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

SERVICE EMPLOYEES	)	No. 81166	Electronically Filed
INTERNATIONAL UNION	)		Nov 06 2020 08:30 p.m.
("SEIU"); SEIU LOCAL 1107 AKA	)		Elizabeth A. Brown
SEIU NEVADA;	)		Clerk of Supreme Court
<i>Appellants,</i>	)		
	)		
Vs.	)		
	)		
ROBERT CLARK, DANA	)		
GENTRY,	)		
<i>Respondents.</i>	)		
	)		
	)		

**Appendix Volume I**

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Attorneys for Petitioner

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

CASE NO.: A-17-764942-C

DEPT. No. XXVI

**OFFER OF JUDGMENT**

SERVICE EMPLOYEES

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

Defendants.

Pursuant to NRCP 68, Defendants Nevada Service Employees Union, misnamed  
as Clark Count Public Employees Association Union aka SEIU Local 1107, and Service  
Employees International Union, jointly, hereby offer to allow judgment to be taken  
against them to resolve all claims against all of the Defendants 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

1 Dollars (\$30,000.00), including all accrued interest, costs, attorney's fees, and any other  
2 sums that could be claimed by Plaintiff Robert Clark against Defendants in the above-  
3 captioned action. This apportioned offer of judgment is conditioned upon the acceptance  
4 by all Plaintiffs against the offerors pursuant to NRCP 68(b).

5 This is not an admission of liability but is an offer of compromise submitted for  
6 the purposes of NRCP 68.

7 NOTICE TO CLERK OF THE COURT: If accepted by Plaintiff, this Offer of  
8 Judgment shall expressly be designated as a compromise settlement pursuant to NRCP  
9 68(d). Defendant shall pay the amount of this Offer of Judgment in a reasonable time and  
10 therefore requests that any entry thereof by the Clerk be recorded as a dismissal of the  
11 claim instead of an entry of judgment.

12 DATED this 16th day of July 2019.

13 CHRISTENSEN JAMES & MARTIN

14 By: /s/ Evan L. James

15 Evan L. James, Esq. (7760)

16 Attorneys for Local 1107, Luisa Blue  
17 and Martin Manteca  
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CERTIFICATE OF SERVICE

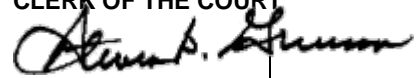
I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served on July 16, 2019 upon the following:

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CHRISTENSEN JAMES & MARTIN  
By: /s/ Natalie Saville  
Natalie Saville



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9 *Attorneys for Local 1107, Luisa Blue and Martin Manteca*

6 **EIGHTH JUDICIAL DISTRICT COURT**  
7 **CLARK COUNTY, NEVADA**

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

CASE NO.: A-17-764942-C

DEPT. No. XXVI

10 Plaintiffs,  
11 vs.

**MOTION FOR ATTORNEY FEES  
AND AWARD OF COSTS**

12 SERVICE EMPLOYEES  
13 INTERNATIONAL UNION, a nonprofit  
14 cooperative corporation; LUISA BLUE, in  
15 her official capacity as Trustee of Local  
16 1107; MARTIN MANTECA, in his  
17 official capacity as Deputy Trustee of  
18 Local 1107; MARY K. HENRY, in her  
19 official capacity as Union President;  
20 SHARON KISLING, individually;  
21 CLARK COUNTY PUBLIC  
22 EMPLOYEES ASSOCIATION UNION  
23 aka SEIU 1107, a non-profit cooperative  
24 corporation; DOES 1-20; and ROE  
25 CORPORATIONS 1-20, inclusive,

HEARING REQUESTED

26 Defendants.

27 LUISA BLUE (“Blue”), MARTIN MANTECA (“Manteca”), and NEVADA  
28 SERVICE EMPLOYEES UNION (“Local 1107”), misnamed as “CLARK COUNTY  
29 PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107” (Luisa, Martin, and  
30 Local 1107 are collectively referred to as “Local 1107 Defendants”), by and through the  
31 law firm Christensen James & Martin, hereby move for legal fees and costs.<sup>1</sup>

32 ///

33 \_\_\_\_\_  
34 <sup>1</sup> The costs claim is before the Court on Plaintiffs’ Motion to Retax Costs and is  
35 therefore not discussed in this motion.

1 DATED this 14th day of January 2020.

2 CHRISTENSEN JAMES & MARTIN

3 By: /s/ Evan L. James

4 Evan L. James, Esq. (7760)

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6 Las Vegas, NV 89117

7 Telephone: (702) 255-1718

8 Fax: (702) 255-0871

9 *Attorneys for Local 1107, Luisa Blue*  
10 *and Martin Manteca*

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 I

13 FACTS

14 Plaintiffs filed their Complaint on November 20, 2017. Ten months later, Plaintiffs  
15 filed a motion for summary judgment on September 26, 2018. Defendants opposed  
16 Plaintiffs' motion for summary judgment and filed a counter motion for summary  
17 judgment on October 15, 2018. Defendants argued that Plaintiffs' claim are preempted  
18 by federal labor law, citing a substantial volume of case law supporting the preemption  
19 argument. However, some exceptions, such as allegations of criminal conduct, exist to  
20 the preemptive power of federal labor law. The Court denied the motions for summary  
21 judgment and allowed the Defendants an opportunity to develop more facts through  
22 additional discovery.

23 The initial discovery completion date was April 15, 2019. See Scheduling Order  
24 entered October 10, 2018 at 1 ¶ 5. To accommodate for further discovery, the parties  
25 stipulated to extend the discovery completion date to July 15, 2019. See Stipulation and  
26 Order entered March 28, 2019 at 3 ln. 4. The undersigned was involved in a serious  
27 cycling accident in mid-June 2019, so despite discovery being almost closed, the parties  
further stipulated to extend discovery to August 15, 2019. See Scheduling Order entered  
June 28, 2019 at ln. 15.

1 On July 16, 2017, Defendants issued an apportioned offer of judgment to each of  
2 the Plaintiffs. Each Plaintiff was offered \$30,000.00. See Ex. A attached hereto. Prior to  
3 issuing the offer of judgment, the undersigned met with Plaintiffs' counsel to inform him  
4 that the offer of judgment issuance was imminent. I explained that no new facts had been  
5 or would be developed in the case and that accepting the offer of judgment would be  
6 prudent given the preemption case law. Plaintiffs' counsel refused the idea of anything  
7 other than full payment of Plaintiffs' claims. See Declaration of Evan James.

8 Plaintiffs valued their claims by employing an expert. The expert valued Ms.  
9 Gentry's claims at \$107,391.00. See Ex. B. The expert valued Mr. Clarke's claims at  
10 \$92,305.00. See Ex. C.<sup>2</sup>

11 The Court entered summary judgment in favor of the Defendants on Friday,  
12 January 3, 2020. Post offer of Judgment fees, incurred since July 16, 2019 through  
13 December 31, 2019 amount to \$56,277.00. See Ex. D. The Local 1107 Defendants filed  
14 a Verified Memorandum of Costs on Monday, January 6, 2020.

### 15 III

#### 16 LEGAL ANALYSIS & ARGUMENT

##### 17 A. Legal fees are allowed pursuant Nevada law.

18 "The purpose of NRS 17.115 and NRCP 68 is to save time and money for the court  
19 system, the parties and the taxpayers. They reward a party who makes a reasonable offer  
20 and punish the party who refuses to accept such an offer. *Dillard Dept. Stores, Inc. v.*  
21 *Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999). However, "the decision to award  
22 attorney fees rests within the district court's discretion..." *O'Connell v. Wynn Las Vegas,*  
23 *LLC*, 134 Nev. 550, 554, 429 P.3d 664, 668 (Nev.App., 2018).

24  
25 <sup>2</sup> The expert's reports were subject to challenge had the case proceeded to trial. For  
26 example, Gentry was awarded an auto allowance of \$6,000.00. However, that allowance  
27 was not a benefit and was for vehicle use reimbursement. Since Gentry did not use her  
vehicle for Local 1107 after employment termination, she was not eligible to receive the  
reimbursement.



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

3 (1) whether the plaintiff's claim was brought in good faith; (2) whether the  
4 defendants' offer of judgment was reasonable and in good faith in both its  
5 timing and amount; (3) whether the plaintiff's decision to reject the offer  
6 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.

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

8 Each factor need not favor awarding attorney fees because "no one factor  
9 under *Beattie* is determinative." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114  
10 Nev. 233, 252 n. 16, 955 P.2d 661, 673 n. 16 (1998). Instead, a district court  
11 is to consider and balance the factors in determining the reasonableness of  
an attorney fees award.

12 "[E]xplicit findings on every *Beattie* factor [are not] required for the district  
13 court to adequately exercise its discretion." *Certified Fire Prot., Inc. v.*  
14 *Precision Constr., Inc.*, 128 Nev. —, —, 283 P.3d 250, 258 (2012).  
15 Instead, the district court may adequately exercise its discretion if the parties  
brief the application of the *Beattie* factors. *See Uniroyal Goodrich Tire Co.*  
16 *v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995)

17 *Scott-Hopp v. Bassek*, 2014 WL 859181, 5 (Nev., 2014).

18 1. ***Plaintiffs' knowledge that their claims were subject to dismissal made***  
19 ***rejection of the offer of judgment unreasonable.***

20 Plaintiffs failed to maintain the action in good faith because they unreasonably  
21 rejected the offer of judgment. "Factors which go to reasonableness include whether the  
22 offeree eventually recovered more than the rejected offer and whether the offeree's  
23 rejection unreasonably delayed the litigation with no hope of greater recovery." *Cormier*  
24 *v. Manke*, 108 Nev. 316, 318, 830 P.2d 1327, 1328 (1992). Plaintiffs obviously received  
25 nothing when the Court entered summary judgment in favor of Defendants. In addition,  
26 Plaintiffs knew in October 2018 that preemption was a valid defense argument capable  
27 of defeating their claims. They were granted months of additional discovery to develop

1 facts that would distinguish them from the plethora of case law across the United States  
2 applying federal labor law preemption to claims just like theirs. By July 2019, Plaintiffs  
3 had failed to establish any facts that would distinguish them from cases such as *Screen*  
4 *Extras Guild*.

5 Indeed, all developed facts supported a finding that Plaintiffs were management  
6 employees subject to dismissal without regard to their written contracts. Plaintiffs  
7 admitted to being high level union employees appointed by the removed President  
8 Mancini. Plaintiffs even argued in their summary judgment briefing of September 2019  
9 that “Plaintiffs’ had a special relationship with L1107 via President Mancini, who  
10 promised them continued employment with L1107 as evidenced by their contracts.” See  
11 Plaintiffs’ Opp’n to L1107 Defendants Motion for Summ. J., filed November 12, 2019,  
12 at 29:2-3. It is clear that Plaintiffs chose to ignore case facts and law that supported  
13 Defendants’ preemption arguments based upon “Plaintiffs’ ... special relationship with  
14 L1107 via President Mancini”. As a matter of fact, Plaintiffs’ did more than ignore case  
15 law holding that special relationships such as theirs were preempted by federal labor law;  
16 they admitted to the special relationship but then brazenly ignored their management  
17 roles as Local 1107 “Directors” in arguing that they were not “confidential employees”  
18 subject to the Labor Management Reporting and Disclosure Act (“LMRDA”). *Id.* at  
19 26:23-24. Based upon the facts and law, it is clear that Plaintiffs assumed and maintained  
20 an unreasonable position that they might recover more than the \$60,000.00 offered by  
21 the Defendants to resolve the litigation. The first *Beattie* factor weighs in favor of  
22 awarding attorney fees and costs.

23 **2. Defendants’ offer of judgment was made in good faith and at a reasonable**  
24 **time because it was made 20 months after litigation started and nine**  
25 **months after Plaintiffs knew their claims were subject to dismissal.**

26 Defendants’ offer of judgment was made in good faith and at a reasonable time.  
27 Offers of judgment made after parties have had an opportunity to evaluate their case and

1 at least 10 days before trial are reasonable. *See Scott-Hopp* at 5. In *Scott-Hopp*, the court  
2 noted that the offer of judgment was reasonable because it was made more than two years  
3 after the plaintiff filed the lawsuit and 10 days before trial. Plaintiffs filed their Complaint  
4 on November 20, 2017. The offer of judgment was issued twenty months later. Plaintiffs  
5 also knew nine months before the offer of judgment was issued that their claims were  
6 subject to a federal preemption defense. They had nine months to develop facts that  
7 would defeat the federal preemption argument. They failed to do so. As such, the timing  
8 of the offer of judgment was reasonable.

9 Defendants' offer of judgment was also reasonable in amount. In *Scott-Hopp*, the  
10 court concluded an offer of judgment for 16% of the claim amount to be reasonable  
11 because liability was contested based upon the facts. The defendant in *Scott-Hopp* offered  
12 \$25,000.00 to settle \$150,000.00 in medical claims. In our case, Defendants offered  
13 Gentry 27.9% of her maximum claim. Defendants also offered Clarke 32.5% of his  
14 maximum claim. Like *Scott-Hopp*, the Defendants offered the Plaintiffs substantial  
15 money to resolve contested claims. In fact, Defendants' offer of judgment exceeded the  
16 *Scott-Hopp* offer in percent value. The value of Defendants' offer of judgment in light of  
17 the likelihood of their claims being preempted made the offer of judgment reasonable.  
18 The second *Beattie* factor therefore weighs in favor of awarding attorney fees and costs.

19 **3. *Plaintiffs' rejection of the offer of judgment was grossly unreasonable***  
20 ***because they ignored case facts that paralleled case law applying***  
21 ***preemption and they significantly misapplied case law that was obviously***  
22 ***not on point in a vain effort to avoid preemption.***

23 Plaintiffs knew and ignored the facts and law. In *Scott-Hopp*, the court found it  
24 grossly unreasonable to reject an offer of judgment when the offeree had access to key  
25 facts and knew their claims were contested. Like *Scott-Hopp*, Plaintiffs knew the  
26 applicable preemption facts and factors. Plaintiffs had at least nine months to develop  
27 case facts before the offer of judgment was issued. With no facts developed, Plaintiffs

1 knew or should have known when the offer of judgment was issued that they stood a  
2 substantial likelihood of losing. Rather than accept Defendants’ offer of judgment,  
3 Plaintiffs demanded full payment of their claimed damages. Such positions are grossly  
4 unreasonable as identified by the *Scott-Hopp* court. The third *Beattie* factor weighs in  
5 favor of awarding attorney fees and costs to Defendants.

6 **4. Defendants’ fees are reasonable because they are well below the market**  
7 **rate and Plaintiffs’ positions forced Defendants to spend substantial time**  
8 **and effort in litigation.**

9 Defense counsel had to perform substantial legal work due to Plaintiffs’ actions.  
10 “In Nevada, ‘the method upon which a reasonable fee is determined is subject to the  
11 discretion of the court,’ which ‘is tempered only by reason and fairness.’” *Shuette v.*  
12 *Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005) (*quoting*  
13 *University of Nevada v. Tarkanian*, 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186  
14 (1994)). The Court uses the Lodestar approach to calculate a legal fee value award, which  
15 “involves multiplying ‘the number of hours reasonably spent on the case by a reasonable  
16 hourly rate.’” *Id.* (*quoting Herbst v. Humana Health Ins. of Nev.*, 105 Nev. 586, 590, 781  
17 P.2d 762, 764 (1989)). However, the Court must continue its analysis and enter findings  
18 upon certain factors, “NAMELY, THE ADVOCATE’S professional qualities, the nature  
19 of the litigation, the work performed, and the result.” *Shuette*, 865, 549. *See also Brunzell*  
20 *v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

21 a. The Professional Qualities of the Advocate.

22 Local 1107 Defendants’ counsel, Mr. James, is a partner in Christensen James &  
23 Martin. He graduated from the J. Reuben Clark Law School at Brigham Young  
24 University in 2001. He is a member of the Nevada State Bar (2001 Admission), the Utah  
25 State Bar (2002 Admission), and the Washington State Bar (2012 Admission) and  
26 thereby authorized to practice law in the respective state courts. He is also admitted to  
27 practice before the Court of Federal Claims in Washington, D.C.; the Ninth Circuit Court

1 of Appeals; and the United States District Courts of Nevada, Utah, Western District of  
2 Washington and Eastern District of Washington. He directs and/or participates in appeals  
3 or litigation cases before many of the listed courts. He also maintains an active  
4 administrative law practice before Nevada state agencies such as the Employee  
5 Management Relations Board, the Nevada Labor Commissioner, and the Nevada State  
6 Contractors Board. He also practices before the National Labor Relations Board.

7 Mr. James's legal experience includes prosecuting claims under the Employee  
8 Retirement Income Securities Act (ERISA) on behalf of multiemployer health, welfare  
9 and pension benefit trusts. He also acts as counsel for numerous joint apprenticeship-  
10 training trust funds, joint labor management committees and certain union locals in  
11 Nevada. In addition to his benefits, wage and hour, and labor practice, Mr. James advises  
12 and defends employers on employment practices and discrimination claims. Mr. James  
13 has authored many employment manuals and directed the implementation of employment  
14 policies at a number of the premier homeowner associations in the Las Vegas Valley. Mr.  
15 James's experience is not limited to labor and employment law issues. He maintains a  
16 vibrant civil litigation practice that includes business litigation and property  
17 encumbrance issues. For example, he was defense counsel for the construction defect  
18 litigation for the McCarran Airport Parking Garage, defeated a contract claim in the  
19 United States District Court for the District of Colorado arguing minimum contacts, and  
20 recently completed litigating a property case involving third-party encumbrances in  
21 excess of 40 million dollars that lasted for 12 years and wound its way through the state  
22 and federal courts in Utah.

23 b. The nature of the litigation.

24 The nature of the litigation was unusual. Plaintiffs' lawsuit is one of the following  
25 five lawsuits being prosecuted by Plaintiffs' counsel against the Local 1107 Defendants:

- 26 1. *Mancini v. SEIU International, et al.*, Case No. 2:17-cv-02137-APG-NJK;
- 27 2. *Garcia v. SEIU International, et al.*, Case No. 2:17-cv-01340-APG-NJK,

1           3. *Gentry v. SEIU International, et al.*, Case No. A-17-764942-C;

2           4. *Cabrera v. SEIU International, et al.*, Case No.: 2:18-CV-00304-RFB-CWH

3           5. *Nguyen v. SEIU International, et al.*, Case No. A-19-794662-C.

4           The nature of each case dealt with the imposition of a trusteeship by the Service  
5 Employees International Union (“SEIU”) over Local 1107 and the appointment of Blue  
6 and Manteca as the trustees. Plaintiffs and their counsel initiated a litigation barrage that  
7 has required substantial effort to strategically evaluate, plan and implement case  
8 strategies that are not present under a normal one case scenario. Even then, the  
9 undersigned has just recently discovered that this litigation was used by Plaintiffs’  
10 counsel to obtain discovery in the *Cabrera* litigation.

11           Of particular note, Cheri Mancini—to whom Plaintiffs’ tied their “special  
12 relationship” claims as Local 1107’s former president—prosecuted the *Mancini* case  
13 cited above and is also a plaintiff in the *Cabrera* case cited above. **Plaintiffs and their**  
14 **counsel had substantial and direct access to former President Mancini but failed**  
15 **to produce even a declaration from her asserting facts supportive of an**  
16 **exception to Defendants’ federal preemption argument.** Implicit in that failure is a  
17 knowledge that truthful testimony from former President Mancini would confirm the  
18 facts upon which Defendants’ federal preemption argument is based. Therefore, it is  
19 reasonable to accept that Plaintiffs knew early in the litigation that Defendants’  
20 preemption argument was substantially supported by law and fact.

21           The litigation was also contentious, a review of the Court’s docket shows that the  
22 following fifteen motions were filed:

- 23           1. Motion to Receive Service of Plaintiffs’ Documents by United States Mail;
- 24           2. Plaintiff’s First Motion for Partial Summary Judgment;
- 25           3. Counter Motion for Summary Judgment by Local 1107;
- 26           4. Counter Motion for Summary Judgment by SEIU;
- 27           5. Motion to Amend Complaint;

6. Application for Default Judgment of Sharon Kisling;
7. Plaintiffs' Request for Judicial Notice of NLRB Decision in *Javier Cabrera v. SEIU Local 1107*, Case 28-CA -209109;
8. Motion to Associate Counsel;
9. Motion to Determine Attorney-Client Privilege;
10. Motion to Compel;
11. Plaintiffs' Second Motion for Partial Summary Judgment;
12. Motion for Summary Judgment by Local 1107;
13. Motion for Summary Judgment by SEIU; and
14. Motion to Coordinate Cases;
15. Motion for Attorney Fees and Costs.

Plaintiffs' asserted substantial case law in each motion that had to be reviewed, analyzed, and synthesized to case facts. Plaintiffs asserted dicta as holdings and argued cases were applicable when they were clearly distinguishable. Plaintiffs' positions and arguments required substantial time and effort from Defense Counsel to ensure the propriety of case law holdings.

c. The work performed.

As just shown, Plaintiffs required Defendants to perform a substantial amount of work. Fifteen motions on a breach of contract claim is substantial. These fifteen motions required Local 1107 to prepare and submit at least 15 briefs to the Court. In addition, most of the motions required substantial review and analysis of material. For example, Plaintiffs' Partial Motion for Summary Judgment filed on October 13, 2019 consisted of 1309 pages of material. In an effort to make Plaintiffs' momentous filing a reasonable size for Court review, Local 1107 Defendants distilled the motion down to a 24 page Opposition Brief, including exhibits.

1 Defense counsel also appeared before this Court 8 times as of December 31, 2019.  
2 Each appearance requires preparation time so as to be able to answer the Court's  
3 questions and responses to Plaintiffs' assertions.

4 Defense attorneys also performed a substantial amount of work in addition to the  
5 multiple briefs produced and court appearances attended. Three of the five depositions  
6 were taken by the Defendants. These depositions include Plaintiffs Dana Gentry and  
7 Robert Clarke and their expert witness Kevin B. Kirkendall. The billing summary in  
8 Exhibit D also shows numerous issues addressed between counsel that did not involve  
9 the Court.

10 d. The result.

11 Plaintiffs were given an opportunity to prove a case but lost on summary  
12 judgment.

13 e. The hourly of \$185 and time spent on this matter were reasonable.

14 Mr. James's \$185.00 hourly rate is reasonable. With over 19 years of experience  
15 in multiple venues, Mr. James could charge substantially more than \$185.00 per hour.  
16 The Nevada Supreme Court has upheld a \$250.00 per hour rate as reasonable. *See Cuzze*  
17 *v. Univ. & Cmtv. Coll. Sys. of Nevada*, 123 Nev. 598, 607, 172 P.3d 131, 137 (2007). *See*  
18 *also, John Bryant Lawson v. William M. Lawson, Jr.*, No. 3: 14—CV—00345—WGC,  
19 2016 WL 1171010, at \*4 (D. Nev. Mar. 24, 2016) (finding \$275.00 per hour for an  
20 attorney with 10 years of experience, \$325.00 per hour for an attorney with 12 years of  
21 experience, \$235.00 per hour for a first year associate, and \$175.00 per hour for a  
22 paralegal reasonable market rates.)

23 The lower hourly rate allows for a better work product through effective briefing  
24 and the proper vetting of legal theories and case law. The Court is (hopefully) better  
25 educated. Good work takes time. The lower hourly rate leaves more money for workers  
26 as Local 1107's funds come from membership dues.



The hours expended are reasonable and justified because they accurately reflect detailed accurate work. Defense counsel did not just throw something together to get in front of the Court on a hope of winning. Defense counsel proceeded thoughtfully, judiciously and thoroughly. Such careful conduct benefited all involved.

## CONCLUSION

The Local 1107 Defendants respectfully request an award of legal fees in the amount of \$56,277.00, which consists of legal fees from January 16, 2019 through December 31, 2019.

Dated this 14th day of January 2020.

CHRISTENSEN JAMES &amp; MARTIN

By: /s/ Evan L. James

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*Attorneys for Local 1107, Luisa Blue and  
Martin Manteca*

CERTIFICATE OF SERVICE

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

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

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Jonathan Cohen: jcohen@rsglabor.com

Glenn Rothner: grothner@rsglabor.com

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

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

\_\_\_ EMAIL: By sending the above-referenced document to the following:

CHRISTENSEN JAMES & MARTIN

By: /s/ Natalie Saville  
Natalie Saville

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

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

DANA GENTRY, an individual; and  
ROBERT CLARKE, an individual,  
  
Plaintiffs,  
  
vs.

CASE NO.: A-17-764942-C

DEPT. No. XXVI

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

DECLARATION OF EVAN JAMES IN  
SUPPORT OF MOTION FOR  
ATTORNEY FEES AND AWARD OF  
COSTS

I hereby declare as follows:

1. I have personal knowledge of the matters set forth herein.
2. Discovery was about to complete in June of 2019. I was involved in a cycling accident in June and could not timely complete discovery responses. As such, discovery was extended. At that time, Plaintiffs began a barrage of discovery even though they had had months prior to engage in discovery.

1 3. On July 16, 2017, Defendants issued an offer of judgment to the Plaintiffs. Each  
2 Plaintiff was offered \$30,000.00. Exhibit A attached hereto contains a true and correct  
3 copy of the offer of judgment.

4 4. Prior to issuing the offer of judgment, I met with Plaintiffs' counsel at my office. I  
5 explained that no new facts had been or would be developed in the case and that accepting  
6 the offer of judgment would be prudent given the preemption case law.

7 5. Plaintiffs' counsel refused the idea of settling for anything other than full payment  
8 of Plaintiffs' claims.

9 6. Plaintiffs hired an expert to evaluate their damages in the event legal liability was  
10 determined against the Defendants. Exhibit B attached hereto is a true and correct copy  
11 of Plaintiffs' expert evaluation for Plaintiff Dana Gentry. Her claim was valued at  
12 \$107,391.00. Exhibit C attached hereto is a true and correct copy of Plaintiffs' expert  
13 evaluation for Plaintiff Robert Clark. His claim was valued at \$92,305.00. Defendants  
14 were prepared to challenge these damages in the event of trial.

15 7. Exhibit D hereto contains an itemized statement of legal services extended and fees  
16 incurred by Local 1107 from the date of the offer of judgment—July 16, 2019—through  
17 December 31, 2019. Some small redactions were made to protect attorney-client  
18 information. Each of the items listed were incurred for the purpose of defending against  
19 Plaintiffs' claims.

20 I declare under penalty of perjury that the foregoing is true and correct.

21 Executed on January 14, 2020.

22 /s/ Evan L. James

23 Evan L. James  
24  
25  
26  
27

# **EXHIBIT**

**A**

**OFFER OF JUDGMENT**  
Appdx. Fees at 019

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

**OFFER**

**CHRISTENSEN JAMES & MARTIN**

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Telephone: (702) 255-1718

Facsimile: (702) 255-0871

Email: [elj@cjmlv.com](mailto:elj@cjmlv.com),

*Attorneys for Local 1107, Luisa Blue and Martin Manteca*

*Local Counsel for SEIU International*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

CASE NO.: A-17-764942-C

DEPT. No. XXVI

**OFFER OF JUDGMENT**

**SERVICE EMPLOYEES**

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

Defendants.

Pursuant to NRCP 68, Defendants Nevada Service Employees Union, misnamed  
as Clark Count Public Employees Association Union aka SEIU Local 1107, and Service  
Employees International Union, jointly, hereby offer to allow judgment to be taken  
against them to resolve all claims against all of the Defendants 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

1 Dollars (\$30,000.00), including all accrued interest, costs, attorney's fees, and any other  
2 sums that could be claimed by Plaintiff Robert Clark against Defendants in the above-  
3 captioned action. This apportioned offer of judgment is conditioned upon the acceptance  
4 by all Plaintiffs against the offerors pursuant to NRCP 68(b).

5 This is not an admission of liability but is an offer of compromise submitted for  
6 the purposes of NRCP 68.

7 NOTICE TO CLERK OF THE COURT: If accepted by Plaintiff, this Offer of  
8 Judgment shall expressly be designated as a compromise settlement pursuant to NRCP  
9 68(d). Defendant shall pay the amount of this Offer of Judgment in a reasonable time and  
10 therefore requests that any entry thereof by the Clerk be recorded as a dismissal of the  
11 claim instead of an entry of judgment.

12 DATED this 16th day of July 2019.

13 CHRISTENSEN JAMES & MARTIN  
14 By: /s/ Evan L. James  
15 Evan L. James, Esq. (7760)  
16 Attorneys for Local 1107, Luisa Blue  
17 and Martin Manteca  
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CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin and caused a true and correct copy of the foregoing document to be served on July 16, 2019 upon the following:

MICHAEL J. MCAVOYAMAYA  
Michael J. Mcavoyamaya (14082)  
3539 Paseo Del Ray  
Las Vegas, NV 89121  
*Attorney for Plaintiffs*

The document was also served electronically to the following:

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com  
Jonathan Cohen: jcohen@rsglabor.com  
Evan L. James: elj@cjmlv.com

CHRISTENSEN JAMES & MARTIN  
By:       /s/ Natalie Saville        
Natalie Saville



# **EXHIBIT**

## **B**

**GENTRY CLAIMED DAMAGES**  
Appdx. Fees at 023

***Gentry, Dana, et al. vs. Service Employees International Union, et al.***

**Wrongful Termination Calculations**

**Lost Earnings & Benefits**

**Exhibit A**

---

**Notes** Ms. Gentry was terminated from her position with SIEU Local 1107 on May 4, 2017, and obtained replacement employment with the Hopewell Fund. From March 19, 2018, through April 8, 2018, Ms. Gentry was to work half-time and commence full time work beginning April 9, 2019. Ms. Gentry was unemployed for a full-time equivalent of .9 years or 10.8 months. Lost earnings and benefits are calculated over a 10.8-month time period.

SEIU Annual Salary (1)	\$	70,000
Employer-paid Benefits		
Pension Contribution - 20% of Gross Salary (1)	\$	14,000
Sick Leave, Vacation or Personal Leave - 8 hours per bi-weekly pay period (1) (2)		7,000
Medical Insurance, Life Insurance and Governmentally Required Benefits as a Percent of Salary - 31.75 % (3)		22,224
Annual Auto Allowance (1)		<u>6,000</u>
Total Employer-paid Benefits		<u>49,224</u>
Total Annual Earnings and Benefits	\$	119,224
Years Unemployed due to Wrongful Termination		<u>90.08%</u>
Lost Earnings & Benefits	\$	<u><u>107,391</u></u>

**Notes:**

- (1) Bates Gentry-Clarke000006.
- (2) Calculated as the annual salary divided by 2,080 annual straight-time hours (\$33.65 per hour) multiplied by 8 hours per each of 26 bi-weekly pay periods in a year.
- (3) See Exhibit C.

# **EXHIBIT**

**C**

**CLARK CLAIMED DAMAGES**  
Appdx. Fees at 025

***Clarke, Robert, et al. vs. Service Employees International Union, et al.***  
**Wrongful Termination Calculations**  
**Lost Earnings & Benefits**  
**Exhibit A**

---

**Notes** Mr. Clarke was terminated from his position with SIEU Local 1107 on May 4, 2017, and obtained replacement employment  
Approximately 8 months (.68 years) later. Lost earnings and benefits are calculated for that 8-month time period.

SEIU Annual Salary (1)	\$	80,000
Employer-paid Benefits		
Pension Contribution - 20% of Gross Salary (1)	\$	16,000
Sick Leave, Vacation or Personal Leave - 8 hours per bi-weekly pay period (1) (2)		8,000
Medical Insurance, Life Insurance and Governmentally Required Benefits as a Percent of Salary - 31.75 % (3)		25,399
Annual Auto Allowance (1)		<u>6,000</u>
Total Employer-paid Benefits		<u>55,399</u>
Total Annual Earnings and Benefits	\$	135,399
Years Unemployed due to Wrongful Termination		<u>68.17%</u>
Lost Earnings & Benefits	\$	<u><u>92,305</u></u>

**Notes:**

- (1) Bates Gentry-Clarke000007.
- (2) Calculated as the annual salary divided by 2,080 annual straight-time hours (\$38.46 per hour) multiplied by 8 hours per each of 26 bi-weekly pay periods in a year.
- (3) See Exhibit C.

# **EXHIBIT**

## **D**

ITEMIZED LEGAL FEES  
Appdx. Fees at 027

# STATEMENT

Christensen James & Martin

7440 W. Sahara Ave.  
Las Vegas, NV 89117  
702/255-1718  
702/255-0871 Fax  
Carma@CJMLV.com

## History of Billing

Nevada Service Employees Union  
SEIU Local 1107  
2250 S. Rancho Drive, #165  
Las Vegas, NV 89102

January 13, 2020

### Professional Services

			<u>Hrs/Rate</u>	<u>Amount</u>
7/16/2019	- LJW	Review Garcia Documents for Production Requests; email to E James	0.70 185.00/hr	129.50
	- ELJ	Telephone call from J Cohen regarding new Discovery Requests, Discovery of Recordings, Protective Order and Offer of Judgment (.7); Research Caselaw and Plaintiff's Discovery positions (2.7); preparation of Response to Demand Letter regarding Discovery (1.4); emails with S Ury [REDACTED] (.1); serve Offer of Judgment (.3)	3.80 185.00/hr	703.00
7/17/2019	- ELJ	Telephone calls to and from S Ury and G Rothner [REDACTED]	0.60 185.00/hr	111.00
7/18/2019	- LJW	Review Garcia Documents for Disclosures	1.00 185.00/hr	185.00
	- ELJ	Telephone call from G Rothner regarding Pro Hac Vice; preparation of Reply Letter to Plaintiff's Objections to Local 1107's Discovery Responses	5.70 185.00/hr	1,054.50
7/19/2019	- ELJ	E-mails with S McDonald obtaining Evidence for Responses to Discovery Requests (.4); preparation of documents for Discovery (1); preparation of Supplemental Disclosures and Serve (1.6); preparation of Response to Demand Letter with supporting positions and Caselaw	5.00 185.00/hr	925.00
	- LJW	Review Garcia Production of Document Requests	3.00 185.00/hr	555.00
7/22/2019	- ELJ	Preparation of Responses to 2nd Set of Requests for Admission; preparation of email and letter to Plaintiff's Attorney; preparation of Stipulation and Protective Order	3.60 185.00/hr	666.00

			<u>Hrs/Rate</u>	<u>Amount</u>
7/22/2019	- DEM	Review and revise Letter to opposing counsel; conference with E James	0.60 185.00/hr	111.00
7/23/2019	- ELJ	Review letter from Rothner to Macavoymaya regarding Order of Deposition (.2); review filings; review Audio file (1.3); telephone call from J Cohen	2.90 185.00/hr	536.50
	- LJW	Review Garcia Production of Document Requests	4.70 185.00/hr	869.50
7/24/2019	- KBC	Conference with E James regarding Objections to Documents and Information Requests	0.40 185.00/hr	74.00
	- DEM	Review draft letter to opposing counsel	0.50 185.00/hr	92.50
	- ELJ	Review Audio file of August 31, 2015 Executive Board Meeting (1.4); Meeting with D Martin regarding Opinion on Attorney Client Privilege; preparation of letter to Plaintiff's Attorney regarding Deposition; telephone call from Grace regarding ██████(.8); emails with B Martin; teleconference J Cohen and G Rothner; review Audio files (1.3)	9.10 185.00/hr	1,683.50
7/25/2019	- KBC	Conference with E James regarding Discovery and potential Conflict Issues	0.20 185.00/hr	37.00
	- ELJ	Conference call with J Cohen, Elia and Steve discussing Discovery Requests served jointly on Local and International (1); review emails from Local 1107 Staff with Evidence; preparation of Evidence; preparation of Supplemental Disclosures; telephone call to Plaintiff's Attorney regarding Deposition (.2); email Grace with confirmation ██████Directives and Deposition Instructions (.1); email to B Marzan regarding Deposition Date (.1)	5.80 185.00/hr	1,073.00
	- LJW	Review Garcia Documents for Production Requests	2.50 185.00/hr	462.50
7/26/2019	- LJW	Preparation of Responses to Request for Production of Documents; preparation of Supplemental Document Production Requests; conference with E James regarding Caselaw and Strategy	1.30 185.00/hr	240.50
	- ELJ	Complete 3rd Supplemental Documents Production (1); complete Supplemental Responses to Interrogatories (.5); complete Supplemental Responses to Documents Production (.5); letter to M Mcavoyamaya regarding Graces Deposition (.3)	1.30 185.00/hr	240.50
7/29/2019	- ELJ	Preparation for and Appearance at Fitzpatrick Deposition (6); review Audio of Emergency Board Meeting (.6); review Audio of 9/27/16 Board Meeting (.5)	7.10 185.00/hr	1,313.50
7/30/2019	- LJW	Preparation of Responses to Request for Production of Document; preparation of Supplemental Documents Production Requests	2.50 185.00/hr	462.50

			<u>Hrs/Rate</u>	<u>Amount</u>
7/30/2019	- ELJ	Telephone calls to and from J Cohen discussing Issues (.8); review Board Meeting Recordings for October 26, 2016 (1); emails with Brenda and Grace; preparation of Discovery Responses	5.90 185.00/hr	1,091.50
7/31/2019	- ELJ	Letter from S McDonald (.8); email documents to Brenda for Deposition; review letter from Plaintiff's Attorney regarding Attorney-Client Privilege; review cited Caselaw; preparation of Reply letter	6.30 185.00/hr	1,165.50
	- LJW	Preparation of Responses to Request for Production of Documents; preparation of Supplemental Documents Production Requests	1.10 185.00/hr	203.50
8/1/2019	- ELJ	Telephone call to Mcavoyamaya requesting immediate Meet and Confer as requested in yesterday's letter (.1); Meet and Confer with Michael on Privilege Issues (.8); Meeting with Marzan to prepare for Deposition (3); preparation of Responses to 4th Document Production Request (2.9)	6.80 185.00/hr	1,258.00
8/2/2019	- LJW	Conference with E James; review Documents for Production	0.10 185.00/hr	18.50
	- ELJ	E-mails with Grace Vergara and Plaintiff's Attorney regarding Deposition Date (.2); telephone call to D Springer regarding Deposition (.1); preparation of Motion for Order Shortening Time to Determine Attorney Client Privilege (.9); preparation of Motion to Determine Attorney Client Privilege (1.4); telephone call to Court regarding Order Shortening Time; emails regarding Discovery	3.90 185.00/hr	721.50
8/5/2019	- LJW	Conference with E James; review Production of Documents	3.80 185.00/hr	703.00
	- ELJ	E-mails with S McDonald and Brenda Marzan regarding [REDACTED] (.7); emails with B Marzan regarding [REDACTED] and Deposition Testimony Transcript (.8); preparation of Joinder to SEIU's Opposition to Motion to Take Judicial Notice (.8); preparation of Opposition to Motion to Take Judicial Notice (1.9); preparation of Notice of Entry of Order (.4)	4.60 185.00/hr	851.00
8/6/2019	- ELJ	Appearance at Motion for Default Judgment Hearing (2); conference with International Attorney regarding Deposition and Discovery (.9); conference with Plaintiff's Attorney regarding Discovery Deadlines (.3); Meeting with D Springer to discuss Deposition (2.5); preparation of Response to Discovery Questions (.4); preparation for Deposition (1.9)	8.00 185.00/hr	1,480.00
	- LJW	Review Documents for Production	0.10 185.00/hr	18.50
8/7/2019	- ELJ	Appearance at Hearing to Determine Attorney Client Privilege (1); conference with International Attorney regarding Discovery (.4); conference with Plaintiff's Attorney regarding Discovery (.4); conference with S Kisling (.2); Appearance at D Springer Deposition (6.5)	8.50 185.00/hr	1,572.50



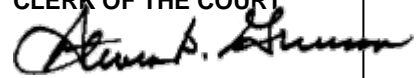
			<u>Hrs/Rate</u>	<u>Amount</u>
8/7/2019	- LJW	Review Garcia Documents for Production	2.90 185.00/hr	536.50
8/8/2019	- LJW	Review Garcia Documents for Production in Gentry Case	5.00 185.00/hr	925.00
8/9/2019	- KBC	Conference with E James regarding Joint Defense Issues, Discovery and Board Decision	0.40 185.00/hr	74.00
	- LJW	Review Garcia Documents for Production in Gentry Case	4.30 185.00/hr	795.50
8/12/2019	- LJW	Preparation of Supplemental Production to First Request for Production of Documents; preparation of Supplemental Production to Second Request for Production of Documents; preparation of Supplemental Production to Third Request for Production of Documents	3.80 185.00/hr	703.00
	- ELJ	Review and edit Stipulation and Order regarding Discovery; emails regarding Extending Discovery	2.10 185.00/hr	388.50
8/13/2019	- LJW	Preparation of Supplemental Production to First Request for Production of Documents; preparation of Supplemental Production to Second Request for Production of Documents; preparation of Supplemental Production to Third Request for Production of Documents; email to E James	1.80 185.00/hr	333.00
	- ELJ	Review Notice of Hearing on Motion to Take Judicial Notice (.3); review proposed revisions to Stipulation and Order regarding Discovery (.4); email to Plaintiff's Attorney requesting an accessible electronic file (.1); complete Responses to Requests for Admission (2.5); complete Responses to Interrogatory Requests (3.5); send Responses to Client for review and approval (.3)	7.10 185.00/hr	1,313.50
8/14/2019	- ELJ	Telephone conference with Eli regarding Discovery (.4); obtain Client Approval and Signature for Discovery Responses; complete Responses to Request for Production of Documents, Interrogatories and Admissions (3.2); preparation of Supplemental Disclosures of emails received from B Marzan (1); preparation of Notice of Entry of Order Denying Default Judgment Motion (.2)	5.00 185.00/hr	925.00
8/15/2019	- ELJ	Review proposed Protective Order (.1); review Speaking Agent Caselaw and Bar Opinion; email to Grace and Brenda with [REDACTED] and Investigation Request	1.90 185.00/hr	351.50
8/19/2019	- ELJ	E-mails with opposing counsel regarding Discovery Commissioner Report and Recommendations (.1); review and reject proposed Discovery Commissioner Report; emails with Attorney (.8)	0.90 185.00/hr	166.50
8/20/2019	- ELJ	Review and edit updated proposed Report and Recommendations of Discovery Commissioner (1.2); email revisions to opposing counsel and International Counsel (.1); telephone call to D Springer Deposition Transcript (.1); email and text to D Springer regarding Deposition Transcript (.1)	1.50 185.00/hr	277.50

			<u>Hrs/Rate</u>	<u>Amount</u>
8/21/2019	- ELJ	E-mails with Grace recommending [REDACTED] (.1); telephone call from Eli regarding Case Calendar Dates (.2); Research Caselaw and Defense Theory to Defamation (1.4); preparation of Notice of Entry of Order for Stipulated Protective Order (.3); review International's Disclosures (1.2)	3.20 185.00/hr	592.00
8/23/2019	- ELJ	Telephone call from J Cohen	0.50 185.00/hr	92.50
8/26/2019	- ELJ	Update Plaintiff's Discovery Disclosures; review Bates Numbers with International Attorney and request missing Bates Numbers	1.10 185.00/hr	203.50
8/27/2019	- ELJ	Review Plaintiff's Motion to Compel (.7); prepare Opposition, annotate Motion with Arguments (.6); Research Arguments relating to Attorney Client Privilege and Defamation (2.1)	3.40 185.00/hr	629.00
8/28/2019	- ELJ	Review Court Ordered Alterations to Scheduling Order and Re-Calendar (.3); review Kisling Deposition Notice; review Document Production Request to Kisling; emails regarding Discovery and Attorney Client Privilege; review Court Minute Order	2.90 185.00/hr	536.50
8/29/2019	- ELJ	E-mail and texts with D Springer regarding Deposition Transcript review	0.10 185.00/hr	18.50
8/30/2019	- ELJ	Telephone call with J Cohen regarding Attorney Client Privilege (.4); email [REDACTED] (.4); email [REDACTED] (.2); Expert Witness Call (.5); emails to Client	1.50 185.00/hr	277.50
9/3/2019	- ELJ	Conference with S McDonald, M Urban and J Cohen regarding [REDACTED] (.9); telephone call to Mcavoyamaya regarding Attorney-Client and Attorney-Work Product Privileges (.2)	1.10 185.00/hr	203.50
9/4/2019	- ELJ	Review and edit Stipulation on Attorney-Client Privilege (1); email Stipulation and Order to Counsel for review (.2); emails regarding Depositions; telephone call to B Marzan and Kisling regarding Deposition (.3)	1.50 185.00/hr	277.50
9/9/2019	- ELJ	Letter to Court regarding Motion to Take Judicial Notice (.4); review Briefs for Hearing on Motion to Take Judicial Notice (.5)	0.90 185.00/hr	166.50
9/10/2019	- ELJ	Appearance at Hearing and Argue Motion to Take Judicial Notice	1.50 185.00/hr	277.50
	- DEM	Review Briefs on Motion for Judicial Notice	0.40 185.00/hr	74.00
9/12/2019	- ELJ	Conference call with J Cohen regarding Depositions	0.30 185.00/hr	55.50
9/17/2019	- ELJ	Preparation of Order Denying Motion to Take Judicial Notice and present to Counsel (.4); preparation of Urban Report and Kisling Report for Disclosure and disclose (1.2); emails with Counsel (.3)	1.90 185.00/hr	351.50

			<u>Hrs/Rate</u>	<u>Amount</u>
9/23/2019	- ELJ	Appearance at Kisling Deposition (1); Meeting with B Marzan for Deposition preparation (2)	3.00 185.00/hr	555.00
9/24/2019	- ELJ	Preparation for and Appearance at B Marzan Deposition	7.50 185.00/hr	1,387.50
9/25/2019	- ELJ	Review Order and file (.2); preparation of Notice of Entry of Order (.4)	0.60 185.00/hr	111.00
10/3/2019	- ELJ	Review letter from Plaintiff's Attorney to Discovery Commissioner regarding Hearing of Motion to Compel (.2); telephone calls to and from J Cohen regarding Declaration; conference call with J Cohen and Luisa Blue [REDACTED]; preparation of Stipulation and Order to Coordinate with Nguyen Case	3.30 185.00/hr	610.50
10/4/2019	- ELJ	Review Proposed [REDACTED] Martin and Commenst; preparation of Summary Judgment Motion	4.20 185.00/hr	777.00
10/7/2019	- ELJ	Preparation of Summary Judgment Motion	6.00 185.00/hr	1,110.00
10/8/2019	- ELJ	Preparation of Summary Judgment Motion	4.10 185.00/hr	758.50
10/9/2019	- ELJ	Preparation of Summary Judgment Motion	4.30 185.00/hr	795.50
10/10/2019	- ELJ	Preparation of Summary Judgment Motion	2.10 185.00/hr	388.50
10/16/2019	- ELJ	Conference call with Martin Manteca (.4); preparation of Summary Judgment Motion; telephone call from J Cohen regarding Trial Date; email to Attorneys regarding Trial Date; telephone call to Grace; Meeting with Brendan regarding Documents Certificate	3.10 185.00/hr	573.50
10/18/2019	- ELJ	E-mails regarding Confidential Documents (.3); email to Client regarding Confidential Documents (.2)	0.50 185.00/hr	92.50
10/23/2019	- ELJ	Preparation of Summary Judgment Motion	3.80 185.00/hr	703.00
10/24/2019	- ELJ	Preparation of Summary Judgment Motion	3.20 185.00/hr	592.00
10/25/2019	- ELJ	Preparation of Summary Judgment Motion; preparation of Marzan Declaration regarding Confidential Documents	9.60 185.00/hr	1,776.00
10/26/2019	- ELJ	Preparation of Appendix to Summary Judgment Motion	5.00 185.00/hr	925.00
10/28/2019	- DEM	Review and revise Motion for Summary Judgment; conference with E James; Research	1.60 185.00/hr	296.00

			<u>Hrs/Rate</u>	<u>Amount</u>
10/28/2019	- ELJ	Revisions to Summary Judgment Motion from D Martin	1.00 185.00/hr	185.00
11/1/2019	- ELJ	Preparation of Opposition to Plaintiff's Summary Judgment Motion	4.90 185.00/hr	906.50
11/2/2019	- ELJ	Research Caselaw to oppose Plaintiff's Summary Judgment Motion; Research Caselaw for LMRA Preemption where Union official not Elected; draft Opposition to Plaintiff's Summary Judgment Motion	4.80 185.00/hr	888.00
11/4/2019	- ELJ	Conference with J Cohen regarding Stipulation to Continue Trial and Opposition to Plaintiff's Summary Judgment Motion	1.00 185.00/hr	185.00
11/5/2019	- ELJ	Preparation of Opposition to Plaintiff's Summary Judgment Motion	3.00 185.00/hr	555.00
11/6/2019	- ELJ	Preparation of Stipulation and Order to Continue Trial Date and Summary Judgment Motion Hearing	0.40 185.00/hr	74.00
11/7/2019	- ELJ	Preparation of Opposition to Plaintiff's Summary Judgment Motion	3.30 185.00/hr	610.50
11/11/2019	- ELJ	Preparation of Opposition to Summary Judgment Motion	8.00 185.00/hr	1,480.00
11/19/2019	- ELJ	Preparation of Motion to Coordinate Cases	0.90 185.00/hr	166.50
11/20/2019	- ELJ	Preparation of Reply to Opposition to Motion for Summary Judgment	4.60 185.00/hr	851.00
11/21/2019	- ELJ	Preparation of Reply to Opposition to Motion for Summary Judgment	4.90 185.00/hr	906.50
11/22/2019	- ELJ	Preparation of Reply to Opposition to Local 1107's Summary Judgment Motion	3.20 185.00/hr	592.00
11/25/2019	- ELJ	Review SEIU's Reply to Opposition to Summary Judgment Motion	0.40 185.00/hr	74.00
11/27/2019	- ELJ	Review Reply to Opposition to Plaintiff's Summary Judgment Motion	0.50 185.00/hr	92.50
12/2/2019	- ELJ	Review all Briefs on Summary Judgment and prepare for Oral Argument by reviewing caselaw; email with counsel for Hearing	7.00 185.00/hr	1,295.00
12/3/2019	- ELJ	Appearance at Summary Judgment Argument (3.5); email Client update on Summary Judgment Motion (.2)	3.70 185.00/hr	684.50
12/9/2019	- ELJ	Telephone call from J Cohen regarding Memorandum of Costs and Motion for Attorney Fees	0.40 185.00/hr	74.00

			<u>Hrs/Rate</u>	<u>Amount</u>
12/13/2019 -	ELJ	E-mail J Cohen seeking Plaintiffs; Response to prepare Summary Judgment Order; telephone call to J Cohen regarding Costs and Fees	0.40 185.00/hr	74.00
12/16/2019 -	ELJ	E-mails with Grace, Brenda and Brian regarding information request from Dana Gentry	0.20 185.00/hr	37.00
12/17/2019 -	ELJ	E-mails with Counsel regarding signature to Summary Judgment Order (.2); preparation of Summary Judgment Order for Court (.1); preparation of Memorandum of Costs (2.5)	2.80 185.00/hr	518.00
12/18/2019 -	ELJ	Complete review of all Costs; preparation of Verified Memorandum of Costs	3.50 185.00/hr	647.50
12/26/2019 -	ELJ	Preparation of Motion for Attorney Fees	5.20 185.00/hr	962.00
12/27/2019 -	ELJ	Preparation of Motion for Attorney Fees and Costs	4.90 185.00/hr	906.50
12/30/2019 -	ELJ	Preparation of Affidavit of Fees and Costs Motion	4.90 185.00/hr	906.50
For professional services rendered			<u>304.20</u>	<u>\$56,277.00</u>



**MATF  
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Attorneys for Service Employees International Union  
and Mary Kay Henry

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-17-764942-C

Dept. 26

**SERVICE EMPLOYEES  
INTERNATIONAL UNION'S AND  
MARY KAY HENRY'S MOTION FOR  
ATTORNEYS' FEES**

HEARING REQUESTED

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**NOTICE OF MOTION AND MOTION**

Service Employees International Union (“SEIU”) and Mary Kay Henry (“Henry”) (collectively, “Defendants”) hereby move for an award of their reasonable attorneys’ fees pursuant to Nevada Rule of Civil Procedure 68(f)(1)(B).<sup>1</sup> Defendants are entitled to their reasonable attorneys’ fees because Plaintiffs Dana Gentry and Robert Clarke rejected Defendants’ statutory settlement offer, but did not recover a more favorable judgment.

This motion is based on this notice, the following Memorandum of Points and Authorities, the Declaration of Jonathan Cohen filed herewith, the pleadings and papers filed in this action, and upon such other matters that may be presented to the Court in connection with this motion.

A hearing on SEIU Local 1107’s Motion for Attorneys’ Fees is scheduled for February 18, 2020, at 9 a.m. Defendants respectfully request that their motion for attorneys’ fees be heard at the same time.

DATED: January 16, 2020

ROTHNER, SEGALL & GREENSTONE  
CHRISTENSEN JAMES & MARTIN

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

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<sup>1</sup> Defendants have already filed a Memorandum of Costs, and therefore do not discuss their costs in this motion.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Introduction**

3 Service Employees International Union (“SEIU”) and Mary Kay Henry (“Henry”)  
4 (collectively, “Defendants”) hereby move for an award of their reasonable attorneys’ fees  
5 pursuant to Nevada Rule of Civil Procedure 68(f)(1)(B). Defendants made an offer of settlement  
6 to plaintiffs Robert Clarke and Dana Gentry (collectively, “Plaintiffs”) pursuant to Rule 68 on  
7 July 16, 2019. Plaintiffs rejected the offer, but did not recover a more favorable judgment. As a  
8 result, Defendants request an order requiring Plaintiffs to pay Defendants’ reasonable attorneys’  
9 fees beginning on July 16, 2019, the date of Defendants’ rejected Rule 68 offer, in the amount of  
10 \$57,206.50.

11 **Statement of Facts**

12 The Court is already familiar with the facts and issues in this case. In short, Plaintiffs are  
13 former managers with defendant Service Employees International Union, Local 1107 (“Local  
14 1107”). Shortly after the imposition of a trusteeship over Local 1107 by SEIU in April 2017, the  
15 Local 1107 Trustees terminated the Plaintiffs’ employment. Plaintiffs thereafter sued SEIU,  
16 Henry, Local 1107, and former Local 1107 Trustees Luisa Blue and Martin Manteca, for breach  
17 of contract, wrongful termination, interference with contract, negligence, and defamation.

18 On September 26, 2018, Plaintiffs moved for partial summary judgment. On October 15,  
19 2018, all defendants opposed that motion, and cross-moved for summary judgment on all claims.  
20 Among other things, all defendants sought summary judgment on the grounds that the claims in  
21 the complaint were preempted by the Labor Management Reporting and Disclosure Act, 29  
22 U.S.C. § 401, *et seq.* (“LMRDA”). On March 22, 2019, the Court issued a minute order denying  
23 the motions without prejudice to allow for additional discovery.

24 Defendants issued written discovery requests to Plaintiffs on October 11, 2018, and again  
25 on March 11, 2019, and received Plaintiffs’ responses to those requests on or about January 4,  
26 2019, and April 24, 2019, respectively. Declaration of Jonathan Cohen in Support of Motion for  
27 Attorneys’ Fees (“Cohen Decl.”), ¶ 2. Defendants then took the depositions of Plaintiffs on  
28 May 29 and 30, 2019. *Id.* Defendants also took the deposition of Plaintiffs’ damages expert on



1 May 31, 2019. *Id.* According to the written report of Plaintiffs’ damages expert, Clarke’s  
2 economic damages were \$92,305.00, and Gentry’s economic damages were \$107,391.00. Cohen  
3 Decl., ¶ 2, Ex. A.

4 Based on Defendants’ evaluation of Plaintiffs’ discovery responses, the deposition  
5 testimony of Plaintiffs, and the deposition testimony and the report of Plaintiffs’ damages expert,  
6 Defendants, together with defendants Local 1107, Manteca, and Blue, made a joint offer of  
7 judgment pursuant to Rule 68 to Gentry in the amount of \$30,000.00, and a joint offer of  
8 judgment pursuant to Rule 68 to Clarke in the amount of \$30,000.00. Cohen Decl., ¶ 3.  
9 Plaintiffs did not accept the offer. *Id.*

10 Notably, despite alleging breach of contract and wrongful termination claims against  
11 SEIU and Henry, Plaintiffs were unable to establish any factual or legal basis whatsoever for  
12 such claims against them. Indeed, it is undisputed that Plaintiffs did not have an employment  
13 contract with SEIU or Henry, and that Plaintiffs did not work for SEIU or Henry. Nor did  
14 Plaintiffs’ first amended complaint allege any legal theory to hold SEIU and/or Henry liable for  
15 such claims in the absence of those essential facts.

16 On October 29, 2019, all defendants renewed their motions for summary judgment.  
17 Plaintiffs also renewed their motion for partial summary judgment. On December 3, 2019, the  
18 Court granted summary judgment in favor of all defendants. The Court ruled that Plaintiffs’  
19 claims were preempted by the LMRDA. The Court further ruled that, given the absence of  
20 employment contracts or employment with SEIU and Henry, Plaintiffs’ breach of contract and  
21 wrongful termination claims against them failed.

## 22 Argument

### 23 **1. The Court Has Discretion to Award Defendants Reasonable Attorneys’ Fees** 24 **Pursuant to Nevada Rule of Civil Procedure 68.**

25 Nevada Rule of Civil Procedure 68 permits any party to “serve an offer in writing to  
26 allow judgment to be taken in accordance with its terms and conditions.” Nev. R. Civ. P. 68(a).  
27 Rule 68 further provides that “[a]n apportioned offer of judgment to more than one party may be  
28 conditioned upon the acceptance by all parties to whom the offer is directed,” and that “[a] joint

offer may be made by multiple offerors.” Nev. R. Civ. P. 68(b) & (c). If the offeree rejects an offer and fails to obtain a more favorable judgment,

the offeree must pay the offeror’s post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and *reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer*. If the offeror’s attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

Nev. R. Civ. P. 68(f)(B) (emphasis added).

In determining whether to award reasonable attorneys’ fees, a court must consider the following factors:

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

*Beattie v. Thomas*, 99 Nev. 579, 588-89 (1983); *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 251 (1998). “After weighing the foregoing factors, the district judge may, where warranted, award up to the full amount of fees requested.” *Beattie*, 99 Nev. at 589. “No one factor under *Beattie* is determinative” and the district court “has broad discretion to grant the request so long as all appropriate factors are considered.” *Yamaha Motor Co.*, 114 Nev. at 252 n.16.

## **2. The *Beattie* Factors Favor an Award of Reasonable Attorneys’ Fees to Defendants.**

An award of Defendants’ reasonable attorneys’ fees in the amount of \$57,206.50 is warranted here. Indeed, there is no dispute that Plaintiffs failed to accept Defendants’ offer of judgment. *See* Nev. R. Civ. P. 68(e) (“If the offer is not accepted within 14 days after service, it will be considered rejected by the offeree and deemed withdrawn by the offeror.”). Nor is there

1 any dispute that Plaintiffs failed to obtain a more favorable judgment.

2 The *Beattie* factors favor an award of Defendants’ reasonable attorneys’ fees. First,  
3 Plaintiffs’ claims against SEIU and Henry were not brought in good faith. It is undisputed that  
4 Plaintiffs did not work for SEIU and/or Henry, and that Plaintiffs had no employment contracts  
5 with SEIU and/or Henry. Moreover, neither the initial complaint nor the first amended  
6 complaint alleged any legal basis for holding SEIU and/or Henry liable for breach of contract or  
7 wrongful termination despite the glaring absence of those essential facts. Thus, at the very outset  
8 of this case there was not a reasonable factual or legal basis for Plaintiffs’ claims against SEIU  
9 and/or Henry. Nevertheless, Plaintiffs pursued their claims against SEIU and Henry and  
10 imposed substantial costs and attorneys’ fees on Defendants.

11 Moreover, even assuming *arguendo* that Plaintiffs initially brought their claims in good  
12 faith, they were aware as early as October 2018, when Defendants first moved for summary  
13 judgment, that their claims were likely subject to LMRDA preemption. In fact, Plaintiffs  
14 admitted in their September 2018 motion for partial summary judgment that they held  
15 management-level positions at Local 1107, a dispositive concession for purposes of LMRDA  
16 preemption.<sup>2</sup> *Screen Extras Guild v. Superior Court*, 51 Cal. 3d 1017, 1028 (1990) (concluding  
17 that “Congress intends that elected union officials shall be free to discharge *management* or  
18 policymaking personnel.”) (emphasis added). Despite that additional undisputed and glaring  
19 factual weakness in their case, Plaintiffs continued to pursue their claims for another year at  
20 significant cost to Defendants.

21 Second, Defendants’ offer was reasonable and in good faith both in timing and amount.  
22 Defendants made their offer pursuant to Rule 68 following receipt of Plaintiffs’ discovery  
23 responses and expert’s report, and the depositions of Plaintiffs and their expert. Based on that

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24 <sup>2</sup> In their September 2018 motion for partial summary judgment, Plaintiffs stated that “[i]t  
25 cannot be disputed that Ms. Gentry and Mr. Clarke were hired *to their management positions*  
26 with Local 1107 by former Local 1107 President Cherie Mancini.” Plaintiffs’ Motion, at 11:19-  
27 20 (emphasis added); *see also id.* at 11:21 (stating that Plaintiffs were “*management employees*  
28 that were not covered by” staff union collective bargaining agreement) (emphasis added). They  
made the same admission in their November 2018 reply brief, describing themselves as  
“*management employees* that answered to [the union’s former president].” Reply, at 18  
(emphasis added).

1 discovery, Defendants were able to reasonably assess both the merits and value of Plaintiffs'  
2 claims. Defendants offered Clarke a payment equal to nearly 33% of the economic loss found by  
3 his expert, and offered Gentry a payment equal to nearly 28% of the economic loss found by her  
4 expert. Given the absence of any contractual or employment relationship between Plaintiffs and  
5 SEIU and/or Henry, and the significant persuasive authority supporting the conclusion that  
6 Plaintiffs' claims were preempted by the LMRDA, Defendants acted reasonably and in good  
7 faith by offering to settle for approximately one-third of the alleged damages determined by the  
8 Plaintiffs' expert.

9 Third, Plaintiffs' decision to reject the offer and continue litigating this action was  
10 unreasonable. Indeed, as the Court is aware, Plaintiffs never established the existence of an  
11 employment or contractual relationship between them and SEIU and/or Henry, or any legal basis  
12 for holding SEIU and/or Henry liable for breach of contract or wrongful termination in the  
13 absence of those essential facts. Additionally, even if there is no binding Nevada authority  
14 regarding LMRDA preemption in this context, by the time of Defendants' Rule 68 offer  
15 Plaintiffs were aware of the substantial persuasive authority holding that the LMRDA preempted  
16 the type of claims at issue here. By rejecting Defendants' Rule 68 offer and continuing to litigate  
17 this case – despite no employment or contractual relationship with SEIU and/or Henry, and in the  
18 face of their earlier admissions that they held management-level positions at Local 1107 –  
19 Plaintiffs did little more than unnecessarily increase attorneys' fees and costs for Defendants.

20 Finally, as discussed more in the next section, the attorneys' fees sought by Defendants  
21 are reasonable and justified in amount. Defendants seek a modest fee of between \$185.00 and  
22 \$225 an hour, and the hours expended on this matter since July 2019, when Plaintiffs' rejected  
23 Defendants' Rule 68 offer, were reasonable.

24 **3. Defendants' Request for Attorneys' Fees is Supported by the *Brunzell* Factors.**

25 In determining whether a request for attorneys' fees is reasonable and justified, courts  
26 should consider the following factors:

- 27 (1) the qualities of the advocate: his ability, his training, education, experience,  
28 professional standing and skill; (2) the character of the work to be done: its difficulty,

1 its intricacy, its importance, time and skill required, the responsibility imposed and  
2 the prominence and character of the parties where they affect the importance of the  
3 litigation; (3) the work actually performed by the lawyer: the skill, time and attention  
4 given to the work; (4) the result: whether the attorney was successful and what  
5 benefits were derived.

6 *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 346 (1969). Each factor should be “given  
7 consideration by the trier of fact and . . . no one element should predominate or be given undue  
8 weight.” *Id.* at 349-50.

9 **A. Counsel for Defendants Have Significant Relevant Experience in Labor Law.**

10 As detailed in the accompanying Cohen Declaration, counsel for Defendants have the  
11 ability, training, education, experience, professional standing, and skill to warrant the attorneys’  
12 fees sought by Defendants SEIU and Henry. *See* Cohen Decl., ¶¶ 4-5, 8; *cf. Easley v. U.S.*  
13 *Corp.*, Case No. 2:11-cv-00357-ECR-CWH, 2012 WL 3245526, \* (D. Nev. Aug. 7, 2012)  
14 (finding hourly rate of \$340.00 reasonable for attorney with ten years of specialized experience  
15 in labor and employment law). Indeed, in proceedings related to the trusteeship by SEIU over  
16 Local 1107, the United States District Court for the District of Nevada awarded hourly rates of  
17 \$375.00 to Defendants’ counsel in January 2019. Cohen Decl., ¶ 8.

18 **B. The Character of Defendants’ Legal Work, as Well as the Skill, Time and**  
19 **Attention Required to Complete It, Warrants an Award of Reasonable**  
20 **Attorneys’ Fees.**

21 The character of Defendants’ legal work warrants an award of reasonable attorneys’ fees.  
22 So too does the skill, time, and attention required to complete that work.

23 As this Court is aware, one of the principal legal issues upon which summary judgment  
24 was granted involved federal preemption under the LMRDA. Defendants spent a significant  
25 amount of time and attention preparing briefing for this Court that addressed federal preemption  
26 in a clear and persuasive fashion. That task, which required extensive research and review of  
27 cases in jurisdictions nationwide, was especially important given the absence of binding Nevada  
28 authority on point.

1 Also, as is evident from review of the Court's docket and counsel's billing records, *see*  
2 Cohen Decl., Ex. C, between Defendants' Rule 68 offer and their successful motion for summary  
3 judgment, Defendants spent considerable time and attention on this case. Among other things,  
4 counsel spent time researching and briefing various motions,<sup>3</sup> addressing ongoing discovery,<sup>4</sup>  
5 and attending court appearances required to advance this litigation to completion.<sup>5</sup> Defendants  
6 completed those demanding but necessary tasks in an efficient and skilled manner.

7 Last, it bears mentioning that this case is one of five lawsuits brought by Plaintiffs'  
8 counsel in connection with the trusteeship by SEIU over Local 1107.<sup>6</sup> Managing litigation and  
9 discovery in that context is a difficult task, and it should be taken into account in assessing the  
10 work of Defendants' counsel in this case.

11 **C. Defendants Obtained Favorable Results.**

12 Last, by obtaining summary judgment on all claims against them in the first amended  
13 complaint, Defendants' counsel achieved a favorable result.

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14 <sup>3</sup> Plaintiffs filed a request for judicial notice on July 22, 2019, which Defendants opposed;  
15 defendants SEIU Local 1107, Manteca, and Blue filed a motion to determine attorney-  
16 client/work product privilege on August 5, 2019; Plaintiffs filed a motion to compel on  
17 August 26, 2019, which was resolved by stipulation filed on September 20, 2019; and the parties  
18 filed motions for summary judgment and partial summary judgment on October 29 and 30, 2019.  
Each of these filings required research and attention by Defendants' counsel.

19 <sup>4</sup> Among other things, Plaintiffs took the depositions of Deirdre Fitzpatrick and SEIU on July  
20 29, 2019; Plaintiffs took the deposition of Debbie Springer on August 7, 2019; and Plaintiffs  
21 took the depositions of Brenda Marzan and SEIU Local 1107 on September 24, 2019. In  
22 addition, Defendants responded to Plaintiffs' third set of requests for admission, second set of  
interrogatories, and fifth request for production of documents on August 14, 2019. All such  
discovery required substantial time and attention by Defendants' counsel.

23 <sup>5</sup> Counsel for Defendants appeared at a hearing on August 6, 2019, related to Plaintiffs' request  
24 for default judgment; a hearing on August 7, 2019, related to the motion to determine attorney-  
25 client/work product privilege; a hearing on September 10, 2019, related to Plaintiffs' request for  
judicial notice (telephonic appearance); and a hearing on the parties' motions for summary  
judgment on December 3, 2019.

26 <sup>6</sup> *See Mancini v. SEIU, et al.*, Case No. 2:17-cv-02137-APG-NJK; *Garcia v. SEIU, et al.*, Case  
27 No. 2:17-cv-01340-APG-NJK; *Gentry v. SEIU, et al.*, Case No. A-17-764942-C; *Cabrera v.*  
28 *SEIU, et al.*, Case No.: 2:18-CV-00304-RFB-CWH; *Nguyen v. SEIU, et al.*, Case No. A-19-  
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**Conclusion**

For the foregoing reasons, Defendants SEIU and Henry respectfully request an award of attorneys' fees in the amount of \$57,206.50.

DATED: January 16, 2020

ROTHNER, SEGALL & GREENSTONE

CHRISTENSEN JAMES & MARTIN

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

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**CERTIFICATE OF SERVICE**

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

I am an employee of Rothner, Segall & Greenstone; my business address is 510 South Marengo Avenue, Pasadena, California 91101. On January 16, 2020, I served the foregoing document described as **SERVICE EMPLOYEES INTERNATIONAL UNION'S AND MARY KAY HENRY'S MOTION FOR ATTORNEYS' FEES** on the interested parties in this action as follows:

**(By ELECTRONIC SERVICE)**

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

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Evan James: elj@cjmlv.com

**(By U.S. MAIL)**

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

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

/s/ Lisa C. Posso  
Lisa C. Posso



1 OPP

2 MICHAEL J. MCAVOYAMAYA, ESQ.

3 Nevada Bar No.: 14082

4 4539 Paseo Del Ray

5 Las Vegas, Nevada 89121

6 Telephone: (702) 299-5083

7 Mmcavoyamayalaw@gmail.com

8 Attorney for Plaintiffs

9 EIGHTH JUDICIAL DISTRICT COURT

10 DISTRICT COURT, CLARK COUNTY OF NEVADA

11 \* \* \* \*

12 DANA GENTRY, an individual, *et al.*

13 Plaintiffs,

14 vs.

15 SERVICE EMPLOYEES INT'L UNION  
16 ("SEIU"), a nonprofit cooperative corporation; *et al.*

17 Defendants.

CASE NO.: A-17-764942-C

Dept. 26

**PLAINTIFFS' OPPOSITION TO**  
**THE LOCAL 1107 DEFENDANTS**  
**MOTION FOR ATTORNEYS'**  
**FEES AND COSTS**

(Hearing Requested)

18 COMES NOW, Plaintiffs, by and through their attorney of record, MICHAEL  
19 MCAVOYAMAYA, ESQ., and hereby brings this Opposition to the Defendants' Motion for  
20 Attorneys' Fees and Costs.

21 These objections are made and based upon the complaint on file herein, the memorandum  
22 of points and authorities submitted herewith, and the affidavits and exhibits attached hereto.

23 Dated this 28th day of January, 2020.

24 /s/ Michael J. Mcavaoyamaya

25 MICHAEL J. MCAVOYAMAYA, ESQ.

26 Nevada Bar No.: 14082

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Telephone: (702) 299-5083

Michael.mcavoyamaya@gmail.com

Attorney for Plaintiffs

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. STATEMENT OF FACTS.**

Plaintiffs filed their Complaint on November 20, 2017. Discovery completed on August 15, 2019. On July 16, 2017, the Defendants issued an offer of judgment to each of the Plaintiffs for \$30,000.00 each. *See* Defs' Ex. A. The offer was not apportioned between the Defendants, and was not approved by their co-Defendant, Sharon Kisling. *Id.* Plaintiffs' refused the offer given that the facts and evidence demonstrated, without question, that the Defendants had breached Plaintiffs' for cause contracts with Local 1107. Plaintiffs' expert valued Ms. Gentry's actual damages at \$107,391.00. *See* Defs' Ex. B. Plaintiffs' expert valued Mr. Clarke's actual damages at \$92,305.00. *See* Defs' Ex. C. The parties filed motions for summary judgment on October 29th and 30th 2019. The motions came up for hearing on December 3, 2019, and the Court created new Nevada law adopting the California Supreme Court's Labor Management Reporting and Disclosure Act ("LMRDA") preemption doctrine concluding that, while there was no dispute that Plaintiffs' for cause contracts existed and were breached, they were unenforceable because of LMRDA preemption of Nevada's wrongful termination law. Defendants' now seek attorneys' fees because this Court has adopted new Nevada law invalidating Plaintiffs' for cause contracts.

### **II. ARGUMENT.**

#### **A. Standard Of Review.**

"The purpose of NRS 17.115 and NRCP 68 is to save time and money for the court system, the parties and the taxpayers. They reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer." *Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999). However, "the decision to award attorney fees rests within the district court's discretion...." *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 554, 429 P.3d 664, 668 (Nev.App., 2018).

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.*, 128 Nev. \_\_\_, 283 P.3d 250, 258 (2012).

**B. The Defendants’ Offers Of Judgment Are Defective As A Matter Of Law.**

Before getting into the *Beattie* factors, the defects in the Defendants’ offers of judgment must first be addressed. In Nevada, “[a]t any time more than 21 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions. Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees.” *See Nev. R.Civ. P. 68(a)*. “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 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

1 apportioned both in terms of the amounts to be paid to each plaintiff, and the amount each  
2 defendant will pay to resolve the claims against it. *Id.*

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

10 There is no doubt the '97 offer was unapportioned. **The offer did not indicate**  
11 **whether the \$ 20,000 was being offered to settle the contractual claims against**  
12 **the Budettis or the tort claims for slander against Musico.** Further, **the offer**  
13 **did not distinguish how much would be paid by each defendant to settle the**  
14 **respective claims.**

14 *Id.* at 240.

15 The *Parodi* case is very similar to the case at bar. Like in *Parodi*, the Plaintiffs sued one  
16 group of Defendants, SEIU and Local 1107, for breach of contract, and another group of  
17 Defendants, Local 1107 and Sharon Kisling, for defamation. *Id.* Like in *Parodi*, less than all of the  
18 Defendants, SEIU and Local 1107, made offers of judgment prior to trial. *See* L1107’s Ex. A, at  
19 1:20-2:4. The Defendants’ offers of judgment to the Plaintiffs states that it is an “offer to allow  
20 judgment to be taken against them **to resolve all claims against all of the Defendants** and  
21 apportioned between Plaintiffs as follows: in favor of Plaintiff Dana Gentry for Thirty Thousand  
22 and 00/100 Dollars (\$30,000.00), including all accrued interest, costs, attorney’s fees, and any  
23 other sums that could be claimed by Plaintiff Dana Gentry against Defendants in the above-  
24 captioned action; and in favor of Plaintiff Robert Clarke for Thirty Thousand and 00/100 Dollars  
25 (\$30,000.00), including all accrued interest, costs, attorney’s fees, and any other sums that could  
26 be claimed by Plaintiff Robert Clark against Defendants in the above-captioned action. This  
27 apportioned offer of judgment is conditioned upon the acceptance by all Plaintiffs against the  
28 offerors pursuant to NRCP 68(b).” *See* L1107’s Ex. A, at 1:20-2:4. However, like in *Parodi*, the

1 offer of judgment made by the SEIU and Local 1107 Defendants did not indicate how much of the  
2 \$30,000.00 that each Plaintiff was supposed to receive would be paid by the respective Defendants,  
3 and was therefore unapportioned. *Id.*

4 The Local 1107 and SEIU Defendants' offer of judgment also does not clearly indicate that  
5 it would resolve all the claims in the action, as required by NRCP 68(a). The offer of judgment  
6 refers to SEIU and Local 1107 as the Defendants, and seeks to "resolve all claims against all of  
7 the Defendants." *Id.* However, the offer of judgment does not appear to indicate that the  
8 Defendants sought and obtained authority to settle Plaintiffs' claims against the Defendants from  
9 Defendants Sharon Kisling. *Id.* This is even more problematic, given the fact that the offer does  
10 not indicate what Defendant would pay what amount to what Plaintiff. Thus, for example, if  
11 Plaintiffs had accepted the offer of judgment, and subsequently sought recovery of some of the  
12 money due to Plaintiff Gentry from Sharon Kisling, it is likely that Kisling could then file a motion  
13 to vacate the offer of judgment because she never agreed to settle the claim or pay any sum of  
14 money to Plaintiff Gentry. The failure to apportion the amount each Defendant would pay for what  
15 claims makes the offer of judgment unapportioned pursuant to *Parodi*. For this reason, the SEIU  
16 and Local 1107 Defendants' offer of judgment is invalid, as it did not give the Plaintiffs reasonable  
17 opportunity to settle all claims in the suit because it was unapportioned as to which of the  
18 Defendants would be the source of payment of the funds.

19 In *Parodi*, the defendants argued that the '97 offer of judgment was valid because "[t]he  
20 Budettis assert[ed] that Musico was their agent and, as such, this is a case of defendants who are  
21 acting jointly, as one entity, similar to the defendants in *Uniroyal Goodrich Tire v. Mercer*, 111  
22 Nev. 318, 890 P.2d 785 (1995)." See *Parodi*, 115 Nev. at 240-41. The *Parodi* Court disagreed,  
23 noting that "[t]he record does not support a finding that Musico was considered to be an agent of  
24 the Budettis at the time *Parodi* rejected the '97 offer." *Id.* According to the *Parodi* Court, the facts  
25 showed that "Musico was sued because she allegedly made false and defamatory statements about  
26 *Parodi*. **The Budettis were not included in these claims, nor was Musico included in the**  
27 **contractual and lien claims against the Budettis.** There is no indication that the Budettis  
28 stipulated to be liable for Musico's actions at the time the offer was made or to pay any judgment

1 that might be entered against Musico.” *Id.* The *Parodi* case, therefore, did “not fall within the  
2 exception contemplated by *Uniroyal*. The district court could not award fees and costs based upon  
3 Rule 68 or NRS 17.115.” *Id.*

4 Again, this case is very similar to the *Parodi* case. Here, Plaintiffs sued the SEIU and Local  
5 1107 Defendants pursuant to various breach of contract theories of liability, and Defendant Sharon  
6 Kisling, for defamation. As the case proceeded through discovery, Local 1107 was added to the  
7 defamation claim, but not the SEIU Defendants. Like in *Parodi*, there is no evidence that Kisling  
8 was considered to be an agent of the SEIU and Local 1107 Defendants, or vice versa, at the time  
9 the offer was rejected by Plaintiffs. Kisling was not party to the breach of contract claims against  
10 the SEIU and Local 1107 Defendants. There is no indication in the record that Local 1107 or SEIU  
11 agreed to be liable for the claims against Kisling. This case does not, therefore, fall within the  
12 *Uniroyal* exception, and attorneys fees and costs based upon Rule 68 or NRS 17.115 cannot be  
13 awarded to the Defendants based on their unapportioned offer. *Id.*

14 Now, the recent amendments to NRS 68 permit unapportioned joint offers of judgment to  
15 multiple Plaintiffs so long as several conditions are met:

16 An offer made to multiple plaintiffs will invoke the penalties of this rule only if:

17 (A) the damages claimed by all the offeree plaintiffs are solely derivative, such as  
18 where the damages claimed by some offerees are entirely derivative of an injury to  
19 the others or where the damages claimed by all offerees are derivative of an injury  
20 to another; and

21 (B) the same entity, person, or group is authorized to decide whether to settle the  
22 claims of the offerees.

23 *See Nev. R. Civ. P. 68(c).*

24 Here, while the Plaintiffs are represented by the same counsel, Plaintiffs’ counsel was not  
25 authorized to decide whether to settle all the claims on behalf of both Plaintiffs because each  
26 Plaintiff had a separate for-cause contract of continued employment with Local 1107 and each  
27 Plaintiff had individual contract rights and damages that were not derivative. Neither Plaintiff was  
28 authorized to settle the claims on behalf of the other Plaintiff. The Plaintiffs claims were not  
brought together because they were derivative of each other, but, rather, because the individual

claims arose under similar factual circumstances so that bringing them as individual lawsuits would have resulted in consolidation of the cases anyway. The SEIU and Local 1107 Defendants' offer of judgment runs afoul of both the requirements for unapportioned joint offers. The damages claimed by all offeree Plaintiffs were not solely derivative, each deriving from individual contracts and individual damages resulting from the breach of those contracts. Plaintiff Clarke was also not party to Plaintiff Gentry's defamation claim. Finally, neither Plaintiff had the authority to agree to settle the claim for the other Plaintiff. Further, given the fact that Plaintiff Gentry had both defamation and contract claims, and Plaintiff Clarke had only contract claims, the equal amount of \$30,000.00 offered to both Plaintiffs to resolve all claims was highly likely to be rejected by Plaintiff Gentry, especially considering the fact that Sharon Kisling did not approve of the SEIU and Local 1107 Defendants' offer of judgment, and the offer did not indicate which of the three Defendants would be paying to settle the respective claims. In sum, the Defendants' offer of judgment was, quite simply, legally invalid as a matter of law, and like in *Parodi*, this Court may not award fees and costs pursuant to Rule 68 or NRS 17.115 based on this unapportioned offer.

**C. None Of The *Beattie* Factors Militate In The Defendants' Favor.**

This is a unique case where Plaintiffs have proven the merits of their breach of contract claims under Nevada law at the time of the offer, but the Court has none-the-less ruled in the Defendants favor by applying a California preemption doctrine creating new Nevada law rendering Plaintiffs' for-cause contracts unenforceable. The unique circumstances of this case demonstrate that none of *Beattie* factors weigh in the Defendants' favor. Both Defendants appear to recognize that they are the prevailing party not because they succeeded on the merits of the case, but, rather, because they succeeded on getting this Court to apply the California Supreme Court's LMRDA preemption doctrine despite the strong presumption against preemption of Nevada law. *See Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990); *see also W. Cab Co. v. Eighth Judicial Dist. Court of Nev.*, 390 P.3d 662, 667 (Nev. 2017); *MGM Grand Hotel-Reno v. Insley*, 102 Nev. 513, 518, 728 P.2d 821, 824 (1986); *see also* SEIU Mot. Atty Fees, at 6:11-13; L1107 Mot. Atty Fees, at 4:26-27.

1 The ultimate issue, therefore, is whether it was reasonable for Plaintiffs to reject an offer  
2 of judgment based on Nevada law at the time the offer was made. The answer to this question is  
3 clearly yes, Plaintiffs' rejection of the Defendants' offers of judgment was both reasonable and in  
4 good faith because Nevada law at the time of the offer of judgment was that Plaintiffs' contracts  
5 were enforceable.

6 ***1. Plaintiffs' Claims Were Brought In Good Faith.***

7 The Local 1107 Defendants do not argue that Plaintiffs' claims were brought in bad faith.  
8 *See* L1107 Mot. Atty Fees, at 4:18-28. Instead, they argue that "Plaintiffs failed to maintain the  
9 action in good faith because they unreasonably rejected the offer of judgment." *Id.* While the Local  
10 1107 Defendants include a section that appears to be discussing the first of the *Beattie* factors, the  
11 Local 1107 Defendants have actually argued the third *Beattie* factor in two different sections of  
12 their brief. *Id.* at 4:18-28, 7:6-12:4. The two sections both address the reasonableness of rejecting  
13 the offer of judgment, not whether Plaintiffs claims in the Complaint were brought in good faith.

14 SEIU International argues that the claims brought against them not brought in good faith,  
15 but misrepresents that there was not "any legal basis for holding SEIU and/or Henry liable for  
16 breach of contract or wrongful termination." *See* SEIU Mot. Atty Fees, at 6:5-10. It is undisputed  
17 that it was SEIU International that imposed the trusteeship over Local 1107. It is undisputed that  
18 the Trustees appointed to oversee Local 1107's operations, SEIU International Executive Vice  
19 President Luisa Blue, and Martin Manteca were both SEIU International employees. It is  
20 undisputed that it was those two SEIU International employees that terminated Plaintiffs in breach  
21 of their for cause contracts. SEIU International was a necessary party because, had Plaintiffs only  
22 sued Local 1107 only, Local 1107 could have claimed that a third party, SEIU International, was  
23 the entity responsible for the terminations. Alter-ego liability is recognized in Nevada, and SEIU  
24 International's liability in this case proceeded under an alter-ego theory of liability.

25 At the hearing on the parties summary judgment motions, Local 1107 counsel, Evan James,  
26 Esq. did not dispute the existence of the for-cause contracts between Plaintiffs and Local 1107.  
27 Mr. James did not dispute that Trustees Luisa Blue and Martin Manteca breached those contracts  
28 when they terminated Plaintiffs. Local 1107 and SEIU's only argument was that the California



Supreme Court’s Labor-Management Reporting and Disclosure Act (“LMRDA”) preemption doctrine articulated in *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990) should be adopted in Nevada, and that it rendered Plaintiffs’ contracts unenforceable. For this reason, Defendants did not win summary judgment in their favor on the merits of this case. Rather, Defendants have succeeded in convincing this Court that despite Plaintiffs proving the merits of their breach of contract claims, recovery is barred because of this new preemption doctrine that this Court adopted for the first time in Nevada on December 3, 2019. Because *Screen Extras Guild* was not the law of Nevada before this Court applied it for the first time on December 3, 2019, Plaintiffs’ claims were clearly brought and maintained in good faith, and proven on the merits.

**2. Defendants’ Offer Of Judgment Was Not Reasonable Nor Made In Good Faith In Both Its Timing And Amount Pursuant To Nevada Law At The Time Of The Offer.**

The Defendants offers of judgment were not reasonable nor in good faith in both timing and amount because it forced Plaintiffs and their counsel to speculate on whether this Court, and ultimately the Nevada Supreme Court would establish new Nevada law invalidating their contracts despite the facts and evidence in the case being it indisputable that the contracts existed, and were breached by the Defendants. *See* Plaintiffs’ Contracts, attached as **Exhibit “1,”** at 1-2; *see also* Plaintiffs’ Termination letters, attached as **Exhibit “2,”** at 1-4. “The purpose of an offer of judgment under former NRS 17.115 and NRCP 68 is to facilitate and encourage a settlement by placing a risk of loss on the offeree who fails to accept the offer, with no risk to the offeror, thus encouraging both offers and acceptance of offers.” *Mendenhall v. Tassinari*, 403 P.3d 364, 374 (Nev. 2017) *citing* *Matthews v. Collman*, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994); *see also* *Marek v. Chesny*, 473 U.S. 1, 5, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985) (noting that the primary purpose behind offers of judgment is to encourage the compromise and settlement of litigation and that they “prompt [] both parties to a suit to evaluate the risks and costs of litigation, and **to balance them against the likelihood of success upon trial on the merits**”); 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 3001 (2014) (stating that by encouraging compromise, **offers of judgment** discourage both protracted litigation and vexatious law suits).

1           The defects in the SEIU and Local 1107 Defendants' unapportioned offer of judgment  
2 aside, the Defendants' offer of judgment was neither reasonable nor in good faith because it  
3 required speculation on this Court, and ultimately the Nevada Supreme Court's adoption of an  
4 LMRDA preemption doctrine that has been adopted by only two state Supreme Courts when the  
5 merits of Plaintiffs' breach of contract case if the doctrine was not adopted were indisputable. A  
6 similar situation occurred in the case of *Zhang v. Frank*, Case No.: A481513, Dept. No. XVI,  
7 Order 7/19/2006, attached as **Exhibit "3,"** at 6:20-7:22. In *Zhang*, the parties were involved in a  
8 contract dispute that resulted in several rulings that were issues of first impression to the Nevada  
9 Supreme Court. *Id.* The District Court had ruled in favor of the Defendants dismissing the  
10 Plaintiffs' Complaint against them under existing Nevada law. *Id.* The Nevada Supreme Court  
11 reversed the decision allowing the case to proceed to trial. During litigation, the Plaintiff sent offers  
12 of judgment to the Defendants to settle the claims, which the Defendants rejected based on existing  
13 Nevada law. Following a trial in 2008, the Plaintiff appealed the ruling in favor of the lenders, and  
14 "As a matter of first impression, the Nevada Supreme Court took a fresh look at the bona fide  
15 encumbrancer law regarding actual and constructive notice, and a lender's duty to look beyond  
16 solely the recorded documents in making a determination about whether or not an exception to  
17 marketable title exists on a property." *Id.* at 4:6-11. The Nevada Supreme Court created new  
18 Nevada law imposing additional duties on lenders, reversed the Judgment of the District Court,  
19 and remanded the case with instructions to enter judgment in favor of the Plaintiff. The Plaintiff  
20 then moved for attorneys' fees pursuant to NRCP 68.

21           The Defendants argued that "Zhang was not entitled to an award of attorneys fees and costs  
22 because, under an analysis of the Beattie factors, the Lenders rejected Zhang's Offers of Judgment  
23 and maintained their defenses against Zhang in good faith, because, under Nevada law as it existed  
24 at that time, the Lenders had a plausible and valid basis for asserting complete priority over Zhang's  
25 specific performance rights based on their bona fide encumbrancer defense. The Lenders' bona  
26 fide encumbrancer defense was not overturned by the Nevada Supreme Court until the Supreme  
27 Court entered its February 26, 2010 Order of Reversal and Remand (nearly two years after the  
28

1 Offers of Judgment were made by Zhang)." *Id.* at 6:20-7:4. The district court that addressed the  
2 Motion for Attorneys' Fees and Costs held that:

3 With regard to the first Beattie factor, the Court finds that the defenses of  
4 Countrywide and Silver State were litigated in good faith, based upon a bona fide  
5 encumbrancer for value defense, and on Countrywide's fall back defense of  
equitable subrogation.

6 With regard to the second Beattie factor, the Court finds that Zhang's two Offers of  
7 Judgment, which mirror the equitable subrogation award, were made in good faith,  
8 and were both reasonable in timing and amount.

9 With regard to the third factor, the Court finds that the liability issues in this matter  
10 were quite intricate and involved issues of first impression in Nevada. Therefore,  
11 the Court finds that the decisions of Countrywide and Silver State to reject Zhang's  
Offers of Judgment was not in bad faith or grossly unreasonable.

12 **Therefore, the Court having fully considered and weighed all of the Beattie**  
13 **factors, the facts and circumstances of this case, and based on the complexity**  
14 **of the issues presented in this case, chooses not to award Zhang any attorney**  
**fees. However, Zhang's Motion for Costs is granted.**

15 *Id.*

16 The *Zhang* Defendants ultimately had to move a second time for relief from the attorney  
17 fee award, and Judge Williams concurred with the prior ruling finding that it was not unreasonable  
18 for the defendants to reject the offers of judgment because "it was not the law in Nevada at the  
19 time that a title insurance company and/or lender had an 'inquiry notice' duty to look in Court  
20 records, beyond what was contained in the Official Public Records, in order to discover any issues  
21 regarding exceptions to marketable title for a certain property. The Nevada Supreme Court's  
22 February 26, 2010 Order of Reversal and Remand for the first time extended the duty of "inquiry  
23 notice" for an investigating title insurance company and/or lender so that they were also required  
24 to research Court records, through available Court searching tools, in order to discover any  
25 possible exceptions to marketable title for a property. Thus, at the time that the Offers of Judgment  
26 were extended, the Lenders had a "good faith" basis for rejecting the same, and pursuing their bona  
27 fide encumbrancer defense, based on what they had discovered in the Official Public Records, and  
28

1 based on the facts and the law as they existed when the Offers of Judgment were made.” *Id.* at  
2 11:23-12:9.

3 Judge Williams’ ruling in *Zhang* is highly persuasive, and demonstrates that an award of  
4 attorneys’ fees and costs to a prevailing party is improper when the law at the time an offer of  
5 judgment is made is altered by the Court. Here, like in *Zhang*, the law of Nevada at the time the  
6 offers of judgment were made was that Plaintiffs contracts were valid and enforceable. Nevada  
7 has not, and still may not adopt the *Screen Extras Guild* LMRDA preemption doctrine, and even  
8 if it does on appeal, Plaintiffs were not unreasonable in rejecting the Defendants’ offers of  
9 judgment based on existing Nevada law. Rather, the Defendants’ offer of judgment was both  
10 unreasonable and in bad faith, as it was not predicated on the merits of the case nor Nevada law at  
11 the time it was made. Unlike *Zhang*, where the offer of judgment was based on the equitable  
12 subrogation award, the Defendants’ offer of judgment is based on a gamble that the Nevada  
13 Supreme Court will ultimately adopt the *Screen Extras Guild* LMRDA preemption doctrine as a  
14 defense to wrongful termination claims in Nevada.

15 In addition to the offer not being based on existing Nevada law, nor a credible dispute on  
16 the merits of the claims, the Defendants sent defective offers of judgment were for an amount less  
17 than 1/3 of Plaintiffs actual losses from the Defendants’ breach of contract based on their gamble  
18 that this Court, and ultimately the Nevada Supreme Court, will adopt the *Screen Extras Guild*  
19 LMRDA preemption doctrine. NRCP 68 was not intended to permit parties to gamble on changes  
20 in Nevada law in the future. Rather, the statute is intended to compel an offeree to evaluate the  
21 merits of the case based on applicable Nevada law at the time the offer is made.

22 Unlike the plaintiff in *Zhang*, who issued an offer of judgment based on an equitable  
23 subrogation award while the case was on appeal, here the Defendants sent an offer of judgment  
24 gambling on this Court, and ultimately the Nevada Supreme Court changing Nevada law as it  
25 relates to union employer liability for claims brought by management employees pursuant to for-  
26 cause contracts negotiated under Nevada law. The fact that Defendants’ offer of judgment for a  
27 fraction of the actual damages was not based on applicable Nevada law at the time of the offer,  
28 nor any credible dispute of the merits of the case, it was unreasonable in both timing and amount.

1 Plaintiffs cannot be expected to pay attorneys' fees and costs for rejecting the Defendants' offer  
2 of judgment based on the law as it existed at the time the offer was made, when the facts and  
3 evidence unquestionable demonstrated the Defendants' liability for breach of the contracts.

4 The Local 1107 Defendants cite to *Scott-Hopp v. Bassek*, 2014 WL 859181, 5 (Nev., 2014)  
5 in support of their position that their offer of judgment was made in good faith in both timing and  
6 amount. *See* L1107 Defs' Mot. Atty Fees, at 4:8-17, 5:23-18. Plaintiffs agree that *Scott-Hopp* is  
7 instructive, but disagrees that the holding supports their argument that their offer of judgment was  
8 reasonable in timing and amount. First, *Scott-Hopp* is a personal injury case, and liability under  
9 Nevada law for personal injury is both well defined, and relatively straightforward. "Bassek made  
10 her offer of judgment nearly two years after the start of the case, **and after each party had an**  
11 **opportunity to conduct discovery and to assess the strengths and weaknesses of its case.**"  
12 *Scott-Hopp*, Nos. 60501, 61943, 2014 Nev. Unpub. LEXIS 352, at \*14. The *Scott-Hopp* Court  
13 concluded that the offer was reasonable in time because it was made after discovery had concluded,  
14 and both parties had the opportunity to evaluate the strength of the merits of the case based on the  
15 facts and the evidence, being offered one day after summary judgment motions were filed. *Id.* The  
16 *Scott-Hopp* Court noted that "the offer was of a reasonable amount" because:

17 Bassek offered \$25,000 to settle Scott-Hopp's claims, which included over  
18 \$150,000 in alleged medical expenses. **Though this offer covered only a fraction**  
19 **of Scott-Hopp's alleged damages, it was reasonable in light of the dispute of**  
20 **factual issues and Bassek's summary judgment motion.** While she conceded that  
21 her vehicle struck Scott-Hopp, **Bassek contested causation and liability**, and  
22 **proffered expert witnesses to testify to a lack of causation.** In addition, the  
23 **eyewitness testimony was ambiguous about liability and causation. Because of**  
24 **the uncertainty about the strength of Scott-Hopp' case, there was substantial**  
25 **evidence that the offer was of a reasonable amount.** Since Basset's offer was  
26 reasonable in time and amount, the second *Beattie* factor was met.

27 *Id.* at \*15.

28 Nothing about *Scott-Hopp* is similar to the facts of this case but the fact that the Defendants'  
offer of judgment was for a fraction of what the actual damages were. The Local 1107 Defendants  
acknowledge that Plaintiffs' expert "valued Ms. Gentry's claims at \$107,391.00" and "Mr.  
Clarke's claims at \$92,305.00." *See* L1107 Defs' Mot. Atty Fees, at 3:8-27. The only part of

1 Plaintiffs' expert's calculation of damages that the Defendants dispute is Plaintiff Gentry's "auto  
2 allowance of \$6,000.00," asserting that "[s]ince Gentry did not use her vehicle for Local 1107 after  
3 employment termination, she was not eligible to receive the reimbursement." *Id.* Assuming  
4 *arguendo*, that the Defendants' argument regarding the allowance is correct, Plaintiffs Gentry and  
5 Clarke's actual damages are \$101,391.00 and \$92,305.00 respectively. Defendants did not retain  
6 a rebuttal expert, so they have no evidence in the record to dispute these amounts. *Id.*

7 Unlike *Scott-Hopp*, here, the Defendants' offer of judgment came well before the close of  
8 discovery, and before Plaintiffs had deposed any of the Defendants' witnesses, and as such, the  
9 Plaintiffs had not had an opportunity to evaluate the factual strength of the merits of the case. *See*  
10 Declaration of Counsel, at 1-2. Also unlike *Scott-Hopp*, the Defendants' offer a judgment was not  
11 based on any dispute of the factual issues in the case, or any reasonable question of liability under  
12 applicable Nevada law at the time of the offer. The factual issues in this case are indisputable that  
13 the Defendants are guilty of breaching the contracts. Unlike *Scott-Hopp*, where the offer of  
14 judgment was based in part on a Summary Judgment motion filed by the defendants, which  
15 outlined the facts and evidence that called into serious question the issues of causation and liability,  
16 here, the Local 1107 Defendants did not dispute that Plaintiffs had for-cause contracts and that  
17 those contracts were breached by the SEIU International Trustees in charge of Local 1107. Indeed,  
18 at no point in Local 1107's Motion for Summary Judgment, their Reply in Support of their Motion  
19 for Summary Judgment, their Opposition to Plaintiffs' Motion for Summary Judgment, or at the  
20 hearing on those motions before this Court, did Local 1107 ever dispute that Plaintiffs had for-  
21 cause contracts, and that those contracts were breached. In this case, the Defendants' offer a  
22 judgment was not based on any factual dispute of liability nor based on existing Nevada law at the  
23 time the offer was made.

24 Rather, the Defendants made their offers of judgment based on a gamble that the Nevada  
25 Supreme Court will adopt the *Screen Extras Guild* preemption doctrine, a matter of first impression  
26 on appeal. Thus, unlike *Scott-Hopp*, where the Court found that the defendant's offer of judgment  
27 was reasonable in time because it was made after discovery so the parties had time and evidence  
28 to evaluate the strength of the case, and reasonable in amount because it was based on serious

1 factual issues in dispute, the Defendants' offer of judgment was neither. The Defendants offer of  
2 judgment was made before Plaintiffs deposed a single defense witness in effort to maximize the  
3 attorney fee award before Plaintiffs had discovery, and unreasonable in amount because Plaintiffs  
4 damages were undisputed and liability under existing Nevada law was clear until this Court created  
5 new Nevada exception to union liability for wrongful termination in breach of a for-cause  
6 employment contracts. The second factor weighs in favor of denying attorneys' fees and costs.

7 **3. *Plaintiffs' Rejection Of The SEIU And Local 1107 Defendants' Offer Of Judgment***  
8 ***Was Both Reasonable And In Good Faith Based On Existing Nevada Law At The***  
9 ***Time The Offers Were Made.***

10 For the same reason cited in the previous section, it was not at all unreasonable for Plaintiffs  
11 to reject an offer of judgment by Defendants because it was not based on the existing law of Nevada  
12 at the time the offer was made, and the facts and evidence pointed to Defendants clear liability on  
13 the merits of the breach of contract claims. It cannot be disputed that the Nevada Supreme Court  
14 had not, and has not adopted the holding of *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal.  
15 3d 1017 (1990) with regards to LMRDA preemption. Plaintiffs' evaluation of their claims based  
16 on Nevada law at the time the offer was made was both reasonable and in good faith. It is  
17 undisputed that Plaintiffs had for-cause contracts. It is undisputed that those contracts were  
18 breached. *See* L1107 MSJ, at 13:11-16. Nowhere in Local 1107's Motion for Summary Judgment,  
19 or Opposition to Plaintiffs' Motion for Summary Judgment, did Local 1107 dispute that the  
20 contracts existed and were breached by the SEIU International Trustees. It is also undisputed that  
21 Local 1107's preemption defense rested entirely on "an issue of first impression in Nevada." *See*  
22 *Order Granting Defs' MSJ*, 12/30/19, at 3:25-28. When an offer of judgment is presented to a party  
23 should not be expected to evaluate the offer based on what Nevada law might be years after the  
24 case has concluded.

25 Plaintiffs stress the LMRDA preemption doctrine adopted by this Court from *Screen Extras*  
26 *Guild, Inc. v. Superior Court*, is not yet the law of Nevada. As a matter of first impression Plaintiffs  
27 are appealing the Court's ruling to the Nevada Supreme Court, and it will take some time before  
28 this Court or the parties actually find out if this doctrine is going to be adopted in Nevada. Existing  
binding Nevada law makes abundantly clear that "[w]hen starting a...preemption analysis, courts

1 should presume ‘that Congress [did] not intend to supplant state law.’” *W. Cab Co.*, 390 P.3d at  
2 669. “[P]re-emption should not be lightly inferred.” *Id.* at 667. The Nevada Supreme Court has  
3 “emphasized that the intent of Congress is the touchstone to preemption analysis and that, absent  
4 a clear and manifest intent of Congress, there is a presumption that federal laws do not  
5 preempt the application of state or local laws regulating matters that fall within the  
6 traditional police powers of the state.” *Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. 789,  
7 794, 263 P.3d 261, 265 (2011).

8 The Nevada Supreme Court has concluded that “the establishment of labor standards falls  
9 within the traditional police power of the State.” *W. Cab Co.*, 390 P.3d at 667. Only “when a  
10 conflict exists between federal and state law, [does] valid federal law overrides, i.e., preempts, an  
11 otherwise valid state law.” *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev.  
12 362, 370-71, 168 P.3d 73, 79 (2007). “Whether a federal enactment preempts state law is  
13 fundamentally a question of congressional intent--did Congress expressly or impliedly intend to  
14 preempt state law? Even when implied, Congress's intent to preempt state law, in light of a strong  
15 presumption that areas historically regulated by the states generally are not superseded by a  
16 subsequent federal law, must be ‘clear and manifest.’” *Id.* The Nevada Supreme Court has  
17 recognized two guiding principles in all preemption cases. “The Court has instructed that “[i]n all  
18 pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which  
19 the States have traditionally occupied, . . . we start with the assumption that the historic police  
20 powers of the States were not to be superseded by the Federal Act unless that was the clear and  
21 manifest purpose of Congress.’ The second principle, known as the presumption against  
22 preemption, arises out of ‘respect for the States as ‘independent sovereigns in our federal system.’”  
23 *Rolf Jensen & Assocs. v. Eighth Judicial Dist. Court of Nev.*, 282 P.3d 743, 746 (2012).

24 Nevada’s treatment of conflict preemption reflects the holdings of the United States  
25 Supreme Court. The United States Supreme Court “decisions establish that a high threshold must  
26 be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. **Any**  
27 **conflict must be ‘irreconcilable . . . . The existence of a hypothetical or potential conflict is**  
28 **insufficient to warrant the pre-emption of the state statute.’”** *Gade v. Nat’l Solid Wastes Mgmt.*



1 *Ass'n*, 505 U.S. 88, 110, 112 S. Ct. 2374, 2389 (1992) *quoting* *Rice v. Norman Williams Co.*, 458  
2 U.S. 654, 659, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1982). “The ‘teaching of this Court's decisions  
3 . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists.”  
4 *English v. Gen. Elec. Co.*, 496 U.S. 72, 90, 110 S. Ct. 2270, 2281 (1990). Supreme Court Justice  
5 Sotomayor, when serving as a Judge for the Southern District of New York, noted in a case similar  
6 to this one that “Since the LMRDA's enactment, the Supreme Court has reinforced that § 603(a)  
7 is ‘an express disclaimer of pre-emption of state laws regulating the responsibilities of union  
8 officials, except where such preemption is expressly provided in the 1959 Act.’” *Schepis v. Local*  
9 *Union No. 17, United Bhd. of Carpenters & Joiners*, 989 F. Supp. 511, 516 (S.D.N.Y. 1998); *De*  
10 *Veau v. Braisted*, 363 U.S. 144, 157, 4 L. Ed. 2d 1109, 80 S. Ct. 1146 (1960). Indeed, in *De Veau*,  
11 the United States Supreme Court expressly stated that:

12 **When Congress meant pre-emption to flow from the 1959 Act it expressly so**  
13 **provided. . . .In addition, two sections of the 1959 Act, both relevant to this case,**  
14 **affirmatively preserve the operation of state laws.** That § 504 (a) was not to  
15 restrict state criminal law enforcement regarding the felonies there enumerated as  
16 federal bars to union office is provided by § 604 of the 1959 Act...And to make the  
17 matter conclusive, § 603 (a) is an express disclaimer of pre-emption of state laws  
18 regulating the responsibilities of union officials, except where such pre-emption is  
19 expressly provided in the 1959 Act.

20 *De Veau*, 363 U.S. at 156-57.

21 It is undisputed that no federal court outside of the California federal District Courts, which  
22 are bound by the *Screen Extras Guild* ruling when passing on state law claims, have concluded  
23 that the LMRDA preempts state wrongful termination law. When Plaintiffs first analyzed the  
24 preemption defendants advanced by the Defendants, Plaintiffs were instructed, pursuant to existing  
25 and binding Nevada law, to presume that preemption did not apply. This alone should end the  
26 analysis of whether Plaintiffs’ claims were made in good faith, and whether Plaintiffs rejection of  
27 the offers of judgment was reasonable and in good faith. Existing Nevada law at the time of the  
28 offer stated Plaintiffs contracts were enforceable, and commanded a presumption that Defendants’  
preemption defense would fail as a matter of law.

Also of note is the fact that only one other state Supreme Court, the Montana Supreme Court, has actually adopted the *Screen Extras Guild* LMRDA preemption doctrine. *See e.g., Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 75 P.3d 1250, 1256 (Mont. Sup. Ct. 2003). Defendants cite *Packowski v. United Food & Commercial Workers Local 951*, 796 N.W.2d 94, 100 (Mich. Ct. App. 2010), *Dzwonar v. McDevitt*, 791 A.2d 1020, 1024 (N.J. App. Div. 2002), and *Young v Int'l Bhd. of Locomotive Eng'rs*, 683 N.E.2d 420 (Ohio Ct. App. 1996), for their argument that their preemption defense was “particularly persuasive” because other jurisdictions have adopted the *Screen Extras Guild* holding. *See* Order Granting Defs’ MSJ, 12/30/19, at 2:25-4:5. Only one of these cases is a state Supreme Court case, *Vitullo. Id.* On the other hand, a greater number of state supreme courts have either outright rejected the *Screen Extras Guild* preemption doctrine, or expressly declined to adopt it when affirming or overruling the lower court on other grounds.

For example, on appeal to the New Jersey Supreme Court in *Dzwonar*, the New Jersey Supreme Court affirmed the appellate court on the issue that the plaintiff had “failed to present a CEPA claim,” and for that reason, it was “unnecessary to address the panel's holding that federal labor law preempts plaintiff's state law claim.” *See Dzwonar v. McDevitt*, 177 N.J. 451, 456, 828 A.2d 893, 896 (2003). Thus, while the New Jersey court of appeals believed that the *Screen Extras Guild* holding should be adopted, when the New Jersey Supreme Court was given an opportunity to adopt the doctrine, it refused to adopt the doctrine. *Id.*

In *Lyons v. Teamsters Local Union No. 961*, the Colorado appellate court noted that *Finnegan* is not a preemption case, and concluded “that Lyons' breach of [employment] contract and promissory estoppel claims are not preempted by the federal labor laws,” expressly rejecting the LMRDA preemption argument. 903 P.2d 1214, 1220 (Colo. App. 1995). “Lyons alleged that the Union hired her in 1989 as a secretary and bookkeeper.” *Id.* The Union president had promised Lyons that her employment would be governed by the same terms as the collective bargaining agreement (“CBA”) the union had negotiated with the employer they bargained with. *Id.* at 1217. The *Lyons* Court found it notable that “*Finnegan* is not a preemption case. The Supreme Court merely held that an appointed policymaking union employee has no wrongful discharge remedy under the LMRDA, which addresses the relationship between union officials and union employees

1 in their status as members, not in their status as employees.” *Id.* at 1220. The *Lyons* Court rejected  
2 the *Screen Extras Guild* preemption analysis holding that:

3       Here, there has been **no contention or showing that Lyons was instrumental in**  
4 **establishing the Union's administrative policies or that her firing was related**  
5 **to her views on union policy.** The Union's stated reason for firing Lyons, who was  
6 a secretary and bookkeeper, was her alleged insubordination and poor job  
7 performance. **Lyons' claims implicate no legitimate union policy and do not**  
8 **threaten any federal interest in ensuring democratic union governance.** Thus,  
9 permitting Lyons to pursue her claims would neither impermissibly interfere with  
10 the ability of democratically elected Union officials to respond to their mandate to  
11 govern, nor frustrate the effective administration of national labor policy. **Thus, we**  
12 **conclude that Lyons' breach of contract and promissory estoppel claims are**  
13 **not preempted by the federal labor laws.**

14 *Id.*

15       In *Casumpang v. ILWU, Local 142*, the Hawaii Supreme Court, cited the *Screen Extras*  
16 *Guild* case and expressly held “that the LMRDA does not preempt Casumpang's state law action  
17 at issue in this appeal.” 94 Haw. 330, 342, 13 P.3d 1235, 1247 (2000). The *Casumpang* Court  
18 noted that “[a]s regards the LMRDA, ‘it is clear that Congress did not intend to occupy the entire  
19 field of regulation, as the text of LMRDA explicitly makes reference to continued viability, of  
20 state laws.’” *Id.* at 1245 quoting *O'Hara v. Teamsters Union Local # 856*, 151 F.3d 1152, 1161  
21 (9th Cir. 1998) (citing 29 U.S.C. § 523, see *infra* note 13). “The only express provisions of the  
22 LMRDA that foreclose the jurisdiction of the courts, both federal and state, are 29 U.S.C. §§ 481  
23 through 483, which provide in relevant part that ‘the remedy . . . for challenging an election [of  
24 union officers] shall be exclusive[ly]’ pursued through the Secretary of Labor.” *Id.* While  
25 Casumpang’s “claim apparently results from his discharge as a union business agent, following a  
26 disciplinary action that culminated in his suspension as a union member, which in turn caused his  
27 disqualification for election to union office, the claim nevertheless has no direct bearing upon  
28 either the validity of the Union's election or Casumpang's eligibility as a candidate.” *Id.*

Other state courts have consistently permitted union employees and officers to bring  
wrongful termination and defamation claims against their unions despite the LMRDA. In *Murphy*  
*v. Am. Fed'n of Grain Millers*, a local union’s international parent union imposed a trusteeship

1 over the local union and removed its top executive officer from his position. 261 N.W.2d 496, 499  
2 (Iowa 1978). The officer had a for-cause contract with the local union. *Id.* The *Murphy* Court held  
3 that, “[i]n the instant case no one disputes the authority of the international union to remove  
4 plaintiff from office. However the jury found no failure by plaintiff in the performance of his  
5 duties. Under these circumstances we believe the policy interests mentioned by the union are  
6 sufficiently supported by the power of removal. **The union removed plaintiff without cause. In**  
7 **doing so it became liable to him for damages**” relating to breach of his for cause employment  
8 contract. *Id.* In *Amalgamated Transit Union, Local 1300 v. Lovelace*, a union officer who lost  
9 reelection sued his union for defamation because the union president, during his election campaign,  
10 accused the former officer, the union’s financial secretary, of stealing union money. 441 Md. 560,  
11 575, 109 A.3d 96, 105 (2015). The Maryland Supreme Court upheld the judgment in favor of the  
12 former union officer.

13 In *Daignault v. Pac. Northwest Reg'l Council of Carpenters*, a the plaintiff, a former union  
14 council representative discharged from his position over a “difference in opinion” between him  
15 and the union council president on how the council should run, and affiliation with another larger  
16 union. 2010 Wash. Super. LEXIS 1019, \*4. The plaintiff raised “two causes of action, (1) the tort  
17 of wrongful discharge, in violation of public policy, and (2) breach of an express or. implied  
18 contract as set forth in the Council's Personnel Policy.” *Id.* The appellate court found that  
19 Daignault’s claims for wrongful discharge did not state a claim under Washington law. *Id.* The  
20 Council urged “the court to rule that Mr. Daignault's claims are preempted by the LMRDA.” *Id.*  
21 The *Daignault* Court rejected the argument, ruling “that the claims are not preempted.” *Id.*

22 Further, every single federal court outside of California has expressly rejected the notion  
23 of LMRDA preemption. *Shuck v. Int'l Ass'n of Machinist & Aero. Workers*, Dist. 837, No. 4:16-  
24 CV-309 RLW, 2017 U.S. Dist. LEXIS 31992, at \*2-5 (E.D. Mo. Mar. 7, 2017); *Ardingo v. Local*  
25 *951, United Food & Commer. Workers Union*, 333 F. App'x 929, 933 (6th Cir. 2009); *Toensmeier*  
26 *v. Amalgamated Transit Union, Div. 757*, No. 3:15-CV-01998-HZ, 2016 U.S. Dist. LEXIS 29152,  
27 at \*2 (D. Or. Mar. 8, 2016); *Hahn v. Rauch*, 602 F. Supp. 2d 895, 911 (N.D. Ohio 2008); *Davis v.*  
28 *Int'l Union, UAW*, 392 F.3d 834, 838 (6th Cir. 2004); *O'Hara v. Teamsters Union Local #856*, 151

1 F.3d 1152, 1162 (9th Cir. 1998); *Simo v. Union of Needletrades*, 322 F.3d 602, 612 (9th Cir. 2003);  
2 *Brookens v. Binion*, No. 99-7030, 2000 U.S. App. LEXIS 2055, at \*7 (D.C. Cir. Jan. 28, 2000);  
3 *Davis v. United Auto.*, No. 1:03CV1311, 2003 U.S. Dist. LEXIS 28190, at \*26 (N.D. Ohio Dec.  
4 31, 2003); *Schepis v. Local Union No. 17, United Bhd. of Carpenters & Joiners*, 989 F. Supp. 511,  
5 515 (S.D.N.Y. 1998); *Reed v. United Transp. Union*, 633 F. Supp. 1516, 1528 (W.D.N.C. 1986);  
6 *Sowell v. Int'l Bhd. of Teamsters*, No. H-09-1739, 2009 U.S. Dist. LEXIS 110339, at \*11-13 (S.D.  
7 Tex. Nov. 24, 2009). The fact of the matter is that the cases rejecting arguments of LMRDA  
8 preemption are far more numerous than those that have adopted it.

9 When evaluating the Defendants offer of judgment, Plaintiffs were faced with: (1)  
10 Nevada's strong presumption that Congress did not intend to preempt Nevada wrongful  
11 termination law; (2) the corresponding federal presumption that preemption is inapplicable and the  
12 high standard for finding conflict preemption; (3) the fact that only two state supreme courts have  
13 actually adopted the *Screen Extras Guild* preemption doctrine; (4) the fact that four state supreme  
14 courts have either rejected it or refused to adopt the doctrine when given the chance; (5) the fact  
15 that every federal court not bound by the *Screen Extras Guild* holding has expressly rejected it,  
16 including the Sixth Circuit Court of Appeals; (6) the fact that no federal appellate court, nor the  
17 United States Supreme Court has held that state wrongful termination claims by union employees  
18 of any category are preempted; (7) the six separate anti-preemption statutes in the LMRDA that  
19 expressly disclaim preemption; (8) the wealth of United States Supreme Court precedent  
20 acknowledging that "When Congress meant pre-emption to flow from the 1959 Act it expressly  
21 so provided" (*De Veau*, 363 U.S. at 156-57); (9) the numerous factual differences between the  
22 cases applying the *Screen Extras Guild* LMRDA preemption doctrine and Plaintiffs' wrongful  
23 discharge claims in this case; and (10) the still unidentified actual conflict between enforcement  
24 of Plaintiffs' contracts and the democracy concerns of the LMRDA. Under these circumstances,  
25 rejecting the offers of judgment was both reasonable and in good faith pursuant to the law of  
26 Nevada at the time of the offer. As Judge Williams held in *Zhang*, this Court should hold, with  
27 regard to the third factor, the liability defense that Defendants ultimately prevailed on was quite  
28 intricate, and involved issues of first impression in Nevada. Therefore, the decisions of Plaintiffs

1 to reject Defendants' offer of judgment were not in bad faith or grossly unreasonable, and attorneys  
2 fees and costs should be denied.

3 **4. *The Fees Sought By The SEIU And Local 1107 Defendants Are Not Reasonable Nor***  
4 ***Justified In Amount.***

5 "In Nevada, 'the method upon which a reasonable fee is determined is subject to the  
6 discretion of the court,' which 'is tempered only by reason and fairness.'" *Shuette v. Beazer Homes*  
7 *Holdings Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005). "[T]he court is not limited  
8 to one specific approach; its analysis may begin with any method rationally designed to calculate  
9 a reasonable amount, including those based on a "lodestar" amount or a contingency fee." *Id.*  
10 Nevada courts are instructed to conduct "its analysis by considering the requested amount in light  
11 of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*, namely, the  
12 advocate's professional qualities, the nature of the litigation, the work performed, and the result."  
13 *Id.* The *Brunzell* factors are "(1) the qualities of the advocate: his ability, his training, education,  
14 experience, professional standing and skill; (2) the character of the work to be done: its difficulty,  
15 its intricacy, its importance, time and skill required, the responsibility imposed and the prominence  
16 and character of the parties where they affect the importance of the litigation; (3) the work actually  
17 performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the  
18 attorney was successful and what benefits were derived." *Brunzell v. Golden Gate Nat'l Bank*, 85  
19 Nev. 345, 349, 455 P.2d 31, 33 (1969).

20 *i. The Fourth Beattie Factor Alone Is Not Sufficient To Justify An Award Of*  
21 *Attorneys' Fees.*

22 The first three of the *Beattie* "factors all relate to the parties' motives in making or rejecting  
23 the offer and continuing the litigation, whereas the fourth factor relates to the amount of fees  
24 requested." *Frazier v. Drake*, 357 P.3d 365, 372, 2015 Nev. App. LEXIS 12, \*17, 131 Nev. Adv.  
25 Rep. 64. While "[n]one of these factors are outcome determinative," the Nevada Court of Appeals  
26 has held that when "the three good-faith *Beattie* factors weigh in favor of the party that rejected  
27 the offer of judgment, the reasonableness of the fees requested by the offeror becomes irrelevant,  
28 and cannot, by itself, support a decision to award attorney fees to the offeror." *Id.* at 373; *see also*  
**Ex. 3**, at 10:11-20.

1 It cannot be disputed that Plaintiffs claims were brought in good faith. The law at the time  
2 Plaintiffs filed their Complaint, through until the date of the hearing on the motions for summary  
3 judgment, December 3, 2019, did not exempt unions from liability for breach of for-cause  
4 employment contracts given management level employees. The first *Beattie* factor unquestionably  
5 cuts in Plaintiffs' favor. Judge Williams' thoughtful and persuasive opinion in *Zhang* that when  
6 complex issues affecting liability turn on matters of first impression in Nevada, and an offeree  
7 reasonably rejects an offer of judgment based on the applicable law at the time the offer was made,  
8 it cannot be said that the offeree rejected the offer unreasonably or in bad faith. Here, Plaintiffs  
9 rejected the Defendants' offer of judgment based on existing Nevada law at the time the offer was  
10 made, and the facts and evidence in this case. But for the exception established by this Court in  
11 this case on December 3, 2019, the Defendants were unquestionably guilty of breach of contract.  
12 Thus, the third *Beattie* factor unquestionably cuts in Plaintiffs' favor.

13 Finally, pursuant to both *Zhang* and *Scott-Hudd*, because the Defendants' offer of judgment  
14 was based on a gamble that the Nevada Supreme Court will eventually adopt the *Screen Extras*  
15 *Guild* LMRDA preemption doctrine in the future, was made before discovery in the case was  
16 concluded, and was not based on any actual matter of contested liability on the facts and evidence,  
17 the second *Beattie* factor cuts in Plaintiffs' favor as well. Under these circumstances, because the  
18 first three good faith *Beattie* factors weigh in favor of Plaintiffs' rejection of the offer of judgment,  
19 "the reasonableness of the fees requested by the offeror becomes irrelevant, and cannot, by itself,  
20 support a decision to award attorney fees to the offeror." *Frazier*, 357 P.3d at 372. The bottom line  
21 is that neither Plaintiffs nor Plaintiffs' counsel are mind readers, and Nevada's offer of judgment  
22 statute is intended to "discourage both protracted litigation and vexatious law suits," by requiring  
23 the offeree to evaluate the case on the merits pursuant to existing law at the time of the offer.  
24 *Mendenhall*, 403 P.3d at 374. "[W]hile NRCP 68 and NRS 17.115 allow an award of attorney fees  
25 where a party rejects an offer of judgment and fails to obtain a more favorable judgment at trial,  
26 **'offers of judgment are designed to encourage settlement and are not intended to unfairly**  
27 **force parties to forego legitimate claims.'**" *Jones v. Gugino*, 2015 Nev. App. Unpub. LEXIS  
28 505, \*7.

1 Defendants' offer of judgment defeats the purpose of NRCP 68 and NRS 17.115, because  
2 it was intended to unfairly force Plaintiffs to forgo legitimate claims pursuant to the applicable  
3 Nevada law at the time the offer was made based on the possibility that the Nevada Supreme Court  
4 would adopt the *Screen Extras Guild* ruling after judgment in this case was final. Had Plaintiffs  
5 accepted the offers, they would have been forgoing more than \$60,000 in undisputed actual  
6 damages each, based on the possibility that the Nevada Supreme Court would apply the *Screen*  
7 *Extras Guild* LMRDA preemption exception to wrongful termination claims against union-  
8 employers. The acceptance of the Defendants' offer of judgment would have, therefore, left open  
9 the question of whether *Screen Extras Guild* would be found applicable to Plaintiffs' claims,  
10 resulting in an acceptance of an offer of judgment based on the prospect of a change in law that  
11 would never actually occur because this Court would not have been given the opportunity to apply  
12 it, and it would not have been appealed to the Nevada Supreme Court for review. Forcing parties  
13 to forgo legitimate claims based on the possibility that Nevada law might change at some point in  
14 the future after the case is concluded is, quite simply, not what the offer of judgment statutes were  
15 intended to accomplish. It is for this reason that the first three *Beattie* factors unquestionably weigh  
16 in Plaintiffs' favor. Because it is not permissible to award attorneys' fees based on the  
17 reasonableness of the fees requested, the reasonableness of the fees requested is not necessary to  
18 analyze. However, even if it were, the Defendants' requested fees are quite unreasonable.

19 ii. *The Defendants' Request For Attorneys' Fees Is Unreasonable And Unjustified In*  
20 *Amount.*

21 In this case, the fourth *Beattie* factor is inextricably intertwined to the unreasonableness of  
22 the Defendants' offer in timing and amount. The Defendants made their offer of judgment  
23 gambling on their belief that the Nevada Supreme Court would adopt the *Screen Extras Guild*  
24 LMRDA preemption doctrine after judgment in this case was issued. That is, if this Court had not  
25 adopted the doctrine, the Defendants would be arguing against awarding of fees and costs, seeking  
26 a stay of any such award, and appealing the judgment against them to the Nevada Supreme Court  
27 asking for them to adopt the LMRDA preemption doctrine anyway. Because the Defendants' offer  
28 of judgment was based entirely on the proposition of the Nevada Supreme Court adopting new



1 law, they advanced it well before Plaintiffs had the opportunity to obtain discovery in this case  
2 resulting in an unreasonable amount of attorneys' fees requested.

3 The date of the offer is evidence of the unreasonable amount of fees sought in this case.  
4 The Defendants made their offer of judgment before discovery in this case was concluded because  
5 they were not actually making their decision to serve the offer of judgment based on the merits.  
6 See Order Granting Defs' MSJ, 12/30/19, at 3:25-28 (this Court ruling that LMRDA preemption  
7 "is an issue of first impression in Nevada.") The Defendants advanced no defense to the merits of  
8 this case on summary judgment, and given that courts routinely decline to award attorneys' fees  
9 and costs based on offers of judgment when matters of liability that determine the prevailing party  
10 in the case are based on complex issues of first impression, like in *Zhang*, even if they lost, they  
11 could make the same argument Plaintiffs make now asking the Court to excuse their bad faith offer  
12 as a reasonable belief that the *Screen Extras Guild* preemption defense would be adopted in  
13 Nevada.

14 Because the Local 1107 Defendants knew they had no defense to the merits of this case  
15 under Nevada law at the time they made their offer, they had no reason to wait until discovery  
16 concluded to make an offer of judgment because they knew that without preemption, they had no  
17 other actual defense to the breach of contract claims. For this reason, to unfairly and unreasonably  
18 maximize their potential attorney fee award, they sent their offer of judgment before the majority  
19 of discovery had been completed. See L1107 Defs' Ex. D, at 1-8. At the same time, the Local 1107  
20 Defendants consistently disputed the validity of Plaintiffs' for-cause contracts during the discovery  
21 process forcing Plaintiffs to conduct additional discovery that could have been avoided had they  
22 simply admitted what they ultimately did not dispute on summary judgment, to wit: that Plaintiffs  
23 had for-cause contracts and that those contracts were breached. Indeed, in the Local 1107  
24 Defendants' responses to Plaintiffs' Second Requests for Admission, the Defendants admitted that  
25 "that an employment contract between Local 1107 and Robert Clarke [and Dana Gentry] existed.  
26 Local 1107 denies that the contract could only be terminated for cause. Local 1107 denies that any  
27 such termination was appealable to the Local 1107 Executive Board." See L1107 Defs' Resp. 2nd  
28

1 RFA, attached as **Exhibit “4,”** at 3:16-4:11. Defendants seek to recover attorneys’ fees for these  
2 responses and the discovery that was necessitated by them. *See* L1107 Ex. D, at 1.

3 The Defendants failed to indicate the basis for their objection or their denial of these  
4 ultimately undisputed facts, forcing Plaintiffs to obtain additional discovery, depositions, written  
5 discovery requests etc., to understand the basis of the Local 1107 Defendants’ fact based defense  
6 that Plaintiffs’ contracts were not for-cause and appealable to the Local 1107 Executive Board. *Id.*  
7 *see also Ex. 1*, at 1-2. Had the Defendants admitted at the outset of the case, or in response to  
8 Plaintiffs’ discovery requests what they ultimately did not dispute when summary judgment  
9 motions were filed, that Plaintiffs had for-cause contracts with clear terms regarding the  
10 termination appeal procedure that were breached, they would have a better argument that their  
11 requested fees were reasonable. However, the Defendants disputed the facts of the case, and did  
12 everything they could to preclude disclosure of relevant discovery, requiring Plaintiffs to move to  
13 compel documents they ultimately produced anyway, and in the end did not dispute the merits of  
14 the breach of contract case. The date of the Defendants’ offer of judgment before Plaintiffs were  
15 able to conduct discovery in the case, and their denial of facts they ultimately did not dispute on  
16 summary judgment, demonstrates that their offer of judgment was intended to maximize recovery  
17 of fees, not a reasonable analysis of the facts, evidence, and applicable law.

18 Although an offer of judgment made before discovery is not, “in and of itself, necessarily  
19 unreasonable,” the Nevada Supreme Court has indicated that if a party identifies “specific  
20 information that they needed to evaluate the reasonableness of the offer of judgment that they did  
21 not have at the time that the offer was extended,” it could be unreasonable. *Anderson v. Doi Huynh*,  
22 2015 Nev. App. Unpub. LEXIS 150, \*2, 2015 WL 1280093. The Local 1107 Defendants’  
23 unreasonable dispute of the factual merits of this case that they ultimately did not dispute on  
24 summary judgment is a prime example of the bad faith in their offer of judgment. If the Defendants  
25 had simply admitted that Plaintiffs had for-cause employment contracts, and that those contracts  
26 were breached, the depositions, additional discovery requests, discovery extensions, etc. would  
27 not have been necessary, and the vast majority of Defendants’ claimed fees would not have  
28 occurred. Local 1107 knew their only defense to this action was preemption, and had they been

1 forthcoming about that, the case could have proceeded to summary judgment without any need for  
2 an extension of discovery. Instead, their responses to Plaintiffs' discovery requests necessitated  
3 the additional discovery for which they now seek attorneys' fees and cost.

4 In a similar case, where an employee sued his former employer for wrongful termination  
5 and the employer sent an offer of judgment before discovery concluded, after a bench trial that  
6 was decided on the merits in favor of the employer, the employer moved for attorneys' fees.  
7 *Niculescu v. Sun Cab, Inc.*, No. 61761, 2013 Nev. Unpub. LEXIS 577, at \*1 (May 15, 2013).  
8 "[T]he district court evaluated the *Beattie* and *Brunzell* factors and awarded respondent  
9 **approximately half of its requested fees** as reasonable attorney fees." *Id.* at \*3. The Nevada  
10 Supreme Court upheld the district court's decision to award only half the attorney fees. *Id.* It is  
11 reasonable to assume that the district court awarded only half of the fees requested, in part, because  
12 of the timing of the offer.

13 *iii. The Brunzell Factors.*

14 Defendants argue their qualifications as an attorney under the first *Brunzell* factor, and  
15 Plaintiffs to not seek to dispute Mr. James's claims about his education and experience as an  
16 advocate. However, when discussing the second factor, the Defendants appear to overstate the  
17 complexity of this case, the preemption issue that will be going up on appeal, and the actual  
18 attorney work that was conducted after the offer of judgment. The majority of the Defendants'  
19 claimed attorneys' fees in this case were not for complex legal work, but, rather, minor review of  
20 documents and producing responses to discovery requests. *See* L1107 Ex. D, at 1-8. In fact, while  
21 the Defendants list fifteen motions in their Motion for Attorneys' Fees, only four on the list were  
22 actually drafted and filed after the offer of judgment was sent. *Id.* The only motion that Local 1107  
23 defense counsel actually claims he participated in drafting were the Local 1107 Motion for  
24 Summary Judgment, the Local 1107 Opposition to Plaintiffs' Motion for Summary Judgment, and  
25 the Motion for Attorneys' Fees. *Id.* at 6-8. The rest of the motions listed in the Local 1107  
26 Defendants' Exhibit D demonstrate that Local 1107 defense counsel either merely reviewed or  
27 edited the documents drafted by others. In fact, of the Local 1107 Defendants 304.20 hours of  
28 attorney work claimed in their Motion for Attorneys' Fees, 106.30 hours are for minor document

1 or discovery review. *Id.* at 1-8. This number includes 5.10 hours of audio file review, and 50.20  
2 hours of review of documents from the *Garcia* case, which the parties agreed to not to do duplicate  
3 discovery. *See* JCCR, at 6:20-23. This duplicate review of documents was clearly unnecessary.

4       The Local 1107 Defendants claim recovery of attorneys' fees for drafting emails, however,  
5 it is impossible to ascertain exactly how much time the Defendants are claiming for most of the  
6 email drafting because much of the emails they seek attorneys' fees for are bundled with other  
7 actions, and do not include an amount of time spent on drafting the emails. For example,  
8 Defendants assert that they spent 2.10 hours reviewing and editing "Stipulation and Order  
9 regarding Discovery; emails regarding Extending Discovery." *See* L1107 Defs' Ex. D, at 4. This  
10 item fails to indicate how much time was spend on review the stipulation and how much time was  
11 spend on the emails. The fact is, the claims in this case were not complex. This case was a straight  
12 forward a breach of for-cause contract and defamation case. The Defendants argued a complex  
13 preemption defense adopted by the California and Montana Supreme Courts. However, the  
14 Defendants conducted all the complex legal research and analysis of the facts and evidence  
15 regarding their preemption defense very early on in the case in their Counter-Motion for Summary  
16 Judgment filed in 2018, well before the offer of judgment. Indeed, the Defendants' Motions for  
17 Summary Judgment are almost a copy and paste from the Counter-Motions for Summary Judgment  
18 the Defendants filed back in early 2018 before discovery had been conducted. *See* L1107 Counter-  
19 MSJ, at 1-14 *contrast to* L1107 MSJ, at 1-21. These documents advance identical preemption  
20 arguments and nearly identical factual analysis, adding only Plaintiffs' deposition testimony to  
21 their overall preemption analysis. In fact, of the Defendants list of fifteen (15) documents filed in  
22 this case demonstrating the supposedly difficult nature of this suit, ten (10) were filed before the  
23 offer of judgment. *See* L1107 Mot. Atty. Fees, at 9:18-10:16.

24       To be clear, Plaintiffs do not argue that the preemption issue was complex in nature, as all  
25 preemption analysis is considered to be complex. However, because the Defendants' arguments  
26 regarding preemption were advanced early on in the case, and did not change as the case  
27 progressed, it is difficult to say that the character of the work to be done after the offer of judgment  
28 was served was difficult, intricate, important, or took significant time and skill to warrant over

1 \$100,000 in attorneys' fees that the Defendants' claim. The majority of the work included in the  
2 Local 1107 Defendants' attorneys' fees billing statement could have been done by a clerk, rather  
3 than a partner in the firm.

4 With regards to the third factor, the Defendants once again cite to the fact that "[t]hese  
5 fifteen motions required Local 1107 to prepare and submit at least 15 briefs to the Court." *See*  
6 L1107 Mot. Atty Fees, at 10:18-21. However, again, only five of these motions were submitted  
7 after the offer of judgment and cannot be considered in the *Brunzell* analysis. Defendants argue  
8 that "[d]efense counsel also appeared before the Court 8 times as of December 31, 2019." *Id.* at  
9 11:1-3. However, only four (4) of those appearances occurred after the offer of judgment. *See*  
10 L1107 Ex. D, at 1-8. This case involved only five deposition, and the Defendants' acknowledge  
11 that "[t]hree of the five depositions were taken by the Defendants." *See* L1107 Mot. Atty Fees, at  
12 11:4-9.

13 As of the date of this opposition, the fourth factor is still yet to be determined. The Nevada  
14 Supreme Court must formally adopt the *Screen Extras Guild* LMRDA preemption doctrine before  
15 it becomes the law of the state of Nevada. The Defendants failed to dispute the merits of the breach  
16 of contract claim in this case, and if *Screen Extras Guild* exception is rejected by the Nevada  
17 Supreme Court, Plaintiffs are the prevailing party in this lawsuit. Thus, any award of attorneys'  
18 fees and costs in this lawsuit now would need to be returned, with interest, and any damages  
19 resulting from such an award would end up added to Plaintiffs overall damages in this case. With  
20 regards to the *Brunzell* factors, only the first factor cuts in favor of Defendants' request for  
21 attorneys' fees. The second and third are predicated on work conducted prior to the offer of  
22 judgment, and the majority of what is claimed for attorneys' fees is for document review, much of  
23 it unnecessary, and emails. This is simply not the kind of work attorneys' fees and costs are granted  
24 for, especially considering a low level clerk or paralegal could have done the work. Finally, the  
25 fourth factor is yet to be determined as the matter the Defendants ultimately won on summary  
26 judgment is a matter of first impression on appeal to the Nevada Supreme Court, which if rejected,  
27 would make Plaintiffs the prevailing party. The *Brunzell* factors militate in favor of denying  
28 attorneys' fees and costs all together.

1       **D. The Defendants Have A More Than \$200,000 Windfall And Equity Demands That**  
2       **Defendants Pay Their Own Attorneys' Fees And Costs.**

3       Finally, as a matter of equity, it must be noted that the Defendants have a more than  
4       \$200,000 windfall in this case. By terminating Plaintiff Gentry and Clarke's contracts, the  
5       Defendants do not dispute that they saved \$107,391.00 and \$92,305.00 respectively. *See* L1107  
6       Mot. Atty Fees, at 3:8-10. The termination letters clearly indicate that the Defendants intended to  
7       run the local without the assistance of directors. *See Ex. 2*, at 1-4. In fact, the SEIU International  
8       Trustees brought in several SEIU International officials to serve in managerial and director level  
9       positions at Local 1107. By having SEIU International employees manage Local 1107, the Local  
10      1107 Defendants saved \$199,696.00 in salary and benefit payments they would otherwise have  
11      had to pay Plaintiffs.

12      Nevada courts, like most courts in the United States, have powers in equity to fashion  
13      reasonable and just damage awards when a party reasonably relies on the promise of another and  
14      that promise is breached, even when no contract exists. This is known as promissory estoppel.  
15      *Dynaletric Co. of Nev., Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 484-85, 255  
16      P.3d 286, 289 (2011). "Following the lead of the Restatement, we hold that the district court may  
17      award expectation, reliance, or restitutionary damages for promissory estoppel claims." *Id.*  
18      "Although the doctrine of promissory estoppel is conceptually distinct from traditional contract  
19      principles, there is no rational reason 'for distinguishing the two situations in terms of the damages  
20      that may be recovered.'" *Id.* "[N]o single measure of damages will apply to each and every  
21      promissory estoppel claim; instead, to determine the appropriate measure of damages for  
22      promissory estoppel claims, the district court **should consider the measure of damages that**  
23      **justice requires and that comports with the Restatement's general requirements that**  
24      **damages be foreseeable and reasonably certain.**" *Id. citing* Restatement (Second) of Contracts  
25      §§ 351, 352 (1981).

26      Here, it is undisputed that Local 1107 entered into for-cause employment contracts with  
27      Plaintiffs. It is undisputed that the SEIU International Trustees breached those contracts despite  
28      Nevada law at the time of the breach not providing unions with an exception to Nevada wrongful  
    termination law. The Defendants are the wrongdoers. The Defendants made a promise. The

1 Defendants breached the promise. Plaintiffs sought to recover under their contracts that this Court  
2 ultimately found unenforceable for LMRDA preemption, a matter of first impression before the  
3 Nevada Supreme Court. Regardless of whether the *Screen Extras Guild* LMRDA preemption  
4 doctrine becomes the law of Nevada, the fact is, Plaintiffs, not Defendants, are the ones with actual  
5 damages of \$199,696.00. The Defendants saved \$199,696.00 when breaching Plaintiffs' contracts.  
6 As a matter of equity, it would be remarkably unjust to award the Defendants attorneys' fees and  
7 costs when the Defendants breached their duties under the contracts, and their claimed attorneys'  
8 fees do exceed the amount they saved from breaching the contracts. Indeed, Local 1107 claims  
9 \$56,277.00 in fees. *See* L1107 Mot. Atty Fees, at 3:11-14. SEIU International claims \$57,206.50  
10 in fees. *See* SEIU Mot. Atty Fees, at 3:7-10. SEIU International has claimed \$14,449.67 in costs.  
11 *See* SEIU Errata To Memorandum of Costs, at 2:6-12. Local 1107 has claimed \$8,829.80 in costs.  
12 *See* L1107 Memorandum of Costs, at 2:1-9. The Defendants' total combined attorneys' fees and  
13 costs, without retaxing or reduction, are \$136,762.47.

14       The question Plaintiffs ask this Court is whether it is just and equitable to award the  
15 Defendants, who did not dispute that Local 1107 entered into for-cause contracts with Plaintiffs,  
16 nor that the SEIU International trustees breached those contracts, should be permitted to profit  
17 from that breach. That is, should the Defendants be permitted to recover attorneys' fees and costs,  
18 when those attorneys' fees and costs are not more than the money they saved breaching the  
19 contracts, when Plaintiffs already have \$199,696.00 in combined and undisputed damages? The  
20 Defendants have a \$62,933.53 windfall, and as a matter of equity, and based on the doctrine of  
21 promissory estoppel, this Court should deny both the requests for attorneys' fees and costs, given  
22 that it is undisputed that Plaintiffs are the only party to have actual losses stemming from the  
23 undisputed breach of their contracts.

24 //

25 //

26 //

27 //

28 //

1 **III. CONCLUSION.**

2 Therefore, based on the foregoing, Plaintiffs respectfully request this Court deny the  
3 Defendants' Motions for Attorneys' Fees.

4 Dated this 28th day of January 2020.

5 /s/ Michael J. Mcavoyamaya

6 

---

MICHAEL J. MCAVOYAMAYA, ESQ.

7 Nevada Bar No.: 14082

8 4539 Paseo Del Ray

9 Las Vegas, NV, 89121

10 Telephone: (702) 299-5083

11 [Mmcavoyamaya@gmail.com](mailto:Mmcavoyamaya@gmail.com)

12 *Attorney for Plaintiffs*



**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of MICHAEL J. MCAVOYAMAYA, and that on January 28, 2020, I caused the foregoing document entitled **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEYS' FEES** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

CHRISTENSEN JAMES & MARTIN  
EVAN L. JAMES, ESQ. (7760)  
KEVIN B. ARCHIBALD, ESQ. (13817)  
7440 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone: (702) 255-1718  
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Email: [elj@cjmlv.com](mailto:elj@cjmlv.com), [kba@cjmlv.com](mailto:kba@cjmlv.com)

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Email: [grothner@rsglabor.com](mailto:grothner@rsglabor.com), [jcohen@rsglabor.com](mailto:jcohen@rsglabor.com)

Dated this 28th day of January, 2020.

/s/ Michael J. Mcavoyamaya

---

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[Mmcavoyamaya@gmail.com](mailto:Mmcavoyamaya@gmail.com)  
*Attorney for Plaintiffs*

# **Exhibit 1**

Paintiffs' Contracts



April 18, 2016

Dana Gentry

I am pleased, on behalf of the membership of the Service Employees International Union, Local 1107, to extend to you this offer of employment with our organization, in the capacity of **Communications Director**. This offer of employment shall commence on April 18, 2016.

After a Six (6) month probation period, you will meet with the President of the Local to evaluate your performance and position.

The wage and benefit package for this position includes the following:

1. Effective **April 18, 2016**, you will commence employment with Local 1107, the annual salary for your position will be \$70,000.
2. Effective **June 1, 2016**, you will be entitled to a fully employer funded health care including medical, dental, vision and prescription benefits.
3. Pension benefit where 20% of your gross salary is contributed to the Affiliates Officers and Employees Pension Fund administered by the Service Employee International Union Benefits Office. Such contributions shall be in addition to the other wage and economic benefits provided herein.
4. Commencing on your first full pay period, you will accrue eight (8) hours of leave for each bi-weekly pay period, which may be used for sick leave, vacation, or personal leave.
5. An auto allowance of \$500.00 will be paid once a month, usually the first pay period of that month.
6. Termination of this employment agreement may be initiated by the SEIU Nevada President for cause and is appealable to the local's Executive Board, which shall conduct a full and fair hearing before reaching a final determination regarding your employment status.

On behalf of the Officers and staff of Local 1107, I would like to express how very excited we are that you have decided to join us.

Sincerely,

A handwritten signature in black ink, appearing to read "Cherie Mancini", written over a horizontal line.

Cherie Mancini  
President  
SEIU Nevada Local 1107

I accept this offer and will begin work on April 18, 2016.

Signed: A handwritten signature in black ink, appearing to read "Dana Gentry", written over a horizontal line.

Date: 4/18/16

Dana Gentry

SERVICE EMPLOYEES  
INTERNATIONAL UNION  
LOCAL 1107, CTW, CLC

3785 E. Sunset Drive  
Las Vegas, NV 89120

PHONE 702-386-8849  
FAX 702-386-4883

[www.seiunv.org](http://www.seiunv.org)



August 23, 2016

Robert Clarke

I am pleased, on behalf of the membership of the Service Employees International Union, Local 1107, to extend to you this offer of employment with our organization, in the capacity of **Director of Finance & Human Resources**. This offer of employment shall commence on September 6, 2016.

The wage and benefit package for this position includes the following:

1. Effective **September 6, 2016**, you will commence employment with Local 1107. The annual salary for your position will be \$80,000.
2. Effective **October 1, 2016**, you will be entitled to a fully employer-funded health care plan including medical, dental, vision and prescription benefits.
3. Pension benefit where 20% of your gross salary is contributed to the Affiliates Officers and Employees Pension Fund administered by the Service Employee International Union Benefits Office. Such contributions shall be in addition to the other wage and economic benefits provided herein.
4. Commencing on your first full pay period, the accrual of eight (8) hours of leave for each bi-weekly pay period, which may be used for sick leave, vacation, or personal leave.
5. An auto allowance of \$500.00 will be paid once a month, usually the first pay period of that month.
6. A one-time relocation reimbursement of \$2,500.00 will be paid within two weeks of the commencement of your employment.
7. Termination of this employment agreement may be initiated by the SEIU Nevada President for cause and is appealable to the local's Executive Board, which shall conduct a full and fair hearing before reaching a final determination regarding your employment status.

On behalf of the officers and staff of Local 1107, I would like to express how very excited we are that you have decided to join us.

Sincerely,

Cherie Mancini  
President  
SEIU Nevada Local 1107

I accept this offer and will begin work on September 6, 2016.

Signed:

Robert Clarke

Date:

8/23/2016

SERVICE EMPLOYEES  
INTERNATIONAL UNION  
LOCAL 1107, CTW, CLC

3785 E. Sunset Drive  
Las Vegas, NV 89120

PHONE 702-386-8849  
FAX 702-386-4883

www.seiunv.org

# **Exhibit 2**

Termination Letters



SEIU Nevada Local 1107  
2250 S. Rancho Drive, Suite 165  
Las Vegas, NV 89102  
Phone (702) 386-8849

May 4, 2017

HAND DELIVERED

To: Dana Gentry

Dear Ms. Gentry:

As you know, Local 1107 has been placed under trusteeship by the Service Employees International Union. The Trustees of Local 1107 have been charged with the restoration of democratic procedures of Local 1107. In connection with formulating a program and implementing policies that will achieve this goal, going forward the Trustees will fill management and other positions at the Local with individuals they are confident can and will carry out the Local's new program and policies. In the interim, the Trustees will largely be managing the Local themselves with input from member leaders.

For these reasons, the Trustees have decided to terminate your employment with Local 1107, effective immediately. You are hereby directed to immediately return any property of the Local that you have in your possession, including but not limited to credit cards, phones, keys or key cards, vehicles, computers, files (both electronic and hard copy) and any other property in your possession.

Sincerely,

A handwritten signature in blue ink, appearing to read "Martin Manteca", with a long, sweeping underline.

Martin Manteca  
Deputy Trustee, SEIU Local 1107



SEIU Nevada Local 1107  
2250 S. Rancho Drive, Suite 165  
Las Vegas, NV 89102  
Phone (702) 386-8849

May 4, 2017

HAND DELIVERED

To: Robert Clarke

Dear Mr. Clarke:

As you know, Local 1107 has been placed under trusteeship by the Service Employees International Union. The Trustees of Local 1107 have been charged with the restoration of democratic procedures of Local 1107. In connection with formulating a program and implementing policies that will achieve this goal, going forward the Trustees will fill management and other positions at the Local with individuals they are confident can and will carry out the Local's new program and policies. In the interim, the Trustees will largely be managing the Local themselves with input from member leaders.

For these reasons, the Trustees have decided to terminate your employment with Local 1107, effective immediately. You are hereby directed to immediately return any property of the Local that you have in your possession, including but not limited to credit cards, phones, keys or key cards, vehicles, computers, files (both electronic and hard copy) and any other property in your possession.

Sincerely,

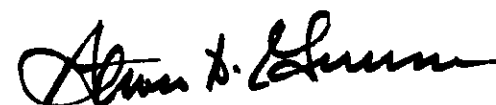
A handwritten signature in blue ink, appearing to read "MM", is written over a horizontal line.

Martin Manteca  
Deputy Trustee, SEIU Local 1107

# **Exhibit 3**

Zhang Order Denying Fees





CLERK OF THE COURT

Douglas D. Gerrard, Esq.  
Nevada Bar No. 4613  
[dgerrard@gerrard-cox.com](mailto:dgerrard@gerrard-cox.com)  
John M. Langeveld, Esq.  
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GERRARD COX & LARSEN  
2450 St. Rose Parkway, Suite 200  
Henderson, Nevada 89074  
(702) 796-4000  
Attorneys for Defendants,  
COUNTRYWIDE HOME LOANS, INC.,  
NATIONAL TITLE COMPANY, SILVER  
STATE FINANCIAL SERVICE, INC., and  
RECONTRUST COMPANY, N.A.

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

LANLIN ZHANG,  
  
Plaintiff,  
  
vs.

FRANK V. SORICHETTI, RECONTRUST  
COMPANY, N.A.; COUNTRYWIDE HOME  
LOANS, INC., a New York corporation;  
NATIONAL TITLE COMPANY, a Nevada  
corporation; SILVER STATE FINANCIAL  
SERVICES, INC., a Nevada corporation; DOE  
individuals I through X inclusive; ROE  
CORPORATIONS XI through XX, inclusive,  
  
Defendants.

AND ALL RELATED MATTERS

Case No. A481513  
Dept. No. XVI

**ORDER GRANTING DEFENDANTS'  
SECOND RENEWED MOTION FOR  
RELIEF FROM ORDER GRANTING  
ATTORNEYS' FEES,**

**AND**

**ORDER DENYING PLAINTIFF'S  
COUNTERMOTION TO AMEND  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT  
REGARDING ZHANG'S MOTION FOR  
ATTORNEY FEES AND COSTS**

THIS MATTER, having come before the Court on May 31, 2016, on Defendants'  
COUNTRYWIDE HOME LOANS, INC. ("Countrywide"), NATIONAL TITLE COMPANY  
("National Title"), SILVER STATE FINANCIAL SERVICE, INC. ("Silver State"), and  
RECONTRUST COMPANY, N.A. ("Recontrust") (hereinafter, collectively "Lenders" or

**GERRARD, COX & LARSEN**  
2450 St. Rose Parkway, Suite 200  
Henderson, Nevada 89074  
(702) 796-4000

1 “Defendants”) Second Renewed Motion for Relief from Order Granting Attorneys’ Fees, and  
2 Motion for Turnover, and on Plaintiff LANLIN ZHANG (hereinafter “Zhang” or “Plaintiff”)  
3 Countermotion to Amend Findings of Fact, Conclusions of Law and Judgment Regarding Zhang’s  
4 Motion for Attorney Fees and Costs; the Lenders having appeared by and through their attorney of  
5 record, Douglas D. Gerrard, Esq., of the law firm of Gerrard Cox Larsen; Zhang having appeared  
6 by and through her attorney of record, Scott A. Marquis, Esq., of the law firm of Marquis Aurbach  
7 Coffing; the Court having heard oral arguments of counsel, having examined the records and  
8 documents on file, and being fully advised in the premises, and good cause appearing, NOW  
9 THEREFORE:

10 **FINDINGS OF FACT**

11 1. In 2004, Zhang entered into a contract to purchase a home located at 240 Royal  
12 Wood Crest in Las Vegas, Nevada ("Property") from Defendant Frank Sorichetti ("Sorichetti") for  
13 the sum of \$532,500.00. Sorichetti subsequently attempted to back out of the deal with Zhang, and  
14 raise the purchase price. As a result, Zhang filed a Complaint against Sorichetti for specific  
15 performance of the purchase agreement, and simultaneously recorded a Lis Pendens against the  
16 Property.<sup>1</sup>

17 2. Upon Sorichetti's motions, the District Court (Judge Adair) initially ordered Zhang's  
18 Complaint dismissed; and, in a separate order, also cancelled Zhang's Lis Pendens. However,  
19 neither order was ever operative as they were consistently stayed throughout appeal, through a  
20 series of orders issued by both the District Court and the Nevada Supreme Court.

21 3. The Supreme Court subsequently issued a published Opinion and declared the  
22 District Court's Order Granting Motion to Dismiss Complaint void, declared the Order Cancelling  
23 Lis Pendens void, and reinstated Zhang's Complaint against Sorichetti. The Supreme Court also  
24 issued a Writ of Mandamus directing the District Court to reinstate Zhang's Complaint and vacate  
25 the Order Cancelling Lis Pendens, and the District Court acknowledged the receipt of the Writ of  
26 Mandamus and complied accordingly.

27  
28 <sup>1</sup> The Court’s Findings of Fact, Conclusions of Law, and Judgment Regarding Zhang’s Motion for Attorney’s Fees and Costs, filed herein on March 24, 2016, are restated and incorporated in this Order, and where applicable.

1           4.       Nine months later, while litigation involving Zhang's complaint was still ongoing,  
2 Sorichetti sought and obtained two refinancing loans (for \$585,000 and \$117,000 respectively)  
3 from Silver State Mortgage, both of which were secured by the Property. Sorichetti, subsequently  
4 defaulted on the first Silver State loans, and foreclosure proceedings were commenced by the new  
5 holder of the note, Countrywide Home Loans, Inc.

6           5.       After being informed of the foreclosure proceedings scheduled for the Property,  
7 Zhang recorded a notice of fraudulent release of lis pendens.

8           6.       Zhang then amended her complaint to assert claims against the lenders (Silver State  
9 and Countrywide), the title company that handled the escrow (National Title Co.) and the trustee  
10 on the first Deed of Trust securing the \$585,000 note owed to Countrywide (ReconTrust  
11 Company).

12           7.       On January 10, 2008, during the course of this litigation, approximately six (6)  
13 months before the original trial took place in this case, Zhang made two related Offers of Judgment  
14 to the Defendants in the following amounts:

15                   (i) **\$281,190.12** to Defendant Countrywide - in exchange for removal of the  
16 \$585,000.00 Deed of Trust that was recorded against the subject Property;

17                   (ii) **\$1.00** to Defendant Silver State - in exchange for removal of the \$117,000.00  
18 Deed of Trust that was recorded against the subject Property;

19 (collectively, the "Offers of Judgment").

20           8.       The Defendants rejected both of Zhang's Offers of Judgment.

21           9.       On July 7, 2008, this Court conducted its first bench trial regarding whether the  
22 deeds of trust of Silver State and Countrywide had priority over Zhang's right to purchase the  
23 subject Property. At trial, the Lenders argued that Plaintiff's Lis Pendens did not impart  
24 constructive notice of her right to purchase the Property because of a recorded release of lis  
25 pendens, and therefore Countrywide and Silver State were to be treated as a bona fide  
26 encumbrancer and the deeds of trust had priority over any purchase rights of Plaintiff. The Lenders  
27 prevailed at the 2008 trial, and this Court issued its ruling that the Lenders' \$702,000.00 worth of  
28

1 deeds of trust (the “Silver State Deeds of Trust”) had priority over Plaintiff’s purchase right, based  
2 on the Lenders’ status as a bona fide encumbrancer (the “2008 Judgment”).

3 10. Following the 2008 trial, Zhang appealed the 2008 Judgment to the Nevada Supreme  
4 Court, arguing that her Lis Pendens had been fraudulently removed from the Property, and as a  
5 result still imparted constructive notice to the Lenders, regarding her lawsuit (and her right to  
6 purchase the Property), and therefore that her interest in the Property had priority over the Lenders’  
7 deeds of trust. As a matter of first impression, the Nevada Supreme Court took a fresh look at the  
8 bona fide encumbrancer law regarding actual and constructive notice, and a lender’s duty to look  
9 beyond solely the recorded documents in making a determination about whether or not an exception  
10 to marketable title exists on a property. In its ruling on appeal, the Nevada Supreme Court held in  
11 relevant part:

12 We conclude that the equity afforded Garner in NC-DSH should be extended to Zhang  
13 based upon the facts of this case. **The burden to check the current status of the case  
and the lis pendens upon performing a title search is not unreasonable. . . .**<sup>4</sup>

14 . . .

15 <sup>4</sup> **We further note that certain search tools such as Blackstone, are commonly used  
by title companies to check and verify documents filed with the Eighth Judicial  
District Court Clerk’s office. If a recorded judgment or exception to marketable  
title was discovered during the title search, a title company should conduct an  
investigation into whether it has been satisfied.**

16  
17  
18 *See* Order of Reversal and Remand, dated February 26, 2010 (the “February 26, 2010 Order of  
19 Reversal and Remand”), p. 5, and n. 4 (emphasis added). Thus, in its ruling the Nevada Supreme  
20 Court held that in order for a lender to claim bona fide encumbrancer status, when investigating a  
21 parcel of property, the inquiring lender was further required to make sufficient “inquiry notice” into  
22 the marketability of a real property by searching court records, and utilizing court search tools that  
23 were at its disposal (such as Blackstone), in order to determine the current status of any lis pendens,  
24 and status of the litigation that was referenced therein. This was even if there was a recorded  
25 release of Lis Pendens, as was the case in this matter. This ruling created new law in the State of  
26 Nevada regarding constructive notice, inquiry notice, and the burden imposed on a title searcher.

27 11. Ruling the foregoing, the Supreme Court then reversed the District Court’s 2008  
28 Judgment on the specific priority issue, holding that Zhang’s interest in the property, which she had

1 obtained from a 2007 judgment against Defendant Sorichetti (i.e., giving Zhang the specific  
2 performance right to purchase the Property), had priority over the Lenders' Deeds of Trust, based  
3 upon the lenders having "inquiry" constructive notice of the existence of this litigation. The  
4 Supreme Court determined that (1) Zhang's lis pendens has priority over both of the Silver State  
5 Deeds of Trust, and (2) Zhang was successful in her claims for quiet title and declaratory relief.  
6 The Supreme Court otherwise affirmed this Court's decision dismissing Zhang's claims for  
7 negligence and slander of title. On February 26, 2010, the Order of Reversal and Remand was filed  
8 by the Nevada Supreme Court. The Supreme Court then ultimately remanded the case back to this  
9 Court on or about December 21, 2010.

10 12. Related to the February 26, 2010 Order of Reversal and Remand, on or about  
11 December 20, 2010 Zhang filed an amended verified memorandum of costs. Moreover, on or about  
12 January 5, 2011, Zhang filed a motion for attorneys fees. Thereafter, on May 23, 2011, this Court  
13 entered an Order granting Zhang's motion for attorney's fees, therein awarding Zhang the sum of  
14 \$113,635.00 for attorneys fees and \$26,928.86 for costs (the "May 23, 2010 Fees Order").

15 13. On or about June 22, 2011, the Zhang obtained a Writ of Execution to levy and seize  
16 funds belonging to Countrywide from Bank of America. As a result of the May 23, 2010 Fees  
17 Order and Writ of Execution, Countrywide paid Zhang the sum of \$142,060.00 for attorneys' fees  
18 and costs.

19 14. On or about August 2, 2011, Zhang filed a Satisfaction of Judgment in this case,  
20 pertaining to the Lenders' satisfaction of the May 23, 2010 Fees Order.

21 15. With the case remanded back pursuant to the Nevada Supreme Court's February 26,  
22 2010 Order of Reversal and Remand, the issue then arose before this Court about whether this  
23 Court had jurisdiction to rule on Countrywide's previously undecided claim of equitable  
24 subrogation, which had been raised by the Defendants in the litigation, but which the Court did not  
25 issue a ruling on following the 2008 trial.

26 16. With regard to the undecided equitable subrogation issue, on or about August 8,  
27 2011 this Court entered an Order Granting in Part and Denying in Part Defendants' Motion to  
28 Reopen Case and Enter Final Judgment (the "Second Judgment"). In the Second Judgment, this

1 Court declared that it did not feel it could award equitable subrogation because it did not believe it  
2 was given jurisdiction to do so by the Supreme Court's February 26, 2010, the Order of Reversal  
3 and Remand.

4 17. On or about December 22, 2011, the Lenders filed a Notice of Appeal, appealing the  
5 Second Judgment to the Nevada Supreme Court.

6 18. On or about January 30, 2014, the Nevada Supreme Court entered a decision  
7 vacating the Second Judgment, and remanding the case back to the District Court for a decision on  
8 Countrywide's Equitable Subrogation defense (the "Decision").

9 19. In its Decision, the Nevada Supreme Court also made the following ruling with  
10 regard to the prior \$142,060.00 award of attorneys fees and costs which had been awarded and paid  
11 to Zhang, which ruling is now incorporated by reference in this order:

12 **Vacating the judgment removes the predicate for the award of fees and costs**  
13 **contested on cross-appeal. We therefore vacate and remand as to attorney fees and**  
14 **costs as well.**

15 See Decision, dated January 30, 2014, pps. 12-13 (emphasis added).

16 20. Upon remand, on May 11, 2015, this Court held its evidentiary hearing on equitable  
17 subrogation, and on July 30, 2015, entered its Final Judgment in this case, ruling that Countrywide  
18 (the assignee of the First Silver State Deed of Trust ) was equitably subrogated to, and received an  
19 assignment of, the Etrade DOT and USBank DOT, in the amount of \$281,090.12. See Final  
20 Judgment, dated July 30, 2015, on file in this case.

21 21. Thereafter, Zhang moved for an award of fees against Defendants Countrywide and  
22 Silver State, and for an award of costs against all Defendants. Zhang argued that she was entitled to  
23 an award of fees under NRCP 68 due to her offers of judgment, and an award of all her costs under  
24 NRCP 68 and NRS 18.020(5). The Lenders asserted Zhang was not entitled to any award of fees  
25 and costs by arguing that Zhang had not succeeded with any of her claims, had not won anything in  
26 this litigation. The Lenders also argued that Zhang was not entitled to an award of attorneys fees  
27 and costs because, under an analysis of the Beattie factors, the Lenders rejected Zhang's Offers of  
28 Judgement and maintained their defenses against Zhang in good faith, because, under Nevada law  
as it existed at that time, the Lenders had a plausible and valid basis for asserting complete priority

over Zhang's specific performance rights based on their bona fide encumbrancer defense. The Lenders' bona fide encumbrancer defense was not overturned by the Nevada Supreme Court until the Supreme Court entered its February 26, 2010 Order of Reversal and Remand (nearly two years after the Offers of Judgment were made by Zhang).

22. On December 1, 2015, this Court heard Zhang's Motion for Attorney Fees and Costs. Thereafter, on March 24, 2016, the Court entered its Findings of Fact, Conclusions of Law, and Judgment Regarding Zhang's Motion for Attorney Fee and Costs (the "March 24, 2016 Fees Order"), making the following conclusions of law in Paragraphs 4 through 8, each of which is incorporated by reference into this Order:

4. The Court also considered the Beattie factors.

5. With regard to the first Beattie factor, the Court finds that the defenses of Countrywide and Silver State were litigated in good faith, based upon a bona fide encumbrancer for value defense, and on Countrywide's fall back defense of equitable subrogation.

6. With regard to the second Beattie factor, the Court finds that Zhang's two Offers of Judgment, which mirror the equitable subrogation award, were made in good faith, and were both reasonable in timing and amount.

7. With regard to the third factor, the Court finds that the liability issues in this matter were quite intricate and involved issues of first impression in Nevada. Therefore, the Court finds that the decisions of Countrywide and Silver State to reject Zhang's Offers of Judgment was not in bad faith or grossly unreasonable.

8. **Therefore, the Court having fully considered and weighed all of the Beattie factors, the facts and circumstances of this case, and based on the complexity of the issues presented in this case, chooses not to award Zhang any attorney fees. However, Zhang's Motion for Costs is granted.**

...

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Zhang's Motion for Attorney Fees is DENIED; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Zhang's Motion for Costs pursuant to N.R.S. § 17.115 and N.R.C.P. 68 is GRANTED, and Zhang is awarded her Costs from the Lenders in the amount of \$46,192.46.

See March 24, 2016 Fees Order, p. 5-6 (emphasis added).

23. Following the Court's entry of the March 24, 2016 Fees Order, on April 27, 2016, the Lenders filed their Second Renewed Motion for Relief from Order Granting Attorneys' Fees, and Motion for Turnover (the "Motion for Turnover"). The Lenders' Motion for Turnover sought a

1 return, turnover and disgorgement of the prior \$142,060.00 attorney's fees and costs sum that the  
2 Lenders had paid to Zhang, but which award had been reversed and vacated by the Nevada  
3 Supreme Court's January 30, 2014, Decision. The Lenders also sought to reconcile the  
4 \$142,060.00 payment with the Court's ruling in the March 24, 2015, Fees Order, which awarded  
5 Zhang her costs, but not any attorney's fees, from the Lenders.

6 24. On May 16, 2016, Zhang filed her Opposition to the Lenders' Motion for Turnover,  
7 and Countermotion to Amend Findings of Fact, Conclusions of Law and Judgment Regarding  
8 Zhang's Motion for Attorney Fees and Costs (the "Motion for Reconsideration"). In her Motion  
9 For Reconsideration, Zhang asked the Court to reconsider and reverse its decision in the March 24,  
10 2016 Fees Order, regarding the Court's ruling to not award Zhang attorney fees. Zhang also argued  
11 that the Court should not disgorge the attorney's fees that were previously paid by the Lenders.

12 25. On May 25, 2016, the Lenders filed their Reply in Support of the Motion for  
13 Turnover, and Opposition to Zhang's Motion for Reconsideration.

#### 14 CONCLUSIONS OF LAW

15 26. The Nevada Supreme Court has held that under the "law-of-the case doctrine", when  
16 an appellate court has decided a principle or rule of law, "that decision governs the same issues in  
17 subsequent proceedings in that case". Dictor v. Creative Management Services, LLC, 223 P.3d  
18 332, 334, 126 Nev. Adv. Rep. 4 (2010); Tien Fu Hsu v. County of Clark, 123 Nev. 625, 173 P.3d  
19 724, 728 (2007); Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 266, 71 P.3d 1258, 1262  
20 (2003). The doctrine applies to issues that were previously determined by the appellate court. *See*  
21 Beemon, 119 Nev. at 266, P.3d 1258 at 1262.

22 27. Related to the "law-of-the-case" doctrine, Courts have also recognized the "rule of  
23 mandate" doctrine. "The rule of mandate is similar to, but broader than, the law of the case  
24 doctrine." *See* United States v. Cote, 51 F.3d 178, 181 (9th Cir. 1995) (citing Herrington v. County  
25 of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993)). "The rule of mandate requires a lower court to act  
26 on the mandate of an appellate court, without variance or examination, only execution." *Id.*; *see*  
27 *also*, In re Sanford Fork & Tool Co., 160 U.S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414 (1895);  
28 *accord* Stamper v. Baskerville, 724 F.2d 1106, 1107 (4th Cir. 1984). Specifically, the "rule of



1 mandate” doctrine provides:

2 When a case has been once decided by this court on appeal, and remanded to the [district  
3 court], **whatever was before this court, and disposed of by its decree, is considered  
4 as finally settled. The [district court] is bound by the decree as the law of the case,  
5 and must carry it into execution according to the mandate.** That court cannot vary  
6 it, or examine it for any other purpose than execution; or give any other or further relief;  
or review it, even for apparent error, upon any matter decided on appeal; or intermeddle  
with it, further than to settle so much as has been remanded.... But the [district court]  
may consider and decide any matters left open by the mandate of this court.... (emphasis  
added)

7 United States v. Thrasher, 483 F.3d 977, 981-982 (9th Cir.2007) (citing In re Sanford Fork & Tool  
8 Co., 160 U.S. 247, 255-56, 16 S.Ct. 291, 40 L.Ed. 414 (1895)).

9 28. An N.R.C.P. 59(e) motion to alter or amend the judgment is proper where there has  
10 been judicial error, as opposed to clerical error, in a judgment of the Court. *See, e.g., Koester v.*  
11 *Administrator of Estate of Koester*, 101 Nev. 68, 73, 693 P.2d 569, 573 (describing the court's  
12 general power to correct clerical errors); 4 Litigating Tort Cases § 46:14 (2011) ("**The motion  
13 must seek to "alter or amend" the judgment, i.e., requesting to correct judicial error as  
14 opposed to clerical error.**"). A "judicial error" is one in which the Court made an error in the  
15 consideration of the matters before it, as opposed to an error in the judgment itself that did not  
16 reflect the true intention of the Court. *See, e.g., Presidential Estates Apartment Associates v.*  
17 *Barrett*, 917 P.2d 100, 103-04 (Wash. 1996).

18 29. Finally, the Nevada Supreme Court has determined that "[a] district court may  
19 reconsider a previously decided issue if substantially different evidence is subsequently introduced  
20 or the decision is clearly erroneous." Masonry & Tile Contractors Ass'n v. Jolley, Urga & Wirth,  
21 Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citing Little Earth of United Tribes v. Dep't of  
22 Hous., 807 F.2d 1433, 1441 (8th Cir. 1986); Moore v. City of Las Vegas, 92 Nev. 402, 405, 551  
23 P.2d 244, 246 (1976)).

24 30. The policy considerations behind reconsideration and rehearing are the same. The  
25 Nevada Supreme Court, in reaching its decision regarding reconsideration in Masonry & Tile  
26 Contractors Ass'n, cited Moore: "[o]nly in very rare instances in which new issues of fact or law  
27 are raised supporting a ruling contrary to the ruling already reached should a motion for  
28 rehearing be granted." *Moore*, 92 Nev. at 405, 551 P.2d at 246 (emphasis added).

31. The Nevada Supreme Court has held that, notwithstanding N.R.S. 17.115 and N.R.C.P. 68, an award of attorney's fees still ultimately lies within the district court's discretion. *See RTTC Communications, LLC v. The Saratoga Flier, Inc.*, 110 P.3d 24, 28, 2005 Nev. LEXIS 6,

12. In considering an award, the court must evaluate the following factors:

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

*Beattie v. Thomas*, 99 Nev. 579, 588-89, 669 P.2d 268, 274 (1983); *Dillard Department Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999); *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001); *RTTC*, 110 P.3d at 28, 2005 Nev. LEXIS at 13. After weighing the foregoing factors, the district judge may, only where warranted, award the attorney's fees requested. *Beattie* at 589, 668 P.2d at 274.

32. The Nevada Court of Appeals held that:

We conclude that where, as here, the district court determines that three good-faith *Beattie* factors weigh in favor of the party that rejected the offer of judgment, **[then the 4th *Beattie* factor], the reasonableness of the fees requested by the offeror becomes irrelevant . . . .**

*Frazer v. Drake*, 131 Nev. Adv. Op 64, 357 P.3d 365, 373 (2015).

33. This Court hereby finds that the plain, unambiguous language of the Supreme Court's January 30, 2014 Decision provides that "[v]acating the judgment removes the predicate for the award of fees and costs contested on cross-appeal. We therefore vacate and remand as to attorney fees and costs as well." *See* Decision pp. 12-13 (emphasis added).

34. The Court rules that pursuant to the Nevada Supreme Court's Decision, this Court's prior, May 23, 2011, Fees Order (under which Zhang was awarded a combined sum of \$142,060.00 for attorneys fees and costs that was paid by Countrywide), was unequivocally reversed and vacated by the Nevada Supreme Court, and is no longer in force or effect.

1           35.     The Court further determines that Zhang has not demonstrated any “judicial error”  
2 under N.R.C.P. 59(e), and has not presented any “substantially different evidence” or “new  
3 evidence or law” that was not already before the Court, which would warrant the Court  
4 reconsidering and/or altering or amending its prior decision on awarding attorney fees and costs in  
5 this case, as set forth in its March 24, 2016, Fees Order.

6           36.     Furthermore, as fully set forth in the March 24, 2016, Fees Order, the Court has fully  
7 considered and weighed all of the Beattie factors with regard to Zhang’s Motion for Attorney Fees  
8 and Costs. Moreover, with regard to Zhang’s current Motion for Reconsideration, the Court has  
9 again considered and weighed all of the Beattie factors and circumstances of this case, as  
10 articulated below.

11           37.     Therefore, the Court rules that pursuant to the Nevada Supreme Court’s Decision,  
12 Countrywide is entitled to a return of the entire sum of money that it paid to Zhang under the May  
13 23, 2011 Fees Order (\$142,060.00), unless this Court exercises its discretion to award attorney’s  
14 fees, or awards costs, to Zhang at the conclusion of this case.

15           38.     With regard to the first Beattie factor, the Court finds that the defenses of  
16 Countrywide and Silver State were litigated in good faith, based upon a bona fide encumbrancer for  
17 value defense, arising from the public record as it existed at the time that the two Silver State Loans  
18 were extended and the trust deeds recorded, and also based upon a fall back defense of equitable  
19 subrogation.

20           39.     With regard to the second Beattie factor, the Court finds that Zhang's Offers of  
21 Judgment, which mirror the equitable subrogation award, were made in good faith, and were  
22 reasonable in timing and amount.

23           40.     With regard to the third Beattie factor, the Court finds that the Defendants’ decision  
24 to reject Zhang’s Offers of Judgment and proceed to trial was not grossly unreasonable or in bad  
25 faith. Of utmost importance, and underpinning the Court’s decision is the fact that Zhang’s Offers  
26 of Judgment were made prior (i.e., January 10, 2008) to the Nevada Supreme Court’s February 26,  
27 2010, Order of Reversal and Remand. On the date of the Offers of Judgment, it was not the law in  
28 Nevada at the time that a title insurance company and/or lender had an “inquiry notice” duty to look

1 in Court records, beyond what was contained in the Official Public Records, in order to discover  
2 any issues regarding exceptions to marketable title for a certain property. The Nevada Supreme  
3 Court's February 26, 2010 Order of Reversal and Remand for the first time extended the duty of  
4 "inquiry notice" for an investigating title insurance company and/or lender so that they were also  
5 required to research Court records, through available Court searching tools, in order to discover any  
6 possible exceptions to marketable title for a property. Thus, at the time that the Offers of Judgment  
7 were extended, the Lenders had a "good faith" basis for rejecting the same, and pursuing their bona  
8 fide encumbrancer defense, based on what they had discovered in the Official Public Records, and  
9 based on the facts and the law as they existed when the Offers of Judgment were made.

10 41. In light of the foregoing, in order to reconcile the return and disgorgement of the  
11 \$142,060.00 sum (ordered under the Nevada Supreme Court's January 30, 2014, Decision), with  
12 this Court's post-trial award to Zhang of her costs in the amount of \$46,192.46 (ordered under the  
13 March 24, 2016, Fees Order), the Court rules that Zhang is required to pay the sum of **\$95,867.54**  
14 (\$142,060.00 - \$46,192.46 = \$95,867.54) to Gerrard Cox Larsen (on behalf of Countrywide) and its  
15 successors-in-interest), and that Zhang's costs are hereby deemed paid.

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**ORDER**

**NOW THEREFORE:**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Zhang's Motion for Reconsideration is DENIED; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Lenders' Motion for Turnover is GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court's March 24, 2016, Fees Order is supplemented and superseded in part by this Order; and

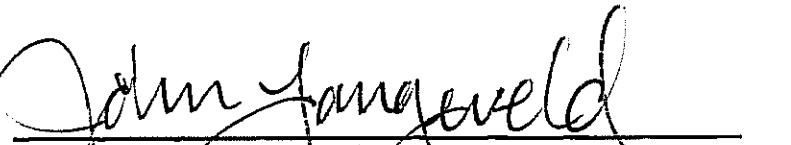
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Zhang is hereby ordered to pay to Gerrard Cox Larsen (on behalf of Countrywide), the sum of Ninety-Five Thousand Eight Hundred Sixty-Seven and 54/100 Dollars (\$95,867.54), plus interest, at the statutory judgment rate, until satisfied in full.

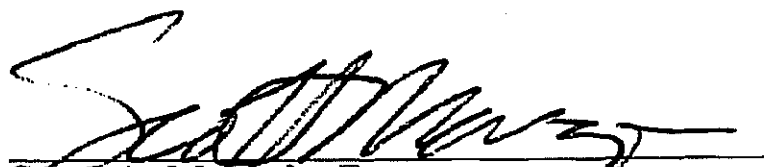
IT IS SO ORDERED THIS 12<sup>th</sup> day of <sup>July</sup>~~June~~, 2016.

  
DISTRICT COURT JUDGE NH

Prepared and submitted by:  
GERRARD COX LARSEN

Read and approved by:  
MARQUIS AURBACH COFFING

  
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STATE FINANCIAL SERVICE, INC., and  
RECONTRUST COMPANY, N.A.

  
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Nevada Bar No. 6407  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Attorneys for Plaintiff, LANLIN ZHANG

# **Exhibit 4**

L1107 Resp. 2nd Req. For Admission

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

**RSPN**  
**CHRISTENSEN JAMES & MARTIN**  
EVAN L. JAMES, ESQ. (7760)  
7440 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone: (702) 255-1718  
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Email: [elj@cjmlv.com](mailto:elj@cjmlv.com),  
*Attorneys for Local 1107, Luisa Blue and Martin Manteca*  
*Local Counsel for SEIU International*

**EIGHTH JUDICIAL DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

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

CASE NO.: A-17-764942-C

DEPT. No. XXVI

Plaintiffs,

vs.

**LOCAL 1107'S RESPONSES TO  
PLAINTIFFS' SECOND REQUESTS  
FOR ADMISSIONS**

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

Defendants.

NEVADA SERVICE EMPLOYEES UNION ("Local 1107"), misnamed as  
"CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION UNION aka SEIU 1107"  
("Local 1107"), by and through the law firm Christensen James & Martin, hereby  
responds to Plaintiffs' Second Requests for Admissions.

DATED this 22nd day of July 2019.

CHRISTENSEN JAMES & MARTIN

By: /s/ Evan L. James  
Evan L. James, Esq. (7760)  
7440 W. Sahara Avenue

Las Vegas, NV 89117  
Telephone: (702) 255-1718  
Fax: (702) 255-0871  
*Attorneys for Local 1107, Luisa Blue  
and Martin Manteca*

INITIAL EXPLANATION

Only Local 1107 responds to the Requests for Admissions because the title of the requests is directed specifically to Local 1107.

OBJECTION TO DEFINITIONS

Local 1107 objects to Plaintiffs' propounded definition of "Local 1107" as it includes attorneys and seeks to characterize certain individuals, i.e. SEIU International Trustees over Local 1107 and "other person acting ... on SEIU International's behalf", in a particular legal light and legal relationships that have not been established as a matter of law or fact. Such a definition requires Local 1107 to assume who was and was not acting on behalf of SEIU International and is therefore argumentative. The definition is also too broad, indefinite and argumentative as it includes "any other person ... purporting to act on SEIU International's behalf."

Local 1107 objects to the Plaintiffs' propounded definition of "Defendants" as it includes attorneys and requires speculation with regard to someone who may be working on behalf of a defendant. One defendant cannot speculate upon who might be acting on behalf of other defendants nor can a one defendant bind another defendant as to who may be acting on behalf of that defendant.

Local 1107 objects to the Plaintiffs' propounded definition of "Subordinate local union" as argumentative.

Local 1107 objects to the Plaintiffs' propounded definition of "Complaint" as vague.

Without waiving the objections, even where additional specific objections are made, Local 1107's responses are set forth below.



RESPONSES

Request for Admission No. 1. Admit that you are not disputing that Sharon Kisling made statements to SEIU Local 1107 members that Plaintiff Dana Gentry was misusing the Local 1107 credit card.

Response to Request for Admission No. 1. Deny.

Request for Admission No. 2. Admit that you are not disputing that Sharon Kisling made statements to SEIU Local 1107 members that Plaintiff Dana Gentry was consuming alcohol at work.

Response to Request for Admission No. 2. Deny.

Request for Admission No. 3. Admit that you are not disputing that the Kisling statements referenced in Requests No. 1 and 2 were false.

Response to Request for Admission No. 3. Objection. Request for Admission No. 3 is argumentative. It requires an acceptance that statements were made, especially as argued. Without waiving the objection and to the extent necessary, all allegations and inferences in Request for Admission No. 3 are denied.

Request for Admission No. 4. Admit that you are not disputing that Local 1107 and Plaintiff Dana Gentry entered into a contract for employment that included a provision that Ms. Gentry's employment could only be terminated for cause and that any such termination was appealable to the Local 1107 Executive Board.

Response to Request for Admission No. 4. Objections. Compound. Vague and ambiguous as to the meaning of "for cause". Calls for a legal conclusion as to the meaning of "for cause". Without waving the objections, the following responses are given in an effort to cooperate: Local 1107 admits that an employment contract between Local 1107 and Dana Gentry existed. Local 1107 denies that the contract could only be terminated for cause. Local 1107 denies that any such termination was appealable to the Local 1107 Executive Board. Any other express or implied admission is denied.

1 Request for Admission No. 5. Admit that you are not disputing that Local 1107 and  
2 Plaintiff Robert Clarke entered into a contract for employment that included a provision  
3 that Mr. Clark's employment could only be terminated for cause and that any such  
4 termination was appealable to the Local 1107 Executive Board.

5 Response to Request for Admission No. 5. Objections. Compound. Vague and  
6 ambiguous as to the meaning of "for cause". Calls for a legal conclusion as to the meaning  
7 of "for cause". Without waving the objections, the following responses are given in an  
8 effort to cooperate: Local 1107 admits that an employment contract between Local 1107  
9 and Robert Clarke existed. Local 1107 denies that the contract could only be terminated  
10 for cause. Local 1107 denies that any such termination was appealable to the Local 1107  
11 Executive Board. Any other express or implied admission is denied.

12 Dated this 22nd day of July 2019.

13 CHRISTENSEN JAMES & MARTIN

14 By: /s/ Evan L. James

15 Evan L. James, Esq.

16 Nevada Bar No. 7760

17 7440 W. Sahara Avenue

18 Las Vegas, NV 89117

19 Telephone: (702) 255-1718

20 Fax: (702) 255-0871

21 *Attorneys for Local 1107, Luisa Blue and*  
22 *Martin Manteca, Local Counsel for SEIU*  
23 *International*  
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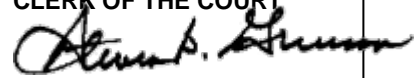
CERTIFICATE OF SERVICE

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

✓ ELECTRONIC SERVICE: Through the Court's E-Service System to the following:

- Michael Macavoyamaya: mmcavoyamayalaw@gmail.com
- Jonathan Cohen: jcohen@rsglabor.com
- Evan L. James: elj@cjmlv.com

CHRISTENSEN JAMES & MARTIN  
By: /s/ Natalie Saville  
Natalie Saville



**RIS**  
**ROTHNER, SEGALL & GREENSTONE**

Glenn Rothner (*Pro hac vice*)  
Jonathan Cohen (10551)  
Maria Keegan Myers (12049)  
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Pasadena, California 91101-3115  
Telephone: (626) 796-7555  
Fax: (626) 577-0124  
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Fax: (702) 255-0871

Attorneys for Service Employees International Union  
and Mary Kay Henry

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-17-764942-C

Dept. 26

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

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

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

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

## Argument

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

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

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

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

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

1 action” as Plaintiffs suggest. Rather, the statute provides that any party “may serve an offer in  
2 writing to allow judgment *to be taken in accordance with its terms and conditions. Unless*  
3 *otherwise specified*, an offer made under this rule is an offer to resolve all claims in the action  
4 between the parties to the date of the offer . . . .” Nev. R. Civ. P. 68(a) (emphasis added). Thus,  
5 Rule 68 permits a party to make an offer of judgment that does not resolve all claims in the  
6 action.

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

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

## 19 **II. The *Beattie* Factors Favor an Award of Attorneys’ Fees.**

20 Plaintiffs argue that the factors identified by *Beattie v. Thomas*, 99 Nev. 579, 588–89  
21 (1983), do not favor an award of attorneys’ fees to SEIU and Henry. None of their arguments is  
22 convincing.

### 23 **A. Plaintiffs’ Claims Against SEIU and Henry Were Not Brought in Good** 24 **Faith.**

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

1 in Plaintiffs’ opposition brief overcomes those glaring and undisputed facts.

2 **i. Plaintiffs’ Contract Claims Against SEIU and Henry Were Frivolous**

3 Plaintiffs contend they brought their claims in good faith because they “have proven the  
4 merits of their breach of contract claims under Nevada law . . . .” Opp. at 7:16. In a similar vein,  
5 they argue that it was undisputed that “Plaintiffs’ for cause contracts were breached.” Opp. at  
6 2:14; *see also id.* at 8:19–20.

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

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

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

20 **ii. Plaintiffs’ Wrongful Termination Claims Against SEIU and Henry**  
21 **Were Frivolous.**

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

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

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



1 judgment proceedings. They continue to assert that SEIU should be liable for the Plaintiffs’  
2 claims because it imposed a trusteeship over Local 1107, and appointed Trustees who later  
3 terminated the Plaintiffs’ employment with Local 1107. Opp. at 8:16-18. As SEIU and Henry  
4 have pointed out to Plaintiffs numerous times, it is settled law that a trustee appointed by an  
5 international union acts on behalf of the local union, not the appointing international union. *See*,  
6 *e.g.*, *Dillard v. United Food & Commercial Workers Union Local 1657*, Case No. CV 11-J-0400-  
7 S, 2012 WL 12951189, at \*9 (N.D. Ala. Feb. 9, 2012) (“As a matter of law, a trustee steps into  
8 the shoes of the local union’s officers, assumes their rights and obligations, and acts on behalf of  
9 the local union.”), *aff’d*, 487 F. App’x 508 (11th Cir. 2012); *Campbell v. Int’l Bhd. of Teamsters*,  
10 69 F. Supp. 2d 380, 385 (E.D.N.Y. 1999) (“A trustee assumes the duties of the local union  
11 officer he replaces and is obligated to carry out the interests of the local union and not the  
12 appointing entity.”). Thus, the fact that the Trustees terminated the Plaintiffs’ employment was  
13 never sufficient to hold SEIU and Henry liable for Plaintiffs’ wrongful termination claims.

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

18 **iii. Plaintiffs’ Vastly Overstate the Significance of the Fact that the**  
19 **Federal Preemption at Issue in This Case Was a Matter of First**  
20 **Impression in Nevada.**

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

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24 <sup>2</sup> *See, e.g., Marshall v. Anderson Excavating & Wrecking Co.*, 901 F.3d 936, 942-43 (8th Cir.  
25 2018) (holding that district court erred in applying alter ego theory of liability where “plaintiffs  
26 never pleaded an alter ego theory in their complaint”); *Garcia v. Village Red Rest. Corp.*, Case  
27 No. 15-civ-62 92 (JCF), 2017 WL 1906861, \*5-6 (S.D.N.Y. 2017) (rejecting alter ego argument  
28 where not raised in pleadings); *Travelers Cas. And Sur. Co. v. Dormitory Authority-State of New*  
*York*, 735 F. Supp. 2d 42, 81-82 (S.D.N.Y. 2010) (holding that party may not “resist summary  
judgment by relying on alter-ego theory” where not raised in pleadings; noting “summary  
judgment is not a procedural second chance to flesh out inadequate pleadings”).

1 was granted to SEIU and Henry – was a matter of first impression in Nevada. *See, e.g.,* Opp. at  
2 10–12, 15–22.

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

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

16 That is *particularly* true here because, as this Court noted in its order granting summary  
17 judgment, California and several other jurisdictions have concluded that the LMRDA preempts  
18 precisely the sort of claims Plaintiffs pursued here. *See, e.g., Screen Extras Guild, Inc. v.*  
19 *Superior Court*, 51 Cal.3d 1017 (1990).<sup>3</sup> Because Nevada courts look to persuasive authority for  
20 guidance when the law is unsettled, *see, e.g., Whitemaine v. Aniskovich*, 124 Nev. 302, 311  
21 (2008), Plaintiffs should have understood that adoption of *Screen Extras Guild* was a likely  
22 outcome. In fact, as has been pointed out several times already in this case, *Plaintiffs admitted*  
23 *from the beginning of this action that they were management-level staff at Local 1107, a*  
24 *dispositive concession for purposes of Screen Extras Guild.* Moreover, Plaintiffs were aware of

25 <sup>3</sup> *See also Vitullo v. Int’l Bhd. of Elec. Workers, Local 206*, 75 P.3d 1250, 1256 (Mont. Sup. Ct.  
26 2003); *Packowski v. United Food & Commercial Workers Local 951*, 796 N.W.2d 94, 100  
27 (Mich. Ct. App. 2010); *Dzwonar v. McDevitt*, 791 A.2d 1020, 1024 (N.J. App. Div. 2002), *aff’d*  
28 *on other grounds*, 828 A.2d 893 (N.J. Sup. Ct. 2003); *see also Young v. Int’l Bhd. of Locomotive*  
*Engineers*, 114 N.E.2d 420 (Ct. App. Ohio 1996).

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

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

8 **B. Defendants’ Offer of Judgment Was Reasonable in Timing and Amount.**

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

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

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

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28 <sup>4</sup> SEIU and Henry do not concede that Plaintiffs have accurately represented the holdings of the  
cases they cite in support of this point.

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

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

6 **C. Plaintiffs’ Rejection of Defendants’ Settlement Offer Was Grossly**  
7 **Unreasonable.**

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

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

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

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

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

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

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

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

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

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25 <sup>6</sup> Plaintiffs appear to complain that defendants' attorneys spent time in this case reviewing  
26 documents that had been disclosed and/or identified in *Garcia v. SEIU, et al.*, Case No. 2:17-cv-  
27 01340-APG-NJK (*Garcia*), a lawsuit concerning the lawfulness of the trusteeship. Opp. at 28.  
28 This should hardly be a surprise. Plaintiffs' position in the parties' Joint Case Conference Report  
was that the *Garcia* action was relevant to this action. See Joint Case Conference Report,  
§ IV(C)(A), at 7–8.

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**Conclusion**

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

DATED: February 5, 2020

ROTHNER, SEGALL & GREENSTONE  
CHRISTENSEN JAMES & MARTIN

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

**CERTIFICATE OF SERVICE**

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

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

**(By ELECTRONIC SERVICE)**

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

Michael Macavoyamaya: mmcavoyamayalaw@gmail.com

Evan James: elj@cjmlv.com

**(By U.S. MAIL)**

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

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/s/ Lisa C. Posso  
Lisa C. Posso

1 RTRAN

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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7  
8 ROBERT CLARKE, ET AL.,  
9 Plaintiffs,

)  
) CASE#: A-17-764942-C  
)  
) DEPT. XXVI  
)

10 vs.

11 SERVICE EMPLOYEES  
12 INTERNATIONAL UNION, ET AL.,  
13 Defendants.

14 BEFORE THE HONORABLE GLORIA STURMAN  
15 DISTRICT COURT JUDGE

16 TUESDAY, FEBRUARY 18, 2020

17 **RECORDER'S TRANSCRIPT OF PENDING MOTIONS**

18 APPEARANCES:

19 For the Plaintiffs: MICHAEL J. MCAVOYAMAYA, ESQ.

20 For the Defendants Local JAMES L. EVANS, ESQ.  
21 1107, Martin Manteca, Luisa  
Blue:

22 For Defendants Service JONATHAN COHEN, ESQ.  
23 Employees International  
Union, Mary K. Henry:

24 RECORDED BY: KERRY ESPARZA, COURT RECORDER  
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Las Vegas, Nevada, Tuesday, February 18, 2020

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

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

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

THE COURT: Okay. And on the phone.

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

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

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

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

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

MR. MCAVOYAMAYA: Okay.

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

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

7 THE COURT: Uh-huh.

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

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

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

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

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

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

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

1 THE COURT: Uh-huh.

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

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

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

20 THE COURT: Okay.

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

25 THE COURT: Okay.

1 MR. MCAVOYAMAYA: -- that the contracts existed.

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

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

8 THE COURT: Okay.

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

13 THE COURT: Okay.

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

18 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

1 appearances and trial.

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

4 THE COURT: I always --

5 MR. JAMES: Sure.

6 THE COURT: -- say --

7 MR. JAMES: Sure.

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

12 MR. JAMES: Sure. And --

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

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

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

1 address that.

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

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

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

22 THE COURT: Uh-huh.

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



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

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

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

17           Do you have any questions specific for me?

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

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

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

10 THE COURT: Uh-huh.

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

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

19 THE COURT: Right.

20 MR. EVANS: Yeah.

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

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

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

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

10 MR. EVANS: Correct.

11 THE COURT: -- to appear.

12 MR. EVANS: Correct.

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

15 MR. EVANS: That was the --

16 THE COURT: -- the deposition appearance fee?

17 MR. EVANS: That was the minimum charge.

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

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

24 THE COURT: Uh-huh.

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

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

3 THE COURT: Uh-huh.

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

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

12 MR. EVANS: Sure.

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

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

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

23 THE COURT: Okay. So --

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

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

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

7 MR. COHEN: Yes, Your Honor.

8 THE COURT: Okay. Got it. Thank you.

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

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

25 With respect to the Court's question about whether costs

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

5 THE COURT: And so the distinction --

6 THE COURT: Your Honor asked --

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

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

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

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

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

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

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

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

13 MR. COHEN: Thank you.

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

16 THE COURT: Yes.

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

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

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

8 THE COURT: Okay. Thanks.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 So you made an offer of judgment, so reasonable as to  
8 timing and amount, but then you have to look at the other two factors,  
9 since I think that's probably where we need to focus our attention  
10 because the issue that was raised by the Plaintiffs in their opposition is  
11 how are we supposed to evaluate this judgment -- this offer of judgment.  
12 I disagree that it's an improper unapportioned offer. It's very clear,  
13 which Plaintiff is to receive which amount. They each were offered  
14 30,000.

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

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

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

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

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

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

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

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

4 THE COURT: Okay. And so --

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

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

10 MR. MCAVOYAMAYA: Correct.

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

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

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

20 MR. COHEN: Thank you, Your Honor.

21 THE COURT: Uh-huh.

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

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

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

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

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

18 THE COURT: Uh-huh.

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

25 THE COURT: No.



1 MR. EVANS: Okay. I would also like to point out that Rule  
2 68(b) allows for this type of apportioned offer. It allows for a resolution  
3 of all claims. And in our particular case, the way the Plaintiffs  
4 prosecuted their claims, made it impossible for one Defendant to settle  
5 without the other Defendants settling, because one of the things that  
6 they asserted against both parties is this contract idea. They asserted  
7 the contract against the International. They also asserted the contract for  
8 each -- against the Local.

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

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

21 THE COURT: Sure.

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

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

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

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

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

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

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

3 MR. COHEN: Ms. Mancini.

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

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

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

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

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

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

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

4 THE COURT: Okay.

5 MR. EVANS: That was the position we took.

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

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

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

1 trying to --

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

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

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

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

11 THE COURT: Uh-huh.

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

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

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

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

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

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

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

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

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

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

23 THE COURT: Okay. Thank you.

24 MR. EVANS: Thank you.

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

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

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

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

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



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

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

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

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

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

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

8 And then if you take a look at -- you know, after that -- so as  
9 an initial matter, to conclude that this offer of judgment was  
10 apportioned, the Court has to overturn *Parodi*, because *Parodi* is clear. It  
11 has to be when there's multiple -- when there's multiple theories of  
12 liability against multiple defendants, that is an unapportioned offer. So if  
13 you're going to say that the offer was apportioned, you would have to  
14 overrule *Parodi*. If you're going to say that -- if you're going to move to  
15 68(c), I mean that clearly doesn't apply because the damages are not  
16 derivative.

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

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

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

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

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

13                  MR. MCAVOYAMAYA: You're right.

14                  THE COURT: We're going to move on.

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

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

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

9                   THE COURT: Okay.

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

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

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

16                  THE COURT: Yeah.

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

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

1 68(c)(3) as the only type of joint unapportioned offer you can make to  
2 Plaintiffs. To the contrary, 68(c)(1) says, a joint offer may be made by  
3 multiple offerors. That's precisely what we did. We were multiple  
4 offerors, SEIU and 1107, and we made a joint offer -- a single offer to each  
5 Plaintiff. So I think, you know, the argument that 68(c)(3) has to apply is  
6 incorrect.

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

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

22           THE COURT: Thank you.

23           MR. MCAVOYAMAYA: Also, one more thing.

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

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

1 Honor.

2 First, I would like to point out the idea of collecting against  
3 Ms. Kisling, who was not a party to the offer of judgment. She would  
4 not have become a judgment debtor under the offer of judgment. It  
5 wouldn't have been proper for the Plaintiffs to try and collect against her  
6 anyway. They would have been collecting against my client, the Local  
7 1107, and the International. So this argument about Ms. Kisling coming  
8 and trying to void the argument -- the offer of judgment, it wouldn't  
9 apply, because she wouldn't have been a judgment debtor. The debtor  
10 would have been my client. My client was on the hook. The  
11 International was on the hook.

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

14 THE COURT: Correct.

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

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

1 two?

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

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

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

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

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

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

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

11 THE COURT: Okay.

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

13 THE COURT: Okay.

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

16 MR. COHEN: Your Honor --

17 MR. EVANS: I'm sorry, Jonathan.

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

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



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

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

5 THE COURT: Uh-huh.

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

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

10 MR. COHEN: And likewise, Your Honor.

11 THE COURT: They can --

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

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

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

17 THE COURT: Okay. All right.

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

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

21 MR. EVANS: I understand.

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

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

1 THE COURT: Yeah.

2 MR. MCAVOYAMAYA: -- the new checks.

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

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

7 MR. COHEN: Thank you, Your Honor.

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

10 THE COURT: Right. Uh-huh.

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

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

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

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

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

7 THE COURT: Right.

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

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

11 MR. EVANS: Okay.

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

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

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

1 THE COURT: Right.

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

4 THE COURT: Right.

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

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

9 MR. EVANS: I understand.

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

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

17 THE COURT: Right.

18 MR. EVANS: Because I --

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

21 MR. EVANS: Sure.

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

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

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

7 MR. EVANS: Okay.

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

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

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

18 MR. EVANS: Okay.

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

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

24 THE COURT: Right.

25 MR. EVANS: -- going to the fourth?

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THE COURT: Right.

MR. EVANS: Okay. Very good.

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

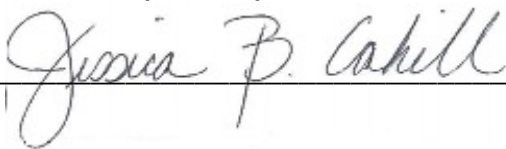
MR. EVANS: Thank you so much.

MR. MCAVOYAMAYA: Thank you, Your Honor.

MR. COHEN: Thank you, Your Honor.

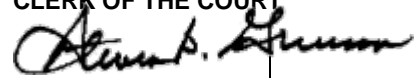
[Proceedings concluded at 10:23 a.m.]

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

  
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**EIGHTH JUDICIAL DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

DANA GENTRY, an individual; and  
ROBERT CLARKE, an individual,  
  
Plaintiffs,  
  
vs.

CASE NO.: A-17-764942-C

DEPT. No. XXVI

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

**ORDER DENYING MOTIONS FOR  
ATTORNEY FEES**

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

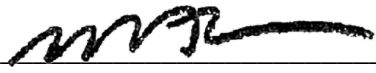
The Court finds that the Offer of Judgment was properly apportioned in  
accordance with NRCP 68(b) and that the Offer of Judgment is in compliance with the  
provisions of NRCP 68.. The Court further finds that the Offer of Judgment was  
reasonable in amount given that the claims were disputed legally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



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

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

9 DATED this 9th day of April 2020.

10   
11 Judge Gloria J. Sturman

12 Submitted By

13 CHRISTENSEN JAMES & MARTIN

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*No Response Received*

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