NO.

IN THE
SUPREME COURT OF THE UNITED STATES

VINCENT LYLE BADKIN,

Petitioner

v.

LOCKHEED MARTIN CORPORATION, a Maryland corporation, dba LOCKHEED MARTIN SPACE SYSTEMS COMPANY; and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington Labor Union,

Defendants

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX A – F

Ahmet Chabuk
11663 Ivy Ln NW
Silverdale, WA 98383
(360) 692-0854
Attorney for Petitioner

APPENDIX A

Order, dated 08/31/2020, Amending Prior memorandum disposition filed on July 21, 2020, and denying petition for re-hearing. U.S. Court of Appeals for the Ninth Circuit, Case No. 19-35524.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 31 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VINCENT LYLE BADKIN,

Plaintiff-Appellant,

v.

LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

Defendants-Appellees.

No. 19-35524

D.C. No. 3:17-cv-05910-BHS
Western District of Washington,
Tacoma

ORDER

VINCENT LYLE BADKIN,

Plaintiff-Appellee,

v.

LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation,

Defendant,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

No. 19-35559

D.C. No. 3:17-cv-05910-BHS

Defendant-Appellant.

VINCENT LYLE BADKIN,

Plaintiff-Appellee,

v.

LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation,

Defendant-Appellant,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

Defendant.

No. 19-35576

D.C. No. 3:17-cv-05910-BHS

Before: NGUYEN and BUMATAY, Circuit Judges, and SIMON,* District Judge.

The prior memorandum disposition filed on July 21, 2020, is hereby amended concurrent with the filing of the amended disposition today.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc, and Judge Simon has so recommended.

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing will be accepted.

NOT FOR PUBLICATION

FILED

AUG 31 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT LYLE BADKIN, Plaintiff-Appellant, v. LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union, Defendants-Appellees.	No. 19-35524 D.C. No. 3:17-cv-05910-BHS AMENDED MEMORANDUM*

VINCENT LYLE BADKIN, Plaintiff-Appellee, v. LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation, Defendant, and	No. 19-35559 D.C. No. 3:17-cv-05910-BHS

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

Defendant-Appellant.

VINCENT LYLE BADKIN,

Plaintiff-Appellee,

v.

LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation,

Defendant-Appellant,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

Defendant.

No. 19-35576

D.C. No. 3:17-cv-05910-BHS

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted July 6, 2020
Seattle, Washington

Before: NGUYEN and BUMATAY, Circuit Judges, and SIMON,** District Judge.

Vincent Badkin (Badkin) appeals the district court's grant of summary judgment in favor of his former employer, Lockheed Martin Corporation (Lockheed), and his former union, the International Association of Machinists and Aerospace Workers, District 160 and Local Lodge 282 (Union). We have jurisdiction under 28 U.S.C. § 1291 and review a district court's grant of summary judgment de novo. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). We affirm.

1. In this "hybrid § 301" claim brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, Badkin alleges that (1) Lockheed breached its collective bargaining agreement (CBA) by terminating Badkin's employment and (2) the Union breached its duty of fair representation by declining to advance Badkin's grievance to arbitration. To avoid summary judgment, Badkin must show at least a genuine issue of material fact on *both* prongs. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 988 (9th Cir. 2007). We conclude that Badkin has not shown a genuine issue of material fact on the Union's breach of its duty of fair representation.

** The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

2. When a hybrid § 301 claim challenges the exercise of a union's judgment, as opposed to conduct that is merely ministerial or procedural, a plaintiff "[t]ypically . . . may prevail only if the union's conduct was discriminatory or in bad faith." *Demetris v. Transp. Workers Union of Am., AFL-CIO*, 862 F.3d 799, 805 (9th Cir. 2017); *Burkevich v. Air Line Pilots Ass'n, Int'l*, 894 F.2d 346, 349 (9th Cir. 1990); *Moore v. Bechtel Power Corp*., 840 F.2d 634, 636 (9th Cir. 1988).[1] The Union's decision not to advance Badkin's grievance to arbitration was an exercise of the Union's judgment. *Beck v. United Food & Com. Workers Union, Loc. 99*, 506 F.3d 874, 879-80 (9th Cir. 2007) (distinguishing "intentional conduct by a union exercising its judgment" from "actions or omissions that are unintentional, irrational or wholly inexplicable, such as an irrational failure to perform a ministerial or procedural act"). A union's action is discriminatory only if there is intentional and severe discrimination unrelated to legitimate union

[1] In *Demetris*, we noted that "a union's conduct generally is not arbitrary when the union exercises its judgment" and that in such circumstances a union's action "can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Demetris*, 862 F.3d at 805 (simplified). The earlier cases of *Burkevich* and *Moore* are even more deferential to a union's judgment. *See Burkevich*, 894 F.2d at 349 (noting that if the conduct involved a union's judgment, "the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith"); *Moore*, 840 F.2d at 636 (same and explaining that when a union's judgment is in question, "[a]rbitrariness alone would not be enough"). We need not resolve this potential tension in the case law because here no reasonable jury could find the Union's action to be without rational basis or explanation. The Union simply viewed the relative strength of Badkin's claim differently than did Badkin.

objectives. *Id.* Here, there is no evidence of discrimination. Badkin admitted at deposition that he had no reason to believe that the Union was acting towards him with ill will or hostility. Likewise, the Union's representative testified that he treated Badkin as he would have treated any other member of the Union under similar circumstances. Badkin presents no evidence to the contrary.

3. In the context of a hybrid § 301 claim, a union acts in bad faith only when there is substantial evidence of fraud, deceitful action, or dishonest conduct. *Beck*, 506 F.3d at 880. Badkin argues that the Union's decision not to proceed to arbitration was done in bad faith. Badkin, however, fails to show a genuine issue of material fact on bad faith. Although Badkin argues that the Union failed to timely inform him about or provide him with a copy of the August 2016 resolution of Badkin's grievance between Lockheed and the Union, the Union consulted with its former attorney and concluded that Badkin's grievance did not have enough merit to proceed to arbitration. The facts are unclear why the Union did not on September 21, 2016 (or earlier) inform Badkin about or give him a copy of the written August 2016 memorialization of the resolution of Badkin's grievance, but there is no evidence from which a reasonable jury could conclude that the Union's failure to do so was in bad faith. At most, the Union was negligent. Mere negligence, however, cannot support a claim of unfair representation. *See Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985).

4. Because Badkin fails to show a genuine issue on whether the Union breached its duty of fair representation, we need not decide whether there is a genuine issue regarding Lockheed's alleged breach the CBA. We also need not decide the cross-appeals of Lockheed and the Union, arguing that summary judgment was appropriate under the applicable six-month statute of limitations or that the district court erroneously excluded certain evidence offered by Lockheed and the Union.

5. Badkin also raises a new issue on appeal. He argues for the first time that Lockheed violated his due process rights under the Fourteenth Amendment by terminating his employment without affording him either a pre-termination or post-termination hearing. In support, Badkin relies on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Badkin, however, does not explain how Lockheed's actions as a private employer trigger any duties under the Fourteenth Amendment. In any event, we decline to address Badkin's new issue because it was not presented to the district court. *See Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (holding that we generally do not consider an issue not raised below); *see also Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1053 (9th Cir. 2007) (declining to consider a constitutional claim presented for the first time on appeal).

6. Finally, Badkin and Lockheed each have filed motions on appeal.

Badkin asks us to take judicial notice of the fact that the attorney whom the Union consulted had resigned from the Washington State Bar approximately two years before the Union discussed Badkin's matter with that attorney. Badkin also seeks leave to file his accompanying supplemental brief on this issue. We grant Badkin's motion. We have considered Badkin's additional evidence and argument, and we conclude that it does not affect the outcome. Lockheed asks us to receive a physical exhibit, specifically, a recording of the 911 call made to law enforcement on the day of Badkin's arrest. Because there is already ample evidence of what occurred that day and additional evidence is not relevant to our analysis of the Union's duty of fair representation, we deny Lockheed's motion.

AFFIRMED.

APPENDIX B

Petition for Panel Rehearing and
Petition for Rehearing En Banc.
U. S. Court of Appeals for the Ninth
Circuit, Case No. 19-35524.

Nos. 19-35524, 19-35559, 19-35576

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT LYLE BADKIN,

Plaintiff-Appellant/Cross-Appellee,

v.

LOCKHEED MARTIN CORPORATION, a Maryland corporation, dba LOCKHEED MARTIN SPACE SYSTEMS COMPANY; and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington Labor Union,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:17-cv-05910
Hon. Benjamin H. Settle

PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC BY APPELLANT VINCENT BADKIN

Ahmet Chabuk
WSBA No. 22543
11663 Ivy Ln NW
Silverdale, WA 98383
(360) 692-0854
achabuk@gmail.com
Attorney for Appellant
Vincent Lyle Badkin

STATEMENT
IN SUPPORT OF PANEL REHEARING AND REHEARING EN BANC AND ARGUMENT

Vincent Badkin is petitioning for a panel rehearing because the panel has overlooked and misstated his primary issues on appeal; misquoted the record; overlooked his material facts on the Union's breach of duty of fair representation and applied the wrong legal standards.

Badkin is also petitioning for rehearing en banc because the panel opinion regarding arbitrary and bad faith conduct by the Union in breach of its duty of fair representation conflicts with decisions of the U.S. Supreme Court (including *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Air Line Pilots Ass'n., Int'l v. O'Neill*, 499 U.S. 65 (1991)) and this Court (including *Peters v. Burlington*, 931 F.2d 534 (9th Cir.1990), *Gregg v. Chauffeurs*, 699 F.2d 1015 (9th Cir.1983), and *Rollins v. Community Hospital,* 839 F.3d 1181 (9th Cir.2016)), and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

References to the record were provided in Badkin's Opening Brief, Reply Brief, and Supplemental Brief.

I.

1. In **page 3, section 1**, contrary to the opinion, Badkin **did not merely argue that he was appealing** the Union's breach "**by declining to advance [his] grievance to arbitration,**" because the

Union had signed its secret settlement agreement with Lockheed, affirming Badkin's termination, more than 10 months before Badkin inquired about an arbitration.

Badkin claims that the Union breached its duty of fair representation by handling his grievance **arbitrarily, dishonestly, perfunctorily**, with **deceitful conduct and discrimination**, in **bad faith**, with **reckless disregard for his rights** by secretly signing an agreement with Lockheed for his wrongful termination and dismissing his grievance **without his knowledge** and **without an explanation**.

The panel decision **does not refer to** the **merits of his case**, and **misstates Badkin's issues.**

2. In **page 4, section 2**, the panel opinion incorrectly forecloses a challenge to the union's judgment as arbitrary, asserting that in a challenge to "the exercise of a union's judgment, . . . a plaintiff may prevail only if the union's conduct was discriminatory or in bad faith," citing *Demetris v. Transport Workers,* 862 F.3d 799, 805 (9th Cir.2017), but *Demetris* itself says: "When a union exercises its judgment, its action can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Id.* (internal quotes and citations omitted.)

3. In **page 4, section 2**, the panel is **incorrect** in stating "*Badkin admitted at deposition that he had no reason to believe that the*

Union was acting towards him with ill will or hostility" because it is taken out of context and it overlooks all of the testimony Badkin submitted on his problems with the Union.

4. In **page 4, section 3**, the panel is incorrect because Badkin did not merely argue about the **Union's decision not to proceed to arbitration**. Badkin's argument is that the whole grievance process was made in bad faith, with deception, in dishonesty, as apparent assistance to Lockheed and against Badkin.

5. In **page 5, section 3**, the panel misstates Badkin's argument because Badkin did not merely argue that the Union's **failed to provide a copy** of the settlement agreement but focused on the fact that the **Union never even mentioned existence of the secret settlement agreement**, dated August 8, 2016.

6. **In page 5, section 3**, the panel is incorrect in stating that ***"it is undisputed that on September 21, 2016*** *the Union representative told Badkin that, after consulting with the Union's attorney, the Union had concluded that Badkin's grievance did not have enough merit to proceed to the arbitration and that the Union considered the agreement resolved and would not take any further action on it."*

This opinion is contrary to the record, it is **not undisputed**, and it is **contrary to the District Court's opinion** denying the Defendants'

motions for dismissal based on the statute of limitations issue. The District Court ruled that **what had been communicated at the meeting on September 21, 2016, is disputed** and that, considering the evidence in favor of Badkin, as the nonmoving party, there was substantial evidence for the jury to decide.

7. In **page 5, section 3**, the panel is **incorrect** in stating that *"the facts are unclear why the Union did not at that time (or earlier) give Badkin a copy of the written August 2016 memorialization of the resolution of Badkin's grievance*." The focus on the issue of the written agreement was not why **a copy was never provided** to Badkin but the fact that the **existence of the secret agreement was never mentioned to him,** with the obvious reason that the **date of that** agreement, **August 8, 2016**, **conflicts and makes Westbrook's other claims factually impossible** to **justify the Union's reasons for settling the grievance without an explanation**.

The Union **not only failed to give a copy** to Badkin but it never mentioned existence of the agreement, which places the Union's conduct far outside of "mere negligence."

II.

The Merits of the Case:

The panel failed to consider the merits of Badkin's grievance even

though it was required to do so**:**

Badkin is a U.S. Navy veteran and, for many years, was employed by Lockheed, and a member of the defendant Union.

On May 10, 2016, Badkin received a message from his teenage daughter, McKenna, that a male acquaintance (named Perez) was harassing her over the phone, that she was afraid to be home alone, and she was leaving for a friend's home for her safety. Badkin arrived home to discover his daughter was gone and Perez had broken into his home. With his lawfully owned handgun, Badkin ordered Perez to come out and remain there, and shot into the ground and into engine of Perez's car several times to stop Perez from assaulting him and to detain Perez until the police arrived. Both Perez and Badkin were arrested.

Badkin's sole charge of first degree assault was later dropped when Badkin entered an Alford plea to gross misdemeanor of unlawful handling of a firearm and the judge ordered for return of his firearm.

While Badkin was in detention, for 10 days, he complied with the CBA's requirement to report his absence to Lockheed within five working days by having his daughter McKenna report his absence for him. Yet, Lockheed terminated Badkin as having "voluntarily resigned" with an allegation that he had failed to report within the five days.

After he was released, Badkin met with Westbrook (Union

representative). Three weeks and two days after the meeting, Westbrook had Badkin sign the proposed grievance drafted by Westbrook, which stated that after being cleared of wrongdoing in the charge brought against him he would be allowed to come back to work without losing any seniority, to which Badkin agreed.

Two months later, on July 21, 2016, Westbrook asked Badkin to settle as having "voluntarily resigned" and that Lockheed would not oppose his unemployment benefits, which Badkin rejected.

On July 25, 2016, Westbrook emailed to Badkin that ***"****there is no guarantee that the Union will take it to arbitration. Our attorney will review and let me know if he thinks the Union would prevail in arbitration after Lockheed provides its formal response to the grievance*.**"**

Westbrook claimed that "over the next couple months," they "continued to discuss possible settlement terms with Lockheed."

However, Westbrook could not have had those "discussions," over the "next couple of months," because just 14 days later, on August 8, 2016, the Union executed their secret settlement agreement with Lockheed that Badkin would remain "voluntarily resigned" — without disclosing it to Badkin.

Later, in an attempt to explain his reasons for agreeing to Badkin's termination as "voluntarily resigned," the Union claimed that "the Union

representatives . . . discussed the merits of the grievance with their legal counsel, and ultimately negotiated the best settlement it could in light of the Plaintiff's guilty plea." ER 55.

However, the Union could not have discussed the merits of the grievance with legal counsel (Terry Jensen) because: a) Jensen had voluntarily resigned from the State Bar Association two years earlier; and, b) the Union could not have considered Badkin's Alford plea in its settlement agreement because Badkin's Alford plea was not even done until September 9, 2016 — more than a month after the settlement agreement was executed. ER 36; ER 116; ER 208; ER 247.

Westbrook claimed that he was concerned with Badkin's misdemeanor plea, in September 2016, and that it *"effectively negated the requested remedy in the grievance . . . ."* ER 59. However, that is factually impossible because Badkin's Alford plea, (on September 9, 2016), was not even done for more than a month after the secret settlement agreement was executed, on August 8, 2016.

Westbrook claimed that *"before making a final decision, [he] sought the legal opinion of the Union's legal counsel regarding the strength of the grievance in arbitration."* ER 59. However, he could not have consulted with the attorney because the attorney had resigned his bar membership and retired more than two years earlier. Therefore, Westbrook never talked

to the attorney.

Westbrook further claimed that he told Badkin, in the "September meeting," that he had reviewed the grievance with the Union's attorney along with the plea deal and Lockheed's settlement offer; that Westbrook allegedly told Badkin that the attorney did not think the grievance was strong enough to prevail in arbitration, which cannot be factually possible because the attorney had resigned his bar membership and moved away more than two years earlier. ER 60. Badkin testified that Westbrook never told him his case was closed, never told him that he was not going to proceed to arbitration, and he left the meeting with the understanding that Westbrook was going to proceed with his grievance.

What has been communicated at that "September meeting," is disputed. Yet, at that "September meeting," Westbrook made no mention of the settlement agreement, executed 44 days earlier. ER 60.

On April 26, 2017, Badkin emailed Westbrook his understanding that the Union and Lockheed had agreed that he would get his job back after he was absolved of the assault charge and his access to the Naval Base was reinstated, and that he was ready to get back to work. ER 44; 76; 258.

On April 27, 2017, Westbrook emailed back that he had communicated his request to Lockheed and that he hoped they would "take quick action." ER 76; ER 258. Yet, Westbrook still made no mention of

their settlement agreement.

In a follow-up email, 11 days later, on May 8, 2017, Badkin asked Westbrook: *"If Lockheed does not timely respond to your request for my reinstatement, please let me know whether or not the Union will take the next step in the grievance procedure, up to and including arbitration if necessary*." ER 43; ER 260.

Westbrook replied: **"***I'm sorry to report that there is a technicality in that you weren't absolved of the wrong doing from the Corrective Action Desired block, which you signed. Since you still have a misdemeanor, Lockheed has closed the file on your case.***"** ER 45; 87; 262.

That was the first time Badkin was informed his file was closed. Yet, Westbrook still made no mention of his settlement, signed the previous year.

The settlement agreement was finally disclosed to Badkin's attorney by Lockheed's General Counsel in the East Coast, almost a year later, and only after Badkin's attorney contacted them directly to complain about Lockheed's refusal to reinstate. ER 46-51.

With the obvious contradictions in his declaration, Westbrook tried his damage control and incorrectly claimed: *"The settlement was signed on October 28, 2016. There is an earlier version dated August 8, 2016, but it did not go into effect until October 28, 2016*." ER 60.

Lockheed (and the Union) refused to reinstate Badkin even though the assault charge was dismissed, and the misdemeanor was not in the original charge, and was not in the grievance form. The Union provided no explanation for its agreement with Lockheed to keep Badkin's "voluntary resignation."

Badkin testified that, a couple months earlier, **he had a dispute – a problem at work with Lockheed** – that he **had raised an electrical hazard/safety issue and that he had complained**, and the Union had never supported him. Badkin argued that **apparently he was terminated by Lockheed in retaliation/retribution for the previous problems with Lockheed**, and that **the Union had joined forces with Lockheed against him** in breach of its duty of fair representation.

Badkin **did not merely argue** that Westbrook may have consulted **an unlicensed attorney**. Badkin also argued that, interpreting the evidence in the light most favorable to Badkin as the non-moving party, the fact that the Union attorney had resigned his bar membership more than two years before the alleged consultation **supports the inference that Westbrook did NOT consult the attorney at all.** Westbrook's claim of having talked to the attorney cannot be factually possible.

Badkin filed his complaint for wrongful termination and the Union's

breach of duty of fair representation, that the Union acted **in arbitrary, perfunctory, irrational manner in dishonesty and bad faith with reckless disregard of Badkin's rights apparently** to assist Lockheed against Badkin.

III.

THE PANEL OPINION IS CONTRARY TO THE APPLICABLE LAW:

> "The appellate court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. [internal citations omitted]." *Pegany v. C&H Sugar Co.*, 201 F.3d 444, at 445 (9th Cir.1999).
>
> "A union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness, as to be irrational. *Air Line Pilots Ass'n., Int'l v. O'Neill*, 499 U.S. 65, 67 (1991)." *Pegany* at 445.
>
> "A union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis." *Peters v. Burlington*, 931 F.2d 534, 538 (9th Cir.1990).

In *Peter*s, the District Court had granted summary judgment for the union and Burlington finding that there were no material issues of fact on the question of the union's breach of its duty of fair representation, and that the union had not acted arbitrarily in violation of its duty to Peters. The Court of Appeals held**:**

> The precise contours of the phrase "**arbitrary conduct**" have proved difficult for us to delineate. We have **defined it variously** as unintentional conduct showing "**an egregious disregard** for the rights of union members, *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th

Cir.1982), or even a "**reckless disregard**" of such rights, *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir.1985); **conduct "without [a] rational basis**," *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1089 (9th Cir.1978); and omissions that are "**egregious, unfair and unrelated to legitimate union interests**," [internal citations omitted]. The Supreme Court early on explained that a union acts **arbitrarily when it ignores a meritorious grievance** or **processes it in a perfunctory fashion**." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967).

. . .

The dichotomy we recognized in *Peterson* was merely a convenient shortcut for segregating acts of judgment from acts of nonjudgment. Surely an act need not fall within the strict "procedural" rubric in order for it to have been undertaken indifferently or recklessly. When a union **inexplicably ignores a strong substantive argument** that must be advanced in order for the employee to prevail on the merits of his grievance, **the egregious nature of its failure transcends mere negligence**. The Supreme Court in *Vaca* recognized this by ruling that a union acts **arbitrarily when it "process[es] [a meritorious grievance**] in **a perfunctory fashion**," 386 U.S. at 191" *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir.1982).

. . .

Accordingly, we believe that the **labels "ministerial act**" and **"act of judgment**" represent **not absolute categories** without relation to one another **but opposing points on a continuum** that broadly attempts to separate discretionary decision making from inexplicable conduct. At **one end of this continuum** are **procedural imperatives** over which a union rarely agonizes by virtue of the fact that they do not necessitate the exercise of much judgment. At the **other end** are actual, **rational attempts** on the part of a union to properly interpret a collective bargaining agreement or otherwise handle a grievance. In between these extremes, however, lie situations in which a particular union might give the most cursory consideration to or even unaccountably avoid a substantive dilemma. In these situations, **it makes little sense to allow a union to hide** behind the **mantle of "judgment**" and **"discretion**" when the **evidence suggests that it actually exercised neither**. . . .. In short, a union's **unexplained failure to consider a meritorious substantive argument** in favor of an employee **signals that the process has broken down** and has

much more in common with a **ministerial failure** than **with a negligent decision**.

"This approach **obligates us to evaluate the strength of the employee's grievance**, something we have sanctioned in the past. [internal citations omitted]. **If the employee's position is fundamentally weak**, the union can hardly be faulted for failing to brood over it. But **if the employee's position has merit**, it **makes no sense to presume that the union exercised judgment** when the **evidence suggests otherwise**. [internal citations omitted]."

. . .

If a union provides an explanation for having ignored a particularly strong argument during a grievance procedure that is **based on reasoning**, we will not question whether the reasoning was faulty or not. To do so would penalize the union for mere negligent decision making. But we must be able to **determine whether the union deliberated the issue in the first place**.

Here, Peters has **submitted enough evidence** that the union processed **his grievance in a perfunctory fashion** to survive the union's motion for summary judgment. . . . Had the union explained its actions as the product of judgment, whether sound or flawed, we might very well have been forced to conclude that Peters on balance failed to prove the existence of a material factual issue. As matters now stand, however, **we must remand because Peters had presented a triable question** as to whether the union acted in a completely **arbitrary, indifferent manner** by failing to research the Agreement. *Peters v. Burlington*, 931 F.2d 534, 540 (9th Cir.1990)

. . .

In determining **whether the union's decision was arbitrary**, the **merits of the grievance and its importance to the employee are relevant** to the sufficiency of the union's representation. *Robesky, 573 F.2d at 1092*. The **more important and meritorious the grievance**, the **more substantial the reason must be** to **justify abandoning it.** *Gregg v. Chauffeurs*, 699 F.2d 1015, 1016 (9th Cir.1983),

. . .

> Whether in a particular case a union's conduct is "negligent", and therefore non-actionable, or **so egregious as to be "arbitrary"**, and hence sufficient to give rise to a **breach of duty claim**, is a question that is **not always easily answered**. A union acts **"arbitrarily"** when it **simply ignores a meritorious grievance** or **handles it in a perfunctory manner**, see *Vaca v. Sipes*, 386 U.S. at 191 . . . . We have said that a union's conduct **is "arbitrary"** if it is "**without rational basis**," [internal citations omitted] **a union's unintentional mistake is "arbitrary"** if it reflects a "**reckless disregard" for the rights of the individual employee** . . . **unintentional union conduct** may constitute a breach of the duty of fair representation in situations **where "the individual interest at stake is strong** and the **union's failure to perform a ministerial act completely extinguishes** the employee's right to pursue his claim." *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir 1985).
>
> . . .
>
> "The union **negligence** may **breach the duty** of fair representation to cases **in which the individual interest** at stake **is strong** and the union's **failure to perform a ministerial act completely extinguishes** the employee's right to pursue his claim.
>
> Here, the individual interest is strong because the grievance concerns **a discharge**, the **most serious sanction** an **employer can impose**. *Tenorio v. NLRB*, 680 F.2d 598, 602 (9th Cir.1982)." *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983)."
>
> . . .
>
> In *Gregg, v. Chauffeurs*, 699 F.2d 1015 (9th Cir.1983), the union

withdrew from arbitration members' grievances. The district court ruled that the union acted arbitrarily. On appeal, the union contended that it acted rationally and breached no duty to the appellees.

> A union's conduct is arbitrary if 'without rational basis. *Robesky v. Qantas Empire*, 573 F.2d 1082, 1089 (9th Cir.1978). The union's reasons may be 'simply too insubstantial' to justify its conduct. This union contends that its **decision to withdraw appellees'** grievances was a rational, tactical decision, based on its **attorney's opinion** that pursuing appellees' grievances weakened the other members' position before the arbitrator. Even if the decision was irrational, it contends, its reliance on the advice of a competent attorney insulates it from liability."
>
> In determining whether the union's decision **was arbitrary**, the **merits of the grievance** and **its importance to the employee are relevant** to the sufficiency of the union's representation. *Robesky*, 573 F.2d at 1092. The **more important and meritorious** the grievance, the **more substantial the reason must** be **to justify abandoning it.** Gregg, at 1016. . . .
>
> [The union] contends that . . . it is immune from liability because it relied **on the advice of counsel**. Such a rule would virtually eliminate a remedy for **arbitrary, discriminatory, or bad faith** union action, as long as an **attorney recommended** such action. The district court's judgment is affirmed. *Gregg, v. Chauffeurs*, 699 F.2d 1015 (9th cir 1983.
>
> . . .
>
> In *Rollins v. Community Hospital,* 839 F.3d 1181 (9th Cir.2016)

Court of Appeals reversed the District Court's summary judgment in favor of the union and held**:**

> A union breaches its duty of fair representation when its conduct toward a member of the collective bargaining unit is **arbitrary**, **discriminatory**, or in **bad faith**. *Beck v. United Food*, 506 F.3d 874, 879 (9th Cir. 2007) . . .
>
> A union acts **`arbitrarily**' when it **simply ignores a meritorious grievance** or handles **it in a perfunctory manner**." *Peterson v. Kennedy*, 771 F.2d 1244, 1253-54 (9th Cir. 1985) (citing *Vaca*, 386 U.S. at 191) . . . . Rollins has submitted enough evidence that the

Union processed her grievance "in a **perfunctory manner**" to allow her to survive the Union's motion for summary judgment. *Peterson*, 771 F.2d at 1254.

the Union provided **factually contested reasons** for **rejecting** Rollins's grievance" . . . when a grievance **is "important** and **meritorious"** a union **must provide a "more substantial reason**" **for abandoning it.** [internal citations omitted] . . . a court must "evaluate the strength of the employee's grievance . . . Rollins has shown a breach of the CBA by the Hospital, thereby demonstrating that she had an important and meritorious grievance. The Union therefore needed to provide a "more substantial" reason for failing to pursue her claim. . . .

We conclude that Rollins has shown a violation of the Security Agreement and the CBA . . . that, if Rollins's evidence is believed, she has shown a violation of the Union's duty of fair representation. We therefore reverse the district court's order granting summary judgment to the Union. *Rollins v. Community Hospital* 839 F.3d 1181, 1188. (9th cir 2016).

. . . .

Arbitrary conduct is not limited to **intentional conduct**. For example, **to "ignore a meritorious grievance** or **process** it in a **perfunctory fashion**" may be **arbitrary**. *Vaca v. Sipes*, 386 U.S. at 191 . . . Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee . . . as to be **arbitrary**. . . total and inexplicable failure of a union to investigate a series of grievances was arbitrary. . . a union's **grossly negligent failure to process a grievance** in a timely fashion, to be **arbitrary**. Such "handling of the grievance" . . . is a **clear example of arbitrary and perfunctory handling of a grievance**." (at p. 1090). . . .

"**Unintentional acts or omissions** by union officials may be **arbitrary** if they reflect **reckless disregard for the rights of the individual employee** . . . and the policies underlying the duty of fair representation would not be served by **shielding the union** from **liability** in the **circumstances of the particular case**, *Ruzicka v. General Motors Corp.*, supra, 523 F.2d at 310."

> "On this evidence a trier of fact could conclude that the Union's **failure to inform** appellant that **her grievance had been withdrawn from arbitration** reflected **reckless disregard** of appellant's rights. (at p. 1091) . . . As to the Union, the **judgment is vacated** and the cause **remanded** for further proceedings. (at p. 1091). *Robesky v. Qantas* 573 F.2d 1082, 1091 (9th Cir. 1978).
>
> . . .
>
> "**A union** is **prohibited from ignoring** a **meritorious grievance** or **processing that grievance perfunctorily**. (citing Vaca, 386 U.S. at 191). . . The trial court properly found that [the union's] **failure to notify Stoody** was **a breach** of the Local's **duty of fair representation**. The **judgment against the union** was **affirmed**." *Galindo v. Stoody Co.*793 F.2d 1502, 1513 (9th Cir. 1986)

CONCLUSION

This case should be reheard by the panel, reheard en banc, and remanded to the district court for a jury trial.

Respectfully submitted on this 4th day of August 2020.

/s/Ahmet Chabuk
Ahmet Chabuk (WSBA No. 22543)
Attorney for Plaintiff-Appellant
11663 Ivy Ln NW, Silverdale, WA 98383
(360) 692-0854

APPENDIX C

Memorandum Disposition, filed on July 21, 2020, U.S. Court of Appeals for the Ninth Circuit, affirming the summary judgment of the District Court.

NOT FOR PUBLICATION

FILED

JUL 21 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT LYLE BADKIN, Plaintiff-Appellant, v. LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union, Defendants-Appellees.	No. 19-35524 D.C. No. 3:17-cv-05910-BHS MEMORANDUM*

VINCENT LYLE BADKIN, Plaintiff-Appellee, v. LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation, Defendant, and	No. 19-35559 D.C. No. 3:17-cv-05910-BHS

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

Defendant-Appellant.

VINCENT LYLE BADKIN,

Plaintiff-Appellee,

v.

LOCKHEED MARTIN CORPORATION, DBA Lockheed Martin Space Systems Company, a Maryland corporation,

Defendant-Appellant,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

Defendant.

No. 19-35576

D.C. No. 3:17-cv-05910-BHS

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted July 6, 2020
Seattle, Washington

Before: NGUYEN and BUMATAY, Circuit Judges, and SIMON,** District Judge.

Vincent Badkin (Badkin) appeals the district court's grant of summary judgment in favor of his former employer, Lockheed Martin Corporation (Lockheed), and his former union, the International Association of Machinists and Aerospace Workers, District 160 and Local Lodge 282 (Union). We have jurisdiction under 28 U.S.C. § 1291 and review a district court's grant of summary judgment de novo. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). We affirm.

1. In this "hybrid § 301" claim brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, Badkin alleges that (1) Lockheed breached its collective bargaining agreement (CBA) by terminating Badkin's employment and (2) the Union breached its duty of fair representation by declining to advance Badkin's grievance to arbitration. To avoid summary judgment, Badkin must show at least a genuine issue of material fact on *both* prongs. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 988 (9th Cir. 2007). We conclude that Badkin has not shown a genuine issue of material fact on the Union's breach of its duty of fair representation.

** The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

2. When a hybrid § 301 claim challenges the exercise of a union's judgment, as opposed to conduct that is merely ministerial or procedural, a plaintiff "may prevail only if the union's conduct was discriminatory or in bad faith." *Demetris v. Transp. Workers Union of Am., AFL-CIO*, 862 F.3d 799, 805 (9th Cir. 2017); *Moore v. Bechtel Power Corp*., 840 F.2d 634, 636 (9th Cir. 1988). The Union's decision not to advance Badkin's grievance to arbitration was an exercise of the Union's judgment. *Beck v. United Food & Com. Workers Union, Loc. 99*, 506 F.3d 874, 879-80 (9th Cir. 2007) (distinguishing "intentional conduct by a union exercising its judgment" from "actions or omissions that are unintentional, irrational or wholly inexplicable, such as an irrational failure to perform a ministerial or procedural act"). A union's action is discriminatory only if there is intentional and severe discrimination unrelated to legitimate union objectives. *Id.* Here, there is no evidence of discrimination. Badkin admitted at deposition that he had no reason to believe that the Union was acting towards him with ill will or hostility. Likewise, the Union's representative testified that he treated Badkin as he would have treated any other member of the Union under similar circumstances. Badkin presents no evidence to the contrary.

3. In the context of a hybrid § 301 claim, a union acts in bad faith only when there is substantial evidence of fraud, deceitful action, or dishonest conduct. *Beck*, 506 F.3d at 880. Badkin argues that the Union's decision not to proceed to

arbitration was done in bad faith. Badkin, however, fails to show a genuine issue of material fact on bad faith. Although Badkin argues that the Union failed to timely provide him with a copy of the August 2016 resolution of Badkin's grievance between Lockheed and the Union, it is undisputed that on September 21, 2016, the Union representative told Badkin that, after consulting with the Union's attorney, the Union had concluded that Badkin's grievance did not have enough merit to proceed to arbitration and that the Union considered the grievance resolved and would not take any further action on it. The facts are unclear why the Union did not at that time (or earlier) give Badkin a copy of the written August 2016 memorialization of the resolution of Badkin's grievance, but there is no evidence from which a reasonable jury could conclude that the Union's failure to do so was in bad faith. At most, the Union was negligent. Mere negligence, however, cannot support a claim of unfair representation. *See Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985).

4. Because Badkin fails to show a genuine issue on whether the Union breached its duty of fair representation, we need not decide whether there is a genuine issue regarding Lockheed's alleged breach the CBA. We also need not decide the cross-appeals of Lockheed and the Union, arguing that summary judgment was appropriate under the applicable six-month statute of limitations or that the district court erroneously excluded certain evidence offered by Lockheed

and the Union.

5. Badkin also raises a new issue on appeal. He argues for the first time that Lockheed violated his due process rights under the Fourteenth Amendment by terminating his employment without affording him either a pre-termination or post-termination hearing. In support, Badkin relies on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Badkin, however, does not explain how Lockheed's actions as a private employer trigger any duties under the Fourteenth Amendment. In any event, we decline to address Badkin's new issue because it was not presented to the district court. *See Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (holding that we generally do not consider an issue not raised below); *see also Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1053 (9th Cir. 2007) (declining to consider a constitutional claim presented for the first time on appeal).

6. Finally, Badkin and Lockheed each have filed motions on appeal. Badkin asks us to take judicial notice of the fact that the attorney whom the Union consulted had resigned from the Washington State Bar approximately two years before the Union discussed Badkin's matter with that attorney. Badkin also seeks leave to file his accompanying supplemental brief on this issue. We grant Badkin's motion. We have considered Badkin's additional evidence and argument, and we conclude that it does not affect the outcome. Lockheed asks us to receive a

physical exhibit, specifically, a recording of the 911 call made to law enforcement on the day of Badkin's arrest. Because there is already ample evidence of what occurred that day and additional evidence is not relevant to our analysis of the Union's duty of fair representation, we deny Lockheed's motion.

AFFIRMED.

APPENDIX D

Supplemental Brief of Appellant Vincent Badkin, In the U.S. Court of Appeals for the Ninth Circuit.

No. 19-35524,
No. 19-35559,
No. 19-35576

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT LYLE BADKIN,

Plaintiff-Appellant/Cross-Appellee,

v.

LOCKHEED MARTIN CORPORATION, a Maryland corporation, dba LOCKHEED MARTIN SPACE SYSTEMS COMPANY; and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington Labor Union,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:17-cv-05910
Hon. Benjamin H. Settle

SUPPLEMENTAL BRIEF OF APPELLANT VINCENT BADKIN

Ahmet Chabuk
WSBA No. 22543
11663 Ivy Ln NW
Silverdale, WA 98383
(360) 692-0854
achabuk@gmail.com
Attorney for Appellant
Vincent Lyle Badkin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

None

Statutes

None

Rules

None

Other Authorities

None

I. ARGUMENT

The recently discovered evidence demonstrates that Westbrook's declaration, in support of the Union's motion for summary judgment, is untruthful and contradictory. The newly discovered evidence is highly relevant to demonstrate arbitrary and bad faith conduct by the Union in breach of its duty of fair representation for Badkin.

Westbrook's declaration and the Union's arguments deserve a second and closer examination:

1. In his declaration, Union representative Robert Westbrook (Westbrook) repeatedly and falsely claimed that he had consulted with the Union's attorney regarding the legal merits of Badkin's grievance before deciding not to take Badkin's grievance to arbitration and before he secretly settled it with Lockheed, without Badkin's knowledge. (Westbrook Declaration - ER 59; Union's Answering Brief at 4, 13).

Earlier, the Union had identified its attorney as Terry Jensen (during the period Badkin's grievance was being processed), and stated: "Legal counsel Terry Jensen further provided advice to the Union regarding the merits of the grievance." ER 55.

However, Badkin has recently discovered (from the Washington Bar Association) that Terry Jensen had voluntarily resigned his Bar Association membership more than two years earlier, effective February 4, 2014. The

events which gave rise to this case did not begin until May 10, 2016 — over two years later. Therefore, Jensen was not even licensed as an attorney at the time the Union allegedly and repeatedly consulted with him for legal advice.

This also explains the reasons why the Union has never submitted an opinion letter from its "attorney."

2. During the pendency of Badkin's grievance, Westbrook also apprised Badkin in his e-mail:

> Just keep in mind that there is no guarantee that the union will take it to arbitration. **Our attorney will review and let me know if he thinks the union would prevail in arbitration** after LOCKHEED provides its formal response to the grievance."

ER 40; ER 73 (emphasis added).

In his declaration, Westbrook admits that, earlier, on July 25, 2016, Badkin had rejected Westbrook's revised proposal, (ER 59), and asked Westbrook to continue with his grievance (ER 73).

In response, Westbrook e-mailed Badkin on July 25, 2016: "Our attorney will review and let me know if he thinks the union would prevail in arbitration," even though Terry Jensen was not even licensed as an attorney during the previous two years. ER 40, 59, 73.

The Union admitted that it "did not provide [Badkin] with a copy of the settlement agreement." ER 55. Badkin's attorney learned of its

existence, (and received a copy, almost a year later, on June 26, 2017), directly from Lockheed's corporate general counsel. ER 50-51.

The Union kept the settlement agreement, (dated August 8, 2016), secret from Badkin and never disclosed it — until Lockheed's corporate general counsel, apparently inadvertently, disclosed it to Badkin's attorney, on June 26, 2017. ER 50-51.

Lockheed's corporate general counsel, Scott Feldman, was apparently unaware of the Union's efforts to keep its settlement agreement secret from Badkin when he provided a copy to Badkin's attorney. During the processing of Badkin's grievance, Westbrook never disclosed its existence and never mentioned it to Badkin. ER 54-55.

3. Westbrook's declaration is contradictory and his claims cannot be factually possible:

The date of August 8, 2016, (the date the secret settlement agreement was executed) (ER 247); and the date of September 9, 2016, (the date Badkin's Alford plea was entered) (ER 36), are significant to demonstrate some material contradictions in Westbrook's claims:

Westbrook claims in his declaration that "over the next couple months, [after July 25, 2016, they] continued to discuss possible settlement terms with Lockheed." ER 59, line 5.

However, Westbrook could not have had those discussions, over the

"next couple of months," because just 14 days later, on August 8, 2016, Lockheed and the Union executed their secret settlement agreement, without ever disclosing it to Badkin — until Badkin's attorney received a copy, a year later, from Lockheed's corporate general counsel.

4. The Union claims that "the Union representatives . . . discussed the merits of the grievance with their legal counsel, and ultimately negotiated the best settlement it could in light of [Badkin's] guilty plea." ER 55.

However, the Union could not have discussed the merits of the grievance with the legal counsel because: 1) Terry Jensen had voluntarily resigned from the Washington Bar Association more than two years earlier; and, 2) the Union could not have considered Badkin's Alford plea in its settlement agreement with Lockheed because Badkin's Alford plea was not even entered until September 9, 2016 — which was more than a month after the settlement agreement was executed on August 8, 2016. ER 36; ER 116; ER 208; ER 247.

5. Similarly, Westbrook claims that, in September, because Badkin entered into a guilty plea he was concerned that Badkin's plea deal effectively negated the requested remedy in the grievance. ER 59, line 16.

However, Westbrook could not have been concerned with Badkin's plea deal in their settlement agreement because Badkin's Alford plea, (on

September 9, 2016), was not even done for more than a month after the secret settlement agreement was executed (on August 8, 2016).

6. Westbrook claims that "before making a final decision, [he] sought the legal opinion of the Union's legal counsel regarding the strength of the grievance in arbitration." ER 59.

Similarly, Westbrook claims that, on September 21, 2016, at "the suggestion of legal counsel," he requested Jamie Nevins as a witness to attend the meeting with Badkin. ER 60. And, Westbrook further claims that he told Badkin, in the same "September meeting," that he had reviewed the grievance with the Union's attorney along with the plea deal and Lockheed's settlement offer; and that Westbrook allegedly told Badkin that the attorney did not think the grievance was strong enough to prevail in arbitration. ER 60.

However, those claims cannot be truthful since the "attorney" could not have expressed such an opinion about the strength of Badkin's grievance because "attorney," Terry Jensen, had resigned from the Washington Bar more than two years earlier.

What has been communicated at that "September meeting," and the contents of Westbrook's notes, allegedly taken as "business records," is disputed and is the subject of a cross-appeal by the Defendants.

Yet, at that "September meeting," Westbrook made no mention of

their secret settlement agreement with Lockheed — even though it had been executed 44 days earlier, on August 8, 2016, and no attorney's opinion was ever produced for the record. ER 60.

If the secret settlement agreement had been disclosed, there would have been no dispute as to what had been communicated at that meeting; there would have been no need for Westbrook to take notes after the meeting and no need to argue that his notes were admissible as "business records"; and there would have been no need for a cross-appeal on that issue.

Yet, the secret settlement agreement was never disclosed — even though 44 days had passed after it was executed, on August 8, 2016.

7. On January 23, 2017, the commanding officer of the naval base reinstated Badkin's access to the base. ER 37; 44; 76; 80; 258.

8. On April 26, 2017, Badkin emailed Westbrook his "understanding that the Union and Lockheed had agreed that" he would get his job back after he was absolved of the assault charge and his access to the Naval Base was reinstated, and that he was ready to get back to work. ER 44; 76; 258.

In response, on April 27, 2017, Westbrook emailed Badkin that he had communicated his request to Lockheed and that he hoped they would "take quick action." ER 76; ER 258.

Yet, Westbrook still made no mention of their secret settlement agreement with Lockheed — even though almost 9 months had passed since it was executed. As it turns out, Badkin's understanding of the agreement was substantially different than what the Union had agreed to with Lockheed in their secret settlement agreement, dated August 8, 2016.

9. In his follow-up email, 11 days later, on May 8, 2017, Badkin asked Westbrook: "If Lockheed does not timely respond to your request for my reinstatement, please let me know whether or not the union will take the next step in the grievance procedure, up to and including arbitration if necessary." ER 43; ER 260.

Westbrook replied: "I'm sorry to report that there is a technicality in that you weren't absolved of the wrong doing from the Corrective Action Desired block, which you signed. Since you still have a misdemeanor, Lockheed has closed the file on your case." ER 45; 87; 262.

Yet, Westbrook still made no mention of his secret settlement agreement with Lockheed, executed 9 months earlier.

10. The secret settlement agreement was finally disclosed to Badkin's attorney — not by the Union, but by Lockheed's general counsel in the East Coast — almost a year later, (on June 26, 2017), and only after Badkin's attorney sent Lockheed a demand letter to complain about the refusal to reinstate Badkin. ER 46-51.

In response, Mr. Scott Feldman (Lockheed's corporate general counsel) initially stated that Badkin can have his job back. ER 46.

However, Feldman emailed back (on June 26, 2017) and stated that Badkin cannot have his job back because of the settlement agreement, signed by the Union and Lockheed. ER 50-51.

That is when, for the first time, Badkin and his attorney learned of the secret settlement agreement, and asked for and received a copy from attorney Feldman. ER 49; ER 50-51. Apparently, Feldman was unaware of the Union's efforts to keep the settlement agreement secret from Badkin, because he was corporate general counsel for Lockheed on the East Coast.

Therefore, facing the obvious contradictions in Westbrook's declaration (dated February 13, 2019 — almost one year and eight months later), Westbrook tried his damage control and incorrectly claimed: "The settlement was signed on October 28, 2016. There is an earlier version dated August 8, 2016, but it did not go into effect until it October 28, 2016." ER 60.

This claim by Westbrook cannot have any legal significance because he tries to contradict a written document by his parol allegations and fabrications. In addition, the Union never produced its alleged settlement agreement, allegedly signed on October 28, 2016, and never produced its alleged "earlier version dated August 8, 2016."

Lockheed general counsel Scott Feldman referred to, and produced, only one settlement agreement, which is the one dated August 8, 2016. Within the four corners of that document, it is clear that it was signed by Sheri Hendrix of Lockheed, and Jamie Nevins, Chief Union Steward, and dated August 8, 2016. ER 247.

In his attempt to change the dates, Westbrook had no authority to allege that the agreement was signed on October 28, 2016, while the document clearly states it was signed on August 8, 2016. Moreover, the document had not been signed by Westbrook, but rather was signed by Jamie Nevins, Chief Union Steward.

Westbrook had no authority to insert parol evidence by his own allegations and fabrications to contradict the Union's written settlement agreement with Lockheed. This is another example of the Union's bad faith conduct against the interests of Badkin.

11. Lockheed terminated Badkin in violation of the CBA with an allegation that Badkin had failed to report his absence within the five days — even though his daughter, McKenna, reported for him while he was in detention; and even though Sherry Hendrix of Lockheed acknowledged Badkin's report by telling McKenna that the Union steward was going to visit him there, in jail. ER 242; 239.

In addition, even if Badkin could not have reported, he was still

entitled to a pre-termination hearing before he was terminated for an opportunity for Badkin to express his valid justification for his inability to report. ER 242-243.

Instead of fairly representing Badkin's grievance against this unlawful termination, the Union secretly settled Badkin's grievance and falsely claimed to have consulted with and relied upon the legal advice of an attorney who was not actually an attorney at the time, having resigned his license more than two years earlier. Therefore, the Union breached its duty of fair representation by acting in an arbitrary, perfunctory, and irrational manner, in dishonesty and bad faith, with reckless disregard of Badkin's rights, apparently to assist Lockheed against Badkin.

II. CONCLUSION

The summary judgment against Badkin should be reversed, and a summary judgment should be entered in his favor with award of costs and attorney's fees.

Respectfully submitted on this 1st day of June 2020.

s/Ahmet Chabuk
Ahmet Chabuk
WSBA No. 22543
Attorney for Appellant
11663 Ivy Ln NW
Silverdale, WA 98383
(360) 692-0854
achabuk@gmail.com

APPENDIX E

Motion for Judicial Notice and for Leave to File Supplemental Brief, in the Court of Appeals –

(the motion was granted).

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT LYLE BADKIN, Plaintiff-Appellant/ Cross-Appellee, v. LOCKHEED MARTIN CORPORATION, a Maryland corporation, dba LOCKHEED MARTIN SPACE SYSTEMS COMPANY; and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union, Defendants-Appellees/ Cross-Appellants.	Nos. 19-35524 19-35559 19-35576 MOTION FOR JUDICIAL NOTICE AND FOR LEAVE TO FILE SUPPLEMENTAL BRIEF BY APPELLANT VINCENT BADKIN

1. IDENTITY OF MOVING PARTY

Plaintiff-Appellant/Cross-Appellee, Vincent Badkin ("Badkin"), requests the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

a. In light of the fact that the Defendant Union had identified Terry Jensen as its attorney during processing of Badkin's grievance in

2016, Badkin requests that the Court take judicial notice that Terry Jensen had voluntarily resigned his Washington Bar Association membership more than two years earlier, effective February 4, 2014 — which Badkin discovered very recently despite the Union's misrepresentations.

b. Badkin requests the Court's leave to file his supplemental brief because of the newly discovered evidence that Terry Jensen was not a licensed attorney during the times the Union heavily relied on Terry Jensen's alleged legal opinions with allegations that Terry Jensen was the Union's counsel; and because Westbrook's claims in his declaration are contradictory.

3. FACTS RELEVANT TO MOTION

In response to Badkin's interrogatory, the Union had identified its attorney as Terry Jensen during processing of Badkin's grievance, and stated: "**Legal counsel Terry Jensen** further provided advice to the Union regarding the merits of the grievance." ER 55 (emphasis added).

The Union repeatedly claimed that it had consulted with its attorney regarding the legal merits of Badkin's grievance before deciding not to take Badkin's grievance to arbitration and secretly settling it with Lockheed, without Badkin's knowledge. (Westbrook Declaration - ER 59; Union's Answering Brief at 4, 13).

During the pendency of Badkin's grievance, Union representative Bob Westbrook also apprised Badkin via e-mail:

> Just keep in mind that there is no guarantee that the union will take it to arbitration. **Our attorney will review and let me know if he thinks the union would prevail in arbitration** after LOCKHEED provides its formal response to the grievance.

ER 40; ER 73 (emphasis added).

However, Badkin has recently discovered from the Washington Bar Association that Terry Jensen had voluntarily resigned his Bar Association membership more than two years earlier, effective **February 4, 2014**. The events which gave rise to this case did not begin until **May 10, 2016 — over two years later**. Therefore, Jensen was not an attorney at the time the Union allegedly repeatedly consulted with him for legal advice.

4. GROUNDS FOR RELIEF AND ARGUMENT

a. This motion is made pursuant to FRAP 27, Circuit Advisory Committee Note to Rule 27-1(7), and Fed.R.Evid. 201(b)(2), which provide grounds for a request for judicial notice.

In *Ramirez-Perez v. Barr*, Nos. 14-73476, 15-70589, 16-71694 (9th Cir. April 30, 2019) (unpublished), at footnote 1, this Court granted the petitioner's motion for judicial notice of the suspended status of an attorney's license to practice law, citing *United States v. Wilson,* 631 F.2d 118, 119 (9th Cir. 1980) and *Bryant v. Carleson,* 444 F.2d 353, 357 (9th Cir.

1971).

Under Fed.R.Evid. 201(b)(2), the Court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. That provision is satisfied here: the status of Terry Jensen's bar license can be accurately and readily determined from the Washington Bar Association and cannot reasonably be questioned.

Attached as exhibits are a printout of the Washington Bar Association's online directory entry for Terry Carlyle Jensen and e-mail correspondence from the Washington Bar to Ahmet Chabuk confirming Terry Jensen's voluntary resignation, effective 02/04/2014.

The fact that Terry Jensen was not an attorney at the time the Union allegedly consulted with him for legal advice is highly relevant to demonstrating arbitrary and bad faith conduct by the Union in breach of its duty of fair representation for Badkin.

In response to Badkin's interrogatory, the Union claimed that its representatives "discussed the merits of the grievance with their legal counsel, and ultimately negotiated the best settlement it could in light of the Plaintiff's guilty plea." ER 55.

Union representative Westbrook declared that "before making a final

decision, [he] sought the legal opinion of the Union's legal counsel regarding the strength of the grievance in arbitration." ER 59.

Similarly, Westbrook claims that, on September 21, 2016, at "the suggestion of legal counsel," he requested Jamie Nevins as a witness to attend the meeting with Badkin. ER 60.

Westbrook further claims that he told Badkin in that meeting that he "had reviewed the grievance with the Union's attorney along with the plea deal and Lockheed's settlement offer" and he told Badkin "that the attorney did not think the grievance was strong enough to prevail in arbitration." ER 60.

b. Badkin is also requesting the Court's leave to file his supplemental brief in light of the newly discovered evidence that Terry Jensen was not a licensed attorney at the relevant times, contrary to the Union's misrepresentations otherwise — including Robert Westbrook's declaration where, under penalty of perjury, Westbrook heavily relied on his alleged consultations with his alleged attorney, and made significant contradictory and untruthful claims. Therefore, it's only fair that the Union's alleged facts and arguments are readdressed in a supplementary brief by Badkin. Circuit Rule 30-1.8(b) indicates that the Court may order supplemental briefs to be filed.

5. CONCLUSION

The Court should take judicial notice of the fact that Terry Carlyle Jensen had voluntarily resigned from the Washington Bar Association, effective February 4, 2014; and should grant Badkin's motion for leave to file his supplemental brief. The proposed supplemental brief has been filed contemporaneously with this motion.

Respectfully submitted on this 1st day of June 2020.

s/Ahmet Chabuk
Ahmet Chabuk (WSBA No. 22543)
Attorney for Plaintiff-Appellant
11663 Ivy Ln NW, Silverdale, WA 98383
(360) 692-0854

ATTACHMENTS:

Exhibit A: Printout of Washington Bar Association's online directory entry for Terry Carlyle Jensen on May 28, 2020, showing his voluntary resignation, effective 02/04/2014. (1 page)

Exhibit B: E-mail correspondence between Washington Bar Association and Ahmet Chabuk on May 19-20, 2020, confirming Terry Jensen's voluntary resignation, effective 02/04/2014. (1 page)

I, Ahmet Chabuk, certify under penalty of perjury under the laws of the state of Washington and the United States that the attached exhibits described above are true and accurate copies of the originals.
s/ Ahmet Chabuk
Ahmet Chabuk

CERTIFICATE OF COMPLIANCE: I certify that this motion contains 898 words excluding items exempted by court rules and complies with the length and font requirements of court rules.
s/ Ahmet Chabuk
Ahmet Chabuk

Terry Carlyle Jensen

License Number: 16783
License Type: Lawyer
Eligible To Practice: No
License Status: Voluntarily Resigned
WSBA Admit Date: 6/2/1987

Contact Information

Public/Mailing Address: 12113 434th Ave SE
North Bend, WA 98045-8833
United States
Email:
Phone: (425) 888-6423
Fax:
Website:
TDD:

Practice Information Identified by Legal Professional

Firm or Employer:
Office Type and Size: Law firm with 6-10 WSBA members
Practice Areas: Labor
Languages Other Than English: None Specified

Professional Liability Insurance

Private Practice: Yes
Has Insurance? Yes - Click for more info
Last Updated: 2/4/2014 8:00:00 AM

Committees

Member of these committees/boards/panels:

None

Disciplinary History

In some cases, discipline search results will not reveal all disciplinary action relating to a Washington licensed legal professional, and may not display links to the official decision documents.

Exhibit A

Gmail

A Chabuk <achabuk@gmail.com>

Bar license / membership confirmation

6 messages

A Chabuk <achabuk@gmail.com> Tue, May 19, 2020 at 5:02 PM
To: "questions@wsba.org" <questions@wsba.org>
Cc: A Chabuk <achabuk@gmail.com>

Will you please let me know the last day the bar membership of Terry Jensen as a lawyer was valid?

Thank you.

Ahmet Chabuk

WSBA #22543

360 692 0854

achabuk@gmail.com

Sent from Mail for Windows 10

Questions <Question@wsba.org> Wed, May 20, 2020 at 8:47 AM
To: A Chabuk <achabuk@gmail.com>

Good morning Mr. Chabuk, it was 02/04/2014

Service Center | Washington State Bar Association

800.945.9722 | 206.443.9722 | questions@wsba.org

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

The WSBA is committed to full access and participation by persons with disabilities. If you have questions about accessibility or require accommodation please contact adamr@wsba.org.

Exhibit B

APPENDIX E

Motion for Judicial Notice and for Leave to File Supplemental Brief, in the Court of Appeals –

(the motion was granted).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

VINCENT LYLE BADKIN,

Plaintiff,

v.

LOCKHEED MARTIN CORPORATION, a Maryland corporation, d/b/a LOCKHEED MARTIN SPACE SYSTEMS COMPANY; and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160 AND LOCAL LODGE 282, a Washington labor union,

Defendants.

CASE NO. C17-5910 BHS

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant Lockheed Martin Corporation's ("Lockheed") motion for summary judgment, Dkt. 20, and Defendant International Association of Machinists and Aerospace Workers, District 160 and Local Lodge 282's ("the Union") motion for summary judgment, Dkt. 24.[1] The Court has considered the

[1] The Court refers to the Union and Lockheed collectively as "Defendants."

pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motions for the reasons stated herein.

I. PROCEDURAL HISTORY

On November 2, 2017, Plaintiff Vincent Lyle Badkin ("Badkin") filed suit against Lockheed and the Union. Dkt. 1. Badkin claims Lockeed wrongfully terminated his employment and breached the Collective Bargaining Agreement ("CBA") when it did so and the Union breached its duty to fairly represent him when his employment was terminated. *Id*. ⁋ 25–28. On February 13, 2019, Lockheed and the Union both moved for summary judgment. Dkts. 20, 24. On March 4, 2019, Badkin responded to both motions. Dkt. 28. On March 7, 2019, the Union replied. Dkt. 31. On March 8, 2019, Lockheed replied. Dkt. 33. On March 12, 2019, Badkin filed a surreply. Dkt. 36.

II. FACTUAL BACKGROUND

Badkin was employed by Lockheed as a senior missile craftsman and support mechanic at Naval Base Kitsap ("the base") in Silverdale, Washington, and was a member of the Union. Dkt. 1, ⁋⁋ 8–9. Within the base, Badkin worked at the Strategic Weapons Facility Pacific ("SWFP"). *Id*. ⁋ 9. The Union was Badkin's exclusive representative with Lockheed. *Id*.

On May 10, 2016, Badkin arrived at his home to discover an acquaintance of his daughter had broken into their house. *Id*. ⁋ 10 n.1. Badkin used his handgun to attempt to detain the acquaintance until the police arrived. *Id.* Badkin fired his gun near the acquaintance's feet. *Id.* The acquaintance called 911. Dkt. 20 at 3. Badkin fired seven shots into the acquaintance's car when he attempted to leave. Dkt. 1, ⁋ 10 n.1. Badkin

was arrested by the Kitsap County Sheriff's Office and detained on a charge of assault in the first degree. *Id.* ¶ 10; Dkt. 22-3. Badkin was scheduled to work on May 11–13 and 16–19. Dkt. 20 at 4 (citing Dkt. 22-5 at 10). On May 13, 2016, Badkin's daughter McKenna Badkin ("McKenna") contacted Lockheed to inform them that he was in county jail and unable to report to work. Dkt. 1, ¶ 11; Dkt. 20 at 4 (citing Dkt. 22-5 at 3). McKenna spoke with Reshondra McInnis, a manager at Lockheed who was not Badkin's supervisor. Dkt. 20 at 4 (citing Dkt. 22-5 at 3). McKenna then left a voicemail for Troy Quick ("Quick"), Badkin's supervisor. *Id.* at 5 (citing Dkt. 22-5 at 3–4). On May 16, 2016, McKenna again contacted Lockheed to let them know Badkin was still in jail and did not wish to resign his position. Dkt. 1, ¶ 11. McKenna spoke with Lockheed Human Resources Manager Sheri Hendrix ("Hendrix"), who told McKenna that Badkin "must follow reporting procedures or his absences would indicate a resignation." Dkt. 20 at 5 (citing Dkt. 22-5 at 4). On May 20, 2016, Badkin was released pending trial. Dkt. 20 at 4 (citing Dkt. 22-1 at 18).

On May 18, 2016, Quick sent a letter to Badkin terminating his employment based on a failure to report for five scheduled workdays without valid justification. Dkt. 1, ¶ 12. The letter concluded that Badkin's conduct amounted to voluntarily resigning his position under Article 4, Section 2 of the CBA. *Id.* On May 25, 2016, the Navy revoked Badkin's access to the base. Dkt. 20 at 6 (citing Dkt. 22-14).

Badkin talked to Union representative Bob Westbrook ("Westbrook") about what had happened so that Westbrook could draft a grievance opposing Badkin's termination.

Dkt. 1, ¶ 14; Dkt. 20 at 6 (citing Dkt. 22-1 at 29–30). Westbrook drafted the grievance for Badkin, including the "Corrective Action Desired" section, which reads:

> If Mr. Badkin is absolved of wrong doing as provided in the allegations and charges brought against him from this incident, Lockheed Martin will provide a recommendation that his previous clearance and base access be reinstated, at which time he may be returned to work with no further penalty or loss of seniority, at the working rate commiserate [sic] with where he would have been had the incident never occurred. In the interim, Lockheed Martin agrees not to fight Mr. Badkin's application for unemployment.

Dkt. 20 at 6–7 (citing Dkt. 22-1 at 29–30; Dkt. 22-8). On June 15, 2016, Badkin reviewed and signed the grievance. Dkt. 22-1 at 29–31.

On July 21, 2016, Westbrook emailed Badkin to let him know that Lockheed had offered settlement terms where if all charges were dropped or dismissed, Lockheed would permit Badkin to apply to available job openings and would not oppose his claim for unemployment benefits. Dkt. 1, ¶ 15; Dkt. 22-9 at 4. At this point, Badkin had already been approved for state unemployment benefits and asked the Union to reject this offer and continue the grievance because the proposed resolution put him "in no better position than he already was." Dkt. 1, ¶ 16; Dkt. 22-9 at 3–4. On July 25, 2016, Westbrook responded "Ok. Just keep in mind that there is no guarantee that the union will take it to arbitration. Our attorney will review and let me know if he thinks the union would prevail in arbitration after LOCKHEED provides its formal response to the grievance." Dkt. 22-9 at 3. On August 8, 2016, the Union and Lockheed agreed to settle Badkin's grievance on three terms: (1) Badkin's termination would be coded as a voluntary resignation; (2) if Badkin was cleared of all charges he could apply as an external candidate to any open

position; and (3) Lockheed would not contest Badkin's right to collect unemployment benefits. Dkt. 1, ¶ 17; Dkt. 20 at 8 (citing Dkt. 22-8).[2] Badkin alleges that the Union led him to believe "that if he was absolved of the assault in the first degree charge and his access to Naval Base Kitsap was reinstated, that he would be reinstated at his previous position," but does not tie this belief to a specific event or communication with the Union. Dkt. 1, ¶ 18.

On September 9, 2016, Badkin entered an Alford plea to a misdemeanor charge of unlawful carrying or handling of a firearm, and the prosecuting attorney dismissed the assault charge. *Id*. ¶ 19. Badkin did not consult with the Union before entering the plea. Dkt. 20 at 9 (citing Dkt. 22-1 at 72). On September 21, 2016 ("the September meeting"), Badkin met with Westbrook and Union Shop Steward Jamie Nevins ("Nevins"). Dkt. 20 at 9 (citing Dkt. 22-11). The parties dispute what was communicated at this meeting. Westbrook declares that he told Badkin that the Union's attorney "did not think the grievance was strong enough to prevail in arbitration" and that "the Union considered his grievance resolved and that we would not take any further action on the grievance." Dkt. 26, ¶ 11. Westbrook also declares that after receiving this information, Badkin "was upset and threatened to sue." *Id*. Badkin testified at his deposition that he does not recall threatening to sue the union and that it is false that the Union informed him that they would not take his grievance to the third step. Dkt. 25-1 at 19–20. Westbrook declares

[2] The Union informs the Court that "[w]hile one version of the settlement is dated August 8, 2016, the settlement actually was not signed off by the parties until October 28, 2016." Dkt. 24 at 7 n.2 (citing Dkt. 26, ¶ 9).

that Badkin sent him a text message a few days later that read in part "I'd like to apologize to you for being abrupt the other day but as you might understand it's hard to lose your career at this point in life . . . ." Dkt. 26, ¶ 12.[3]

On January 23, 2017, Badkin received a letter from Captain E.A. Schrader, Commanding Officer of the base, reinstating his access to the base. Dkt. 1, ¶ 21. On April 26, 2017, Badkin informed Westbrook that his base access had been reinstated and he was ready to return to work under his "understanding that the union and Lockheed Martin agreed that I would get my job back after I was absolved of the assault charge and my access to Naval Base Kitsap was reinstated." *Id*. ¶ 22; Dkt. 20 at 10 (citing Dkt. 22-9 at 10). Westbrook told Badkin that he had communicated Badkin's request to Lockheed and hoped they would "take quick action." Dkt. 1, ¶ 22.

On May 8, 2017, Badkin emailed Westbrook, requesting that if Lockheed did not respond to the request to reinstate him, Westbrook "let [him] know whether or not the union will take the next step in the grievance procedure, up to and including arbitration if necessary." Dkt. 20 at 11 (citing Dkt. 22-9 at 12). Westbrook responded, stating "I'm sorry to report that there is a technicality in that you weren't absolved of the wrong doing from the Corrective Action Desired block, which you signed. Since you still have a misdemeanor Lockheed has closed the files on your case." Dkt. 1, ¶ 23; Dkt. 20 at 11 (citing Dkt. 22-9 at 14)

[3] During the deposition, Westbrook's handwritten notes from the meeting were offered as an exhibit. Dkt. 25-1 at 18–19. Badkin's attorney objected that the notes were hearsay. *Id*. Badkin's opposition argues that the notes "are hearsay and inadmissible." Dkt. 28 at 10. The Court will treat this argument as a motion to strike.

III. DISCUSSION

Lockheed and the Union move for summary judgment on two bases: (1) Badkin's claims are barred by the statute of limitations and (2) Badkin cannot meet his burden to prove both of the required prongs of his claim: that Lockheed breached the CBA and that the Union breached the duty of fair representation.

A. Motions to Strike

Each party asks the Court to strike evidence from consideration. Lockheed Martin asks the Court to strike evidence of negotiation from the summer of 2017 between one of its general counsels and Badkin's counsel regarding his reinstatement. Dkt. 33 at 4.[4] Lockheed argues that the evidence consists of settlement negotiations and cannot be used to establish liability in a case. Dkt. 33 at 5 (citing *Navigators Ins. Co. v. Nat'l Union Fire Ins. Co.*, No. C12-0013-MJP, 2013 WL 4008826, at *6 (W.D. Wash. Aug. 5, 2013)). While the earliest cited email from Lockheed's counsel to Badkin's counsel does not explicitly discuss a threat of suit from Badkin, an email five days later on June 26, 2017 has the subject line "Badkin Settlement Discussions" and opens by stating "[a]s you know, we have had a series of telephone conversations for the purposes of potentially resolving Mr. Badkin's allegations of wrongful termination . . . ." Dkt. 29. The discussion of a series of conversations in the later email supports a reasonable inference that the prior email was also part of settlement negotiations for Badkin's wrongful termination

[4] The Court understands this request to apply only to the cited emails regarding potential settlement of a wrongful termination claim by Badkin against Lockheed, not to the earlier discussions between the Union and Lockheed regarding settlement of Badkin's grievance.

claims. The Court finds that the contents of the emails support Lockheed's contention that they are settlement discussions inadmissible to prove liability under Fed. R. Evid. 408. Therefore, the Court grants Lockheed's motion to strike the relevant portions of Dkt. 29, Declaration of Ahmet Chabuk and the relevant portions of Badkin's response, Dkt. 28. *See* Dkt. 33 at 5.

Badkin moves to strike three sources of evidence. First, during Badkin's deposition, Westbrook's handwritten notes from the September meeting were offered as an exhibit. Dkt. 25-1 at 18–19. Badkin's attorney objected that the notes were hearsay. *Id.* Badkin argues in his response brief that the notes "are hearsay and inadmissible." Dkt. 28 at 10. Because Lockheed and the Union rely on these notes for the truth of what was stated in the meeting and do not mention the notes in their reply briefs, the Court construes this as an admission that Badkin's objection has merit and grants the motion to strike the notes.[5]

Second, Badkin asks the Court to strike two declarations pursuant to Local Rule 7(g). Dkt. 36. The declarations are Dkt. 32, Second Declaration of Robert Westbrook, and Dkt. 34, Declaration of Sheri Hendrix. *Id.*[6] Badkin argues that these declarations "are new evidence and not in reply to Plaintiff's response." Dkt. 36 at 2. On one hand,

[5] Even if the Court's finding here is incorrect, and even with the likelihood that these notes could be admissible at trial if Westbrook were impeached on his testimony about what occurred at the meeting per Fed. R. Evid. 801(d)(1)(b), any error would be harmless because the Court concludes there is a question of fact about what was communicated at the September meeting, and on summary judgment all evidence must be taken in the light most favorable to Badkin as the nonmoving party.

[6] Hendrix's two declarations in this case are Dkt. 21, filed in support of Lockheed's motion for summary judgment, and Dkt. 34, filed in support of Lockheed's reply brief.

Westbrook's second declaration elaborates on Westbrook's intent while working with Badkin, and therefore is in reply to the allegation in Badkin's response that the Union's handling of his grievance was perfunctory or in bad faith. *See* Dkt. 31 at 3–4 (citing Dkt. 32). On the other, the additional context could have been presented in support of the Union's opening brief, and Badkin does not now have an opportunity to respond. *See Karpenski v. Am. Gen. Life Ins. Co., LLC*, 999 F. Supp. 2d 1218, 1226 (W.D. Wash. 2014) (granting motion to strike when facts introduced on reply should have been introduced in opening brief); *see also Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 308 F. Supp. 2d 1208, 1214 (W.D. Wash. 2003) (granting motion to strike declaration with new evidence submitted in reply). The Court finds that Westbrook's actions and decision-making process are one of the central issues in this case and that the Union could have presented the more comprehensive picture of Westbrook's thoughts and actions in his declaration supporting their opening brief. Therefore, the Court will grant the motion to strike Westbrook's Second Declaration, Dkt. 32.

Similarly, the Court finds Hendrix's declaration presents additional facts about Lockheed's absence-reporting policies and about why a HR designation of voluntary resignation would benefit Badkin if he were rehired. Dkt. 34. Because there is no reason these facts could not have been presented earlier, the Court will grant the motion to strike to the extent these facts were not presented in Lockheed's opening brief.

B. Summary Judgment

1. Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically

attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).

2. Statute of Limitations

The parties agree that Badkin's suit is governed by the six-month statute of limitations borrowed from section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), for lawsuits which combine claims for an employer's breach of a collective-bargaining agreement under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, with claims against a union for its breach of the duty of fair representation. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165–70 (1983); Dkt. 20 at 16; Dkt. 28 at 8. The claims are known as hybrid § 301/fair representation claims. *DelCostello*, 462 U.S. at 165. The parties dispute when Badkin's cause of action accrued.

a. Standard for Claim Accrual

In the Ninth Circuit, a fair representation claim "generally begins when an employee knows or should know of the alleged breach of duty of fair representation by a union." *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986). In the context of processing a grievance, "the simplest case is one where a union decides not to file a grievance; the cause of action generally accrues when the employee learns or should have learned of the union's decision." *Id.* If the claim attempts to overturn an arbitration award

because of the union's error in the proceedings, "the claim accrues when the employee learns of the arbitrator's award." *Id*.

Lockheed argues that under the standard in *Galindo* Badkin's claim accrued when he "knew or reasonably should have known that the union was not going to pursue [his] grievance," framing the failure to progress the grievance as the operative breach alleged. Dkt. 20 at 16 (citing *Galindo*, 793 F.2d at 1509–10). Badkin counters that according to *Price v. S. Pac. Transp. Co.*, 586 F.2d 750, 754 (9th Cir. 1978) the operative date for the statute of limitations is the last act by the union "of any consequence." *Price* involved a plaintiff who was discharged and whose union wrote to the employer asking that he be reinstated on a leniency basis. *Id*. at 751. The court described the day of the employer's denial of the request as one "at which any injury to [the plaintiff] allegedly caused by the Union became fixed and reasonably certain." *Id*. at 752–54. The standard in *Galindo* and the standard in *Price* do not appear to necessarily conflict, as the time of the breach of duty, *Galindo*, 793 F.2d at 1509, could also be the time when injury to the plaintiff becomes "fixed and reasonably certain," *Price*, 586 F.2d at 752–54.

b. Facts of Claim Accrual

Defendants put forward two dates more than six months before Badkin filed his suit on which the Court could find Badkin's cause of action accrued. First, Lockheed argues that Badkin's cause of action accrued as of the September meeting "when he was informed, in unequivocal terms, that the Union saw no merit to his grievance and would not be taking his grievance to arbitration." Dkt. 20 at 16 (citing Dkts. 22-11, 22-15). Westbrook declares that at the meeting (1) he told Badkin he had reviewed the grievance,

the plea deal, and Lockheed's settlement with the Union's attorney, (2) the attorney did not think the grievance would prevail in arbitration, and (3) the Union had decided not to take the grievance any further. Dkt. 26, ¶ 11. The Union argues that Badkin "gave a series of conflicting answers" in his deposition when asked "whether Westbrook informed him [at the September meeting] that his grievance lacked merit." Dkt. 24 at 12 (citing Dkt. 25-1 at 17). Earlier in the deposition, Badkin stated that he did not recall being told the grievance lacked merit. Dkt. 25-1 at 17. Later, Badkin stated that Westbrook did not tell him the grievance would not be pursued and did not tell him the Union had consulted with legal counsel. *Id*. at 30. Badkin argues that there is a dispute of fact as to whether he became aware at this meeting that the Union would not take further action on his grievance, based on his deposition testimony that he did not recall being told his grievance had no merit and would not be advanced to arbitration. Dkt. 28 at 10 (citing Dkt. 25-1 at 20, 30).

While Badkin's statements do appear somewhat contradictory, the Court finds that taking the facts in the light most favorable to Badkin as the nonmoving party, he has established a material question of fact. Therefore, the Court denies Defendants motion on the issue of whether Badkin's cause of action accrued in September 2016.

Second, even if Badkin did not understand what was allegedly communicated to him at the September meeting, Lockheed argues that he should have known the grievance was terminated when he communicated with the Union about job openings between September 2016 and April 2017 but never mentioned the grievance. Dkt. 20 at 17. Lockheed argues that Badkin is charged with constructive knowledge of the time limits in

the CBA and that grievances are considered waived under Article 3 of the CBA if not advanced to the next step within seven or fourteen days. Dkt. 20 at 17 (citing *Metz v. Tootsie Roll Indus., Ind.*, 715 F.2d 299, 304 (7th Cir. 1983); *Eason v. Waste Mgmt. of Alameda Cty.*, No. C-06-06289 JCS, 2007 WL 2255231, *7 (N.D. Cal. Aug. 3, 2007) (collecting cases supporting the proposition that courts routinely find that employees subject to collective bargaining agreements are charged with constructive knowledge of the terms)). The Union also asks the Court to follow the Seventh Circuit's decision in *Metz* that a plaintiff whose union did not respond to her request may not claim lack of notice that the union is not proceeding on the grievance without more. Dkt. 24 at 10 (citing *Metz*, 715 F.2d at 304).

On the facts at bar, the Union explains that "[i]n the case of a termination, the grievance procedure begins at the third step of the process" and "[i]f a termination grievance is not settled at the third step, then a written demand to arbitrate must be filed within thirty days of the step three response." Dkt. 24 at 4 (citing Dkt. 26). The CBA also states that "management shall give their written response within seven (7) calendar days of the Step Three meeting." Dkt. 22-2 at 19. In contrast to *Metz*, where the Seventh Circuit explained that the grievance proceedings would be exhausted if not taken to arbitration in twenty-three days, 715 F.2d at 303, the facts in this case do not clearly establish that the CBA's strict time limits were rigorously followed. For example, the Union explains that following submission of Badkin's written grievance and a meeting between the Union and Hendrix in July 2016, "[o]ver the next couple months, the Union and Lockheed continued discussing possible settlement terms to resolve the grievance."

Dkt. 24 at 6 (citing Dkt. 26, ¶ 6). Incorporating the dispute of fact regarding what Badkin was told at the September meeting, it is plausible that even if charged with constructive knowledge of the grievance processing deadlines in the CBA, Badkin could have reasonably concluded that those deadlines were not being applied in his case because (1) the grievance was initiated mid-June, (2) he received an update on settlement discussions in July, and (3) he received another "update" at the September meeting. Therefore, the Court finds that the facts of *Metz* are distinguishable and concludes that it cannot be established as a matter of law that Badkin should have known the Union was not taking his grievance to arbitration between September 2016 and mid-April 2017.

Lockheed and the Union next argue that Badkin's April 26, 2017 email to Westbrook asking to be reinstated under the terms agreed to between the Union and Lockheed shows certain knowledge that the Union was not proceeding with his grievance. Dkt. 20 at 17; Dkt. 24 at 13. The Union notes that Badkin also sent Westbrook a letter on the same date. Dkt. 24 at 13 (citing Dkt. 26-7). Counting from this April 26, 2017 email, the statute of limitations would have expired on October 26, 2017, seven days before Badkin filed suit on November 2, 2017. Dkt. 20 at 17. The contents of Badkin's email and letter are somewhat contradictory.

In the email, Badkin explains that the assault charges against him were dropped in September 2016 and his access to the base was restored in January 2017. Dkt. 26-6. He states that "[i]t is my understanding that the union and Lockheed Martin agreed that I would get my job back after I was absolved of the assault charge and my access to Naval Base Kitsap was reinstated." *Id.* This email appears to communicate that he believed

Lockheed and the Union resolved his grievance in his favor, he had satisfied the conditions in the grievance, and he was eligible to return to work.

The seven-page letter conveys a substantially different sense of Badkin's perception of the state of affairs, opening with the following paragraph:

> Mr. Westbrook I am writing you this letter with the hope that you will please take some time in your busy schedule to read it and that you may gain further insight to the travesty that affected our lives and the dire situation that we are in now. Our hope is that you will come to see the truth and consider supporting our position.

Dkt. 26-7 at 2. It provides a comprehensive description of Badkin's skills, military experience, and employment history and states that "I am now humbly asking you most respectfully to consider support in my grievance with Lockheed Martin, as I believe the outcome of my case as the victim of a crime, warrants its reassessment." *Id*. at 3. It provides a highly detailed description of Badkin's version of the events surrounding his arrest, argues that the Kitsap County Prosecutor's Office and Lockheed both acted unjustly, and states that Badkin has "no indication in [sic] getting my current career back." *Id*. at 3–7. Badkin closes the letter asking Westbrook to help him and support his grievance. *Id*. at 8. The letter supports an inference that Badkin considers the grievance closed and believes it would have to be reassessed or re-opened in some way in order for him to be reinstated.

Westbrook replied to Badkin by email on April 27, 2017, stating "I sent my request for your return to Lockheed. Hopefully, they will take quick action." Dkt. 26-6 at 2. Relatedly, Badkin declares that he had not received a copy of the written settlement closing his grievance and that the Union had "led [him] to believe that if [he] was

absolved of the assault in the first degree charge and [his] access to Naval Base Kitsap was reinstated, then [he] would be reinstated at [his] previous position." Dkt. 30 at 4. Westbrook's response shows Badkin was not wholly irrational in believing that the parties had agreed to conditions that would permit his reinstatement and that he had fulfilled them. It is also consistent with Badkin's argument that did not and should not have known at this point that the Union had harmed him.

Badkin sent a follow-up email inquiry to Westbrook on May 8, 2017. Dkt. 28 at 9 (citing Dkt. 30 at 13). Westbrook replied later that day explaining that Badkin's misdemeanor plea meant that would not be reinstated because he had not fulfilled the requirement in his Corrective Action Desired block that he be absolved of wrongdoing and stating that "[s]ince you still have a misdemeanor Lockheed has closed the files on your case." *Id.* Badkin declares that this May 8, 2017 email is the first time he was notified that his grievance was closed. Dkt. 28 at 7 (citing Dkt. 30 at 5).[7] Though it is a close question, the Court finds that the evidence is sufficiently unclear that it is possible a reasonable juror could find that Badkin did not know that his grievance was irrevocably closed or that he had a cause of action against the Union until May 2017.

For these reasons, the Court denies Lockheed and the Union's motion for summary judgment on the basis of the statute of limitations.

[7] Relatedly, it appears that part of the Union wrongdoing Badkin alleges is poor drafting of the terms of the settlement agreement, but it could be that he did not know exactly what those terms were until this point or slightly later.

3. Employer and Union Obligations

To prevail on the merits of a hybrid § 301/fair representation suit, the plaintiff must show both that the employer breached the collective bargaining agreement and that the union breached its duty of fair representation. *Rollins v. Cmty. Hosp. of San Bernadino*, 839 F.3d 1181, 1185 (9th Cir. 2016) (citing *DelCostello*, 462 U.S. at 164–65).

a. Employer's Breach of Contract

Badkin alleges that Lockheed breached the CBA by discharging him based on his failure to personally report his absences. Dkt. 1, ⁋⁋ 25–26. He argues that based on the language of the CBA which Lockheed cited in discharging him, his reporting through his daughter should have been sufficient. Dkt. 28 at 10. Lockheed cited Article 4 Section 2 of the CBA, which provides that "a five working day unreported absence on scheduled workdays without valid justification for failure to report shall be considered a resignation." Dkt. 1 ⁋⁋ 12–13; Dkt. 22-2 at 24. Badkin also argues that Lockheed should not have coded his termination as a voluntary resignation when his daughter communicated that he did not wish to resign his position. Dkt. 28 at 10–11.[8]

"[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such question arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Allis Chalmers Corp.*

[8] While the parties also devote a substantial portion of their briefing to Lockheed's defense that it did not breach the CBA because the Navy "effectively terminated Badkin when it revoked his base access," Dkt. 20 at 21, the Court finds that because Badkin has failed to support his claim that Lockheed breached the CBA, it does not need to reach Lockheed's defense.

v. Lueck, 471 U.S. 202, 211 (1985). While the parties do not direct the Court to the standards for contract interpretation under federal common law, the Court "may look to general principles for interpreting contracts." *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989) (citing *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983)). "The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous." *International Union of Bricklayers & Allied Craftsman Local No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir.1985). "A contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Kennewick*, 880 F.2d 1032 (quoting *Castaneda v. Dura–Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981)).

Badkin, as the party contesting Lockheed's interpretation and application of the CBA, must provide evidence of or argument for a contrary reasonable interpretation. Even construing all inferences in favor of Badkin as the nonmoving party, Badkin fails to provide a contrary interpretation that establishes an ambiguity as to the relevant CBA provision. Instead, he argues that Lockheed's policy that employees must personally report absences "is not found in the CBA" and that he was not aware of the policy. Dkt. 28 at 11. Badkin also argues that the existence of Lockheed's policy "is an issue of fact that must be resolved by the jury." Dkt. 28 at 12.

Preliminarily, a jury's factual finding that the policy exists will not resolve the legal issue of whether Lockheed's implementation of the policy represents a breach of contract. Badkin's position appears to be that the CBA prohibits Lockheed from putting any limitations on the term "report" not found in the CBA itself. However, Badkin does

not cite to an integration clause or other basis for the Court to conclude that the CBA prohibits Lockheed from implementing policies not explicitly contained within the CBA's text. Badkin further fails to cite to any evidence from which the Court may conclude that Lockheed's policy is contrary to the intent of the parties in agreeing to the CBA.

While the Court finds both sides have insufficiently briefed the legal issue of a breach of a collective bargaining agreement, on the record as a whole, Badkin has failed to present more than a metaphysical doubt that Lockheed's policy violates the CBA. *See Matsushita*, 475 U.S. at 586. Even if Badkin had not failed to support his breach of contract claim, the Court finds that the Union did not breach its duty of fair representation, so Badkin's claims fail on an alternate basis. *DelCostello*, 462 U.S. at 165 ("To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.") (alterations in original) (internal citations omitted).

b. Union's Duty of Fair Representation

Because the NLRA allows a single labor union to collectively represent the interests of all employees, that union must "exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *DeCostello*, 462 U.S. at 164 n.14 (quoting *Vaca v. Sipes*, 286 U.S. 171, 177 (1967)). "A union breaches its duty of fair representation when its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Rollins*, 839 F.3d at 1186 (internal citations and

quotations omitted). "Unions maintain 'wide discretion to act in what they perceive to be their members' best interests,' and [courts] 'accord substantial deference' to the Union's decision" not to pursue a claim. *Id.* at 1188 (quoting *Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985)).

The Ninth Circuit stated that it has "never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's *judgment* as to how best to handle a grievance." *Peterson*, 771 F.2d at 539–40 (emphasis added). It later elaborated that the difference between ministerial or procedural acts and acts of judgment is not a dichotomy but a continuum, extending from "procedural imperatives over which a union rarely agonizes by virtue of the fact that they do not necessitate the exercise of much judgment," to "rational attempts on the part of a union to properly interpret a collective bargaining agreement or otherwise handle a grievance." *Peters v. Burlington N. R.R. Co.*, 931 F.2d 534, 539–40 (9th Cir. 1990). Between these poles "lie situations in which a particular union might give the most cursory consideration to or even unaccountably avoid a substantive dilemma," where the union should not be excused for relying on its judgment "when the evidence suggests that it actually exercised neither." *Id.* at 540.

"When a union exercises its judgment, its action 'can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation.'" *Demetris v. Transport Workers Union of Am., AFL-CIO*, 862 F.3d 799, 805 (9th Cir. 2017) (quoting *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007)). "Typically, if the challenged conduct involves 'the union's judgment, then

the plaintiff[s] may prevail only if the union's conduct was discriminatory or in bad faith.'" *Id.* (quoting *Burkevich v. Air Line Pilots Ass'n, Int'l*, 894 F.2d 346, 349 (9th Cir. 1990)).

First, "[a] union acts arbitrarily when it simply ignores a meritorious grievance or handles it in a perfunctory manner." *Rollins*, 839 F.3d at 1186 (internal citations and quotations omitted). To avoid acting arbitrarily, a union must at least minimally investigate a grievance. *Id.* at 1186–87. Westbrook declares that he investigated Badkin's grievance through "several conversations with Badkin, a review of documents relating to the termination, discussions with a Lockheed representative, and discussions with the Chief Union Steward, Jamie Nevins." Dkt. 26, ¶ 17. The Court finds that these actions, which Badkin does not dispute, constitute at least minimal investigation. *Rollins*, 839 F.3d at 1186.

Badkin argues that "Westbrook provides no rational explanation why for the 'corrective action desired' he sought relief which provided Badkin with nothing." Dkt. 28 at 14. Badkin cites the Ninth Circuit's reasoning in *Peters*, 931 F.2d at 540, that where "the employee's position has merit, it makes no sense to presume that the union exercised judgment when the evidence suggests otherwise." Dkt. 28 at 14. However, at the time Westbrook drafted the corrective action in the grievance, Badkin believed that he was going to be absolved of all wrongdoing. Dkt. 22-1 at 31. Westbrook declares that he drafted the section based on his conversation with Badkin and asked Badkin to review the entire grievance including the corrective action desired before it was filed to ensure it was accurate. Dkt. 26, ¶ 3. The section reads in part that "[i]f Mr. Badkin is absolved of

wrong doing as provided in the allegations and charges brought against him from this incident, Lockheed Martin will provide a recommendation that his previous clearance and base access be reinstated." Dkt. 26-2 at 2. The evidence that Westbrook drafted the section based on a conversation he had with Badkin at a time at which Badkin believed he was going to be absolved of wrongdoing does not show a dispute of fact whether Westbrook ignored a meritorious position Badkin asked him to advance.

A union reasonably considers a plaintiff's defense when it interviews him extensively, considers other employee statements, deliberates the plaintiff's proffered argument, and can provide an explanation for its decision not to pursue the argument. *Slevira v. W. Sugar Co.*, 200 F.3d 1218, 1221–22 (9th Cir. 2000). Because Badkin argues that the Union "inexplicably conceded the false 'voluntary resignation,'" he may intend to argue that by failing to challenge Lockheed's theory that an employee can be found to have voluntarily resigned despite reporting absences through a family member, the Union failed to consider his defense. However, unlike the plaintiff in *Slevira*, Badkin does not argue or allege that he asked the Union to advance this defense on his behalf. Badkin also fails to present a compelling case that his argument about the absence reporting policy is a particularly strong or obvious one that the Union should have deliberated. *See Peters*, 931 F.2d at 540. The Court cannot conclude that a question of fact exists about whether the Union ignored Badkin's theory when Badkin fails to assert that he actually asked the Union to consider the theory and when the theory is not noticeably contrary to the parties' intent in entering the CBA. Further, the Union's evidence supports a conclusion that it thoroughly considered the issues surrounding Badkin's grievance. Badkin's

evidence fails to go beyond hindsight and speculation and does not create a material dispute of fact about whether the Union irrationally failed to advance an obvious argument in his favor. *Demetris*, 862 F.3d at 805.

Regarding the terms on which the Union settled his grievance, Badkin argues that the Union acted arbitrarily by "inexplicably conced[ing] the false 'voluntary resignation,'" obtaining nothing in his favor, and actually leaving him worse off by requiring him to be cleared of all charges to reapply as an external candidate, when there were positions he could apply to as an external candidate which were not contingent on his being cleared of all charges. Dkt. 28 at 15. He argues that the Union reached this settlement without notifying him, implying but not arguing that he would have asked them to pursue different terms at the point of settlement. *Id*. Badkin does not put forward an alternative designation the Union should have pursued other than "voluntary resignation" and does not explain why another designation would have been more favorable.

While Badkin disputes whether the settlement terms were in his favor, the Court finds that settling a grievance after substantial negotiation and consultation with legal counsel falls decisively within the Union's exercise of judgement—its "rational attempts . . . to properly interpret a collective bargaining agreement or otherwise handle a grievance." *Peters*, 931 F.2d at 539–40. Because the Union was exercising judgment, its action can be found arbitrary only when irrational. *Demetris*, 862 F.3d at 805. Courts do not find that unions are liable for "good faith, non-discriminatory errors of judgment made in the processing of grievances." *Peters*, 931 F.2d at 539 (citing *Peterson*, 771 F.2d

at 1254). Westbrook declares that while the Union was negotiating with Lockheed over a period of months, attempting to negotiate a settlement that would allow Badkin to be reinstated, Badkin pled to the misdemeanor charge, and the Union was "unable to convince Lockheed to improve upon the settlement offer [Badkin] had previously rejected." Dkt. 26, ¶¶ 6–7.[9] Westbrook then had to decide whether to "move the grievance to arbitration or settle it over [Badkin's] objection." *Id*. ¶ 7. Westbrook declares that he carefully evaluated the impact of Badkin's plea on the requested remedy in the grievance and was concerned that even if the Union won in arbitration, Badkin "would still not be returned to work because he had not been 'absolved.'" *Id*. ¶ 8. Westbrook consulted with legal counsel and made a final decision not to take the grievance to arbitration, deciding that "the settlement was the best outcome for the grievance." *Id*. ¶ 9. Moreover, on the particular point that it could be arbitrary for the Union to agree to a settlement that required Badkin to be cleared of all charges at the point when Badkin had already pled to the misdemeanor charge, Westbrook declares that the plea occurred while negotiations were taking place and that he and Nevins "were unable to convince Lockheed to improve upon the settlement offer that [Badkin] had previously rejected." Dkt. 26, ¶ 7. While Badkin argues that this condition of the settlement agreement left him worse off than he was before the settlement, Badkin fails to present evidence from which

[9] Badkin argues that at this point the Union had led him to believe he would be reinstated if absolved of the assault charge, Dkt. 28 at 6 (citing Dkt. 30 at 4–5). However, he does not submit facts to support how he developed this belief, or address this fact in the argument section of his brief which addresses the Union's breach of its duty—he does not ask the Court to hold the Union responsible for the impact of his plea on the settlement efforts or argue that he would have handled the criminal charges differently absent his belief.

a reasonable juror could conclude that the Union acted in an arbitrary or perfunctory manner, rather than exercising its judgment in an evolving situation.

Unlike the union in *Peters*, the Union here did not "inexplicably ignore a strong substantive argument" that was critical to the success of Badkin's grievance. *Peters*, 931 at 540. At most, Westbrook's belief that the best available remedy was a settlement that Badkin believes did not improve his circumstances amounts to error in judgment, not an "egregious" failure which "transcends mere negligence." *Peters*, 931 F.2d at 539. The available evidence shows that Badkin asked the Union to pursue reinstatement and that the Union made a reasonable, good-faith effort to pursue that goal. The Court concludes that on the record before it, no reasonable juror could hold that the Union's exercise of judgment in negotiating the terms of the settlement was irrational or without explanation.

Badkin fails to present facts from which a reasonable juror could conclude the Union treated his grievance in a perfunctory or arbitrary manner, failed to investigate it, or ignored a potentially meritorious argument he asked them to advance. Therefore, the Court finds the Union did not breach its duty of fair representation by handling Badkin's grievance arbitrarily.

Second, "[t]o establish that the union's exercise of judgment was in bad faith, the plaintiff must show 'substantial evidence of fraud, deceitful action or dishonest conduct.'" *Beck*, 506 F.3d at 880 (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971)). The Union argues that Badkin "has no facts supporting a claim of bad faith or hostility by the Union" and that Badkin testified in his deposition that he had no reason to believe Westbrook or Nevins had ill will toward him. Dkt. 24 at 18 (citing

Dkt. 22-1 at 334). Lockheed makes the same argument. Dkt. 20 at 21. Badkin argues that "[t]he jury will likely also find that the Union acted in bad faith by secretly settling Badkin's grievance and never informing Badkin of the settlement." Dkt. 28 at 16. In reply, the Union points out that Westbrook shared the settlement terms with Badkin in July 2016, so the terms were not secret. Dkt. 31 at 6 (citing Dkt. 26, ¶ 5). That Badkin had a different understanding of the terms does not amount to substantial evidence of fraud or deceit. *Beck*, 506 F.3d at 880.

The Union also argues that its failure to provide Badkin a copy of the final agreement was negligence at most. Dkt. 31 at 6. As the Union correctly argues, "negligent union conduct does not rise to the level of bad faith." Dkt. 31 at 6 (citing *Demetris*, 862 F.3d at 808). Moreover, Westbrook declares that he told Badkin about the outcome of the grievance at the September meeting, and his emails with Nevins demonstrate his intent to do so. Dkt. 26, ¶ 11; Dkt. 26-4 at 2 ("I only have a short message to give him that the union is not progressing the grievance and that the grievance doesn't have merit according to our attorney"). Though there is a dispute of fact about what Badkin was told or what he understood at the September meeting, no facts suggest Westbrook or Nevins made any deceitful or dishonest statements. The Court finds that no reasonable juror could conclude Badkin has shown "'substantial evidence of fraud, deceitful action or dishonest conduct.'" *Beck*, 506 F.3d at 880. Therefore, the Court finds that the Union did not breach its duty of fair representation by acting in bad faith.

Finally, the Ninth Circuit holds that to prove a union's exercise of judgment was discriminatory "a plaintiff must adduce substantial evidence of discrimination that is

intentional, severe, and unrelated to legitimate union objectives." *Addington v. US Airline Pilots Ass'n*, 791 F.3d 967, 984 (9th Cir. 2015) (internal citations omitted). Badkin testified at his deposition that while he did not believe Nevins or Westbrook had any ill will or hostility toward him, he believed that they discriminated against him based on "their inactions in communicating." Dkt. 22-1 at 83. Lockheed argues that these statements and others show a lack of evidence of discrimination such that no reasonable jury could find for Badkin. Dkt. 20 at 24. The Union cites Badkin's testimony in deposition that "when you pay somebody to help you and they don't and they ignore you, it's hard to think they might be looking out for your best interests" and that "they were discriminatory maybe towards all their customers or all their – all the people, or maybe they're selectively discriminatory. Or maybe it's a matter of, you know, just not really caring or overlooking it," arguing that Badkin's opinion "fails to rise to the level required under binding precedent for a legal finding of discrimination." Dkt. 24 at 18–19 (citing Dkt. 22-1 at 83).

Badkin's response brief does not discuss this deposition testimony or argue the Union discriminated against him. *See* Dkt. 28 at 13–16. The Court finds that Badkin fails to present substantial evidence that the Union discriminated against him. *Addington*, 791 F.3d at 984. Therefore, the Court finds that the Union did not breach its duty of fair representation by handling Badkin's grievance in a discriminatory manner.

In sum, the Court finds that Badkin has failed to show a dispute of material fact about whether the Union breached its duty of fair representation. Therefore, his claims cannot prevail against either the Union or Lockheed. *DelCostello*, 462 U.S. at 165.

IV. ORDER

Therefore, it is hereby **ORDERED** that Lockheed's motion for summary judgment, Dkt. 20, and the Union's motion for summary judgment, Dkt. 24, are **GRANTED**.

The Clerk shall enter a **JUDGMENT** and close the case.

Dated this 22nd day of May, 2019.

BENJAMIN H. SETTLE
United States District Judge