**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| ROBERT CLARKE, DANA GENTRY<br><br>Appellant/Respondents<br>Vs.<br>SERVICE EMPLOYEES INTERNATIONAL UNION ("SEIU"); SEIU LOCAL 1107 AKA SEIU NEVADA;<br>Appellants/Respondents. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 80520<br><br>Consolidated for briefing<br>with<br><br>No. 81166 |



# APPELLANT/RESPONDENTS RESPONSE/REPLY BRIEF

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## LEGAL ARGUMENT

### I. APPELLEES' REQUEST FOR THIS COURT TO ADOPT THE NOVEL PREEMPTION ANALYSIS IN *SCREEN EXTRAS GUILD* THAT IS BARRED BY UNITED STATE SUPREME COURT AND NEVADA SUPREME COURT PRECEDENT REGARDING EXPRESS PREEMPTION CASES.

Appellees do little to rebut Appellant's arguments pursuant to this Court's prior express preemption case law and the United States Supreme Court's clear holding in *De Veau v. Braisted*, 363 U.S. 144, 157 (1960) that Congress did not leave the question of preemption pursuant to the LMRDA to inference, because it included extensive express preemption language in the LMRDA. Appellees acknowledge that "[w]hen Congress *does not include statutory language expressly preempting state law*, Congress's intent to preempt state law nonetheless may be implied in two circumstances known as field preemption and conflict preemption." *See* Appellees' Answering Brief, at 28 *quoting Nanopierce Techs., Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 371 (2007) (emphasis added). Appellees also do not dispute that Congressional intent is the cornerstone to every preemption analysis. *Id.* Appellees request that this Court ignore this binding precedent nonetheless.

Here, there express preemption language in the LMRDA limiting the scope of preemption and delineating the scope of Congressional intent to preempt. *See* 29 U.S.C. §§ 413, 466, 483, 501, 523, 524, 524a. The United States Supreme Court has already interpreted this express statutory preemption language in the LMRDA, concluding that "the [LMRDA]…reflects congressional awareness of the problems of pre-emption in the area of labor legislation, and *which did not leave the solution of questions of pre-emption to inference.* When Congress meant pre-emption to flow from the [LMRDA] it expressly so provided." *De Veau*, 363 U.S. at 156-57 (emphasis added). This Court is bound by this expression of Congressional intent found in the express statutory preemption language of the LMRDA, and the Supreme Court's interpretation of that express preemption language. *Id.* Courts are permitted to evaluate an act for implied preemption only if there is an absence of "explicit pre-emptive language." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

Congress included a broad anti-preemption savings clause statute, or an express preemption statute in every Title of the LMRDA, and disclaimed any intent to preempt state law unless expressly stated. *See*

29 U.S.C. §§ 413, 466, 483, 501, 523, 524, 524(a). Congress did so because it was aware "of the problems of pre-emption in the area of labor legislation," and Congress chose not to "leave the solution of questions of pre-emption [under the LMRDA] to inference." *De Veau*, 363 U.S. at 156-57. The implied preemption analysis Appellees seek here is not permissible because Congress included express language on the issue of preemption in the LMRDA. *Id.* In other words, this is an express preemption case, not an implied preemption case.

Appellees have failed to cite to any Supreme Court case overruling *De Veau*, and instead, appear to acknowledge that the Supreme Court reaffirmed the validity of its holding that Congress disclaimed implied preemption when passing the LMRDA just two years after *Finnegan v. Leu*, 456 U.S. 431, 436 (1982), the Supreme Court case they rely for implied preemption in this case. *See* Appellees Answering Brief, at 40 *citing De Veau*, 363 U.S. at 156-57; *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union, Local 54*, 468 U.S. 491 (1984). According to Appellees, "Neither *DeVeau* nor *Brown* is apt here" because "[t]his case does not concern a conflict between the right of employees to select a bargaining representative and state criminal law." *Id.* at 40-41.

However, Appellees ignore the rule expressed in *De Veau* and reaffirmed in *Brown* that:

> *As the Court has already recognized*, another provision of LMRDA, § 603(a), is 'an express disclaimer of pre-emption of state laws regulating the <u>responsibilities</u> *of union officials*, except where such pre-emption is expressly provided…*De Veau* v. *Braisted*, 363 U.S. 144, 157 (1960) (plurality opinion); see also *id*., at 160-161 (BRENNAN, J., concurring in judgment) (LMRDA 'explicitly provides that it shall not displace such legislation of the States'). In affirmatively preserving the operation of state laws, § 603(a) indicates that Congress necessarily intended to preserve *some* room for state action *concerning the* <u>responsibilities</u> and qualifications *of union officials*.

*Brown*, 468 U.S. at 505-06 (emphasis added).

This opinion from *Brown* reaffirms the holding in *De Veau* that "the [LMRDA]…reflects congressional awareness of the problems of pre-emption in the area of labor legislation, and which did not leave the solution of questions of pre-emption to inference." *De Veau*, 363 U.S. at 156-57. The Supreme Court did not limit its analysis of the Congressional intent behind the LMRDA to "a conflict between the right of employees to select a bargaining representative and state criminal law." *See* Appellees Answering Brief, at 40-41. Instead, the Supreme Court recognized that the LMRDA has broad express preemption language, and expressly disclaimed implied preemption, which is why the federal courts

have never analyzed the LMRDA under any implied preemption doctrine. Because the Congressional intent behind the LMRDA is clear from its express language, and has been expressly interpreted by the Supreme Court, "that is the end of the matter; for the court…must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

While the statutes sought to be preempted in any given case are often different, the analysis of whether preemption applies under both Nevada and federal law is always the same because it is a question of law, not a question of fact. *Dancer v. Golden Coin, Ltd.*, 124 Nev. 28, 32 (2008). In analyzing "whether a federal law preempts a state law, [this Court] look[s] to congressional intent." *Id.* at 32-33. "When Congress has explicitly spoken on the issue, *we look to the language it used to determine its intent*. Thus, *state law is expressly preempted when federal law explicitly sets forth the degree to which it preempts state law*." *Id.* at 33 (emphasis added).

This Court turns to express preemption language, if it exists, to determine Congressional intent. Not only is it impermissible to analyze implied preemption when there is express preemption language in a

federal statute, here, Congress has expressly directed that the LMRDA preempts state law only to the extent it has expressly so provided. *See* 29 U.S.C. § 523. The LMRDA does not expressly preempt state wrongful termination law with regards to union employees because there is no express preemption clause in the LMRDA providing for such preemption. In expressly limiting the scope of preemption under the LMRDA to express preemption, Congress has disclaimed any inferential or implied preemption.

All forms of implied preemption, like express preemption, are "fundamentally…question[s] of congressional intent—did Congress expressly or impliedly intend to preempt state law?" *See* Appellees Answering Brief, at 28 *citing Nanopierce Techs.*, 123 Nev. at 370-71. Conflict preemption is a form of implied or inferential preemption, which Appellees acknowledge applies only "[w]hen Congress does not include statutory language expressly preempting state law." *Id.* Because the LMRDA includes express language on the issue of preemption, this Court cannot resort to implied preemption to determine Congressional intent. *Id. see also* 29 U.S.C. § 523.

"Congress expressly preempts state law when it explicitly states that intent in a statute's language. Thus, when determining whether Congress has expressly preempted state law, a court must examine statutory language--*any explicit preemption language generally governs the extent of preemption*." *Nanopierce Techs., Inc.*, 123 Nev. at 371 (emphasis added). Only "[w]hen Congress does not include statutory language expressly preempting state law," can "Congress's intent to preempt state law nonetheless…be implied in two circumstances known as field preemption and conflict preemption." *Id.*

Here, the LMRDA includes a broad express anti-preemption savings clause in every single title of the LMRDA but one. *See* 29 U.S.C. §§ 413, 466, 501, 483, 524, 524(a). The LMRDA includes two express preemption clauses. *See* 29 U.S.C. §§ 440, 483. The LMRDA includes an all-encompassing anti-preemption savings clause that expressly disclaims preemption "except as explicitly provided to the contrary." *See* 29 U.S.C. § 523. This language generally governs the extent of preemption. *Id. see also Nanopierce Techs., Inc.*, 123 Nev. at 371; *see also De Veau*, 363 U.S. at 156-57.

The Congressional intent gleaned from the plain language of the LMRDA, and binding Supreme Court precedent interpreting it, clearly states that Congress did not leave the question of preemption to inference, and limited application of preemption to the express preemption language included the act. *Id. see also Dancer,* 124 Nev. at 33; *Nanopierce Techs., Inc.*, 123 Nev. at 370-71. "Even when implied, Congress's intent to preempt state law, in light of a strong presumption that areas historically regulated by the states generally are not superseded by a subsequent federal law, must be 'clear and manifest.'" *Nanopierce Techs., Inc.*, 123 Nev. at 370-71. ""States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Insley*, 102 Nev. at 518 *citing Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380, 2398 (1985); *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

Appellees argue that the fact that these cases were not addressing preemption pursuant to the LMRDA, that the principles established in these preemption cases somehow do not apply. Appellees are incorrect. The conflict preemption analysis applied to an NLRA case applies equally to any other case analyzing conflict preemption. In *Nanopierce Techs.,*

*Inc.*, this Court noted that "Congress's intent to preempt state law is implied to the extent that federal law actually conflicts with any state law. Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives." 123 Nev. at 371-72. The *Nanopierce Techs., Inc.* involved a preemption argument involving the Securities Exchange Act of 1934. *Id.* at 367. However, this Court cited to a Supreme Court case addressing conflict preemption pursuant to the Public Health Cigarette Smoking Act of 1969. *Id.* at n.15-22 *citing Cipollone v. Liggett Grp.*, 505 U.S. 504, 510 (1992).

In *Cipollone*, the Supreme Court noted that the "ultimate touchstone' of any pre-emption analysis" is Congressional intent. 505 U.S. at 516-17 *citing Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978) (an ERISA and NLRA preemption case); *Retail Clerks Int'l Asso. v. Schermerhorn*, 375 U.S. 96, 103 (1963) (an LMRA and NLRA preemption case). The Court noted that preemption may be express or implied. *Id.* The Court noted that "*[i]n the absence of an express*

*congressional command*, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id. citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983) (the Atomic Energy Act of 1954 preemption case); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982) (a Home Owners' Loan Act of 1933 preemption case). The federal act being analyzed is of no consequence because the preemption analysis is always the same: (1) if there is express preemption language, that language generally governs the extent of preemption; (2) if there is no express preemption language, the Court may find preemption to be implied under the consistent principles of field or conflict preemption analysis. *Id.*

What distinguishes the type of preemption analysis that applies to any given act is simple: how Congressional intent behind the act is determined:

> The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine congressional intent. *Pre-emption may be either express or implied*, and 'is compelled whether Congress'

> command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' *Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred* because **[1]** "[the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," **[2]** because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or **[3]** because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."
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> **[4]** Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"

*Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 152-53 (emphasis added); *see also Pacific Gas & Elec. Co.*, 461 U.S. at 204; *Cipollone*, 505 U.S. at 516-17; *Malone*, 435 U.S. at 499; *Retail Clerks Int'l Asso.*, 375 U.S. at 103.

Because there explicit/express preemptive language in the LMRDA, it is not permissible to analyze the LMRDA under the principles of implied preemption. *Id. see also Nanopierce Techs., Inc.*, 123 Nev. at 370-71. The extensive express preemption and anti-preemption language in the LMRDA controls the preemption analysis in this case. *Id.* This case is an express preemption case because the LMRDA has express preemption language limiting the scope of federal preemption. Appellees'

Answering Brief does almost nothing to address this clear distinction between express and implied preemption cases, and fails to cite a single case, other than *Screen Extras Guild*, where a court permissibly moved to implied preemption despite limitations in the express preemptive language of the federal act.

Appellees argue that preemption precedent does not establish that "if a statute has an express preemption provision, the statute cannot also impliedly preempt state law." *See* Appellees Answering Brief, at 37. However, every case cited by Appellants and Appellees reiterates that very preemption principle: "Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred." *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153; *Nanopierce Techs., Inc.*, 123 Nev. at 370-71. Appellees cite to *FMC Corp. v. Holliday*, for the rule that preemption may be either express or implied. *See* Appellees Answering Brief, at 37. The Supreme Court's use of exclusionary language "either" "or" indicates mutually exclusive options. Either an act has express preemptive language and is limited by that language, or it does not, and preemption may be implied. *Fmc Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S. Ct. 403, 407 (1990).

*Holliday* was an express preemption case involving ERISA. *Id.* The preemption and savings clauses found within ERISA controlled the entire preemption analysis of the case. *Id.* The *Holliday* Court did not endeavor to analyze whether Congressional intent could be implied because there were "Three provisions of ERISA speak[ing] expressly to the question of pre-emption." *Id.* at 57. The LMRDA has eight provisions speaking expressly to the question of preemption, and the analysis of Congressional intent to preemption pursuant to the LMRDA is confined to those express provisions. *Id. see also* 29 U.S.C. §§ 413, 440, 466, 483, 501, 523, 524, 524a. Contrary to Appellees argument, every single preemption case other than *Screen Extras Guild* states that implied preemption may be found only absent explicit preemptive language. *Gade*, 505 U.S. at 98; *see also Holliday*, 498 U.S. at 56-57; *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153; *Nanopierce Techs., Inc.*, 123 Nev. at 370-71; *Pacific Gas & Elec. Co.*, 461 U.S. at 204; *Cipollone*, 505 U.S. at 516-17; *Malone*, 435 U.S. at 499; *Retail Clerks Int'l Asso.*, 375 U.S. at 103.

Appellees appear to imply that *Gade* is a conflict preemption case, arguing that "*Gade* recognized the 'ultimate task in any pre-emption case is to determine whether state regulation is consistent *with the structure*

*and purpose of the statute as a whole.*'" *See* Appellees Answering Brief, at 37-38 n.18. What Appellees fail to dispute is that, like in *Holliday*, because OSHA included a broad preemption provision in 29 U.S.C. § 651, and preserved state law in only two respects with 29 U.S.C. §§ 653 and 667, the preemption analysis the Supreme Court applied in *Gage* was express preemption, not implied preemption. *See Gade*, 505 U.S. at 97. Preemption in *Gade* was found only within the express confines of express preemption and savings clauses in the act. *Id.* The law is clear that express language generally governs preemption pursuant to the act. *Nanopierce Techs., Inc.*, 123 Nev. at 370-71.

Further, Appellees disregard the Supreme Court's clear analysis of the LMRDA's all-encompassing savings clause when arguing that "The first two provisions he cites, 29 U.S.C. §§ 413 and 523(a), preserve state actions involving the rights of union *members*, not actions seeking to vindicate the rights of union *employees*." *See* Appellees Answering Brief, at 38 *citing Screen Extras Guild*, 51 Cal. 3d at 1030 n.10. In *Brown*, the United States Supreme Court made clear that §523 "is 'an express disclaimer of pre-emption of state laws regulating the <u>*responsibilities*</u> *of union officials*, except where such pre-emption is expressly provided…'

*Brown*, 468 U.S. at 505-06 (emphasis added) *citing De Veau*, 363 U.S. at 157. Appellees conveniently ignore the "responsibilities" language in 29 U.S.C. § 523, because honoring for-cause employment contracts negotiated under state law is a "responsibilit[y] of a[] labor organization or a[] officer, agent, shop steward, or other representative of a labor organization" established under state law, and preserved by the statute. *See* 29 U.S.C. § 523; *see also Brown*, 468 U.S. at 505-06. Judge Eagleson's dissent in *Screen Extras Guild* highlighted the "responsibilities" language in §523, which again, is consistent with the Supreme Court's own interpretation of the statute. *Screen Extras Guild*, 800 P.2d at 883 (Eagleson dissent).

In fact, the analysis of Congressional intent in *Finnegan* supports a finding that Nevada wrongful termination law is not preempted here. *See Finnegan*, 456 U.S. at 441-442. In *Finnegan*, the Supreme Court ultimately concluded that a union officer had no cause of action under Title I of the LMRDA as a union employee because "Nothing in the Act evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies." *Id.* "[I]n enacting Title I of

the Act, Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff." *Id.* Because Congress was not concerned with providing protections from wrongful termination from union employment, the Supreme Court held that Congress did not intend to grant appointed union employees a cause of action under the LMRDA.

Analyzing Congressional intent for the purpose of preemption invokes the same Congressional intent analysis. *Cipollone*, 505 U.S. at 516-17 *citing Malone*, 435 U.S. at 499; *Retail Clerks Int'l Asso.*, 375 U.S. at 103. If there is no Congressional intent to preempt, express or implied, it is impermissible to find preemption of state law. Nowhere in Appellees Answering Brief do they argue that Congress intended to preempt Nevada wrongful termination law when passing the LMRDA. Instead, Appellees argue pursuant to *Finnegan* that Congress did not intend to restrict elected union official's ability to appoint/terminate union administrators. *See* Appellees' Answering Brief, at 30, 41. A lack of Congressional intent to alter the union-union employee relationship is evidence of Congressional intent not to preempt, as setting labor standards is a traditional police power of the state. *See W. Cab Co.*, 133

Nev. at 68. Congress did not intend to alter the traditional state police power to set labor standards that apply to unions acting as employers.

In sum, if it is undisputed that Congressional intent is the ultimate touchstone of all preemption analysis, it is entirely impermissible to rule that Congressional intent is inferred or implied, when Congress was careful to include extensive express preemption language in the LMRDA. There is express preemption language in the LMRDA. That express preemption language determines Congressional intent and governs the preemption analysis. Congress did not leave preemption under the LMRDA to inference. *De Veau*, 363 U.S. at 156-57. Preemption flows from the LMRDA only if there is an express preemption clause preempting state law. *Id.* There is no express preemption clause preempting state wrongful termination law with respect to union employment because Congress was not concerned with regulating, or preempting the union-union employee relationship. *Finnegan*, 456 U.S. at 442. Because the express preemption provisions of the LMRDA generally govern the preemption analysis of this case, and there is no express preemption provision preempting state wrongful termination law, preemption cannot flow from the act and this Court should overturn the District Court's

entry of summary judgment. *De Veau*, 363 U.S. at 156-57; *Nanopierce Techs., Inc.*, 123 Nev. at 370-71.

## II. EVEN IF CONFLICT PREEMPTION WERE PERMITTED WHEN ANALYZING THE LMRDA, NEVADA'S EXISTING CONFLICT PREEMPTION PRECEDENT PRECLUDES A FINDING OF CONFLICT PREEMPTION IN THIS CASE.

It is undisputed that Appellees are arguing conflict preemption. *See* Appellees Answering Brief, at 27-28. Appellees then engage in circular, contradictory reasoning when requesting that this Court adopt the novel substantive preemption doctrine applied by the California Supreme Court in *Screen Extras Guild*. *Id.* at 36. Appellees' request should be rejected because the *Screen Extras Guild* ruling is inconsistent with Nevada's existing preemption precedent.

### A. The Application Of *Screen Extras Guild* And Conflict Preemption Is Not An Issue Of First Impression In Nevada.

Appellees assert that "[t]he Unions are not aware of a Nevada case adopting *Screen Extras Guild*. Because this appears to be a matter of first impression in Nevada, this Court may look to persuasive authority for guidance." *See* Appellees Answering Brief, at 31. However, adoption of out of state precedent a party offers as "persuasive" is not an issue of first impression because, if it were, any time a party offered out of state

precedent that this Court has not expressly rejected or adopted, it would be an issue of first impression regardless of whether this Court has actually ruled on the legal issue in the out of state case.

Rather, an "issue of first impression" is a legal issue "whose resolution was not clearly foreshadowed" by prior binding precedent in a particular jurisdiction. *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 35 (1994); *see also In re Revision of Portion of the Rules of the Court of Criminal Appeals*, 2003 OK CR 9, ¶ 2 ("an 'issue of first impression' is defined as one where the result was not dictated by precedent existing at the time"); *Simpson v. Dir., Office of Workers' Comp. Programs, etc.*, 681 F.2d 81, 87 (1st Cir. 1982).

The narrow issue of first impression implicated in this case is not the "adopting [of] *Screen Extras Guild*." *See* Appellees Answering Brief, at 31. Rather, the narrow issue of first impression implicated in this appeal is whether Nevada's wrongful termination law is preempted by the LMRDA pursuant to the preemption analysis established in Nevada's clear and consistent precedent on the issue of federal conflict preemption. This distinction is important, as Appellees' Answering Brief repeatedly argues that this Court should deviate from its existing preemption

precedent and apply an entirely novel preemption analysis established in *Screen Extras Guild*, which is inconsistent with Nevada law on conflict preemption.

This fact is clear by the manner in which Appellees seek to dismiss the consistent preemption analysis across all of Nevada's existing preemption precedent because "none of the preemption cases he cites…addresses conflict preemption under the LMRDA, thus offering little guidance here." *See* Appellees Answering Brief, at 34. Appellees ignore the fact that the analysis of preemption is always the same in every case regardless of the federal act or state statute sought to be preempted. In every single preemption case, regardless of the federal act or state statute sought to be preempted, this Court always determines "whether a federal law preempts a state law" by "look[ing] to congressional intent." *Dancer*, 124 Nev. at 33; *W. Cab Co. v. Eighth Judicial Dist. Court of Nev.*, 390 P.3d 662, 668 (Nev. 2017); *MGM Grand Hotel-Reno v. Insley*, 102 Nev. 513, 518 (1986); *Nanopierce Techs., Inc.*, 123 Nev. at 370.

According to Appellees, "Although Clarke argues that *Screen Extras Guild* applied a 'novel 'substantive preemption' doctrine,' Br. 12–13, the

analytical distinction between jurisdictional and substantive preemption discussed in *Screen Extras Guild*, *see* 51 Cal. 3d at 1023, is grounded in U.S. Supreme Court precedent." *Id. citing Brown*, 468 U.S. at 491. However, the *Screen Extras Guild* Court did not state that it was applying, and did not apply conflict preemption. *Id.* Rather, the *Screen Extras Guild* majority invented a brand new doctrine of "substantive preemption." *Id.*

Appellees argument is essentially that because the *Screen Extras Guild* majority held that its novel preemption doctrine is grounded in Supreme Court precedent, it is grounded in Supreme Court precedent. Other federal courts have, however, noted that the California Supreme Court's preemption analysis is predicated on its "solitary interpretation" of preemption pursuant to the LMRDA. *Shuck v. Int'l Ass'n of Machinist & Aero. Workers, Dist. 837*, No. 4:16-CV-309 RLW, 2017 U.S. Dist. LEXIS 31992, at *3 (E.D. Mo. Mar. 7, 2017). The *Screen Extras Guild* preemption doctrine is a brand new preemption doctrine that diverts wildly from established and consistent preemption precedent, as the dissenting judges in the case acknowledged. 51 Cal. 3d at 1033.

The Supreme Court in *Brown*, which is cited by Appellees and the *Screen Extras Guild* majority as the basis for their novel substantive preemption doctrine, applied the same conflict preemption analysis that every other conflict preemption case under federal and Nevada law has previously, and after that case. *Brown*, 468 U.S. at 501. That is, "in the absence of…express [preemption] language or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law." *Brown*, 468 U.S. at 501. An "actual conflict between state and federal law exists when 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id. citing Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Under Nevada's binding preemption precedent, which cites to mandatory Supreme Court preemption precedent, "*[w]hen a law does not state explicit intent to preempt state law*, preemption may be implied under the doctrines of field preemption or conflict preemption." *Renfroe v. Lakeview Loan Servicing, LLC*, 398 P.3d 904, 906 (Nev. 2017)

(emphasis added). "Conflict preemption applies *when a direct conflict exists between federal and state law*." *Id.* (emphasis added) *citing Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). This court has explained that:

> Conflict preemption analysis *examines the federal statute* as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, *in light of the federal statute's purpose* and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives.

*Id.* (emphasis added) *quoting Nanopierce*, 123 Nev. at 371-72, 168 P.3d at 80; *see also Munoz v. Branch Banking & Tr. Co., Inc.*, 348 P.3d 689, 692-93 (2015).

To conclude that Nevada's wrongful termination law is preempted by the LMRDA pursuant to conflict preemption analysis, potentially invalidating thousands of Nevada union employees' contracts, Appellees must identify an actual, direct conflict between the LMRDA statutes and Nevada's wrongful termination law permitting employers and employees to enter into for-cause contracts that would either: (1) make compliance with both laws impossible; or (2) undermine the objectives of Congress in passing specific LMRDA statutes. *Id.* That is, the state law must stand as an obstacle to the overall objective of Congress in passing a specific LMRDA statute based on the conduct the federal statute regulates, and

how it is enforced. *Id.* It is for this reason that every single federal conflict preemption case expressly cites the specific state and federal law being analyzed, notes the conduct the laws regulate and how the laws are enforced, and then analyzes the laws for a potential conflict by discussing the specific objectives of the federal statutes. *Paul*, 373 U.S. at 138; *Hines*, 312 U.S. at 60.

### B. Appellees Do Not Identify Any Actual, Direct Conflict Between The LMRDA And Nevada's Wrongful Termination Law.

At no point in Appellees answering brief do they attempt to identify an actual, direct conflict between Nevada wrongful termination law and the LMRDA. *See* Appellees' Answering Brief, at 41-49. Instead of attempting the applicable conflict preemption analysis, Appellees argue as if Nevada and federal conflict preemption precedent does not exist, and under the presumption that *Screen Extras Guild* is binding precedent.

#### *1. Appellants Do Not Dispute That The Screen Extras Guild Majority Identified An Abstract And Indefinite Conflict When Crafting Its Novel LMRDA Preemption Doctrine.*

Under the section supposedly identifying the alleged "Conflict Between the LMRDA and Clarke's Claims," Appellees quite simply fail to identify the requisite actual, direct conflict between Nevada wrongful

termination law and the LMRDA, as required by Nevada and federal preemption precedent. *Renfroe*, 398 P.3d at 906. Instead, Appellees argue that because the *Screen Extras Guild* majority identified a conflict, this Court should ignore the requisite conflict preemption analysis all together. *See* Appellees Answering Brief, at 41.

Appellees assert that Appellant "appears to argue none of the cases discussed by *Screen Extras Guild* supports the existence of conflict preemption." *Id.* at 41. By misrepresenting Appellant's argument, Appellees then proceed to argue that the federal cases cited by the *Screen Extras Guild* majority support the existence of conflict preemption because the *Screen Extras Guild* majority said so. *Id.* at 41-43. However, it cannot be disputed that the two federal LMRDA cases cited by Appellees and the *Screen Extras Guild* majority, *Finnegan* and *Lynn*, were not preemption cases, did not identify an actual, direct conflict between state law and the LMRDA, and did not hold Congress intended to preempt state law with the LMRDA. *Id.*

Appellant is not disputing that the *Screen Extras Guild* majority used two non-preemption cases to craft its novel LMRDA preemption doctrine. Appellant is not disputing that the *Screen Extras Guild*

majority identified an abstract and indefinite conflict between state and federal law that is precluded by Nevada and Supreme Court conflict preemption precedent. *Id.* Appellant is arguing that under existing Nevada and federal conflict preemption precedent, Appellees must identify an actual, direct conflict between the operation of state and federal law at issue in this case before preemption can be found. *Paul*, 373 U.S. at 138; *Hines*, 312 U.S. at 60. *Renfroe*, 398 P.3d at 906; *Boyle*, 487 U.S. at 504; *Nanopierce*, 123 Nev. at 371-72; *Munoz*, 348 P.3d at 692-93. Appellees simply fail to identify such a conflict, and for that reason, conflict preemption cannot apply. *Id.*

### *2. The Trustees Having Authority To Terminate Appellant's Employment Is Not Relevant To Finding An Actual, Direct Conflict Between The LMRDA And Nevada Wrongful Termination Law.*

Appellees next argue, under the "conflict" section of their brief, that "even assuming conflict preemption applies to the LMRDA, unlike in *Screen Extras Guild* there is no conflict between the LMRDA and *his* state claims." *See* Appellees Answering Brief, at 43. The issue of whether the trustees had authority to terminate Appellant's employment is a factual issue that is irrelevant to the conflict preemption analysis, and

whether an actual, direct conflict between the state and federal law exists.

What is relevant, however, is the fact that the supposed conflict identified by the *Screen Extras Guild* majority was not an actual, direct conflict between state and federal law. *Id.* at 44. Appellees attempt to conflate the legal issue of identifying of an actual, direct conflict between state and federal law as required by Nevada preemption precedent, and the factual issue of whether the "abstract and indefinite" potential conflict identified by the *Screen Extras Guild* majority would apply to this case, which it would not. Again, under Nevada and Supreme Court binding precedent an actual, direct conflict between the operation and enforcement of the state and federal law at issue must first be identified before preemption can be found. *Paul*, 373 U.S. at 138; *Hines*, 312 U.S. at 60. *Renfroe*, 398 P.3d at 906; *Boyle*, 487 U.S. at 504; *Nanopierce*, 123 Nev. at 371-72.

The supposed evidence of Appellant's hostility towards the trusteeship does not establish the requisite actual, direct conflict between state and federal law that is necessary for finding conflict preemption. *Id.* The conflict identified by the *Screen Extras Guild*

majority is not sufficient to find conflict preemption under Nevada and Supreme Court conflict preemption precedent because that case did not identify an actual, direct conflict between the enforcement of the state and federal law. *Id.* Instead, the *Screen Extras Guild* majority identified the potential for an abstract and indefinite conflict, and then crafted an entirely new preemption doctrine to fit its own analysis, which it identified as "substantive preemption." *Screen Extras Guild*, 51 Cal. 3d at 1023. "Substantive preemption" is an invention of the California Supreme Court, and is inconsistent with Nevada and Supreme Court conflict preemption precedent.

Appellees also misrepresent the notion that there is a "consensus of courts" applying the *Screen Extras Guild* "substantive preemption" doctrine invented by the California Supreme Court pursuant to *Finnegan. See* Appellees' Answering Brief, at 27. In *Ardingo v. Local 951*, the Sixth Circuit Court, which is the only federal circuit court to opine on this issue, held that "the savings clause makes it clear that the LMRDA does not occupy the field of regulation with respect to the relationships between union leaders and subordinates so thoroughly that union employees cannot enter into and enforce just-cause employment

contracts under state law" when rejecting the argument that *Finnegan* stood for the proposition that an union employee's breach of just cause contract claim was preempted by the LMRDA. 333 F. App'x 929, 934 (6th Cir. 2009); *Simo v. Union of Needletrades*, 322 F.3d 602, 612 (9th Cir. 2003); *Brookens v. Binion*, No. 99-7030, 2000 U.S. App. LEXIS 2055, at *7 (D.C. Cir. Jan. 28, 2000) (holding that the plaintiff's state breach of contract claim was not preempted by the LMRDA citing to § 523); *Davis v. United Auto.*, No. 1:03CV1311, 2003 U.S. Dist. LEXIS 28190, at *26 (N.D. Ohio Dec. 31, 2003) (state wrongful discharge claim not preempted by the LMRDA citing § 523); *Casumpang v. ILWU, Local 142*, 94 Haw. 330, 340, 13 P.3d 1235, 1245 (2000) (declining to apply *Screen Extras Guild*); *Int'l UNION, UNITED Auto. v. RUSSELL*, 356 U.S. 634, 646 (1958) (Supreme Court concluded "that an employee's right to recover, in the state courts, *all* damages caused him by" a union was not preempted by the LMRDA); *Shuck*, No. 4:16-CV-309 RLW, 2017 U.S. Dist. LEXIS 31992, at *3 (expressly rejecting *Screen Extras Guild*); *Lyons v. Teamsters Local Union No. 961*, 903 P.2d 1214, 1220 (Colo. App. 1995) (refusing to adopt *Screen Extras Guild* despite discussing its holding).

### *3. Whether California's Substantive Preemption Doctrine Applies To Appointed Trustees Is Irrelevant To Whether An Actual, Direct Conflict Between The LMRDA And Nevada Wrongful Termination Law Exists.*

Appellees next argue under the "conflict" section that "The Rationale of *Screen Extras Guild* Applies to Appointed Trustees." *See* Appellees Answering Brief, at 45. Again, Appellees disregard Nevada and Supreme Court conflict preemption precedent, and apply the substantive preemption doctrine to the facts of this case without identifying an actual, direct conflict between the LMRDA and Nevada's wrongful termination law. *Paul*, 373 U.S. at 138; *Hines*, 312 U.S. at 60. *Renfroe*, 398 P.3d at 906; *Boyle*, 487 U.S. at 504; *Nanopierce*, 123 Nev. at 371-72.

### *4. Whether Appellant Was A Policy Making Employee Is Irrelevant To Whether An Actual, Direct Conflict Between The LMRDA And Nevada Wrongful Termination Law Exists.*

Finally, under Appellees' "conflict' section they argue that Appellant was a policy making employee. Again, the factual issue of Appellant being a policy making employee under California's novel substantive preemption doctrine is irrelevant to whether there is an actual, direct conflict between the LMRDA and Nevada's wrongful termination law. *Paul*, 373 U.S. at 138; *Hines*, 312 U.S. at 60. *Renfroe*, 398 P.3d at 906; *Boyle*, 487 U.S. at 504; *Nanopierce*, 123 Nev. at 371-72,

168 P.3d at 80; *Munoz*, 131 Nev., Adv. Op. 23, 348 P.3d at 692-93. Appellees simply failed to identify an actual, direct conflict between the state and federal law in this case. As such, conflict preemption should be rejected in this case.

### C. The LMRDA Does Not Protect Or Establish A Right Of Union Leaders To Select Their Administrators.

Appellees argue, pursuant to *Finnegan*, that the LMRDA protects the right of union leaders to select their administrations. *See* Appellees Answering Brief, at 28-30. However, Appellees do not cite to any language in the LMRDA, nor any Supreme Court case that actually suggests that the LMRDA established a right of union officials to select administrations. *Id.*

Appellees note that the LMRDA "was the product of congressional concern with widespread abuses of power *by union leadership*." *See* Appellees' Opening Brief, at 29 (emphasis added) *quoting Finnegan*, 456 U.S. at 436; *see* 29 U.S.C. § 401. "The statute, among other things, establishes a bill of rights for union members, *see* 29 U.S.C. §§ 411–15 ("Title I"); imposes reporting requirements on unions, *see* 29 U.S.C. §§ 431–41 ("Title II"); regulates the imposition of trusteeships over local unions, *see* 29 U.S.C. §§ 461–66 ("Title III"); regulates union officer

elections, *see* 29 U.S.C. §§ 481–83 ("Title IV"); and establishes fiduciary duties and bonding requirements for union officers, and bars individuals from holding office if they have committed enumerated crimes, *see* 29 U.S.C. §§ 501–04 ("Title V")." *Id.* None of these LMRDA Titles, or related statutes, creates or enforces any right of a union or elected union official to terminate union employees or select their administrations. These statutes also do not preclude unions or union officials from entering into enforceable for-cause employment contracts with union employees under state law. *Id.*

In *Finnegan*, the Court held that the union employee did not have an LMRDA cause of action because "in enacting…the [LMRDA], Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff." *See* Appellees' Answering Brief, at 29-30 *citing* *Finnegan*, 456 U.S. at 436. The LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Id.* "[T]he Court noted that it was 'virtually inconceivable that Congress would have prohibited the longstanding practice of union

patronage without any discussion in the legislative history of the [LMRDA]." *Id.*

> [T]he [LMRDA's] overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. Far from being inconsistent with this purpose, *the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.*

*Id.*

"[N]othing in the [LMRDA] evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies." *Id.* The absence of Congressional intent to alter, restrict, or regulate a union official's ability to terminate employees is not the same thing as Congressional intent to grant union officials an unfettered right to terminate employees at-will, or preclude unions from entering into enforceable for-cause contracts with their employees under state law. If Congress did not intend to alter the union-union employee relationship, it cannot be said that the LMRDA establishes a right of union officials to terminate employees. *Id.* An act does not establish rights where the plain

language and Congressional intent behind the act does not so indicate such intent. *Finnegan*, 456 U.S. at 436.

### D. Appellees Request That This Court Adopt California's Substantive Preemption Doctrine That Is Inconsistent With Nevada's Existing Conflict Preemption Precedent.

In arguing that this Court should apply California's substantive preemption doctrine, Appellees' assert that because Nevada's wrongful termination law supposedly could potentially conflict with the general Congressional purpose of entire LMRDA, not the purpose behind one of the LMRDA's statutes, this Court should find implied conflict preemption. *See* Appellees' Answering Brief, at 41-49. Appellees request this Court ignore its own binding precedent on conflict preemption, the Supreme Court's binding precedent on conflict preemption, the LMRDA's express preemption language, and the specific statutory provisions of the LMRDA to find conflict preemption without analyzing and identifying an actual, direct conflict between the enforcement of the state and federal laws at issue in this case.

In other words, Appellees ask this Court to find conflict preemption without an actual, direct conflict between the LMRDA and Nevada's wrongful termination law. Under Nevada and Supreme Court conflict

preemption precedent, finding conflict preemption without identifying an actual, direct conflict is not permissible. *Renfroe*, 398 P.3d at 906; *Nanopierce*, 123 Nev. at 371-72, 168 P.3d at 80; *see also Munoz*, 131 Nev., Adv. Op. 23, 348 P.3d at 692-93; *Paul*, 373 U.S. at 142-143; *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Here, the state law at issue is Nevada's law granting employers the right to enter into enforceable employment contracts with employees "that employment is to be for an indefinite term and may be terminated only for cause or only in accordance with established policies or procedures." *D'Angelo v. Gardner*, 107 Nev. 704, 712 (1991). The law Appellees argue is preempted is the right of a union, acting as an employer, to enter into employment contracts with employees under Nevada law. The federal act at issue is the LMRDA, which has forty-three separate statutory provisions, including a declaration of Congressional purpose. *See* 29 U.S.C. § 401; *see also* Appellees' Answering Brief, at 29.

From this express Congressional purpose section, this Court should be confident in concluding that the "democracy concerns" Congress was addressing with the LMRDA was unethical conduct by union officials that had resulted in "instances of breach of trust, corruption, disregard

of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives." *Id.* The notion that Congress intended to preclude unions from giving their own employees for-cause contracts is absurd on its face, given the fact that this statute makes clear that protecting "the rights and interests of employees" is an actual stated purpose of the LMRDA. *Id.*

Congress simply was not concerned with creating laws that would perpetuate union employment, or alter the union-union employee relationship. *Finnegan*, 456 U.S. at 436. For this reason, union employees typically have no actionable claims pursuant to the LMRDA unless they: (1) are union members; and (2) their LMRDA claim implicates one of democracy concerns Congress was actually concerned about, such as protecting union member rights to free speech. *Id. see also Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 354–55 (1989). Indeed, Appellees acknowledge that "that Title I '*does not restrict* the freedom of

an elected union leader to choose a staff whose views are compatible with his own.'" *See* Appellees' Answering Brief, at 29. The LMRDA also does not restrict the states from creating and enforcing state laws that do restrict the freedom of elected union officials to choose their staff, or otherwise impose responsibilities on unions and union officials, such as honoring for-cause employment contracts negotiated under state law. *Id. see also* 29 U.S.C. § 523.

Appellees ignore the fact that all Nevada and Supreme Court precedent addressing conflict preemption when state law stands as an obstacle to the achieving Congressional intent did so with express reference to specific functions of the state and federal laws at issue, not general overarching purposes of Congress to pass an act. In *Paul*, the Supreme Court analyzed both types of conflict preemption by analyzing the specific state and federal laws that established "minimum standards of the picking, processing, and transportation of" avocados. 373 U.S. at 145. The Court noted that the federal avocado oil content standard was lower than the California standard, and then rejected conflict preemption because the Congressional purpose of establishing minimum standards

for agricultural goods included no indication of a Congressional purpose to prevent states from adopting more stringent standards. *Id.*

Similarly, in *Hines*, the Court was analyzing Pennsylvania's "Alien Registration Act" which imposed immigrant reporting and identification requirements that deviated from the specific registration requirements of federal act. 312 U.S. at 59. "No requirement that aliens carry a registration card to be exhibited to police or others is embodied in the law, and only the wilful failure to register is made a criminal offense; punishment is fixed at a fine of not more than $ 1000, imprisonment for not more than 6 months, or both." *Id.* Because the state law frustrated the objectives of the federal law, it was found to conflict with the purpose of the federal law. *id.* "[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Id.* at 66-67.

A necessary predicate to a finding of conflict preemption is that the state and federal law regulate the same or related conduct, and the

enforcement of the state law actually/directly conflicts with the federal law either because compliance with both laws is impossible, or the state law regulates the conduct in a way that frustrates the purpose of the federal law. *Renfroe*, 398 P.3d at 906; *Nanopierce*, 123 Nev. at 371-72, 168 P.3d at 80; *see also Munoz*, 131 Nev., Adv. Op. 23, 348 P.3d at 692-93; *Paul*, 373 U.S. at 142-143; *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Here, the state and federal laws do not regulate the same or related conduct. The two laws are not related, compliance with both laws is not impossible, and the state law does not regulate conduct in a manner that frustrates the purpose of Congress because it is undisputed that "Congress simply was not concerned with creating laws that would perpetuate union employment." *Id.* at 30. State law cannot conflict with the purpose of Congress when Congress was not concerned with the regulating the conduct the state law regulates. What Congress was concerned with in passing the LMRDA is the courts finding preemption when Congress did not intend preemption to flow from the LMRDA. *De Veau*, 363 U.S. at 157; *Brown*, 468 U.S. at 501; *see also* 29 U.S.C. §§ 413, 466, 483, 501, 523, 524, 524a.

As the dissenting judges in *Screen Extras Guild* correctly noted, the democracy concerns Congress was addressing were making union officers accountable to the membership, not granting union officers carte blanc authority to terminate employees and breach contracts. *Screen Extras Guild*, 51 Cal. 3d at 1050 (Justice Arabian dissenting). Further, enforcing Nevada employment laws simply does not pose a conflict with the democracy concerns of the LMRDA because, as Appellees have now conceded, Nevada wrongful termination law would not protect a union employee who is thwarting an elected union official's policies. *See* Appellees' Answering Brief, at 44.

Appellant argued in his opening brief that the "the conflict identified in *Screen Extras Guild* was too 'abstract and indefinite' to support preemption, based on the mere possibility policymaking and/or confidential staff could thwart a union's policies" at some unidentified point in the future. *Id. see also* Appellant's Opening Brief, at 48-50. Appellees respond that "Such a conflict was not speculative *here*" because "Clarke was 'critical' of the trusteeship and questioned its legitimacy; sent text messages to other managers displaying hostility to the trusteeship, and then, to hide his hostility, urged them to delete the

messages; and last, shortly after his termination, helped prepare a nationwide press release condemning the trusteeship." *Id.*

The problem with Appellees argument in this regard is the fact that Appellees did not terminate Appellant's employment for being critical or hostile to the trusteeship because they did not know about those text messages until discovery in this case. *Id.* In fact, Appellant never had an opportunity to work under the trusteeship at all. *See* A-Appdx. at 9-10. Had Appellees simply waited for Appellants to actually try and thwart the objectives of the trusteeship, there would have been a for-cause basis for terminating Appellant's employment with Local 1107, which Appellees now concede is the case. *See* Appellees Answering Brief, at 44. In so conceding, Appellees have acknowledged that enforcing Nevada wrongful termination law would not prevent an elected union official from terminating an employee for thwarting the elected official's policies because such a termination would be for-cause. *Id.*

Because Nevada wrongful termination law does not prevent an elected union official from terminating employees thwarting their policies, enforcing Appellant's for-cause employment contract cannot conflict with the LMRDA. That is, enforcement of the contract does not

actually impede or obstruct a union's right to terminate employees for not doing their job, undermining their boss, or refusing to implement the union's policies because such conduct is a sufficient for cause basis for termination. As soon as a union employer becomes aware of an employee thwarting the administration's policies, termination for-cause can occur under Nevada law.

Appellees' argument that "[t]he likelihood that Clarke would have undermined the trustees was palpable," demonstrates the weakness in their argument on appeal. *See* Appellees Answering Brief, at 44. Appellees are relegated to arguing what Appellant likely would have done because at the time Appellant was terminated he had not done anything to undermine the trusteeship. *Id.* Appellant was terminated without cause in violation of the contract. For that reason, enforcement of Nevada wrongful termination law does not act as an obstacle to the achievement of the LMRDA's Congressional purpose.

## III. APPELLEES RAISE MATTERS IN RESPONSE THAT ARE NOT ISSUES ON APPEAL.

Appellees focus a significant portion of their brief arguing that they cannot be held liable for Appellant's claims because SEIU had no contractual or employment relationship with Appellant. *See* Appellees'

Answering Brief, at 16-23. However, Appellant's theory of liability concerning SEIU for these claims was rooted in the alter-ego theory of liability, which the District Court clearly recognized and addressed. *See* A-Appdx. at 276:18-21. Appellees are, essentially, requesting in their Response that this Court issue rulings on appeal on matters not raised, nor at issue. This Court should not consider Appellees' arguments on the merits of Appellant's claims against SEIU because the District Court did not rule on the merits of the claims. Rather, the District Court concluded that Appellant did not discovery any evidence that "the contract was assumed" by SEIU, and failed prove his alter-ego theory of liability on the evidence. *See* A-Appdx. at 111-115, 281-282. It is the District Court's ruling on the alter-ego theory that Appellant has appealed, and this Court should not consider any other issues raised by Appellees that are not responsive to Appellant's opening brief.

## IV. APPELLANT ESTABLISHED THE ALTER-EGO CLAIM.

### A. Nevada Law Does Not Require An Alter-Ego Claim To Be Expressly Plead In A Complaint.

Under Nevada law, an alter-ego argument/claim is not required to expressly plead as a separate "alter-ego claim," nor does Nevada law

require a party to sue a parent and subsidiary in the same action. *Callie v. Bowling*, 123 Nev. 181, 185-86 (2007). A party may sue an alter-ego in a separate independent action "against the alleged alter ego with the requisite notice, service of process, and other attributes of due process" post-judgment entered against the subsidiary. *Id.* That is, after judgment is entered against the subsidiary, a party may then initiate a collection action against the alter-ego in a separate, post-judgment case served on the alter-ego. *Id.*

Nevada also "allows for a reverse piercing of the corporate veil in addition to the traditional piercing of the corporate veil," which applies the same alter-ego test. *Gardner v. R&O Constr. Co.*, 443 P.3d 549 (Nev. 2019) *citing LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 904 (2000). "This test does not have any requirement that a reverse piercing claim can only be brought post-judgment. Additionally, this court has allowed parties to plead traditional veil piercing claims in the initial complaint, prior to the entry of judgment." *Id.*

Appellees' open their Response to Appellant's appeal by raising an argument that the District Court rejected when addressing the merits of Appellant's alter-ego argument, to wit: that Appellant waived the alter-

ego claim for failure to plead a specific claim in the Complaint for the alter-ego theory of liability. *See* Appellees' Answering Brief, at 49-51. However, the District Court did not hold that Appellant's allegations in the Complaint did not sufficiently plead the elements of alter-ego, and Appellees "couldn't find a Nevada case" that requires the words "alter-ego" to be plead as a separate claim in a complaint an because alter-ego theory of liability may be plead in the complaint if sufficient facts to meet the test are plead, or may be brought post-judgment in a separate action against the alleged alter-ego. *Id.* What is required by Nevada law are "requisite notice, service of process, and other attributes of due process." *Callie*, 123 Nev. at 185-86.

Here, Appellant alleged that SEIU imposed a trusteeship over Local 1107 and appointed the Trustees to control Local 1107, that SEIU and Local 1107 shared officers, Luisa Blue, and alleged that it was the SEIU International trustees who committed all the unlawful acts, making adherence to the fiction of separateness unjust. *See* A-Appdx. at 334-39. Appellee SEIU was provided notice of the Complaint and that Appellant was advancing an alter-ego theory of liability, was served with

the Complaint, and received due process as they argued against the alter-ego theory of liability throughout the case.

Ultimately, the District Court rejected Appellees' claims of waiver of the alter-ego claim, instead addressing the claim on the merits. *See* A-Appdx. at 277-281. Specifically, the Court asked about the evidence presented for alter-ego and whether there was any evidence that "the International had said you can't fire them, you have to rehire them, the Local wouldn't have had to do it. They have no control." *Id.* at 280. The Court then noted that:

> THE COURT: Well, it would be different if they had said we're here.
> MR. COHEN: Fire them.
> THE COURT: We would like to get rid of a bunch of employees, is that okay with you, International?
> MR. COHEN: That's right.
> THE COURT: And the International says, sure fine. That might be different –
> MR. COHEN: That might be.

*Id.* at 281-282.

In the Order, which Appellees prepared, it did not state that the Court found Appellees' alter-ego argument to have been waived for failure to plead the words "alter-ego" specifically, as an independent claim. *See* A-Appdx. at 111-115. The Order asserts that "Plaintiffs have

failed to establish any basis for the claims against SEIU or Henry in the FAC." *Id.* at 115. The basis referred to in the Order is, of course, the District Court's addressing of the alter-ego liability theory on the merits and evidence. *Id. see also* A-Appdx. at 281-282. Appellant's alter-ego theory was not waived.

### B. Appellees' Waiver Argument Is Itself Waived For Appellees' Failure To Appeal The District Court's Decision On The Merits Of The Alter-Ego Claim.

Arguments not raised in a direct appeal are considered waived. *See Bank of Am., N.A. v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 427 P.3d 113, 117 n.1 (Nev. 2018); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (arguments not raised on appeal are deemed waived).

Here, Appellees were aware of their waiver argument, raised the issue before the district court, and knew that the District Court had rejected the argument instead opting to address Appellant's alter-ego theory of liability on the merits. *See* A-Appdx. at 115, 281-282. Appellees could have appealed the District Court's decision to address the merits of the alter-ego claim based on their objection that Appellant waived the theory by failing to plead it in the Complaint. However, Appellees failed

to timely appeal the issue. As such, this Court must not address their waiver argument in this appeal. The issue on appeal this Court must address the issue of whether there was sufficient evidence presented to support the alter-ego claim.

### C. There Was Sufficient Evidence Presented To Establish Every Element Of Alter-Ego Liability.

Appellees next mischaracterize Appellant's arguments and choose to argue the general federal law surrounding the imposition of union trusteeships, rather than addressing the specific ruling of the District Court that Appellant failed to establish alter-ego liability because of lack of evidence that SEIU International directed the Local 1107 trustees to make staffing decisions. *See* Appellees' Answering Brief, at 52-55. Again, Appellees raise arguments that were not addressed by the District Court when rejecting Appellant's alter-ego claim, and Appellees failed to appeal the District Court's decision to address the merits of the alter-ego theory based on the evidence. As such, their objection based on arguments not ruled on by the District Court are waived. *Bank of Am., N.A.*, 427 P.3d at 117 n.1; *Powell*, 127 Nev. at 161 n.3; *Edwards*, 122 Nev. at 330 n.38. In any event, the arguments Appellees do raise, which are not responsive to Appellant's arguments on appeal, lack merit.

### *1. An Alter-Ego Theory Is Always A Fact Specific Analysis Regardless Of Whether The Theory Is Raised In The Context Of A Union Trusteeship.*

Appellees assert that "Clarke contends the first factor is met because SEIU placed Local 1107 in trusteeship, suspended its bylaws, and appointed the Trustees." *See* Appellees' Answering Brief, at 52. However, this is not what Appellant argued on appeal. Rather, Appellant argued that he established all three elements of alter-ego liability in this case because "(1) Local 1107 was being influenced and governed by SEIU because the Trustees actions were directly supervised and directed by the SEIU President; (2) there was unity of interest and ownership of Local 1107 by SEIU during the trusteeship, as they were governed by the same constitution, controlled and directed by SEIU International and its employees making one essentially inseparable from the other; and (3) The facts here are such that adherence to the fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice because it would impose liability on Local 1107' membership for actions of SEIU International." *See* Appellant's Opening Brief, at 61-62.

Appellant's argument on appeal conducted the fact and evidence specific analysis required any time a Nevada plaintiff raises an alter-ego

theory of liability. *Viega GmbH v. Eighth Jud. Dist. Ct.*, 328 P. 3d 1152, 1162 (Nev. 2014); *Frank McCleary Cattle Company v. Sewell*, 317 P. 2d 957, 959 (Nev. 1957); *Gordon v. Aztec Brewing Company*, 33 Cal.2d 514, 522; 203 P.2d 522, 527; *Callie*, 123 Nev. at 185-86. Appellant did not simply argue that "because SEIU placed Local 1107 in trusteeship, suspended its bylaws, and appointed the Trustees" SEIU was Local 1107's alter-ego. Instead, Appellant focused on the facts, evidence, and specific characteristics of this individual trusteeship, SEIU's governing documents, documents produced in discovery, and the testimony of SEIU employees and officers to establish the requisite control element that the District Court asserted had not been met. *See* Appellant's Opening Brief, at 57-68.

According to Appellees, "Clarke's reliance on these facts reflects a fundamental misconception about the nature of trusteeships. As noted earlier, the Trustees' role was to act on behalf of Local 1107, not SEIU." *See* Appellees' Answering Brief, at 52-53. However, Appellees' entire argument rests on the notion that all union trusteeships and how they operate are the same regardless of the union or specific factual circumstances. *Id.* While Appellees cite to numerous federal cases where,

based on the specific facts of those individual trusteeships, an alter-ego claim was found to fail as a matter of law, Appellant also cited federal and Supreme Court precedent where an alter-ego claim against an international union based on actions by a local affiliate it controlled was, in fact, found to be permissible, including when a local was under trusteeship. *See* Appellant's Opening Brief, at 59-60 *citing International Union of Op. Eng. V. JA Jones Const. Co.*, 240 S.W.2d 49, 54 (Ky. Ct. App. 1951); *Granite Rock v. Intern. Broth. Of Teamsters*, 561 U.S. 287 (2010); *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 837-38 (9th Cir. 1978). SEIU failed to address any of these cases in their response brief, and the failure to address this argument that evaluation of an alter-ego theory, even when made in the context of a union trusteeship, is always a fact specific analysis constitutes a concession that the position has merit. *Kille v. State*, 2019 Nev. App. Unpub. LEXIS 447, *3-4, 2019 WL 1976981; *see also Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036. 1036 (1955).

### *2. The First Element Of Alter-Ego Liability In This Case Was Met Because The SEIU International President, Not The SIEU Trustees, Had Ultimate Control Over Local 1107 And Exerted That Control.*

SEIU argues that the first element of alter-ego liability was not met because the Local 1107 Trustees act on behalf of Local 1107, not SEIU International. *See* Appellees' Answering Brief, at 52. However, Appellants presented clear evidence that the Trustees' was not to act on behalf of Local 1107, but rather, they reported and were supervised and directed by the SEIU International President. *See* Appellant's Opening Brief, at 62. The District Court clearly acknowledged that the language in the SEIU International Constitution was relevant to the alter-ego liability analysis. *Id.* at 62-63, *see also* Appellees' Answering Brief, at 52; *see also* A-Appdx. at 280.

However, according to the District Court, the language in the SEIU Constitution was not enough. *Id.* According to the District Court, there needed to be evidence that SEIU actually exerted that authorized control over Local 1107 during the trusteeship. *Id.* Indeed, the District Court expressly acknowledged, and SEIU's counsel agreed, that if such evidence existed, it would result in a different decision:

> THE COURT: Well, it would be different if they had said we're here.
> MR. COHEN: Fire them.
> THE COURT: We would like to get rid of a bunch of employees, is that okay with you, International?
> MR. COHEN: That's right.
> THE COURT: And the International says, sure fine. That might be different –
> MR. COHEN: That might be.
> THE COURT: -- reporting after the fact.
> MR. COHEN: That might be, but there's no evidence of that, and I'm not even so sure that would be enough because let's just pivot to the – that's the first factor.

*See* A-Appdx. at 281-282.

Appellant has appealed the District Court's conclusion that such evidence of SEIU directing the Trustees to make specific decisions concerning the management of Local 1107 did not exist, because it clearly did exist. *See* Appellant's Opening Brief, at 63-68. There were two separate emails between SEIU International officials discussing the SEIU International President's directives to the Trustees regarding staffing of Local 1107 while under trusteeship, and that requests for replacement staff needed to be directed to the SEIU President. *See* A-Appdx. at 12-13. Those emails discussed an SEIU International trusteeship program to get rid of local staff quickly, and to document staff covered by CBAs to justify later termination. *Id.* There was a suggestion

by SEIU International to the Trustees to use a temp agency to get temporary employees. *Id.*

In addition to this clear evidence of directives from SEIU International to Local 1107, there was testimony presented to the District Court from Barry Roberts, a former SEIU International Senior Organizer who worked on numerous SEIU trusteeships, who stated that "normally under a trusteeship, they normally wipe out the entire staff. They normally take them all out." *See* A-Appdx. at 691. This sworn testimony from a former SEIU International employee provides clear evidentiary context for the statements in the emails between SEIU International and the SEIU International Trustees over Local 1107, showing that there was, indeed, an SEIU International program for trusteeships, which includes wiping out the entire trusteed local union staff to replace them with SEIU International employees. *Id.*

This position is further supported by the fact that after the Trustees implemented the SEIU program to get rid of the local staff quickly, SEIU International facilitated the transfer of its own employees into the director level positions at Local 1107. Specifically, Davere Godfrey, an SEIU International Coordinator, was subsequently transferred to Local

1107 to act as Field Director, a position previously held by Peter Nguyen. *See* A-Appdx. at 12-13, 716. Grace Vergara, also an SEIU International Coordinator, testified that she was transferred to Local 1107 to serve as its Field Director. *Id.* at 770. Several other SEIU International employees were transferred to Local 1107 to serve as lead organizers, positions previously held by Local 1107 staff that were covered by the CBA. *See* A-Appdx. at 706.

This sworn testimony, in concert with the emails, demonstrated that there was an SEIU International trusteeship program to get rid of staff quickly and replace them with SEIU International staff. For this reason, there was clear evidence that SEIU did, in fact, direct and influence Appellant's termination and replacement. Blue's report to SEIU International is significant, as it demonstrates that Blue was reporting her compliance with SEIU's trusteeship policy to the SEIU International President, as the SEIU Constitution required.

Finally, the SEIU International staff that testified under oath at the NLRB proceeding acknowledged that as soon as the SEIU Trustees obtained control over Local 1107, they began implementing "Together We Rise" ("TWR") SEIU International organizing program. *See* A-Appdx. at

783. According to the Trustees, the SEIU International TWR organizing program was started by SEIU International in "preparation for the Janus case." *Id.* The Trustees, however, acknowledged that the "Janus [Supreme Court] decision" did not affect Nevada because it is "a right to work state, and the Janus, you know, as we all know, the Janus case is for the public sector in like California and in closed shop states." *Id.* In *Janus v. AFSCME, Council 31*, the Supreme Court held that it was an unconstitutional violation of employees' First Amendment rights to compel employees to pay union dues to public employee unions that "closed shop" agreements between employers and unions. 138 S. Ct. 2448, 2464 (2018). The *Janus* decision posed a significant negative impact on SEIU International's collection of union dues in closed shop states. *Id.* However, Nevada is not a closed shop, compelled union dues state. *See* A-Appdx. at 783. As such, the *Janus* decision had no impact on Nevada.

This evidence demonstrates that it was SEIU International actually controlling Local 1107's operations, not the Trustees working independently for the benefit of Local 1107. The SEIU International Trustees, following the SEIU International Trusteeship program, got rid of the local staff quickly to replace them with SEIU International

employees in order to implement the TWR organizing program. The Trustees demoted employees covered by a CBA and replaced them with SEIU International employees. The Trustees then, at the direction of SEIU International, immediately began implementing an SEIU International Organizing program designed to respond to a Supreme Court decision that had no effect on Nevada unions or union members. While Appellant maintains that the emails were sufficient to establish the control element of alter-ego liability, there was plenty of other evidence that supported it as well and that evidence was presented to the District Court. *See* A-Appdx. at 392.

### *3. Appellant Established The Second And Third Elements Of Nevada's Alter-Ego Theory Of Liability.*

While not addressed by the District Court, and not discussed in Appellant's opening brief by virtue, it is clear that there was evidence presented to the District Court to establish the second and third elements of the alter-ego theory of liability. Appellees seek to argue that Appellant did not establish alter-ego liability by pretending that Nevada applies a "traditional unity-of-interest factors" test to alter-ego cases. *See* Appellees' Answering Brief, at 55 *citing Truck Ins. Exch. V. Swanson*, 124 Nev. 629, 636 (2008); *Bonanza Hotel Gift Shop v. Bonanza No. 2*, 95 Nev.

463, 466 (1979). However, no such "unity-of-interest factors" test actually exists. Rather, to show unity of interests, a Nevada plaintiff must merely show that the parent not only exercised control over the subsidiary, "[i]t must further be shown that the subsidiary corporation 'is so organized and controlled, and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation.'" *Bonanza*, 95 Nev. at 466.

The unity of interest element of alter-ego liability looks at the structure and operation of the two entities, and a variety of evidence is used to determine whether a subsidiary and a parent are alter-egos. Such traditional evidence includes: (1) evidence that the entities share common officers; (2) mutuality of interests; (3) comingling of funds; (4) co-mingling of property interests; (5) joint or separate bank accounts; (6) separate directors; (7) separate director's meetings; (8) recognition of full corporate formalities observed; (9) "independent federal tax identification number;" (10) "operated under its own bylaws;" (11) was supervised by a licensed Nevada attorney;" (12) "possessed an independent business license;" (13) separate staff; (14) joint operations, etc. *Truck Ins. Exch.*, 124 Nev. at 636; *Bonanza*, 95 Nev. at 467.

Existence of one or two of these circumstances typically will not suffice, but when more are shown, the parent entity is typically found to be the alter-ego of the subsidiary. Here, it is undisputed that Local 1107 and SEIU were governed by the same constitution and bylaws, as Appellees argue that SEIU suspended Local 1107's Constitution and Bylaws upon imposition of the trusteeship. *See* Appellees' Answering Brief, at 8. Local 1107 and SEIU shared two controlling/governing officers: (1) SEIU International Executive Vice President and Local 1107 Trustee, Luisa Blue; and (2) SEIU International President Mary Kay Henry, who supervised and directed Blue's activities as the Trustee. *Id.* at 52 n24; *see also* A-Appdx. at 12-13, 716.

Under the trusteeship, there was a mutuality of interests that were directed by SEIU International while Local 1107 was under trusteeship. Specifically, the SEIU International Trustees gave sworn testimony under oath that almost immediately after imposition of the trusteeship, the SEIU Trustees implemented the SEIU International TWR organizing campaign at Local 1107 in response to *Janus*, a Supreme Court decision that had significant financial impact on SEIU International, but no financial impact on Local 1107 because Nevada is not a closed shop,

compelled union dues state. 138 S. Ct. at 2464; *see also* A-Appdx. at 783. Upon imposition of the trusteeship, the SEIU Trustees over Local 1107 immediately began focusing Local 1107's operations on SEIU International's TWR campaign to help SEIU make up the difference in dues revenue SEIU was set to lose due to the *Janus* decision. *Id.* As such, Local 1107 and SEIU had joint operations, and mutuality of interests.

Local 1107 and SEIU International also had common employees, and specifically, Local 1107's directors and lead organizers during the trusteeship were SEIU International Employees. *See* A-Appdx. at 12-13, 706, 716, 770. As such, Local 1107 and SEIU International also did not have separate directors and staff.

Local 1107 also did not have separate director meetings and corporate formalities were not respected. Again, Local 1107's Trustees were both SEIU International employees, one of them and SEIU International Vice President. Local 1107's Directors during the trusteeship were also, all SEIU International employees, as were the lead organizers. The Local 1107 Trustees were also supervised and directed by the SEIU International President, whom they reported to regarding Local 1107's operations during the trusteeship. As such, there was both

significant control over Local 1107 exerted by SEIU, and a unity of interests,

Finally, recognizing corporate separateness here would sanction injustice, as it would require the members of Local 1107 to pay for the unlawful actions of the SEIU Trustees, whom they did not elect, and whose conduct was not subject to the democratic process. H *Truck Ins. Exch.*, 124 Nev. at 636; *Bonanza*, 95 Nev. at 467. Here, SEIU International imposed the trusteeship over Local 1107, intentionally purged Local 1107's staff despite their valid and binding contracts so they could install its own staff as at Local 1107, and now SEIU argues that Local 1107 and its membership should be responsible for their tortious conduct, and intentional and malicious breach of contracts. *See* Appellees' Answering Brief, at 55-56. According to SEIU, the SIEU Trustees were supposed to be acting for the benefit of Local 1107. However, SEIU fails to explain how, as a union, intentionally breaching employment contracts with their employees was for the benefit of Local 1107. In any event, these issues were not ultimately ruled on by the District Court, and are not at issue in this appeal, because the Court's ruling was focused on the control factor.

## V. THE DISTRICT COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION WHEN IT DENIED APPELLEES' REQUEST FOR ATTORNEY'S FEES.

NRCP 68(a) permits any party, at any time more than 21 days before trial, to "serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions." *See* Nev. R. Civ. P. 68(a). "Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees." *Id.* NRCP 68 permits apportioned offers of judgment to more than one party, and from multiple offerors. *Id.* However, as a condition precedent to making an offer, the attorney/party who makes the offer of judgment, and the attorney/party who accepts the offer must either represent all the parties the offer is made by or to, or be authorized to make/accept the offer of judgment on behalf of all the involved parties. *Id.*

"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." *See* Nev. R.Civ. P. 68(b). An offer of judgment is unapportioned if it made to multiple offerees and fails to apportion the amount that will

be paid be paid to each offeree. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 422, 132 P.3d 1022, 1030 (2006). An offer of judgment is also unapportioned if the offer fails to "indicate how much of the" amount offered will "be paid by the respective defendants." *Parodi v. Budetti*, 115 Nev. 236, 239, 984 P.2d 172, 174 (1999). To be apportioned, in a case involving numerous claims, by multiple plaintiffs asserting numerous theories of liability against multiple defendants, an offer of judgment must be apportioned both in terms of the amounts to be paid to each plaintiff, and the amount each defendant will pay to resolve the claims against it. *Id.*

In *Parodi*, the plaintiff brought breach of contract claims against one group of defendants, Budettis, and slander claims against another, separate defendant, Musico. *Parodi*, 115 Nev. at 239. "Prior to trial, three offers of judgment were served upon Parodi. The first and second were made in 1996 by the Budettis alone. The last was made on March 19, 1997, for the sum of $ 20,000 inclusive of all fees, costs and pre-judgment interest ('97 offer). This final written offer was made by the Budettis and Musico. It did not indicate how much of the $ 20,000 was to be paid by the respective defendants and was therefore unapportioned." *Id.*

The *Parodi* case is very similar to the case at bar. Like in *Parodi*, the Plaintiffs sued one group of Defendants, Appellees SEIU and Local 1107, for breach of contract, and another group of Defendants, Local 1107 and Sharon Kisling, for defamation.[1] *Id.* Like in *Parodi*, less than all of the Defendants, SEIU and Local 1107, made offers of judgment prior to trial. *See* L1107's Ex. A, at 1:20-2:4. The Defendants' offers of judgment to the Plaintiffs states that it is an "offer to allow judgment to be taken against them to resolve all claims against all of the Defendants and apportioned between Plaintiffs as follows: in favor of Plaintiff Dana Gentry for Thirty Thousand and 00/100 Dollars ($30,000.00), including all accrued interest, costs, attorney's fees, and any other sums that could be claimed by Plaintiff Dana Gentry against Defendants in the above-captioned action; and in favor of Plaintiff Robert Clarke for Thirty Thousand and 00/100 Dollars ($30,000.00), including all accrued interest, costs, attorney's fees, and any other sums that could be claimed by

[1] Because the present case involves two related, but not fully consolidated appeals by the parties where there would be Cross-Appellants and Cross-Appellees, for this section: (1) "Appellees" will refer to SEIU and Local 1107; (2) "Plaintiffs" will refer to the Dana Gentry and Robert Clark, the Appellees in the attorneys' fees appeal; and (3) "Defendants" will refer to SEIU, Local 1107, and Sharon Kisling collectively.

Plaintiff Robert Clark against Defendants in the above-captioned action. This apportioned offer of judgment is conditioned upon the acceptance by all Plaintiffs against the offerors pursuant to NRCP 68(b)." *See* Appdx. Fees at 1-2. However, like in *Parodi*, the offer of judgment made by the SEIU and Local 1107 Defendants did not indicate how much of the $30,000.00 that each Plaintiff was supposed to receive would be paid by the respective Defendants, and importantly, failed to include Defendant Sharon Kisling, a party neither entity represented. *Id.* The offer was, therefore, unapportioned. *Id.*

Appellees' offer of judgment did not clearly indicate that it would, or could resolve all the claims in the action, as required by NRCP 68(a), because the parties who submitted it did not represent Defendant Sharon Kisling. The offer of judgment referred to Appellees, but sought to "resolve all claims against all of the Defendants." *Id.* However, the offer of judgment did not indicate that Appellees sought and obtained authority to settle Plaintiffs' claims against Defendant Sharon Kisling. *Id.* This is even more problematic, given the fact that the offer did not indicate what Defendants would pay what amount to what Plaintiff. For

this reason, the District Court believed that "there was no way [Plaintiffs] could accept his offer." *See* Appdx. Fees at 141.

"[T]he decision to award attorney fees rests within the district court's discretion…." *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 554 (Nev.App., 2018). The standard at issue in this appeal is, therefore, the extremely difficult abuse of discretion standard. *See* Appellees' Answering Brief, at 58; *see also Albios v. Horizon Comms., Inc.*, 122 Nev. 409, 417 (2006); *Wyeth v. Rowatt*, 126 Nev. 446, 464 (2010) (jury instructions); *Ringle v. Bruton*, 120 Nev. 82, 94 (2004) (new trial motions); *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423 (2000) (attorney fees); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352 (1998) (costs).

In considering whether to award attorney fees for either a plaintiff or defendant the court must consider the following four *Beattie* factors:

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

*Id., quoting Beattie v. Thomas,* 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

When evaluating the factors, "no one factor under *Beattie* is determinative." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n. 16, 955 P.2d 661, 673 n. 16 (1998). Rather, a district court is charged with considering and balancing the factors in determining the reasonableness of an attorney fees award. *Id.* "Although explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion… If the record clearly reflects that the district court properly considered the Beattie factors." *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) *citing Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994). However, the Nevada Supreme Court has noted that explicit findings are preferred. *Id. see also Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 283 P.3d 250, 258 (2012). "[T]he abuse of discretion standard is generally deferential," but a "reviewing court will not defer to a district court decision that is based on legal error." *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330-31 (2006); *see also Frazier v. Drake*, 2015 Nev. App. LEXIS 12, *4, 131 Nev. 632, 637; *see also AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589 (2010). This Court has "consistently recognized that 'the decision to award attorney fees is

within the [district court's] sound discretion…and will not be overturned absent a 'manifest abuse of discretion.'" *Id.*

Appellees misrepresent to this Court that the District Court denied their Motion for Attorneys' Fees "Because the Offers of Judgment Were Jointly Made." *See* Appdx. Fees at 58. However, it was not the fact that Appellees' made a global offer of judgment that resulted in the denial of their Motion for Attorneys' Fees. Rather, the fact that the offer "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." *See* Appdx. Fees at 139:1-18, 141:13-17. Nowhere in Appellees' brief do they mention that it was the fact that Appellees' counsel did not represent all Defendants that was the basis of the District Court's decision. *Id.*

Here, the District Court exercised its discretion to deny the Motion for Attorneys' Fees based on the first and third *Beattie* factors, which Appellees barely discuss. *See* Appellees' Answering Brief, at 60; *see also* Appdx. Fees at 139. Specifically, the District Court found that Appellees' offer of judgment was reasonable in time and amount, and found the fees

sought were reasonable. *See* Appdx. Fees at 140-141. However, the District Court also found that Plaintiffs' claims were brought in good faith, and that their rejection of the offer was not grossly unreasonable or in bad faith, because it sought a global settlement for all claims, against all Defendants, when Appellees did not represent Sharon Kisling. *Id.* For this reason, the District Court reasonably exercised its discretion to deny the Motion for Attorneys' Fees.

For Appellees to succeed on this appellate issue, they needed to identify a manifest abuse of discretion. *Id.* In light of the broad discretion left to the district court in this area, this Court must conclude that the district court's decision to deny attorney fees pursuant to the *Beattie* factors was not a manifest abuse of its discretion. Rather, under the circumstances, the denial of attorneys' fees was entirely reasonable because "there was no way [Plaintiffs] could accept [the] offer" because it sought to settle claims on behalf of a party that they did not represent. *See* Appdx. Fees at 141.

## CONCLUSION

For the reasons set forth above, Appellant requests that this Court GRANT his appeal, and reverse the District Court's Order granting

Respondents summary judgment. Appellant further requests that this Court reject Appellees' appeal of the District Court Order denying their request for attorneys' fees.

Respectfully submitted,

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## CERTIFICATE PURSUANT TO NRAP 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

> [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook; or
>
> [ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

I further certify that this response brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

> [X] Proportionately spaced, has a typeface of 14 points or more, and contains 13,998 words, less than the 14,000 word limit; or
>
> [ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or
>
> [ ] Does not exceed 30 pages.

Finally, I hereby certify that I have read this response brief, and to the best of my knowledge, information, and belief, it is not frivolous or

interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada.

Dated this **6th** day of **November 2020**.

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 6th day of November, 2020. Electronic service of the foregoing document was made in accordance with the Master Service List as follows:

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