

1 **NOT**

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Clerk of Supreme Court

9 **SUPREME COURT OF NEVADA**

10 * * * *

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

13 Plaintiffs,

14 vs.

15 SERVICE EMPLOYEES INTERNATIONAL
16 UNION, *et al.*

17 Defendants.

No. 80520

Consolidated with

No. 81166

NOTICE OF RECENT EVENTS RE:
FEDERAL COURT DECISION ON
ALTER EGO LIABILITY

18 Appellant Robert Clarke hereby provides notice to the Court of recent events in a related
19 case proceeding in federal court on the issue of alter-ego liability:

20 The Supreme Court of Nevada Rule of Professional Conduct 3.3, Candor Toward the
21 Tribunal, and Model Rule of Professional Conduct 3.3 are consistent with one another. Courts
22 interpret Rule 3.3 to require the disclosure of additional information to the Court where that
23 information may affect the court's decision. "It is appropriate to remind counsel that they have a
24 'continuing duty to inform the Court of any development which may conceivably affect the
25 outcome' of the litigation." *Board of License Com'rs of Town of Tiverton v. Pastore*, 105 S.Ct.
26 685, 686, 469 U.S. 238, 240 (1985); *quoting Fusari v. Steinberg*, 419 U.S. 379, 391, 95 S.Ct. 533,
27 540, 42 L.Ed.2d 521 (1975) (BURGER, C.J., concurring). As one court has noted, "The [judicial]
28 system can provide no harbor for clever devices to divert the search, mislead opposing counsel or
the court, or cover up that which is necessary for justice in the end." *U.S. v. Shaffer Equipment*
Co., 11 F.3d 450, 457-58 (4th Cir. 1993).

1 In the present matter, Appellant has argued the issue of alter-ego liability stemming from
2 SEIU International's control over Local 1107. *See* Clarke Op.Brf., at 57-68. Both parties argued
3 both state and federal law on the issue of alter-ego liability. *Id. see also* SEIU Jt.Op.Brf, at 49-56.
4 In *Cabrera et al. v. SEIU et al*, 2:18-cv-00304, the parties brought a nearly identical breach of
5 contract action against Appellees SEIU and Local 1107. *See* Order, *Cabrera et al. v. SEIU et al*,
6 2:18-cv-00304, (ECF No. 224), attached as **Exhibit 1**, at 1-10. With regards to the breach of
7 contract action, the only real difference was that the plaintiffs, Javier Cabrera and Debbie Miller,
8 were covered by a collective-bargaining agreement ("CBA") rather than a for-cause employment
9 contract like Plaintiff Clarke and Gentry. *Id.* As such, their claims were required to proceed in
10 federal court, rather than state court. However, like the present case, the plaintiffs in *Cabrera*
11 argued that SEIU International was liable under a theory of alter-ego liability. *Id.* at 7-8. The
12 United States District Court for the District of Nevada recently ruled, based on the same evidence
13 as was presented in this case, that "The record suggests that Blue, by virtue of her high-level
14 position within SEIU, may have had sufficient and continuous contact with SEIU to an extent that
15 could support an alter ego finding. The Court therefore denies summary judgment on this claim."
16 *Id.*

17 Because the courts are ruling on the same alter-ego claim, with identical evidence, this
18 Court should consider the federal court's decision as persuasive when making its decision in this
19 matter.

20 DATED this 27th day of April, 2021.

21 /s/ Michael J. Mcavaoyamaya

22 _____
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CERTIFICATE OF SERVICE

1 I HEREBY CERTIFY that on the 3rd day of February 2020, the undersigned served the
2 foregoing **NOTICE OF RECENT EVENTS** on all counsel in the E-Service Master List for the
3 above-referenced matter in the Nevada Supreme Court eFiling System in accordance with the
4 Nevada Electronic Filing and Conversion Rules.

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26 Dated this 27th day of April, 2021.

27 /s/ Michael J. Mcavoyamaya

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Exhibit 1

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

JAVIER CABRERA, et al.,
Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION et al.,
Defendants.

Case No. 2:18-cv-00304-RFB-DJA

ORDER

I. INTRODUCTION

Before the Court are Plaintiffs’ Objection/Appeal to Magistrate Order, Motion for Reconsideration, Motions for Summary Judgment, Counter Motion to Strike Answer and Defendants’ Motions for Summary Judgment. ECF Nos. 137, 155, 167, 168, 171, 172, 185. For the following reasons, the Court denies Plaintiffs’ motions and denies in part Defendants’ motions.

II. PROCEDURAL BACKGROUND

On February 16, 2019, Defendants removed this case from the Eighth Judicial District Court. ECF No. 1. On February 22, 2019, this Court held a hearing granting Plaintiffs’ motion to amend their complaint. ECF No. 26. On March 8, 2019, Plaintiffs filed an amended complaint against Defendants. ECF No. 27. On May 10, 2019, Defendants filed a motion for sanctions regarding Plaintiffs’ amended complaint which this Court granted. ECF Nos. 40, 153. On February 26, 2020, Plaintiffs’ counsel failed to appear in a hearing in front of Magistrate Judge Albregts. ECF No. 126. On March 20, 2020, Judge Albregts held a hearing regarding Plaintiff’s failure to appear and awarded Defendants’ fees and costs in the amount of \$2,102.95. ECF Nos. 127,132. On April 3, 2020, Plaintiff filed an objection/ appeal to Judge Albregts order. ECF No. 137. On

1 April 9, 2020, Defendants filed a response. ECF No. 138. On July 22, 2020 Defendant Service
2 Employees International Union (“SEIU”) filed a motion for summary judgment. ECF No. 167. On
3 September 2, 2010, Plaintiff filed a response and on September 16, 2020, Defendant SEIU filed a
4 reply. ECF Nos. 199, 200, 205. On July 22, 2020, Defendants Luisa Blue, Clark County Public
5 Employees Association, & Martin Manteca filed a motion for summary judgment. ECF No.168.
6 On September 2, 2020, Plaintiffs filed responses and Defendants filed a reply on September 16,
7 2020. ECF Nos. 196, 198, 203. On July 22, 2020, Plaintiffs filed a partial motion for summary.
8 ECF No. 172. Defendants responded on September 2, 2020 and Plaintiffs replied on September
9 16, 2020. ECF Nos. 192, 193, 209. On July 22, 2020 Plaintiff Debbie Miller filed a motion for
10 summary judgment which was fully briefed. ECF Nos. 171, 180, 183. On August 19, 2020,
11 Plaintiff filed a motion to strike answer to the amended complaint which was fully briefed on
12 September 1, 2020. ECF Nos. 185, 188, 189, 190.

13 14 **III. FACTUAL BACKGROUND**

15 The Court makes the following findings of undisputed and disputed facts.

16 **a. Undisputed facts**

17 The Clark County Public Employees Association (“Local 1107”) entered into a valid and
18 binding collective bargaining agreement (“CBA”) with Nevada Service Employees Union Staff
19 Union (“NSEUSU”). On April 28, 2017, SEIU President Mary Henry was placed in Local 1107
20 under emergency trusteeship. Henry appointed Luisa Blue and Martin Manteca as Trustee and
21 Deputy Trustee. These appointees took over duties of the former officers and handled day to day
22 affairs of Local 1107.
23

24 Plaintiff Deborah Miller was an organizer employed by Local 1107 from 2009 until her
25 separation from Local 1107 in January 2018. Miller was, at all times relevant herein, a staff
26 employee covered by the CBA between Local 1107 and NSEUSU. On September 13, 2017, after
27 a rally at Rancho High School that was part of the Trustees new program, Miller collapsed in the
28 parking lot at work while getting out of her car because of her diabetes. Miller had severe

1 burning and stabbing pains in her legs after this fall. On October 11, 2017, Miller informed the
2 Trustees over Local 1107 of her medical condition and requested that she be given an
3 accommodation. Miller also provided a doctor's note, which stated that there was "0%
4 disability." However, it also stated that Miller was recommended to perform desk work and
5 implement a set schedule for works and breaks due to her history of diabetes and high blood
6 sugar. On October 17, 2017, local SEIU sent Miller a letter confirming she requested to meet to
7 discuss a request for reasonable accommodations under the American with Disabilities Act
8 ("ADA") and for Miller to be transferred from her fieldwork position to a desk job. The SEIU
9 denied the request because it was "unclear what qualifying disability [she had] that would
10 warrant reasonable accommodation." On October 26, 2017, the Trustees over Local 1107 sent
11 Miller a letter acknowledging she has been diagnosed diabetic; however, Miller had not
12 sufficiently explained how her impairment prevented her from working her current fieldwork job
13 and how a desk job would enable her to better manage her diabetes. Therefore, SEIU denied the
14 transfer but SEIU "granted reasonable accommodation to take reasonable breaks during her shift
15 to manage her blood glucose levels...[and] to take breaks as needed to take medication...[and] to
16 eat during your shift to manage diabetes..."

17
18 On October 29, 2017, the NSEUSU filed a grievance against the SEIU Trustees and
19 SEIU alleging a violation of the CBA Article 2 "Non-Discrimination." Specifically, the
20 grievance alleged that Local 1107 breached Article 2 of the CBA because the Spanish speaking
21 "criteria" [for the secretary position] is non-existent in that previous employees in this position
22 did not speak Spanish and were not required to do so," and reclassifying the position in response
23 to a request for accommodations for her physical disability constituted discrimination under the
24 CBA. A Step 1 meeting (part of the multi-step grievance) was scheduled for December 15, 2017
25 however it was cancelled because Miller appeared with counsel. On January 3, 2017, Trustee
26 Luisa Blue wrote a letter to Miller through counsel asserting that after reviewing the grievance, it
27 was not cognizable because it asserted matters that are not subject to grievance and arbitration
28 under the CBA. Luisa Blue also noted that there is no jurisdiction under the CBA to grieve

1 matters subject to management rights because management rights are expressly not subject to
2 grievance under Article 8 of the CBA.

3 Javier Cabrera is a fifteen year employee of Local 1107, and now the former President of
4 the NSEUSU. Cabrera filed grievances regarding workplace issues against Deputy Trustee
5 Manteca with Local 1107. On October 30, 2017, Cabrera received a notice of termination.
6 Cabrera went through with the formal grievance steps. Cabrera failed to attend the Step 2
7 meeting; therefore, Luisa Blue denied the grievance and made a request for arbitration. NSEUSU
8 did not advance an arbitration case. On November 1, 2017, Cabrera filed an unfair labor practice
9 charge against Local 1107 with the National Labor Relations Board (“NLRB”) and the general
10 counsel of NLRB issued a complaint against Local 1107. The NLRB administrative judge found
11 that Local 1107 had engaged in certain unfair labor practices under the NLRA and issued an
12 order of full reinstatement of back pay. Cabrera was reinstated with Local 1107 on October 21,
13 2019.

14
15 **b. Disputed Facts**

16 The parties whether Plaintiff Miller was disabled under the ADA. Parties also dispute the
17 legal effect of the facts.

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19 **IV. LEGAL STANDARDS**

20 **A. Objection/ Appeal to Magistrate Judge Order**

21 A district court “may accept, reject, or modify, in whole or in part, the findings or
22 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). A party may file specific
23 written objections to the findings and recommendations of a magistrate judge. 28 U.S.C. §
24 636(b)(1); Local Rule IB 3-2(a). When written objections have been filed, the district court is
25 required to “make a de novo determination of those portions of the report or specified proposed
26 findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); see also Local
27 Rule IB 3-2(b).

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1 **B. Motion for Reconsideration**

2 The Court has discretion to grant or deny a motion for reconsideration. Navajo Nation v.
3 Norris, 331 F.3d 1041, 1046 (9th Cir. 2003). Absent highly unusual circumstances, the court
4 should grant a motion for reconsideration only where: (1) it is presented with newly discovered
5 evidence; (2) it has committed clear error or the initial decision was manifestly unjust; or (3) there
6 has been an intervening change in controlling law. Nunes v. Ashcroft, 375 F.3d 805, 807 (9th Cir.
7 2004); Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000); Sch. Dist. No.
8 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for
9 reconsideration “may not be used to raise arguments or present evidence for the first time when
10 they could reasonably have been raised earlier in the litigation.” Kona, 229 F.3d at 890; Marlyn
11 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (citation
12 and quotation marks omitted. “A party seeking reconsideration . . . must state with particularity
13 the points of law or fact that the court has overlooked or misunderstood. Changes in legal or factual
14 circumstances that may entitle the movant to relief also must be stated with particularity.” L.R. 59-
15 1.

16 **C. Motion for Summary Judgment**

17 Summary judgment is appropriate when the pleadings, depositions, answers to
18 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no
19 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
20 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering
21 the propriety of summary judgment, the court views all facts and draws all inferences in the light
22 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.
23 2014). If the movant has carried its burden, the non-moving party “must do more than simply
24 show that there is some metaphysical doubt as to the material facts.... Where the record taken as
25 a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
26 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation
27 marks omitted). It is improper for the Court to resolve genuine factual disputes or make credibility
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1 determinations at the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th
2 Cir. 2017) (citations omitted).

3
4 **V. DISCUSSION**

5 **a. Objection/Appeal of Magistrate Judge Albregts' Order**

6 Plaintiffs do not dispute that Defendants are entitled to reimbursement; instead, Plaintiffs
7 argue that Judge Albregts committed clear error when he awarded Defendants fees and costs for
8 traveling to the hearing in the amount of \$2,643.95. This Court disagrees. The Court finds that
9 Defendants submitted adequate proof of traveling fees. The Court finds no error by Judge Albregts
10 in his order. The Court therefore denies Plaintiff's objection/appeal of Magistrate Judge Albregts'
11 Order.

12 **b. Motion for Reconsideration of the Court Granting Sanctions**

13 The Court incorporates by reference the findings of fact in its Order on Defendants' Motion
14 to Dismiss and Motion for Sanctions.

15 Plaintiff argues that this Court made clear errors in the application of facts and law. This
16 Court disagrees. In its ruling from the bench at the March 11, 2020 hearing on the various motions,
17 the Court dismissed, Plaintiffs' thirteenth, fourteenth, and fifteenth claims from the Amended
18 Complaint as duplicative of the action then-pending before Judge Gordon. To determine whether
19 a suit is duplicative, the test for claim preclusion is applied. Adams v. California Dep't of Health
20 Servs., 487 F.3d 684, 688 (9th Cir. 2007), overruled on other grounds by Taylor v. Sturgell, 553
21 U.S. 880, 904 (2008). "Thus, in assessing whether the second action is duplicative of the first, we
22 examine whether the causes of action and relief sought, as well as the parties or privies to the
23 action, are the same. Id. at 689 (citing The Haytian Republic, 154 U.S. 118, 124 (1894)). As this
24 Court explaining in its Order, Plaintiffs' claims were indeed duplicative despite this Court explicitly
25 ordering Plaintiff to not include claims that implicate the consolidated case before Judge Gordon.
26 Plaintiffs ignored this Court's Order to not include duplicative claims. Plaintiffs fail to show that
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1 this Court made a clear error and therefore, this Court denies Plaintiffs' Motion for
2 Reconsideration.

3 **c. Motion to Strike**

4 This Court denies Plaintiffs' Motion to Strike Defendants' Answer. Plaintiffs had 21 days
5 after being served the Answer to file a response. FRCP 12(f)(2). Defendant Local 1107 filed its
6 Answer to the Amended Complaint on July 23, 2020, so Plaintiff could have filed a motion to
7 strike within 21 days but failed to do so. Plaintiffs waited over one year later until August 19, 2021
8 to file the motion to strike. Therefore, the Court denies Plaintiffs' Motion to Strike.

9 **d. Motions for Summary Judgement**

10 **i. SEIU Liability**

11 Defendants argue that SEIU cannot be liable for any of Plaintiffs' claims because Plaintiffs
12 were employed by the Local 1107, not SEIU. Plaintiffs argue that SEIU is an "alter ego" of Local
13 1107 and therefore can be held liable. The Ninth Circuit applies the alter ego test to determine
14 liability of allegedly related entities under Section 301, the ADA and Nevada law. To determine
15 whether two employing agencies are "alter egos" the court considers (1) inter-relation of
16 operations; (2) common management;(3) centralized control of labor relations; (4) common
17 ownership or financial control. Herman v. United Bhd. of Carpenters and Joiners of Am., Local
18 Union No. 971, 60 F.3d 1375, 1383 (9th Cir. 1995).

19
20 Here, Luisa Blue and Martin Manteca were appointed by the SEIU to the control the Local
21 1107's operations. Blue and Manteca made all the decision s related to the claims in the complaint:
22 Miller's accommodation request, Cabrera's termination, and dealings with local union grievances.
23 Although there is no direct evidence in the record that Blue and Manteca consulted with SEIU
24 about any issue while operating the Local 1107, Blue remained a member of the SEIU executive
25 board. Because the record does not provide the full extent of Blue's specific responsibilities and
26 actions while serving on the SEIU executive board, this Court finds that there are material disputed
27 facts and inferences that must be resolved by a factfinder and not this Court at summary judgment.
28 The record suggests that Blue, by virtue of her high-level position within SEIU, may have had

1 sufficient and continuous contact with SEIU to an extent that could support an alter ego finding.
2 The Court therefore denies summary judgment on this claim.

3 **ii. Miller’s Discrimination and Reasonable Accommodation**

4 Defendants argue that Miller did not suffer adverse action and does not qualify as an
5 individual with disability. Plaintiffs argues that L1107 not only denied that Miller had a disability,
6 but also never negotiated the reasonable accommodations with Miller, instead opting to dispute
7 that she was disabled and present her with a take it or leave it ultimatum. The ADA defines a
8 “qualified individual” as an individual “with a disability who, with or without reasonable
9 accommodation, can perform the essential functions of the employment position that such
10 individual holds or desires.” 42 U.S.C. § 12111(8) (emphasis added).

11 Here, there is a genuine dispute of material facts regarding whether Miller had a disability
12 and Defendants offered a reasonable accommodation. The record reflects that Miller diligently
13 requested reasonable accommodations for her diabetes and provided a doctors’ note. However, at
14 least one doctors’ note appears to have conflicting information; for example, one note stated that
15 Miller had “0% disability,” but requested that her employer provide specified accommodations for
16 her diabetes. Because the Court finds there to be disputed material questions of fact regarding
17 Miller’s disability and Defendants reasonable accommodations, the Court denies Plaintiffs’ and
18 Defendants’ summary judgment arguments.

19 **iii. Miller’s Section 301 Claim**

20 Defendants argue that Miller’s Section 301 claim fails as a matter of law because the CBA
21 expressly excludes a grievance that contains matters subject to EEOC or Nevada Equal Rights
22 Commission (NERC) jurisdiction. This Court agrees. The CBA limits actionable Section 301
23 claims and grievances. See Vaca v. Sipes, 386 U.S. 171, 184 (1967). Here, Article 11 of the CBA
24 states in part: “A grievance shall not be defined to include any matter or action taken by the
25 Employer or its representatives for which the Equal Employment Opportunity Commission
26 (EEOC), or Nevada Equal Rights Commission (NERC), has jurisdiction or any matter specifically
27 excluded from grievance and arbitration by other provisions of this Agreement.” It is apparent the
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1 Plaintiff Miller’s grievance concerned matters for which the EEOC or NERC would have
2 jurisdiction. And although Plaintiff Miller did not file a complaint with either entity, that does not
3 affect Miller’s ADA grievance being under EEOC or NERC jurisdiction. Therefore, the Court
4 finds that part of Plaintiff Miller’s Fifth Claim fails as a matter of law.

5 Defendants also argue that Plaintiff cannot proceed under Section 301 for CBA breaches
6 for which Miller never filed a grievance and because Miller only grieved violation of Article 1 and
7 2 of the CBA, she cannot allege breached of Article 8, 22, and 24. Plaintiffs do not contest this
8 point and instead argue that they were excused from exhausting remedies under the CBA. This
9 Court disagrees and finds that Plaintiff Miller cannot proceed under Section 301 for alleged
10 breaches of Article 8, 22, and 24.

11 **iv. Cabrera’s Claims**

12 Defendants argue that Plaintiff Cabrera already achieved a full remedy through his NLRB
13 proceeding and therefore his claims are moot. This Court disagrees. “The general rule is that
14 punitive damages are not allowed in actions for breach of contract brought pursuant to Section
15 301.” Bricklayers & Allied Craftsmen, Local Union No. 3 v. Masonry & Tile Contractors Ass’n,
16 No. CV-LV-81-726 RDF, 1990 WL 270784, at *22 (D. Nev. July 2, 1990) citing Hotel and Rest.
17 Emp., Etc. v. Michelson's Food Serv., 545 F.2d 1248, 1254 (9th Cir. 1976). However, there are
18 instances in which the general rule does not apply. Id. (the court “express[ed] no opinion as to
19 what the arbitrator's powers would be ...” in a 301 case in which punitive damages were timely
20 raised). The Ninth Circuit in Hotel and Rest. stated that punitive damages or extraordinary
21 remedies “are not usually appropriate in breach of contract cases ... (emphasis added),” not that
22 such damages are never appropriate. Id. Some attempts by courts to fashion remedies in section
23 301 actions will lack express statutory sanction but will be solved by looking at the policy of the
24 legislation and fashioning a remedy that will effectuate that policy. Textile Workers Union of
25 America v. Lincoln Mills, 353 U.S. 448, 456–457 (1957).

26 Here Plaintiff Cabrera’s claim involve an alleged breach of the CBA involving flagrant
27 violations of duties created by such agreement which result in a serious undermining and violation
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1 of the national labor policy. Specifically, Plaintiff Cabrera alleges that SEIU Trustees over Local
2 1107 engaged in willful, flagrant breaches of the SNEUSU CBA and duties and therefore
3 Defendants' conduct constitutes oppression, fraud, and malice. The Court finds that Plaintiff
4 Cabrera's allegations do not foreclose punitive damages; however, there remains a dispute of
5 material questions of fact regarding the alleged breach that must be resolved by a factfinder.
6 Therefore, the Court denies both parties' motions with respect to Cabrera's claim.

7
8 **VI. CONCLUSION**

9 **IT IS ORDERED** that Plaintiffs' Objection/Appeal to Magistrate Judge Albregts' Order
10 (ECF No. 137), Motion for Reconsideration (ECF No. 155), Motions for Summary Judgment (ECF
11 Nos. 172, 171), Motion to Strike (ECF 185) are DENIED.

12 **IT IS FURTHER ORDERED** that Defendants' Motions for Summary Judgment (ECF
13 Nos. 167, 168) are DENIED in part. The Court grants Defendants' motion for summary judgement
14 with respect to Plaintiff Miller' Section 301 Claim and Claim regarding CBA violation of Article
15 8, 22, and 24.

16 **IT IS FURTHER ORDERED** that parties shall submit a joint pretrial order with
17 trial dates in July or August, 2021 by April 14, 2021.

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20 **DATED:** March 31, 2021.

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23 **RICHARD F. BOULWARE, II**
24 **UNITED STATES DISTRICT JUDGE**