracts were between them and Local 1107, not SEIU or Henry*. Thus, breach or not, SEIU and Henry could not be liable for Plaintiffs' breach of contract and related claims. *See Clark County v. Bonanza No. 1*, 96 Nev. 643, 648-49 (1980) ("As a general rule, none is liable upon a contract except those who are parties to it."). In the absence of any contractual relationship, Plaintiffs' breach of contract claims against SEIU and Henry were baseless.

ii. Plaintiffs' Wrongful Termination Claims Against SEIU and Henry Were Frivolous.

Just like their breach of contract claims, Plaintiffs' wrongful termination claims against SEIU and Henry were frivolous.

Plaintiffs were not employed by SEIU or Henry. That alone supports the conclusion that Plaintiffs' wrongful termination claims against SEIU and Henry were without merit from the start. Needless to say, an essential element of a wrongful termination claim is an employment relationship. *See, e.g., D'Angelo v. Gardner*, 107 Nev. 704, 717–18 (1991).

Nonetheless, Plaintiffs cling to the same failed arguments they raised in summary

judgment proceedings. They continue to assert that SEIU should be liable for the Plaintiffs' claims because it imposed a trusteeship over Local 1107, and appointed Trustees who later terminated the Plaintiffs' employment with Local 1107. Opp. at 8:16-18. As SEIU and Henry have pointed out to Plaintiffs numerous times, it is settled law that a trustee appointed by an international union acts on behalf of the local union, not the appointing international union. *See, e.g., Dillard v. United Food & Commercial Workers Union Local 1657*, Case No. CV 11-J-0400-S, 2012 WL 12951189, at *9 (N.D. Ala. Feb. 9, 2012) ("As a matter of law, a trustee steps into the shoes of the local union's officers, assumes their rights and obligations, and acts on behalf of the local union."), *aff'd*, 487 F. App'x 508 (11th Cir. 2012); *Campbell v. Int'l Bhd. of Teamsters*, 69 F. Supp. 2d 380, 385 (E.D.N.Y. 1999) ("A trustee assumes the duties of the local union officer he replaces and is obligated to carry out the interests of the local union and not the appointing entity."). Thus, the fact that the Trustees terminated the Plaintiffs' employment was never sufficient to hold SEIU and Henry liable for Plaintiffs' wrongful termination claims.

Plaintiffs also defend the reasonableness of their claims by arguing that SEIU and Henry are somehow the alter-egos of Local 1107. *See* Opp. at 8:22-23. This argument is a non-starter. As SEIU and Henry pointed out during summary judgment proceedings, Plaintiffs did not plead this theory of liability in their operative complaint and therefore waived it.[2]

iii. Plaintiffs' Vastly Overstate the Significance of the Fact that the Federal Preemption at Issue in This Case Was a Matter of First Impression in Nevada.

Plaintiffs argue that their claims against SEIU and Henry were brought in good faith because preemption of their claims pursuant to the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401, *et seq*. – one of the grounds upon which summary judgment

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

was granted to SEIU and Henry – was a matter of first impression in Nevada. *See, e.g.*, Opp. at 10–12, 15–22.

Plaintiffs vastly overstate the significance of this point. First, their argument ignores the more fundamental basis upon which summary judgment was granted in favor of SEIU and Henry, namely, that Plaintiffs had neither a contractual nor employment relationship with SEIU or Henry. In other words, even if LMRDA preemption did not apply here, *Plaintiffs' breach of contract and wrongful termination claims against SEIU and Henry were still without merit.*

Second, Plaintiffs' argument is based on the incorrect assumption that federal preemption is a novel issue in Nevada. It is not. It is well-settled in Nevada that "even when Congress's enactments do not pervade a legislative field or regulate an area of uniquely federal interest, Congress's intent to preempt state law is implied to the extent that federal law actually conflicts with any state law." *See Nanopierce Techs., Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 371 (2007). Thus, even if the precise type of LMRDA preemption at issue here is a matter of first impression in Nevada, Plaintiffs cannot reasonably argue that federal preemption of their claims came as a surprise.

That is *particularly* true here because, as this Court noted in its order granting summary judgment, California and several other jurisdictions have concluded that the LMRDA preempts precisely the sort of claims Plaintiffs pursued here. *See, e.g., Screen Extras Guild, Inc. v. Superior Court*, 51 Cal.3d 1017 (1990).[3] Because Nevada courts look to persuasive authority for guidance when the law is unsettled, *see, e.g., Whitemaine v. Aniskovich*, 124 Nev. 302, 311 (2008), Plaintiffs should have understood that adoption of *Screen Extras Guild* was a likely outcome. In fact, as has been pointed out several times already in this case, *Plaintiffs admitted from the beginning of this action that they were management-level staff at Local 1107*, a dispositive concession for purposes of *Screen Extras Guild*. Moreover, Plaintiffs were aware of

[3] *See also Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 75 P.3d 1250, 1256 (Mont. Sup. Ct. 2003); *Packowski v. United Food & Commercial Workers Local 951*, 796 N.W.2d 94, 100 (Mich. Ct. App. 2010); *Dzwonar v. McDevitt*, 791 A.2d 1020, 1024 (N.J. App. Div. 2002), *aff'd on other grounds*, 828 A.2d 893 (N.J. Sup. Ct. 2003); *see also Young v. Int'l Bhd. of Locomotive Engineers*, 114 N.E.2d 420 (Ct. App. Ohio 1996).

Screen Extras Guild as early as October 2018, when the first round of summary judgment motions were briefed by defendants.

Plaintiffs also contend that various courts have rejected LMRDA preemption in this context.[4] *See* Opp. at 18–21. Even if that were correct, given the similarity between this case and *Screen Extras Guild*, Plaintiffs should have appreciated the significant risk that this Court would adopt its reasoning. Their unreasonable gambit failed, and they must accept the consequences.

B. Defendants' Offer of Judgment Was Reasonable in Timing and Amount.

The second *Beattie* factor considers whether "the defendants' offer of judgment was reasonable and in good faith in both its timing and amount." *Beattie*, 99 Nev. at 588–89. Plaintiffs offer several arguments related to this factor, but none is persuasive.

First, Plaintiffs complain that the timing of defendants' offers of judgment was not reasonable or in good faith because "it forced Plaintiffs and their counsel to speculate" about whether they would prevail. Opp. at 9. Of course, *this is always true*; the point of a settlement offer is to force the offeree to balance the potential risks and benefits of further litigation when the outcome is uncertain.

Next, Plaintiffs argue that the offer of judgment "was not based on any dispute of the factual issues in the case, or any reasonable question of liability under applicable Nevada law at the time of the offer." Opp. at 14. *This is manifestly incorrect*. As noted earlier, SEIU and Henry disputed from the beginning the existence of any contractual or employment relationship between them and Plaintiffs. Also, Plaintiffs never pled a theory of liability against SEIU or Henry that could overcome that absence of any contractual or employment relationship. And even if Plaintiffs could overcome these high hurdles, SEIU and Henry have always maintained that the Trustees had sufficient cause to terminate Plaintiffs' employment. Finally, SEIU and Henry disputed the existence of any factual or legal basis for Plaintiffs' claim for tortious interference with contract. Although this is not an exhaustive list of the factual and legal

[4] SEIU and Henry do not concede that Plaintiffs have accurately represented the holdings of the cases they cite in support of this point.

disputes at issue at the time of the offers, it illustrates the falsity of Plaintiffs' argument.

Last, Plaintiffs note that they had not yet conducted depositions at the time of defendants' offers of judgment. *See* Opp. at 14. This is a red-herring. *Plaintiffs knew from the start that there was no contractual or employment relationship between them and SEIU or Henry.* No deposition could change that.

C. Plaintiffs' Rejection of Defendants' Settlement Offer Was Grossly Unreasonable.

The third *Beattie* factor considers whether the "plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith." *Beattie*, 99 Nev. 588–89. Plaintiffs' arguments regarding this factor are a rehash of the arguments already described above, or the arguments they raised in their unsuccessful summary judgment papers. There is no reason to revisit them here. In short, Plaintiffs have only themselves to blame for their wrongheaded rejection of defendants' reasonable settlement offers.

III. The *Brunzell* Factors Favor SEIU's and Henry's Attorneys' Fees Request.

In a last-ditch effort, Plaintiffs argue that the factors identified by the court in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 346 (1969), do not favor an award of attorneys' fees to SEIU and Henry.[5] Again, none of their arguments is convincing.

First, Plaintiffs appear to argue that defendants are at fault for incurring attorneys' fees in this case. Specifically, Plaintiffs argue that "[i]f the Defendants had simply admitted that Plaintiffs had for-cause employment contracts, and that those contracts were breached, the depositions, additional discovery requests, discovery extensions, etc. would not have been necessary, and the vast majority of Defendants' claimed fees would not have occurred." Opp. at 26. Plaintiffs' attempt to shift the blame for the costs of their lawsuit is meritless. Plaintiffs

[5] *Brunzell* requires a court to consider the following factors: "(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived." *Brunzell*, 85 Nev. at 346.

pursued a factually and legally unsupported lawsuit against SEIU and Henry and refused to settle it despite reasonable offers, and have nobody but themselves to blame for the attorneys' fees incurred by SEIU and Henry as a result.

Relatedly, Plaintiffs argue that LMRDA preemption was at issue in the first round of summary judgment motions, and that they should not have to pay for any attorneys' fees associated with research and briefing on the topic during the second round of such motions. Opp. at 28. In fact, SEIU and Henry were forced to continue researching and briefing the topic because Plaintiffs continued to raise new arguments and cases in support of their unreasonable position that LMRDA preemption did not apply. Furthermore, as Plaintiffs admit, in between the first and second round of summary judgment motions, defendants took the Plaintiffs' depositions. Careful attention to that factual record required additional time.

Plaintiffs also quibble with the fact that SEIU and Henry seek attorneys' fees for discovery, document review, and reviewing briefs, "not for complex legal work." Opp. at 27. Complex or not, such work is an essential part of litigation. Defendants are therefore entitled to recoup their reasonable attorneys' fees for such work.[6]

Plaintiffs' final argument is purportedly an equitable one. They claim that defendants received a "windfall" by not having to pay any damages to Plaintiffs, and that it would be unfair to make Plaintiffs pay defendants' attorneys' fees too. *See* Opp. at 30–31. But Plaintiffs never had a legitimate claim against SEIU or Henry to begin with, since they had no contracts with, and did not work for, SEIU or Henry. Far from receiving a "windfall," SEIU and Henry incurred well in excess of $57,206.50 in attorneys' fees for defending this plainly ill-advised lawsuit.

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[6] Plaintiffs appear to complain that defendants' attorneys spent time in this case reviewing documents that had been disclosed and/or identified in *Garcia v. SEIU, et al.*, Case No. 2:17-cv-01340-APG-NJK (*Garcia*), a lawsuit concerning the lawfulness of the trusteeship. Opp. at 28. This should hardly be a surprise. Plaintiffs' position in the parties' Joint Case Conference Report was that the *Garcia* action was relevant to this action. See Joint Case Conference Report, § IV(C)(A), at 7–8.

Conclusion

For the foregoing reasons, SEIU and Henry respectfully request that the Court award them reasonable attorneys' fees in the amount of $57,206.50.

DATED: February 5, 2020

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

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

CERTIFICATE OF SERVICE

Gentry, et al. v. Service Employees International Union, et al.
Case No. A-17-764942-C

I am an employee of Rothner, Segall & Greenstone; my business address is 510 South Marengo Avenue, Pasadena, California 91101. On February 5, 2020, I served the foregoing document described as **SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES** on the interested parties in this action as follows:

[X] **(By ELECTRONIC SERVICE)**
Pursuant to Rule 8.05 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, the document was electronically served on all parties registered in the case through the E-Filing System.

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

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

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LUISA BLUE ("Blue"), MARTIN MANTECA ("Manteca"), and NEVADA SERVICE EMPLOYEES UNION ("Local 1107"), misnamed as "CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107" (Luisa, Martin, and Local 1107 are collectively referred to as "Local 1107 Defendants"), by and through the law firm Christensen James & Martin, hereby reply to Plaintiffs' Opposition to Motion for Attorney Fees.

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DATED this 5th day of February 2020.

CHRISTENSEN JAMES & MARTIN

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MEMORANDUM OF POINTS AND AUTHORITIES

I

FACTS PERTINENT TO PLAINTIFFS' OPPOSITION

All parties agree that Plaintiffs brought their claims together. All parties agree that the Plaintiffs' claims involve the same facts and circumstances. In fact, Plaintiffs' original complaint lists identical claims for both Plaintiffs. All parties agree that the same core legal doctrines, principles and defenses apply to both of the Plaintiffs.

III

ARGUMENT

A. The purposes of NRCP 68, in light of case facts, should guide the Court's decision.

Why would the Defendants settle with one Plaintiff if they were required to litigate the same facts, issues, and law with the other Plaintiff who refused to settle? That question addresses the essence of Plaintiffs' argument, which is that Defendants joint offer of judgment is defective because it was made to two offerees.

"The purpose of … NRCP 68 is to save time and money for the court system, the parties and the taxpayers." How would that purpose have been served in this case if Plaintiff Gentry had accepted an individual offer of judgment while Plaintiff Clarke had not? The answer is that NRCP 68's purpose would not have been served. Thus, the only way to meet and honor the purpose of NRCP 68 in this case was for the Defendants to issue an apportioned offer of judgment conditioned upon acceptance by all. There is no

question that Plaintiffs' unison litigation of the same claims, facts, circumstances and law materially impacted how an offer of judgment could be presented to accomplish the purposes of NRCP 68. There is no error in Defendants' offer of judgment.

B. Defendants' offer of judgment satisfies NRCP 68(b).

Defendants' offer of judgment complies with NRCP 68(b). "An apportioned offer of judgment to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed." NRCP 68(b). The offer of judgment apportions $30,000.00 to each of the Plaintiffs. It also contains the following language: "This apportioned offer of judgment is conditioned upon the acceptance by all Plaintiffs against the offerors pursuant to NRCP 68(b)." See Mot., Ex. A, 3:2-4. In our case, Plaintiffs tied their identical claims together. In our case, Defendants' preemption defense applied to all Plaintiffs. In our case, either Plaintiff could have individually forced litigation of the same facts and law. In our case, the Defendants had no incentive to issue an offer of judgment unless both Plaintiffs accepted the offer. In sum, Plaintiffs married their claims, and Defendants had no choice but to condition the offer "upon the acceptance by all parties to whom the offer [was] directed," as specifically authorized by NRCP 68(b).

C. Plaintiffs NRCP 68(c)(3) derivative argument is inapplicable.

Plaintiffs' derivative argument under NRCP 68(c)(3) is inapplicable. The offer of judgment expressly invoked NRCP 68(b).

D. Plaintiffs' cited case law is neither controlling nor persuasive to their positions.

Nothing in NRCP 68 states that an apportioned offer is limited to apportionment among defendants. "Apportioned" means "[t]o divide and distribute proportionally." Black's Law Dictionary 99 (6th ed. 1990). It does not mean to divide and distribute only among defendants. NRCP 68(b) speaks of an "apportioned offer," and, in our case, the offer of judgment was divided and distributed among the Plaintiffs for resolution of their individual claims. Both Local 1107 and SEIU were individually liable for the full amount

of the offer of judgment. Plaintiffs could have collected against either Defendants individually or against both of them jointly.

As to cases cited by Plaintiffs, NRCP 68 has been amended from time to time, making Plaintiffs' case law suspect and/or inapplicable. For example, the Nevada Supreme Court found fault with an unapportioned offer of judgment that "did not indicate whether the $20,000 was being offered to settle the contractual claims against the Budettis or the tort claims for slander against Musico." *Parodi v. Budetti*, 115 Nev. 236, 240, 984 P.2d 172, 175 (1999). *Parodi* was superseded by statutory and rule amendments. *See RTTC Comms., LLC v. Saratoga Flier, Inc.*, 112 Nev. 34, 41-42 (2005). However, *Parodi's* case facts support a finding that the Defendants' offer of judgment is valid. Even though the Plaintiffs in our case essentially brought the same causes of action based upon the same facts and circumstances, the Defendants' offer of judgment satisfied the concern in *Parodi* of apportioning an offer by claims. Gentry was offered $30,000.00 to settle her claims and Clarke was offered $30,000.00 to settle his claims. This fact satisfied the concern raised in *Parodi* because everyone knew what each Plaintiff would get to satisfy each Plaintiff's individual claims.

E. Plaintiffs ignored existing law when rejecting the offer of judgment.

Contrary to Plaintiffs' assertion, this Court did not create new law when it applied federal law to the facts of this case. True, the preemption issue was a matter of first impression in Nevada, but the federal law was not new, having been in existence since 1982. *See Finnegan v. Leu*, 456 U.S. 431 (1982). Nor was the application of *Finnegan* to claims such as those brought by the Plaintiffs new. *See e.g., Screen Extras Guild, Inc. v. Super. Ct.*, 51 Cal.3d 1017, 275 Cal.Rptr. 395, 800 P.2d 873 (Cal.1990); *Dean v. General Teamsters Union, Local No. 406*, No. G87–286–CA7, 1989 WL 223013 (W.D.Mich. Sept. 18, 1989). Thus, Plaintiffs were not prevented from evaluating their claims in light of federal law. Nor were Plaintiffs prevented from evaluating the likelihood that this Court would apply federal preemption just like a multitude of other state and federal

courts had. It was therefore unreasonable for the Plaintiffs to ignore existing federal law and highly persuasive case law applying the preemption doctrine.

Indeed, it was extremely unreasonable if, as they suggest, the Plaintiffs' rejected the offer of judgment because of *Zhang v. Soreichetti,* Eighth Judicial District Court, Nevada Case No. A481513 (2016). In *Zhang,* the Supreme Court created new law regarding in rem property issues—a Nevada specific issue. The *Zhang* court concluded rejecting the offer of judgment was reasonable because doing so was "based upon the facts and law as they existed when the Offers of Judgment were made." See Opp'n., Ex. 3, 12:9. In our case, on point facts and law existed when Defendants issued their offer of judgment. Plaintiffs were top ranking management employees and federal and state law existed detailing why their claims were preempted. Plaintiffs were not prevented from evaluating the likelihood that they would lose the preemption argument, especially given Nevada's legal doctrine of looking to California law on matters of first impression. *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."). Plaintiffs therefore should have known that *Screen Extras Guild, Inc. v. Super. Ct.*, 51 Cal.3d 1017, 275 Cal.Rptr. 395, 800 P.2d 873 (Cal.1990) would be highly persuasive and likely dispositive.

F. Plaintiffs' claims were brought and/or maintained in bad faith.

There was no reasonable basis for the Plaintiffs to sue SEIU. Local 1107 leaves the bulk of showing why to SEIU, but notes that SEIU had no contractual relationship with the Plaintiffs. Including SEIU in the litigation increased costs and attorney fees for Local 1107. As an example of such increased costs, Local 1107's counsel had to prepare for and attend the deposition of SEIU personnel and participate in discovery directed at SEIU.

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G. Plaintiffs assert contradictory reasons for why they rejected the offer of judgment.

One the one hand, Plaintiffs argue against awarding attorney fees because "[p]laintiffs had not had an opportunity to evaluate the factual strength of the merits of the case." Opp'n, 14:9. On the other hand, Plaintiffs argue against awarding attorney fees because "it was not at all unreasonable for Plaintiffs to reject an offer of judgment by Defendants because … the facts and evidence pointed to Defendants clear liability on the merits of the breach of contract claims." *Id.* 15:9-12. Which is it? It cannot be both. However, it can be neither.

No discovery was necessary for Plaintiffs to know that they were top management employees whose claims were subject to federal preemption. Plaintiffs knew that they held top ranking management positions as Director of Finance and Human Resources and Director of Communications.[1] Plaintiffs knew in October of 2018 that contractual claims brought by management level employees were preempted by federal law. Plaintiffs' contradictory arguments are both wrong. They knew who they were, what they did, and that courts had determined claims like theirs were preempted.

F. The fees sought are reasonable.

Plaintiffs' nit picking of Local 1107's fees has the same problem as their other arguments, they make sweeping declarations (which are incorrect) supported by little substance. When substance is supplied, it supports Defendants' position and is easily explainable. Local 1107 will now address each of Plaintiffs' attorney fee gripes.

1. 106.3 hours of for document and discovery review. See Opp'n. 27:28, 21:1 Plaintiffs' failure to provide specificity as to each task makes it impossible to effectively address the matter. From an overall substantive standpoint, the work had to be done.

2. 5.10 hours of audio file review. Id., 28:1. This work was necessary because Plaintiffs requested the audio files in document production requests.

[1] If Plaintiffs were indeed ignorant of their job titles and duties, then they deserved to be fired.

3. 50.20 hours reviewing documents from Garcia. Id. 28:1-2. First, the actual time spent on the documents was 19.4 hours (dates of 7/23, 7/25, 8/7, 8/8 and 8/9) hours and not 50.2 as asserted by Plaintiff. Second, Plaintiffs argue throughout their Case Conference Report filed on August 27, 2018 that the *Garcia* case and its documents were relevant to this litigation. Third, the *Garcia* documents consisted of more than 13,000 pages of material.

4. Claim of Block Billing for emails. Opp'n. 28:4-10. First, Plaintiffs ignore the fact that the entire time entry, including emails, involves the same discovery issue and not separate issues. Second, Plaintiffs ignore the fact that the undersigned's time entries are generally replete with task specific time calculations. See Mot. Ex. D

5. Two summary judgment motions. Plaintiffs assert that they should not have to pay for briefing of the second round of summary judgment motions. Opp'n. 28:17. The Defendants had to address issues and new cases raised by the Plaintiffs during the second round of summary judgment motions. Doing so takes time, especially given the Plaintiffs' extensive list of asserted claims, improper citation to and misapplication of case law, and changing legal theories. It took a lot of time to dissect Plaintiffs' arguments and parse their improper case law application.

6. Plaintiffs improperly blame Defendants for discovery. See Opp'n. 26. Plaintiffs' assert the fantastic argument that they should not have to pay Plaintiffs' legal fees because discovery was necessary. First, discovery happens in litigation. Second, Plaintiffs knew in October 2018 that their claims were subject to preemption. Third, Defendants were forced to incur discovery costs because Plaintiffs chose to conduct discovery.

G. Plaintiffs' equitable windfall argument lacks evidence and merit.

Plaintiffs assert that Defendants will receive a windfall if awarded attorney fees because Plaintiffs were not paid a salary after their employment termination. Opp'n. 28. This argument is like mixing oil and water. They do not go together and naturally

separate. Plaintiffs make many bald factual assertions, not supported by evidence before the court, in advancing the argument. Apparently premising their position upon the argument that the Court found their contracts valid and breached (which it did not), Plaintiffs then declare that the Court should deny attorney fees under the doctrine of promissory estoppel. Id. 31:21. NRCP 68 has nothing to do with promissory estoppel and there is no factual or legal basis to apply promissory estoppel to NRCP 68.

H. Plaintiffs' make materially false arguments to support their opposition.

Plaintiffs' opposition is premised upon the incorrect contentions that they proved the merits of their claims and that this Court did in fact or wanted to rule in their favor. Opp'n. 9:5-7. These bald assertions are unsupportable and patently false.

CONCLUSION

Awarding legal fees is appropriate.

Dated this 5th day of February 2019.

CHRISTENSEN JAMES & MARTIN

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CERTIFICATE OF SERVICE

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

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

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Jonathan Cohen: jcohen@rsglabor.com

Glenn Rothner: grothner@rsglabor.com

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

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CHRISTENSEN JAMES & MARTIN

By: */s/ Natalie Saville*
Natalie Saville

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 18, 2020

AMENDED RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

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

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, February 18, 2020

[Case called at 9:13 a.m.]

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

MR. MCAVOYAMAYA: Michael Mcavoyamaya on behalf of the Plaintiffs.

THE COURT: Okay. And on the phone.

MR. COHEN: Jonathan Cohen, Your Honor, via CourtCall, on behalf of Defendants SEIU and Mary K. Henry.

THE COURT: Okay. We have a couple of motions on. The first of these is the motion to retax costs.

So, Mr. Mcavoyamaya, that's your motion to retax the costs' claim by the Defendants.

MR. MCAVOYAMAYA: Your Honor, I would like to push that to after the attorney's fee award because, I mean, if the attorney's fee and costs motion is granted, then wouldn't that make the motion to retax costs -- then we would just be discussing that later. So, I mean, we could do either one in the order, but --

THE COURT: Well, they're going to get their costs no matter what, so retaxing costs is an entirely separate concept from --

MR. MCAVOYAMAYA: Okay.

THE COURT: -- from whether or not attorney's fees are awarded under an offer of judgment.

MR. MCAVOYAMAYA: Okay. Your Honor, with regards to the retaxing of costs, you know, I think it's just problematic that both Defendants are seeking the costs that they are seeking. I mean, as you can see, Mr. Cohen is over the phone. There is no reason for them to have to travel out here for every single motion. As you can see, he's on the phone right now. So the hotel fees and costs --

THE COURT: Uh-huh.

MR. MCAVOYAMAYA: -- seem unreasonable. And the duplication of the work when both Defendants are represented by the same counsel seems rather absurd, especially considering the -- like, the transcript issue. I mean, the Defendants' only response to that was that it would somehow hurt court reporters, because there's multiple defendants. But if you take a look at that issue, if you take out Rothner Segall and Greenstone, if Mr. Evan James represented both Defendants at the same time, would he be able to purchase two independent, you know, copies of the transcripts, and then charge Plaintiffs for that? That seems remarkably absurd to allow that to go forward.

The same thing with the research costs. If you take a look at every single motion that both Defendants reply to that were filed in this case, they're identical. And to that point, and the reason why I kind of wanted to argue the motion for attorney's fees first, is if you take a look at the reply to the motion for attorney's fees and costs that the Defendants filed, if you take a look on page -- let me find it -- 3 of the SEIU International's attorney's fees and costs, the citation to *RTTC Communications LLC v Saratoga Flyer Incorporated*, they cite this case

to state that somehow the *Parodi* case that we made our arguments on was superseded by statute, which is incorrect.

But if you take a look at the citation, both Defendants in both replies cite the case as one -- a 112 Nev. 34. This is an incorrect citation. They both incorrectly cite the case. It's really 121. And the point is with regards to the legal research, they were just copying and pasting into each motion. Local 1107's arguments were not substantially different than SEIU International's. And so they were sharing all the same arguments for every single motion and opposition made in the case, and to double charge for that when both Defendants are represented by the same counsel is just double dipping.

THE COURT: And you raise an interesting point about the memorandum of costs versus the offer of judgment. A prevailing party under our statute is entitled to their costs no matter what. So the -- one of the arguments is the memorandum of costs covers costs from the beginning of the litigation, whereas the offer of judgment was made in July of 2019.

So if they are just awarded costs and fees under the memorandum of costs, then their costs only begin in July. However, you know, the way I read the statute, I do believe that, you know, irregardless they are going -- they are entitled to their costs from the beginning. So, I mean, do you take a position on that? I mean, because I think --

MR. MCAVOYAMAYA: I do take a position on that. The final position that I would take on that, Your Honor, is --

THE COURT: Uh-huh.

MR. MCAVOYAMAYA: -- is you have the powers and equity to make a decision on the costs. And the reality here is there is a -- there are individuals who have suffered actual losses in this case. It is my clients. The Defendant has an over $200,000 windfall in this case. The costs and attorney's fees for both counsel do not even equal that. And we would ask that you use your powers of equity to require each party to pay their costs or, in the alternative, at the very least, suspend a ruling on the cost issue until the issue of first impression is ruled on by the Supreme Court of Nevada regarding the preemption issue. Because if the preemption issue is rejected by the Supreme Court of Nevada, by -- automatically we would be -- the Plaintiffs become the victorious party, the prevailing party.

THE COURT: Well, no, you don't because all that would mean is we would come back for a trial.

MR. MCAVOYAMAYA: You're right, but the Defendants did not dispute that the contracts existed. And so the only issue that we would be discussing when we get back down after that is the amount of damages --

THE COURT: Okay.

MR. MCAVOYAMAYA: -- because -- and just to hammer that point home I brought, just in case you did not -- you don't recall, I brought with me the Local 1107's responses to the request for admissions where they admit --

THE COURT: Okay.

MR. MCAVOYAMAYA: -- that the contracts existed.

THE COURT: Okay. So again, getting back to costs, because we have a statute on costs, which indicates the prevailing party is entitled to an award of costs. So is it your position that under the statute, Chapter 18, that they would not be entitled to their costs?

MR. MCAVOYAMAYA: My -- our position is that you have the discretion to deny it.

THE COURT: Okay.

MR. MCAVOYAMAYA: And we would ask that you would use that discretion in equity given the fact that the Defendant has a windfall in this case. That the only reason that -- like I said, I mean -- and I can show you the -- they admitted that the contracts existed.

THE COURT: Okay.

MR. MCAVOYAMAYA: The provisions were for cause. You know, they didn't -- you know, they filed -- when they argued the damages, you know, they didn't argue that the majority of the damages were accurate.

THE COURT: Okay.

MR. MCAVOYAMAYA: They argued only the $6,000 auto allowance.

THE COURT: All right. And so moving on then to your -- the issue that you raised with respect to travel and lodging, the -- again, looking at our statute -- on cost awards under our statute, that statute provides for an award of costs for travel for a deposition.

Now as you pointed out, counsel for one of these parties

does not reside locally. So when they travel, even for a deposition -- they traveled here for depositions, does that fall under the ambit of what's intended by our legislature or is what's intended by our legislature travel to depositions in other jurisdictions?

MR. MCAVOYAMAYA: I believe that it would be -- if you don't have to travel, then those costs should not be awarded. And the fact is that both Defendants were represented by the same counsel. There was no reason -- they didn't need to be here. Mr. James was here in Nevada. He could have been the one that appeared for each deposition. And, you know, I mean that's the bottom line. It really is just double dipping unnecessarily.

THE COURT: Okay. Thank you very much. All right. So we can take the Local first, and then we'll talk to Mr. Cohen on the phone about the SEIU.

MR. JAMES: Just speaking to the issues of costs, Your Honor, first I would like to point out that the necessity to have a local counsel is by Local Rule. And certainly, I'm not speaking on behalf of the International at this point, because Mr. Cohen represents them in this motion.

Had we employed another attorney to act as local counsel that would have increased the legal cost with regard to the International's costs? And so we were actually benefiting the Plaintiffs by allowing me to act as local counsel to meet the rule of having somebody present. So the idea that --

THE COURT: Well, they only have to be present for court

appearances and trial.

MR. JAMES: Well, actually each court is a little bit different that I've appeared in front of. So --

THE COURT: I always --

MR. JAMES: Sure.

THE COURT: -- say --

MR. JAMES: Sure.

THE COURT: -- when somebody is admitted pro hac vice, I don't care what you do in your discovery, however, you must have local counsel present with you when you appear for trial or for a court appearance, because that's what the local rule requires.

MR. JAMES: Sure. And --

THE COURT: Local counsel must be present in court, in other words.

MR. JAMES: Very well. But the International's entitled to their discovery. They had different issues than the Local. And that's one thing I would like to point out with regard to the cost is they were not exactly the same. One of the issues were -- was the same, and that was the preemption issue. But you may want to recall that with regard to the contracts at issue, the International had no contracts with the Plaintiffs. It was only the Local that had the contracts with the Plaintiffs.

And so there are many causes of action associated with those contracts, tortious interference, for example, bad faith discharge, for example, that were specific to the Local. So the issues were not exactly the same, nor were the briefs exactly the same. I will briefly

address that.

Certainly, we do coordinate amongst ourselves, but we have to look -- I mean, we, meaning the International and the Local. But what we have to do is we still have to look out for our particular client's interest. And so with regard to the coordination, absolutely, that would happen almost with any defense and joint defense. It's not unusual.

And so just going to the idea of identical motions, I mentioned that, that we did coordinate, but it's not true that they're identical. That's a misstatement. Copy and paste is a misstatement. That last citation he points out that is incorrect. That's my error, not Mr. Cohen's. I own that one. He provided that case law to me, not that he got it wrong, but I did use that case in my brief. However, the briefs are substantially different. The fact that we identify a case in the same briefs doesn't mean that they're the same. The issues are different.

And then one additional item here. Actually, two additional items that I just need to address, and I think it will be more fully argued, perhaps, on the motion for legal fees is the idea that we admitted to liability. We have never admitted to liability. The existence of a contract is different than the breach of that contract, and we did say, yes, these contracts exist, but that doesn't mean that these contracts are breached. So I don't want to conflate those two issues, okay.

THE COURT: Uh-huh.

MR. EVANS: One final issue on the research costs. That was -- actually, that was a little bit of an issue for me yesterday, so I went back and looked at the research costs And there's two points, I think,

that come out in my mind with regard to that issue. The first is the Plaintiffs briefs are extensive. There are a lot of cited cases in those briefs. They are long briefs, there are a lot of cases. Those cases need to be researched; they need to be shepherdized to make sure that they say what they claim to be saying. That takes time, and it takes a research tool.

The second thing that I did yesterday in looking at the research costs, is I looked at when the majority of those were costs, and you can -- excuse me, incurred. You can see on the research costs that there are three or four months that had extensive costs. Those months are associated with motions. And not every motion applied to -- necessarily to both parties.

So, for example, in the fall of 2018, there were motions. In the spring of 2019, there were motions brought by the Plaintiffs. And so you can see on those months that were brought, that's where you get a substantial amount of the research costs.

Do you have any questions specific for me?

THE COURT: With respect to the depositions, on these depositions what was the charge for the depositions? I mean is it -- because the statute provides for an original and a copy. So, for example, in looking at -- I'll just -- I just happened to turn to the invoice for Ms. Gentry and that's a 337 page deposition. They charged $1,600 for the deposition, exhibits they charged, and a full day attendance fee, minor charge for something called an eBundle, condensed transcript, statutory administration of the transcript subsequent to publication, which, you

know -- I mean these are just passive revenue generators, but how do they -- there weren't additional fees incurred in any of these depositions. For example, they weren't videotaped, you know, those kinds of things that can add substantially to the cost of the deposition.

MR. EVANS: So the best I can tell you on the depositions, that if you see something on the transcript from my office, so, for example, you were looking at Ms. Gentry's. The eBundle would be, from my understanding, is an additional fee if they provided that in an electronic format. Not a PDF format --

THE COURT: Uh-huh.

MR. EVANS: -- but an electronic format. And so that one looks like it's a $30 fee, all right. And so it's the same transcript, but that's what the eBundle would be for. The condensed transcript, again that's an additional charge for what I -- appears to be a condensed version of the transcript.

Now on this particular invoice that you were looking at, I don't see a charge for the transcript itself. What I see is, I see a page charge, which is the $1600 and that's a per page charge.

THE COURT: Right.

MR. EVANS: Yeah.

THE COURT: And the statute provides for an original and copy. So is that copy sent electronically or a hard copy if it's an original and a copy?

MR. EVANS: So that would have been the original. And then it appears that on this transcript -- I can't speak specifically, but it

appears to me that there might be two copies here, although I don't think I would have ordered two copies. The copy would have either been the eBundle or the condensed version.

THE COURT: Right. So then with respect to Mr. Kirkendall who is, I guess, Plaintiffs' economic expert, the -- if I understand the parties -- the Defendants shared the cost of his deposition, and so it's not -- his fee does not appear under experts that you are claiming, rather that appears in these other charges, because he's not your expert, and you have to pay him --

MR. EVANS: Correct.

THE COURT: -- to appear.

MR. EVANS: Correct.

THE COURT: Okay. And so that was -- I believe there's, I think, $1,000 charge for him to appear at his --

MR. EVANS: That was the --

THE COURT: -- the deposition appearance fee?

MR. EVANS: That was the minimum charge.

THE COURT: Okay. Great. Thanks. And so with respect to -- you also had your -- because I saw that appeared under expert witness, so I wasn't sure if you were charging -- did you have your own expert witness or was that just --

MR. EVANS: Okay. Well, what we did is we chose not to disclose our expert --

THE COURT: Uh-huh.

MR. EVANS: -- because we found there were significant

problems with Mr. Kirkendall's analysis that we could make without incurring an expert fee.

THE COURT: Uh-huh.

MR. EVANS: So that's something that we chose not to do as the Local, although we did discuss an expert, and we chose not to disclose him. So the fee that you're talking about is the appearance fee for Mr. Kirkendall, which is separate from the transcript fee. So those are two separate charges.

THE COURT: Okay. I think that with respect to the Local's charges, I think those were all the questions that I had. Yeah, I think those were the questions that I had. Okay. Thank you.

MR. EVANS: Sure.

THE COURT: All right. So then with respect to -- on the phone with respect to SEIU International, Mr. Cohen.

MR. COHEN: Thank you, Your Honor. I would like to respond to a few of Plaintiffs' points, and then make myself available for questions.

First, it's my -- I'm licensed in Nevada. I don't maintain an office in the state, which is -- my understanding is that is why our offices required to have local counsel. We were required to have counsel in the state to receive correspondence and mail inside the state. Mr. James' office has served that purpose, but in terms of --

THE COURT: Okay. So --

MR. COHEN: -- the substantive work on behalf --

THE COURT: -- in other words it was not a pro hac vice

application where he was required to be present with you, so, you know, a party with out-of-state counsel is -- and they have a pro hac vice, then they're required to have their counsel with them. Since you're admitted that's not a requirement, it is simply the Supreme Court rule that requires there be local counsel for service in the state if you don't maintain your office, even though you are admitted?

MR. COHEN: Yes, Your Honor.

THE COURT: Okay. Got it. Thank you.

MR. COHEN: That's right. With respect to the point about transcript sharing it kind of follows that same point. You know, it would certainly have been cheaper for myself and Mr. James to share copies of all the transcripts, but we didn't feel that was appropriate or ethical given that we represent different parties and that court reporters, you know, I think expect each party to purchase their own copy of the transcript, not to share the single purchased copy. And that's really all I need to say about that point.

With respect to Plaintiffs insistence that preemption is the sole issue in this case, I just want to echo what Mr. James said. That's incorrect. We have always disputed the existence of any contractual or employment relationship with the Plaintiffs. That was one of the grounds upon which the Court granted us summary judgment. So if the Nevada Supreme Court disagrees on the preemption issue, we still prevail because there is no contract between us. There's no employment relationship between us.

With respect to the Court's question about whether costs

must be allowed under NRS 18.020, my read of the statute, Your Honor, is that indeed it's a requirement. It says, costs must be allowed, of course, to the prevailing party. That's 18.020. So I don't think costs to the prevailing party under that statute are discretionary.

THE COURT: And so the distinction --

THE COURT: Your Honor asked --

THE COURT: -- the distinction of an award of costs under Chapter 18, is they start from the inception of the case, not just from when the offer of judgment is served.

MR. COHEN: Exactly, Your Honor. That's -- we would be entitled to costs as the prevailing party. All the costs, not just those incurred following our offer of judgment.

THE COURT: Okay. And then finally, my last question is the travel question that was raised by Mr. Mcavoyamaya.

MR. COHEN: Yes, and I'm glad you raised that, and that's a fair point, Your Honor. I indeed traveled into the jurisdiction for depositions and court appearances when I thought it appropriate, and my client and I decided that was the right course. You know, I don't -- I'm not aware of a case on point that I could cite to you, so I'll just leave that to the Court's discretion. But I want to make one distinction in the travel costs that we submitted.

There are a number of costs. The majority of those costs are associated with my travel into Las Vegas for depositions and court appearances, but there are some costs that are associated with my partner's travel to Washington, D.C., to defend a deposition of Deidre

Fitzpatrick. She's the Chief of Staff at SEIU. The Plaintiffs took her deposition via Skype. But we didn't think it was appropriate to defend the Chief of Staff of the International Union via Skype, so my partner, Glenn Rothner, traveled to Washington, D.C., to defend that deposition in person.

I think those costs are within the wheelhouse of the legislature's intent for travel for the purposes of depositions. And I just want to distinguish those costs from the rest, Your Honor, and they are described in Exhibit D to my declaration. There's an airfare, hotel, and cab fare associated with that travel.

THE COURT: Okay. Thank you for pointing that out. All right. Thanks very much.

MR. COHEN: Thank you.

MR. MCAVOYAMAYA: I would just like to address a few things, Your Honor.

THE COURT: Yes.

MR. MCAVOYAMAYA: Number one, you know, Mr. James came up here and said that they used local -- him as local counsel to save costs to us, but what costs did that save? He's still charging for the independent, you know, costs. I mean he, you know -- and, you know, the SEIU Defense counsel says that they represented different Defendants. But if that is the case, why does the opposition -- the SEIU's opposition to the motion to retax costs include Mr. James? I mean, they were represented by the same counsel.

I mean if Mr. Rothner's office was not -- Mr. Cohen's office

was not involved, would Mr. James be able to charge twice for deposition transcripts? That -- no. I mean, the answer to that is absolutely no. That makes no sense just because there's two Defendants, when there's one counsel representing both Defendants. You don't get to charge two different transcripts just because there's two different Defendants. Those are the two issues, you know, that I would note there.

THE COURT: Okay. Thanks.

With respect to the memorandum of costs, I'm going to grant the motion to retax on the following issue and that's with respect to the travel and lodging fees for travel here for court appearances and depositions. I believe that deposition travel is only allowed when you're traveling to a different jurisdiction for the deposition of a witness. Therefore, the point that Mr. Cohen made about his partner traveling to defend one of their witnesses who was in Washington, D.C., even though over Skype, he is correct that's the appropriate time to charge for travel under our statute.

So otherwise, I think that the costs, having had the explanation from counsel that Mr. Cohen is admitted in the State of Nevada, but the Supreme Court Rules require local counsel for the purpose of service. They are not representing the same party for that reason. Therefore, they're entitled each to charge for their clients to have separate depositions. Whatever they wish to do separately it's appropriate. So their costs for legal research, their costs for depositions are reasonably explained.

I did not see, as I said, additional charges for things like video depositions, which I don't think are allowable. So other than that, I thought that the costs charged by both parties were appropriate under our statute. As I said, the only costs that I would state would need to be deducted would be those travel costs that are simply from -- Mr. Cohen, from his office to Las Vegas for either a deposition or court appearance. Those would need to be redacted or blacked out.

The cost of travel for the deposition of the witness who was physically present in Washington in order to be physically present with their client for her deposition is entirely appropriate. So that deposition cost -- travel cost would be allowed. Other than that, I think the costs are appropriate and were explained by the parties. So I am -- that would be the only adjustment I would make.

So it's granted for that limited extent. The costs for travel to depositions here locally or court appearances should be blacked out. Otherwise, all the other costs have been explained and are reasonable, necessary, and actually incurred.

Okay. So moving on from the memorandum of costs to the issue of attorney's fees under the Rule 68 motion.

MR. EVANS: Your Honor, Evan James. I went first the last time. I'll allow Mr. Cohen to go first if he desires.

THE COURT: Okay. So, Mr. Cohen, you can go first with respect to the motion for attorney's fees on behalf of the SEIU.

MR. COHEN: Thank you, Your Honor. You know, I don't want to just repeat what's in our papers, but I think, first off, that our

Rule 68 offer was appropriate. Plaintiffs have raised several questions about whether the form of the offer itself was supported by the statute. We believe it was. It's a joint unapportioned offer in the sense that SEIU and Local 1107 together made an offer to each individual Plaintiff. We think that the statute directly supports that, Rule 68(c)(1), entitled multiple offerors provides that, quote, "a joint offer may be made by multiple offerors." That's exactly what happened. SEIU and Local 1107 were the multiple offerors. And we made a joint offer.

So I don't think there's any question that the form of the offer itself was supported by Rule 68. And I think the question then becomes whether under the *Beattie* and *Brunzell* factors, the fees are appropriate. And I just -- you know, I think there's a few points I would like to make, Your Honor, then make myself available for questions.

The first is that we offered about one-third of the Plaintiffs' alleged damages according to their expert's report. Now we're not conceding the correctness of their expert's report by any stretch, but taking that as the measure of their damages, we offered a third of that, which we think was reasonable both in timing and amount.

With respect to timing, we made those offers after having taken their depositions, after a significant amount of discovery, after the first round of summary judgment motions were filed. So I think Plaintiffs had a good idea of what our lever position was in the case. We had a very good idea of what their alleged damages were, as well as the factual criteria for their claims, having taken their depositions.

The second point I really want to emphasize, Your Honor, is

the Plaintiffs have made their defense of attorney's fees revolve around a single issue, which is that it was reasonable for them to litigate this case beyond our offers because the federal preemption issue was a matter of first impression in Nevada.

Now I want to set that to one side. The fact of the matter is as regards to the SEIU and Mary K. Henry, there was a separate independent ground all along for our position in the case, which is that we never had a contractual relationship with Plaintiffs, and we never had an employment relationship with the Plaintiffs.

So from the start of this case, they've understood there's no contract, there's no employment, and yet they sued us for breach of contract, breach of the covenant of good faith and fair dealing based on the contracts they had with the Local. They sued us for wrongful termination, never having had an employment relationship with us. For those reasons, we think their pursuit of this lawsuit against us was groundless from the beginning. No amount of discovery changed that fact. They knew those facts from the outset, and they never had a theory to hold us liable despite that.

So although they make a massive deal about LMRDA preemption being a matter of first impression in Nevada, the fact of the matter is that's somewhat of red herring at least as to SEIU and Henry. And in fact, that was the basis for the Court's grant of -- one of the two bases for granting summary judgment in favor of SEIU and Henry. And I really don't --

THE COURT: Okay. With respect -- with respect to the

language used in the offer of judgment, talking about joint unapportioned offers, the -- because that is an issue that is also raised by the Plaintiffs, the offer reads, pursuant to NRCP, Defendants Nevada Service Employees Union misnamed, whatever, and Service Employees International Union, jointly hereby offer to allow judgment to be taken against them to resolve all claims against all of the Defendants.

So it appears to be an offer just by these two entities. It doesn't mention any of the individual Defendants. The offer comes from the two entities --

MR. COHEN: That's right, Your Honor.

THE COURT: -- to resolve all claims as to all parties.

So in analyzing in a -- if a Plaintiff is provided with an offer from an -- well, you know, technically, I guess, not two corporations, but in this kind of a context where there is an entity who is defending not only an entity but also named employees or representatives of that entity and the offer comes just from the entity, but says we want you to release not only this entity that's making you the offer, but all the other defendants as well. Is that proper?

MR. COHEN: Well, Your Honor, I mean, we think the answer is yes. The fact is the statute says that a party may serve an offer to allow judgment to be taken in accordance with its terms and conditions, and we believe that this offer truly sets out the terms and conditions of the offer --

THE COURT: Okay. Well, then let's --

MR. COHEN: -- that is exchanged for --

THE COURT: -- then let's look at the Nevada law on how you analyze an offer of judgment. You've talked about timing and reasonableness. That this was after the discovery was well underway. You had taken their depositions, you understood what their damage claims were, you understood what the allegations against your clients were.

So you made an offer of judgment, so reasonable as to timing and amount, but then you have to look at the other two factors, since I think that's probably where we need to focus our attention because the issue that was raised by the Plaintiffs in their opposition is how are we supposed to evaluate this judgment -- this offer of judgment. I disagree that it's an improper unapportioned offer. It's very clear, which Plaintiff is to receive which amount. They each were offered 30,000.

The thing for me that was unusual about this offer was the idea that it was an offer from an entity that seeks to dismiss not only the representatives from the entity, but there's also this unrepresented party, Ms. Kisling that apparently would also have been dismissed by this, so.

MR. COHEN: Your Honor, our view is that we were entitled to make the offer on behalf of all of the Defendants. You know, it's true Ms. Kisling was not represented, neither myself nor Mr. James represented her in this proceeding, but the fact of the matter is Ms. Kisling was a former member of the executive board and a former officer of the Union. The other Defendants -- individual Defendants, that is, are all associated with the corporate Defendants. Mary K. Henry is the

President of SEIU, Louisa Blue and Martine Manteca were the former trustees of the Local Union.

So it doesn't strike me as unusual that the offer of judgment would be on behalf of the institutional or the corporate Defendants on behalf of themselves and the individual Defendants in the case to resolve all claims. And that was the way I read Rule 68(a), we're allowed to make an offer to be taken in accordance with its terms. And again the terms are the dismissal of claims against all parties.

And, obviously, the Plaintiffs were free to reject it, and they did. They didn't ask any questions about the offer. There was no counteroffer. There was no -- you know, they just let the offer lapse. It wasn't, as best I could tell, for lack of understanding or confusion about the terms of the offer, or how it would operate.

And, you know, whether again the Plaintiffs -- the other factors the Court identified -- the other *Beattie* factors being 2 and 3, whether the Defendants offer of judgement was reasonable and in good faith both in the time and the amount, we talked about that. But whether the Plaintiffs' decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith.

Now I think the principle argument, Your Honor, that I would like to offer on behalf of SEIU and Henry is that there was never a contract between us and the Plaintiffs. There was never an employment relationship between us and the Plaintiffs. There was never an allegation, a theory of liability pled except for a single cause of action for intentional interference with contract. That was the only cause of action

against SEIU and Henry that could exist in the absence of an employment relationship or a contractual relationship. And yet, the Plaintiffs pursued all of the claims against SEIU and Henry.

THE COURT: Okay. And so --

MR. COHEN: And we think it was grossly unreasonable.

THE COURT: -- if they said, okay, we see here that we can't -- we don't have a valid claim against the International or we would like to get rid of our claim against the International, there was no way they could accept his offer.

MR. MCAVOYAMAYA: Correct.

MR. COHEN: Well, the offer was -- that's right. They had to accept it on behalf of -- it was required that both Plaintiffs accept it.

THE COURT: Okay. Both accept it as to -- and it would get rid of the entire case as to all Defendants, and that's the only way it was going to settle. It was a global settlement for the entire case for both entities and all the individuals including the one who is self-represented. Okay. Thanks.

MR. EVANS: Your Honor, Evan James again on behalf of the Local.

MR. COHEN: Thank you, Your Honor.

THE COURT: Uh-huh.

MR. EVANS: Let me jump directly to your questions and what you were asking about. You thought that it was unusual in the sense that it was resolving everything in a global situation.

The first point, Ms. Henry, Blue, and Manteca, they were all

sued in their official capacities by Plaintiffs. They have admitted that and argued that many times. Meaning those lawsuits against those individuals were against the entity. And so by suing those individuals, they're suing the entity. And so the fact that it was made by the entities, it's still making it on behalf of their officers, and so that's one explanation of why those others aren't included.

With regard to Ms. Kisling, Mr. Cohen already pointed out the claims alleged against her were based upon her role as an officer of the Local. And so one of the things that happened last fall is the Plaintiffs brought a motion to get -- for -- not summary judgment, for a default judgment against Ms. Kisling in which time we defended, and we had pointed out to the Court that our defenses run to Ms. Kisling. So if we're successful on our defenses, then Ms. Kisling, the claims against her individually are also successful, and at that point the Court denied the motion for default judgement against Ms. Kisling.

She didn't participate in the lawsuit until that motion was brought.

THE COURT: Uh-huh.

MR. EVANS: I was able to contact her and said, look, you're not represented here, you better appear if you want to address this. And it was at that point, which I think may have been August/September time period in which she first appeared. And so those are a couple of interesting facts that hopefully go to answer your questions. Is there anything else you would like to ask specifically about those issues?

THE COURT: No.

MR. EVANS: Okay. I would also like to point out that Rule 68(b) allows for this type of apportioned offer. It allows for a resolution of all claims. And in our particular case, the way the Plaintiffs prosecuted their claims, made it impossible for one Defendant to settle without the other Defendants settling, because one of the things that they asserted against both parties is this contract idea. They asserted the contract against the International. They also asserted the contract for each -- against the Local.

Well if the Local settles out its claims, those contract breaches and those issues of preemption still are going to be litigated. If the International settles its claims, those issues of preemption and contract breach are still litigated by the Local, because of the way the Plaintiffs prosecuted their lawsuit. It made it impossible for us to actually separate ourselves from that type of -- in that type of situation because one party settles, they all of a sudden become funded to try and litigate the rest of the lawsuit. The issues were going to be litigated. We had to issue a joint offer of judgment. And I hope that's also an explanation for you.

As I was reading these -- now I would like to go on to my argument unless you have any additional questions.

THE COURT: Sure.

MR. EVANS: As I was reading the motions yesterday and the briefings, I want to just point out a couple highlights that came to me rather than reiterate what's in the briefings.

On page 26 of the opposition to the motion for fees, the

Plaintiffs make this argument: If Defendants had simply admitted that Plaintiffs had a for cause employment contracts and that those contracts were breached, the depositions, additional discovery requests, discovery extensions, et cetera, would not have been necessary, and the vast majority of Defendants' claimed fees would not have occurred. That argument stuck out to me for the following reasons.

One, the Plaintiffs knew in July of 2019, what the issue with regard to preemption was. They knew the preemption law existed. They also knew factually that they were high ranking employees of the Local. They also knew that the federal preemption had been applied in other jurisdictions to preempt their cases. So the legal fees that were incurred after July weren't fees trying to create an exception to the preemption argument and the preemption law, those were fees incurred by the Plaintiffs trying to establish the propriety of their breach of contract claims.

Those costs were incurred by the Plaintiffs for their benefit. They knew what the law was, and yet they went ahead and stubbornly refused to recognize it. And the depositions, discovery, all of those fees -- and let's put this argument that they make on the other foot. All of those fees could have been avoided had they accepted the offer of judgment. And so I think that that argument is really telling.

The other argument that is -- that I would like to point out -- the other thing is factually you may be aware -- and I'm just going to step back -- Ms. Kisling -- Sharon Kisling was President of the Local who hired the Plaintiffs. She was removed by a trusteeship under federal law. The

Plaintiffs argue that they had a special relationship with Ms. Kisling, and it's that special relationship that created these contracts. Well --

MR. COHEN: Ms. Mancini.

MR. EVANS: Excuse me, Ms. Mancini. Thank you, Jonathan.

So Ms. Mancini was the President. That was a special relationship that existed, yet they never provided one declaration for Ms. Mancini, one affidavit trying to establish the propriety of their contract breaches. Nothing from her. Not a single fact.

In July of 2019, the Plaintiffs' knew what the law was, they knew what they did for the Local, they knew that the law had been applied against them as high -- again in situations similar to theirs and yet they stubbornly refused to accept an offer of judgment. There's nothing more that we could have done in this case to try to resolve it than what we did, and that was to submit a reasonable offer of judgment.

Those are a couple of things that stuck out to me. Any questions for me?

THE COURT: No. I guess -- the thing again that, to me, was, as I said, the terminology here where it is these two entities making this offer as to a certain amount for each of the Plaintiffs, so that's clear. So I guess my question is this idea of the global settlement. So if one of the Plaintiffs wanted to settle with one of the Defendants, there's no way to do that. That the -- it was an all or nothing. As you said, it was an all or nothing and that's -- I understand your client's position this is all or nothing, and I appreciate the fact that they didn't come back with any of

this broken out, but that there was just -- that this was an all or nothing deal.

MR. EVANS: We didn't have any choice.

THE COURT: Okay.

MR. EVANS: That was the position we took.

THE COURT: And how does that go to the question -- because the one question that remains unanswered in all this is were the Plaintiffs grossly unreasonable in not accepting this offer where you are presented with an all or nothing settlement package. This is going to settle -- you know, it's on behalf of these two corporate entities, but we want to settle all claims, as to all parties, even non-represented parties who share our defenses, and it's -- you both have to take the same amount of money and settle every one of your claims against each of the parties. I mean, so they couldn't just settle as to SEIU.

So how does that affect the analysis as to was the offer reasonable as to one party and not as to the other? I mean, you couldn't even -- there's no way for the Court to even make a determination as to, well, it was unreasonable to not settle with SEIU, because they should have known by that point that they had no claim against SEIU, but there's no way for them to say, well, we'll accept it as to SEIU and their corporate entity actors, but not as to the Local and its actors.

So how does that play into this because the somewhat block I have is the gross -- were they grossly unreasonable in rejecting this? I mean, that's -- it's a heavy burden to overcome, they have to be grossly unreasonable to get out from under an offer of judgment. And I'm just

trying to --

MR. EVANS: Sure. I would be happy to --

THE COURT: -- in the global settlement offer, I'm just struggling with whether that's grossly unreasonable or not.

MR. EVANS: I would be happy to address that on two points.

First, my understanding of the factors for accepting an offer of judgment is that no one factor is controlling. So perhaps it wasn't grossly unreasonable for -- maybe the Court reaches that conclusion. That doesn't still mean that that's the controlling factor. The case law is clear about that --

THE COURT: Uh-huh.

MR. EVANS: -- that they have -- that you have four factors that you have to address and that grossly unreasonable is only one of them.

In my estimation, understanding the case, having lived with it for a couple of years, I do think it was grossly unreasonable. And the reason why I think it was grossly unreasonable is this. First of all, I've already mentioned they prosecuted the case in a particular way. That was their choice to do it. It's not fair, and I know that's a broad word, but I don't -- let me back up, because I don't even know if I like that word fair. I don't think that it's appropriate to take Rule 68 and push it aside and say I'm not going to apply Rule 68, because the Plaintiffs might have some difficulty due to the way that they prosecuted the case. That would allow Plaintiffs to bring claims and start to game system, all right. That would be problematic for the rule itself.

So I think the rule has to stand on the idea that what it says, we can fashion the rule in a particular way to meet the needs of the case, and that's exactly what we did. We went through this, we tried to analyze the various case law, we tried to analyze the various forms that are out there, and this was the best way that we could come up with to address the issues based upon the way that Plaintiffs brought the case. So I think that that's very reasonable, and there's room in the rule for that. There's language in the rule for that.

The second reason why I think it was grossly unreasonable for them not to accept these offers is the fact that factually -- and this goes more directly to, I think, what your question was, how could one Plaintiff accept it and the other not. Factually, these two Plaintiffs were in the same position. They were both directors at the Local. They were both high ranking directors at the Local. They both factually had control over certain parts of the Local and what the Local did, one financially, the other communications.

So, factually they're on the same page. Sure, they may have some unique facts to them, but those facts are parallel to one another. Factually, the law applied the same to them. Factually, as a case fact, not as a fact of what happened that brought the litigation. The situation for us was we had to address both of those fact situations, both of those legal situations in the same context.

So I think that factually it was grossly unreasonable for them to step back and say, no, we're not going to do this. We're not going to do the calculus. We're not going to do the analysis of what we know we

did. We're not going to do the analysis of what we know our job duties were. We're not going to do analysis of what the *Finnegan* -- the United States Supreme Court *Finnegan* case says. We're not going to do the analysis of what the *Screen Actors Guild out of California* case says. We're not going to do the analysis of every court that's ever applied this law that came basically to same conclusion unless there's an exception.

Now there is some case law, Your Honor, that criticizes the rule. We recognize that. But those cases are distinguished, and they're distinguished well. They never step forward to try and establish an exception. Not one exception. For example, a crime exception. They never did that. It was grossly unreasonable just to throw their hands up in the air and say, well, we think that this isn't going to apply.

And let me finish by this. In their opposition brief they use the terms gamble, and they say that we, as Defendants, were gambling on preemption. That's just opposite. Everybody knew what the law was, they knew what the facts was, they knew how the law had been applied. If anybody was gambling on not having that California law and federal law applied in Nevada, it was the Plaintiffs.

And I don't think that it's reasonable to require the Defendants to pay exorbitant -- that's the wrong word -- they have to incur legal fees when the Plaintiffs should have been circumspect of what their situation was.

THE COURT: Okay. Thank you.

MR. EVANS: Thank you.

MR. MCAVOYAMAYA: Your Honor, I'll address your issue

with the offer of judgment directly. What you're talking about with regards to Kisling is precisely what the wisdom in the rule outlined in *Parodi* indicates, when there are multiple -- like, so *Parodi* was a case that involved two separate actions that had connected facts that were consolidated. They were -- it was a tort claim for defamation and a breach of contract claim. And the Defendants did a, you know, overall, you know, offer of judgment for the entire case.

And the Court -- the Nevada Supreme Court in *Parodi*, the rule in that case is not affected by any amendment to the statute. It defines what an unapportioned offer is. An unapportioned offer is -- can be unapportioned as to the plaintiffs that it's issued to if there's multiple plaintiffs, but also if there are multiple claims, involving multiple defendants, and multiple theories of liability it has to be apportioned as to what portion of the settlement each defendant is going to pay off.

And the reason why the wisdom in that rule is exactly the issue that you're talking about here, if we had accepted this offer to settle all claims and have a judgment entered against all Defendants based on this offer of judgment, and we want to go seek recovery from Sharon Kisling, the non-represented Defendant in this case, she could come in and invalidate the settlement, just like that. I never agreed to this, I wasn't represented by either of these counsel, I was not consulted about agreeing to this and now there's a judgment against me for $30,000.

So the ability to analyze, you know, the apportionment of that -- the offer, that rule in *Parodi* has never been overturned. And, you know, the case that they cite, which is a miscite, the -- it's *RTTC*

Communications case. That case does not say that *Parodi* is overruled or superseded by statute at all. All that that case states is that after the amendments, now unapportioned offers are okay if they are -- you know, all the Plaintiffs have derivative damages. That is not the case here. Each Plaintiff had independent contractual claims. Each one had the right to reject the offer, independent of the other. And neither one of them could make that offer.

And if you listen to what the SEIU International counsel argued, they abandoned their argument pursuant to Federal Rule of Civil Procedure 68(b), and went to C. But if you don't meet the requirements of C, which requires derivative damages, then the offer is unapportioned and unavailable. And that's the issue here, and that's what you're talking about, and that's what the wisdom in *Parodi* -- why that case makes sense, because if two defendants can try and settle a case against all defendants without saying which defendant pays what amount, when the plaintiff goes to seek recovery against one the defendants, and they're like, oh, we didn't agree to that, they're to come in and vacate the offer of judgment, and that's the issue.

That's why when there are -- when there are multiple -- when there's -- you know, when there are multiple plaintiffs, certainly, it must be apportioned between the plaintiffs, but when there are multiple defendants and multiple theories of liability against each defendant, it also must be apportioned against each defendant.

And I have a case right there, it is -- the cite is -- it's an unpublished case. It's *Westgate Planet Hollywood Las Vegas LLC v.*

Tudor-Saliba Corp. It's a 2019 case, citing *Parodi* is still good law. There is just nothing in the Nevada precedent that indicates that *Parodi* does not still apply.

And the fact is, is that the unapportioned nature of that offer made it impossible to settle, because it -- you know, with Kisling out there and not authorizing or signing on to this blanket settlement made it impossible to analyze.

And then if you take a look at -- you know, after that -- so as an initial matter, to conclude that this offer of judgment was apportioned, the Court has to overturn *Parodi*, because *Parodi* is clear. It has to be when there's multiple -- when there's multiple theories of liability against multiple defendants, that is an unapportioned offer. So if you're going to say that the offer was apportioned, you would have to overrule *Parodi*. If you're going to say that -- if you're going to move to 68(c), I mean that clearly doesn't apply because the damages are not derivative.

And then you take a look at the two offers of judgment. So if Ms. Gentry went after any amount of money against Sharon Kisling, Sharon Kisling would come in and say, hey, I also did not agree to accept liability for breach of contract, and they're equal amounts of money. So I mean, you know, what is the difference there. It just didn't -- it just wasn't properly apportioned in a way that could be fairly analyzed.

And then so on top of that you would have to create new Nevada law to invalidate *Parodi*, and then that would be on top of -- you would have to incorporate that analysis into what was reasonable to

reject. And when you take a look at the preemption issue, I'm sorry, there's only two State Supreme Courts that have adopted this rule. Every federal court outside of California has rejected it expressly. There are more states that have rejected it, than have accepted it. We took all of that into account including the rule with *Parodi* when we evaluated these offers of judgment and determined that they were just simply invalid.

And it's just patent -- and I would point out to this Court, right now, it is not the law of Nevada that this preemption doctrine applies. It is the law of this case --

THE COURT: We're not going to get into that. That doesn't, you know --

MR. MCAVOYAMAYA: You're right.

THE COURT: We're going to move on.

MR. MCAVOYAMAYA: What the issue is, is when you're evaluating a case, you know, the rule for the offer of judgment is to encourage, you know, parties to evaluate their claims based on the existing law, and it is not intended for a plaintiff to forego meritorious claims. And so if you're talking about -- I mean, what you're really talking about is forcing -- you know, even if we had accepted the offer, there would be no ruling that that preemption rule applies in Nevada.

And so, you know, with regards to the -- I mean, there was -- it was pretty much undisputed damages. They didn't provide an expert report disputing it. The only issue that they've raised so far with regards to the damages was the $6,000 auto allowance award.

And so under those circumstances, you're asking a Plaintiff to forego over $60,000 in actual damages based on the possibility that the law might change in the future, after the case is over because, like I said, we are on appeal now. It's an issue of first impression in Nevada, and the Nevada Supreme Court may still reject it. And if it does, you know, this offer of judgment was based only on their preemption argument. That was the only thing that they raised when they made this offer of judgment.

THE COURT: Okay.

MR. MCAVOYAMAYA: And so that's the issue here. It was just -- overall just invalid.

THE COURT: All right. Thank you. Anything further in conclusion, from either Mr. Cohen -- anybody?

MR. COHEN: Your Honor, this is Jonathan Cohen. I would just like to make a brief point.

THE COURT: Yeah.

MR. COHEN: 68(c), Plaintiffs continue to take the position that our offer was invalid under 68(c), but as I read 68(c), there are actually different types of offers that the statute describes. Plaintiffs' counsel keeps referring to 68(c)(3), which is an offer to multiple plaintiffs. The way I read the statute, it concerns a single offer made to multiple plaintiffs, which is why the subsections of the statute address the derivative liability.

Here, there was not a single offer to multiple Plaintiffs. There were two separate offers to two separate Plaintiffs. And we don't read

68(c)(3) as the only type of joint unapportioned offer you can make to Plaintiffs. To the contrary, 68(c)(1) says, a joint offer may be made by multiple offerors. That's precisely what we did. We were multiple offerors, SEIU and ll07, and we made a joint offer -- a single offer to each Plaintiff. So I think, you know, the argument that 68(c)(3) has to apply is incorrect.

The argument that somehow Sharon Kisling would have -- it would have -- there would have been a problem because she was not represented, I think is incorrect. We were offering -- SEIU and 1107 were offering to pay a sum certain to the Plaintiffs, and I don't understand why Sharon Kisling would have anything to do with that or why there's a problem. If we didn't make good on our offers of judgment, then the offer wouldn't operate, and they would be able to pursue claims against all Defendants.

And the last point, Plaintiffs continue to make this argument that the damages are undisputed. That's just flatly incorrect. If we had ever gotten to a hearing in the case, we would have disputed every aspect of those damages. We're not required to tell the Plaintiffs precisely what our expert consultant told us about their expert's report. Just because we didn't do that, doesn't mean that the damages are undisputed.

THE COURT: Thank you.

MR. MCAVOYAMAYA: Also, one more thing.

THE COURT: No, we're done. Thank you.

MR. EVANS: I have just a couple of quick points, Your

Honor.

First, I would like to point out the idea of collecting against Ms. Kisling, who was not a party to the offer of judgment. She would not have became a judgment debtor under the offer of judgment. It wouldn't have been proper for the Plaintiffs to try and collect against her anyway. They would have been collecting against my client, the Local 1107, and the International. So this argument about Ms. Kisling coming and trying to void the argument -- the offer of judgment, it wouldn't apply, because she wouldn't have been a judgment debtor. The debtor would have been my client. My client was on the hook. The International was on the hook.

The second point that I would like to also point out, with regarding to *Parodi*, I don't know how to pronounce it, P-A-R-O-D-I.

THE COURT: Correct.

MR. EVANS: The issue really there was the Supreme Court's concern about an apportionment for the particular claims, all right. It wasn't this issue with regard to, well, we're just going to throw this offer out there and see what fish bites on it. It was apportionment as to claims. Well that's what our offer of judgment does, all right. It doesn't list out each claim by detail, but it does say, Ms. Gentry, for your claims we're going to give you 30,000. Mr. Clarke, for your claims we're going to give you $30,000. It is apportioned.

The *Parodi* case, the concerns of the Supreme Court, those are not concerns with regard to our offer of judgment, because it does apportion it by claim. It identifies the Plaintiffs. Any questions on those

two?

THE COURT: No, I've never viewed this as unapportioned offer. My problem with it has always been the idea that it's a global offer. And there is no way for -- for example, if Mr. Clarke just wanted to be done, and he just wanted to be done with SEIU, he could have done that. He had to settle his claims along with Ms. Gentry and against both entities. So that's my problem with it when I look at was it unreasonable -- grossly unreasonable to reject this offer. I don't think it was.

I understand what the parties were doing. The Defendants viewed this as a case that required a global settlement. It's the only way they could see that it would settle. I understand that. But when looking at is it unreasonable to reject it, I don't think it was. So for that reason, I'm going to deny the motion for attorney's fees. As I said, I think costs are a different matter, and you're entitled to your costs.

But with respect to this offer of judgment, given the fact that it is -- even by everybody's own argument, there was a totally separate basis by which they should not have been pursuing the SEIU International, they couldn't just settle with them. And so that's my problem with it, is it was global, and it was therefore impossible for them to accept it without dismissing their entire case, which they may not have viewed as a reasonable thing to do.

The other issues with the offer though, I thought it pretty much passed all the other aspects of the test, but it's this global nature of it, that while I don't think that technically falls under the issues with unapportioned offers, for me it made it an unreasonable offer. So it

wasn't unreasonable for them to reject it. So for that reason, I'm going to deny the motion for attorney's fees.

So I don't know how you wish to do these offers since, technically, the motion to retax was Mr. Mcavoyamaya's. I just don't know if you would prefer to do them yourself.

MR. EVANS: Well, a couple of things I'll address. My viewpoint is on the orders I actually would prefer to write the order on the issue. Mr. Cohen, his side with the International would have to reevaluate the travel costs issue, and he would have to provide that, but I would prefer to write the orders --

THE COURT: Okay.

MR. EVANS: -- and if that's okay.

THE COURT: Okay.

MR. EVANS: All right. And then I do have one question. I know you --

MR. COHEN: Your Honor --

MR. EVANS: I'm sorry, Jonathan.

MR. COHEN: On that point -- this is Jonathan Cohen, Your Honor. So will Mr. James be preparing proposed orders on all the fees motions and all the costs motions or will each Defendant be preparing separate orders --

THE COURT: That's my question. Does it make more sense to do one and to have the Defendants prepare one order, because they're the ones who need to go through and like back out the one part of the -- maybe two separate orders. One on fees. That's -- like I said,

how do you think it's easiest to do it.

MR. EVANS: Well, there were multiple motions, so I'm not going to speak with Mr. Cohen, but with regard to the Local I would like to prepare that motion on the fees.

THE COURT: Uh-huh.

MR. EVANS: And I would also like to -- either he or I prepare the order on the motion to retax costs.

THE COURT: Okay. Mr. Mcavoyamaya, do you want to just --

MR. COHEN: And likewise, Your Honor.

THE COURT: They can --

MR. MCAVOYAMAYA: Yeah, they can just submit it to me.

THE COURT: So provide you with their proposed orders. And do you wish to do the one on the Rule 68 or?

MR. MCAVOYAMAYA: I mean, it's just been denied, so I mean I can do that one.

THE COURT: Okay. All right.

MR. MCAVOYAMAYA: Either way. It doesn't matter to me.

THE COURT: Okay. I mean it's odd, because technically he won on his motion to retax, but --

MR. EVANS: I understand.

THE COURT: -- it makes more sense to have the Defendants do their motions on their costs.

MR. MCAVOYAMAYA: Yeah, especially because they have to calculate --

THE COURT: Yeah.

MR. MCAVOYAMAYA: -- the new checks.

THE COURT: Well, Mr. Mcavoyamaya, why don't you do the one that just denies the Rule 68 motion, and then the respective Defendants will do their own orders on their respective costs?

MR. EVANS: Then there's one other point.

MR. COHEN: Thank you, Your Honor.

MR. EVANS: In order for that to take place -- I understand the words that you told me on the order.

THE COURT: Right. Uh-huh.

MR. EVANS: I'm not sure I completely understand the reasoning in light of Rule 68, and that's what I want to make sure that we get correct.

THE COURT: It's the *Beattie* -- in looking at the *Beattie* factors, I appreciate your point, but they don't -- there's no one controlling *Beattie* factor. But my problem with this being a global settlement is that I don't understand how the Plaintiffs would have analyzed it for purposes of settlement if, for example, one of the parties wanted to settle with one of the Defendants. There's no way under this offer to do it.

Now grant you, they could have done their own offers, and apparently they didn't. That might have made more sense, but it's just that when you have a global offer to settle made in the name of two corporate -- well -- entities, that it's just the named entities, but it purports to settle all claims as to all Defendants, even those that aren't

represented by those entities, it just -- I don't know, I found like it would be a very difficult analysis to make. So I can't say they were unreasonable in rejecting it, because I just don't understand how they would have analyzed it.

MR. EVANS: Okay. So again I'm just trying to be clear, I'm not trying to argue --

THE COURT: Right.

MR. EVANS: -- because my issue is with 68(b) and the specific language in 68(b).

THE COURT: I'm just talking about *Beattie* --

MR. EVANS: Okay.

THE COURT: -- and the *Beattie* factors and looking -- if it otherwise meets all the requirements of a Rule 68 offer, and you go down -- you click off your factors, the one that has been a hang up for me is grossly unreasonable. Were they grossly unreasonable. And my problem was I don't see how they could have analyzed it at all. So how would they -- could they possibly have been unreasonable in rejecting it? It's so difficult to analyze.

Maybe they didn't want to dismiss as to Ms. Kisling. Maybe they really wanted to go after her, but even though she's not named as one of the offerors, they have to give up their claims against her? I mean that's my problem with it. I just didn't understand how the Plaintiffs could have analyzed it; therefore, how could they have been unreasonable in rejecting it.

MR. EVANS: That's why I'm having difficulties is I'm --

THE COURT: Right.

MR. EVANS: -- and again I'm not arguing. You made your ruling, and I just want to make sure that the record is clear --

THE COURT: Right.

MR. EVANS: -- because that analysis, I don't understand it in light of the language in 68(b), which says --

THE COURT: I'm not talking about -- I'm talking about *Beattie*.

MR. EVANS: I understand.

THE COURT: That in Nevada you have to analyze -- if you assume a valid offer of judgment, that's only step one. Step two is you have to look at these four factors under *Beattie*. And the thing I could not get passed is how could these people have analyzed this in a way that it would have been unreasonable to have rejected it.

MR. EVANS: Okay. I understand. So we're just dealing with *Beattie*?

THE COURT: Right.

MR. EVANS: Because I --

THE COURT: That's contrary to what Mr. Mcavoyamaya -- he's got his own issue with it. I understand that.

MR. EVANS: Sure.

THE COURT: My problem was if you just assume valid offers, how do you settle this case based on these offers? How can you be -- how can you reasonably analyze them such that you're unreasonable to have rejected it?

MR. EVANS: That's why -- we're getting to my crux of what my problem is. That's why I'm curious, because I believe 68(b) says we get to do that.

THE COURT: Okay. Right. But my problem is this particular offer, I don't understand how these particular Plaintiffs -- I understand the rule.

MR. EVANS: Okay.

THE COURT: But in this particular case, the way this offer is written, how do these two particular Plaintiffs analyze this particular offer as to all of these other Defendants? How do you analyze it? How can it be reasonably accepted or not accepted? They have to be grossly unreasonable in rejecting it. How could they have even analyzed it?

MR. EVANS: Okay. So the rest of the *Beattie* factors you're not making a ruling --

THE COURT: I thought with respect to timing and amount, I appreciate Mr. Cohen's point, is it's perfectly reasonable in timing and amount. I had no problem with that.

MR. EVANS: Okay.

THE COURT: But I just could not get passed this -- was it -- grossly unreasonable to reject it. Well, no, I didn't even understand the offer.

MR. EVANS: And since you didn't get passed, I think, it was the third or second *Beattie* factor, we're not --

THE COURT: Right.

MR. EVANS: -- going to the fourth?

THE COURT: Right.

MR. EVANS: Okay. Very good.

THE COURT: I just didn't go there, because I just could not get passed it. Okay.

MR. EVANS: Thank you so much.

MR. MCAVOYAMAYA: Thank you, Your Honor.

MR. COHEN: Thank you, Your Honor.

[Proceedings concluded at 10:23 a.m.]

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

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A-17-764942-C

DEPT. No. XXVI

NOTICE OF ENTRY OF JUDGMENT

Please take notice that the attached order deny attorney fees was entered on April 10, 2020.

DATED April 14, 2020.

CHRISTENSEN JAMES & MARTIN

By:*/s/ Evan L. James*
Evan L. James, Esq. (7760)
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CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served on April 14, 2020 upon the following:

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By: */s/ Natalie Saville*
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EIGHTH JUDICIAL DISTRICT COURT

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Defendants.

CASE NO.: A-17-764942-C

DEPT. No. XXVI

ORDER DENYING MOTIONS FOR ATTORNEY FEES

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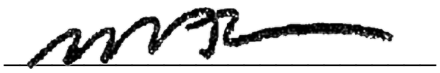
Defendants' Motions for Attorney Fees (collectively "Motion") having been briefed and argued, the Court hereby enters the following findings and order.

The Court finds that the Offer of Judgment was properly apportioned in accordance with NRCP 68(b) and that the Offer of Judgment is in compliance with the provisions of NRCP 68.. The Court further finds that the Offer of Judgment was reasonable in amount given that the claims were disputed legally and factually. The Court further finds that the Offer of Judgment was reasonable in amount given the value offered in comparison to the damages claimed. The Court further finds that the Plaintiffs hand

ample time to evaluate the merits of the respective positons, making the Offer of Judgment's timing reasonable.

However, the Court finds that it was not grossly unreasonable for the Plaintiffs to reject the Offer of Judgment because the Offer of Judgment required a global resolution of all claims against all Defendants. Because the Offer of Judgment required a global resolution, it is not clear to the Court how the Plaintiffs could have properly analyzed the Offer of Judgment. The Court therefore denies the Motion and makes no finding on the reasonableness of the fees incurred.

DATED this 9th day of April 2020.



Judge Gloria J. Sturman

Submitted By

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EIGHTH JUDICIAL DISTRICT COURT

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

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vs.

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Defendants.

Case No.: A-17-764942-C

Dept. 26

NOTICE OF APPEAL

Defendants Service Employees International Union ("SEIU") and Nevada Service Employees Union, Local 1107 ("Local 1107") hereby jointly appeal to the Nevada Supreme Court from the District Court's order, entered on April 10, 2020, denying SEIU's and Local 1107's motions for attorneys' fees.

DATED: May 11, 2020

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

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

By */s/ Evan L. James*
Evan L. James
Attorneys for Service Employees International Union and Mary Kay Henry and Nevada Service Employees Union

CERTIFICATE OF SERVICE

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

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

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Jonathan Cohen: jcohen@rsglabor.com

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Evan L. James elj@cjmlv.com

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

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

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

CHRISTENSEN JAMES & MARTIN

By: */s/ Natalie Saville*
Natalie Saville

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 **APPENDIX OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION A/K/A SEIU LOCAL 1107, VOLUME 7** 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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/s/ Jonathan Cohen
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