APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion of the United States Court of Appeals for the Ninth Circuit, Corrected and Reissued with Order Denying Petition for Rehearing (January 5, 2022) 1a

Dissenting Opinion of Judge Ikuta 26a

Dissent from Order to Deny Rehearing by Judge Bennett 45a

Order of the United States District Court for the District of Oregon Adopting Magistrate Report and Dismissing Without Prejudice (December 20, 2019) 58a

Findings and Recommendation of the Magistrate Judge (June 12, 2019) 66a

RELEVANT STATUTORY PROVISIONS

Relevant Statutory Provisions 90a

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

CET First Amended Complaint
(March 28, 2022) 94a

Collective Bargaining Agreement
(August 27, 2014) 115a

Grain Handler's Agreement 160a

Shipside Addendum 165a

Shipboard Foremen's Addendum 172a

Side Letter of Agreement Regarding Shipboard Manning 176a

Letter of Understanding
Re: Electrical Maintenance Work 178a

Memorandum of Agreement 179a

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CORRECTED AND REISSUED WITH ORDER DENYING PETITION FOR REHEARING (JANUARY 5, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

*** FOR PUBLICATION ***

COLUMBIA EXPORT TERMINAL, LLC,

Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; KANE AHUNA, an Individual; JASON ANDREWS, an Individual; JESUS ARANGO, an Individual; MIKE AYERS, an Individual; BRIAN BANTA, an Individual; KEN BANTA, an Individual; KEITH BANTA, an Individual; ANDRE BARBER, an Individual; CRYSTAL BARNES, an Individual; CRAIG BITZ, an Individual; LISA BLANCHARD, an Individual; RANDY BOOKER, an Individual; BRAD BOYD, an Individual; LARRY BROADIE, an Individual; FELIX BROWN, an Individual; JIMMY BROWN, an Individual; JON BUDISELIC, an Individual; WILLIAM BURRIS, an Individual; DOUGLAS CAREY, an Individual; GREG CARSE, an Individual; ANTHONY CERRUTTI, an Individual; HUGH COLSON, an Individual; TIM COPP, an

Individual; E. COTUREN, an Individual; STEVEN COX, an Individual; RYAN CRANSTON, an Individual; JAMES DAW, an Individual; ADAM DAY, an Individual; JAMES DEGMAN, an Individual; TORRAE DE LA CRUZ, an Individual; FRANK DE LA ROSA, an Individual; THOMAS DEMUTH, an Individual; JAMES DINSMORE, an Individual; BRIAN DIRCKSEN, an Individual; TERENCE DODSON, an Individual; GARY DOTSON, an Individual; OLIVER EDE, an Individual; RAY ELWOOD, an Individual; TODD ENGLERT, an Individual; CHRIS EUBANKS, an Individual; DAVID FAMBRO, an Individual; LARRY FAST, an Individual; JAMES FINCH, an Individual; GREG FLANNERY, an Individual; MIKE GARDNER, an Individual; BRETT GEBHARD, an Individual; RICHARD GILSTRAP, an Individual; TED GRAY, an Individual; KURTIS HANSON, an Individual; MIKE HARMS, an Individual; RANDY HARPER, an Individual; TERRY HICKMAN, an Individual; JAMES HOLLAND, an Individual; BRUCE HOLTE, an Individual; RONALD HUSEMAN, an Individual; NATHAN HYDER, an Individual; TROY JAMES, an Individual; SAM JAURON, an Individual; ANTHONY JEFFRIES, an Individual; KEVIN JOHNSON, an Individual; PAT JOHNSON, an Individual; TERRY JOHNSON, an Individual; TIM JONES, an Individual; JON JULIAN, an Individual; LEROY KADOW, an Individual; GEORGE KELLY, an Individual; ERIC KING, an Individual; WAYNE KING, Esquire, an Individual; KEVIN KNOTH, an Individual; KENNETH KYTLE, an Individual; MIKE LACHAPELLE, an Individual; JIMMY LAI, an Individual; TOM LANGMAN, an Individual; TYLER

LAUTENSCHLAGER, an Individual; JACK LEE, an Individual; KEN LEE, an Individual; DAN LESSARD, an Individual; SHANTI LEWALLEN, an Individual; DANNY LOKE, an Individual; THOMAS LOVE, an Individual; WILFRED LUCH, an Individual; KARL LUNDE, an Individual; CRAIG MAGOON, an Individual; MIKE MAHER, an Individual; JASON MALACHI, an Individual; LEVI MANNING, an Individual; RICKIE MANNING, an Individual; JAY MANTEI, an Individual; PAT MARONAY, an Individual; A. MARTIN, an Individual; GARRY MATSON, an Individual; PAT MCCLAIN, an Individual; M. MCMAHON, an Individual; MIKE MCMURTREY, an Individual; DONALD MEHNER, an Individual; CURTIS MEULER, an Individual; KARL MINICH, an Individual; JOSH MORRIS, an Individual; JOHN MULCAHY, an Individual; TOM NEITLING, an Individual; MARTIN NELSON, an Individual; GREG NEMYRE, an Individual; RIAN NESTLEN, an Individual; CHRIS OVERBY, an Individual; KEN OVIATT, an Individual; THOMAS OWENS, an Individual; JOHN PEAK, an Individual; SHANE PEDERSON, an Individual; JEFF PERRY, an Individual; JOHN PERRY, an Individual; ARNOLD PETERSON, an Individual; TERRY PLAYER, an Individual; JAMES POPHAM, an Individual; DAVID PORTER, an Individual; MIKE RAPACZ, an Individual; JOHN RINTA, an Individual; WILLIAM ROBERTS, an Individual; JOSEPH ROBINSON, an Individual; MARK ROBINSON, an Individual; CHRIS SCHEFFEL, an Individual; THEODORE SCHUH, an Individual; MIKE SEXTON, an Individual; MARK SIEGEL, an Individual; COURTNEY SMITH, an Individual; JEFF SMITH,

an Individual; MIKE SMITH, an Individual; SCOTT STEIN, an Individual; DONALD STYKEL, an Individual; MIKE SUHR, an Individual; LEAL SUNDET, an Individual; LAWRENCE THIBEDEAU, an Individual; MARK THORSFELDT, an Individual; SHAWN THORSTAD, an Individual; JAMES THORUD, an Individual; DAVID TRACHSEL, an Individual; WILLIAM UNDERWOOD, an Individual; JASON VANCE, an Individual; DAVID VARNON, an Individual; PAN VARNON, an Individual; MIKE WALKER, Esquire, Attorney, an Individual; DWAYNE WAMSHER; EUGENE WEBB, an Individual; MIKE WEHAGE, an Individual; KEVIN WELDON, an Individual; SPENCER WHITE, an Individual; RICHARD WIDLE, an Individual; NURAL WILLIS, an Individual; RONALD WOODS, an Individual; MARK WRIGHT, an Individual; CAROL WURDINGER, an Individual; JERRY YLONEN, an Individual; P. YOCITIM, an Individual; RICHARD ZATTERBERG, an Individual; FRED ZOSKE, an Individual; JAMES COTHREN, an Individual; BOBBY CRANSTON, an Individual; TEREK JOHNSON, an Individual; ANGELA MARTIN, Esquire, an Individual; PATRICK MCCLAIN, an Individual; MATTHEW MCMAHON, an Individual; SHANN PEDERSON, an Individual; MICHAEL SEXTON, an Individual; JEFFREY SMITH, an Individual; LAURENCE THUBEDEAU, an Individual; PAUL YOCHIM, an Individual,

Defendants-Appellees.

No. 20-35037

D.C. No. 3:18-cv-02177-JR

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted October 26, 2020
Portland, Oregon

Before: Susan P. GRABER, Richard R. CLIFTON, and Sandra S. IKUTA, Circuit Judges.

Order;
Opinion by Judge Clifton;
Dissent by Judge Ikuta
Dissent from Order by Judge Bennett

ORDER

The opinion and dissent filed on June 28, 2021 (Docket Entry No. 31), and published at 2 F.4th 1243 (9th Cir. 2021) are withdrawn. A new opinion and dissent are filed concurrently with this order.

Plaintiff-Appellant has filed a petition for rehearing en banc (Docket Entry No. 34). Judge Graber votes to deny the petition for rehearing en banc, and Judge Clifton so recommends. Judge Ikuta votes to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

CLIFTON, Circuit Judge:

Columbia Export Terminal ("CET") brought an action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against the International Longshore and Warehouse Union ("ILWU") and 154 individual ILWU workers employed by CET. The district court concluded that CET's RICO claims could not properly proceed in court at this time and dismissed the case without prejudice. It reasoned that the claims required interpretation of the collective bargaining agreement ("CBA") under which the workers were employed, that the CBA provided a process for arbitration of disputes, and that the Labor Management Relations Act ("LMRA") precluded court adjudication of the RICO claims before the arbitration process had been exhausted. CET appeals the dismissal.

We previously reached a conclusion similar to that reached by the district court regarding a labor contract governed by the Railway Labor Act ("RLA"). *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094 (9th Cir. 1991). The district court relied on that precedent, rejecting an argument by CET that *Hubbard* had been overruled. We agree with the district court that *Hubbard* remains alive and persuasive. Our conclusion that the same result is required for a contract governed by the LMRA is a logical extension of our precedents. We take that step here and affirm the judgment of the district court.

I. Background

CET operates a grain export terminal in the Port of Portland and employs workers who are members of

the ILWU. CET alleges that the ILWU and the 154 named individual defendants conspired to fraudulently furnish timesheets reporting hours that were not actually worked and, as a result, overbilled CET by more than $5.3 million.

CET filed this action alleging seven claims under RICO, 18 U.S.C. §§ 1961–68. In response, the ILWU filed a motion to dismiss contending, among other things, that CET's claims were preempted under § 301 of the LMRA, 29 U.S.C. § 185, because resolution of the claims required interpretation of the underlying CBA, which requires exhaustion of the agreement's grievance procedures. The individual defendants joined the union's motion. The district court agreed with the ILWU and dismissed the case without prejudice. CET appeals.

II. Discussion

The central dispute on appeal is whether CET's claims, which it styled as RICO claims, are preempted or precluded by § 301 of the LMRA. We review the district court's interpretation of the statutes *de novo*. *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 916 (9th Cir. 2018) (en banc).

A. The two-step preclusion and preemption under LMRA § 301.

The LMRA, sometimes described as the Taft-Hartley Act, was enacted in 1947 to "promote the full flow of commerce" by "provid[ing] orderly and peaceful procedures for preventing [] interference by [employees or employers] with the legitimate rights of the other." 29 U.S.C. § 141(b). To that end, LMRA § 301(a) provides that "[s]uits for violation of contracts between an

employer and a labor organization . . . may be brought in any district court." 29 U.S.C. § 185(a).

On its face, § 301 reads as a jurisdictional statute, and it "contains no express language of preemption, [but] the Supreme Court has long interpreted the [provision] as authorizing federal courts to create a uniform body of federal common law to adjudicate disputes that arise out of labor contracts." *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450–51, 457 (1957).

Consistent with this purpose, the Supreme Court concluded that § 301 impliedly preempted state law in order to give effect to the congressional intent that "doctrines of federal labor law uniformly [ ] prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). Therefore, any "union agreement made pursuant to [a federal labor law] has [ ] the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be [ ] vitiated by any provision of the laws of a State." *California v. Taylor*, 353 U.S. 553, 561 (1957) (quoting *Ry. Emp. Dept. v. Hanson*, 351 U.S. 225, 232 (1956)).

Federal courts have developed common law to govern labor disputes and have concluded that a "central tenet of federal labor-contract law under § 301 [is that] the arbitrator, not the court, [] has the responsibility to interpret the labor contract in the first instance." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). As we explained in *Alaska Airlines* and reiterated last year in *Curtis*, preserving the role of the CBA's grievance process is important for three reasons:

> First, a [CBA] is more than just a contract; it is an effort to erect a system of industrial self-government. Thus, a CBA is part of the continuous collective bargaining process. Second, because the CBA is designed to govern the entire employment relationship, including disputes which the drafters may not have anticipated, it calls into being a new common law—the common law of a particular industry or of a particular plant. Accordingly, the labor arbitrator is usually the appropriate adjudicator for CBA disputes because he was chosen due to the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. Third, grievance and arbitration procedures provide certain procedural benefits, including a more prompt and orderly settlement of CBA disputes than that offered by the ordinary judicial process.

Curtis, 913 F.3d at 1152 (internal quotation marks and citations omitted).

For more than sixty years, the Supreme Court has interpreted § 301 to require the specific performance of promises to arbitrate grievances in collective bargaining agreements. *Lincoln Mills*, 353 U.S. at 451.

We have thus applied the preemptive effect of § 301 to all "state law claims grounded in the provisions of a CBA or requiring interpretation of a CBA." *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d

1024, 1032 (9th Cir. 2016). We have distilled the relevant Supreme Court cases into a two-part test:

> The essential inquiry is this: [1] Does the claim seek purely to vindicate a right or duty created by the CBA itself? If so, then the claim is preempted, and the analysis ends there.
>
> [2] But if not, we proceed to the second step and ask whether a plaintiff's state law right is substantially dependent on analysis of the CBA, which turns on whether the claim cannot be resolved by simply looking to versus interpreting the CBA.

Curtis, 913 F.3d at 1152–53 (internal citations and quotation marks omitted).[1]

CET argues that this preemption approach properly applies only to claims arising under state law, not to claims, such as the RICO claims alleged here, arising under federal law. Instead, CET contends that we should apply a preclusion test that asks whether the two federal statutes necessarily conflict, and if so, favors the statute passed later in time. CET argues that because the RICO statute was enacted after the LMRA, if there is an irreconcilable conflict between the two federal statutes, the older one, the LMRA, must be deemed to have been repealed or amended by the later legislation.

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[1] A variation of the test asks: (1) whether the claim asserted exists independently of the CBA, and if so (2) whether the resolution of the claim nonetheless substantially depends on analysis of the CBA. *Kobold*, 832 F.3d at 1032. Both versions of the test are used interchangeably.

We recognize, as CET argues, that a conflict between two federal laws implicates different considerations than a conflict between a state and a federal law. The Sixth Circuit considered this issue in the context of an Americans with Disabilities Act ("ADA") claim brought by a union employee. In permitting the ADA claim to proceed, the court explained that "Congress's power to preempt state law is rooted in the Supremacy Clause of the United States Constitution." *Watts v. United Parcel Serv., Inc.*, 701 F.3d 188, 191 (6th Cir. 2012). "Because [the plaintiff's] claim is based on a federal cause of action and is in federal court, there is no danger of divergent application of a CBA's provisions by state courts; thus, the motivating purpose of § 301 preemption simply does not apply." *Id.* at 191–92.

We agree, but that is not the *only* purpose of § 301 preemption. Crucially, § 301 preemption also is designed to ensure "specific performance of promises to arbitrate grievances under collective bargaining agreements." *Lincoln Mills*, 353 U.S. at 451. As the Supreme Court explained in *Lueck*,

> If respondent had brought a contract claim under § 301, he would have had to attempt to take the claim through the arbitration procedure established in the collective-bargaining agreement before bringing suit in court. Perhaps the most harmful aspect of the Wisconsin decision [that permitted the state law tort claim to proceed] is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need

> to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in [*Lucas Flour*, 369 U.S. at 105.] The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is pre-empted, their federal right to decide who is to resolve contract disputes will be lost.

471 U.S. at 219.

This principle—that claims which are, in substance, labor disputes subject to the CBA must not be evaded by artful pleading—applies with equal force to federal statutory claims,[2] "although they might be better described as 'precluded.'" *Alaska Airlines*, 898 F.3d at 920 n.10. The LMRA guarantees a "federal

---

[2] *Watts* seemed to recognize this principle as well. The Sixth Circuit did not rest its holding solely on the inapplicability of preemption doctrine as between two federal laws. The court further explained that "the right to be free from disability discrimination that Watts seeks to vindicate in this action does not arise from the CBA or from state law; rather, it is founded on the ADA." *Watts*, 701 F.3d at 192 (emphasis added). Moreover, the *Watts* court recognized that the outcome might have been different had the employer "argued that [the employee] was subject to a mandatory arbitration agreement under the CBA that she failed to exhaust before bringing her ADA claim in federal court." *Id.* (emphasis added).

Thus, the *Watts* court acknowledged the distinction between federal rights that arise independently from the CBA and rights that exist only because of the CBA. This is precisely the distinction the preclusion analysis aims to sift through, and the LMRA requires disputes arising from the CBA to be funneled, if so required by the CBA, to arbitration. Accordingly, our holding here is entirely consonant with *Watts*.

right to decide who is to resolve contract disputes." *Lueck*, 471 U.S. at 21. Therefore, when a claim styled as a federal statutory claim turns in substance on the provisions of the CBA rather than on an independent statutory right, the federal court must direct the claim to the proper adjudicator. *Cf. Vadino v. A. Valey Engineers*, 903 F.2d 253, 266 (3d Cir. 1990) ("In short, while claims resting on [the Fair Labor Standards Act ("FLSA")] are clearly cognizable under that section, we believe that claims which rest on interpretations of the underlying collective bargaining agreement must be resolved pursuant to the procedures contemplated under the LMRA, specifically grievance, arbitration, and, when permissible, suit in federal court under section 301.").

Whether called "preemption" or "preclusion," the same two-step approach applies whether the conflicting statute is a federal or state provision. In *Hubbard*, for instance, we held that the RLA, which also preceded the enactment of RICO, preempted a fraud claim under RICO. 927 F.2d at 1099; *see also Long v. Flying Tiger Line, Inc.*, 994 F.2d 692 (9th Cir. 1993) (RLA precludes ERISA claims). Similar conclusions have been reached by circuit courts across the country.[3]

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[3] Other circuits have applied the "preemption" or "preclusion" test when considering federal claims in the context of labor disputes, without referencing the dates of passage of each federal act. Like our court, the Seventh Circuit has also held that the RLA precludes RICO claims. *Underwood v. Venango River Corp.*, 995 F.2d 677 (7th Cir. 1993) *narrowed by Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 317–18 (7th Cir. 1994) (RLA precludes RICO claims unless causes of action are independent of the CBA). Similarly, at least two circuits have held that the LMRA precludes FLSA claims. *Vadino*, 903 F.2d 253; *Martin v. Lake Cnty. Sewer Co., Inc.*, 269 F.3d 673 (6th Cir. 2001). At least

Although the Supreme Court has never directly passed on that precise question, we are guided by its holding that "[s]ection 301(a) governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (emphasis added) (quoting *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)). The Supreme Court has enforced arbitration requirements in § 301 cases when resolution of the claims required interpretation of the CBA, regardless of the form of the claim. *See, e.g.*, *Lueck*, 471 U.S. at 219 ("Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims.")

Thus, in *Hubbard*, we explained that "federal labor law was intended to provide the exclusive remedy for generic fraud claims relating to rights under a CBA. If the same predicate acts were the basis of state claims for fraud . . . they would be preempted . . . [so plaintiffs] cannot evade preemption through 'artful pleading' of the claims as RICO claims." 927 F.2d at 1098. If the court held otherwise, any plaintiff could avoid arbitration by converting a garden-

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four circuits have held that the RLA precludes ERISA claims. *de la Rosa Sanchez v. E. Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978); *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777 (5th Cir. 2012); *Hastings v. Wilson*, 516 F.3d 1055 (8th Cir. 2008); *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227 (D.C. Cir. 2013).

variety contract dispute into a case of federal racketeering.

Though in *Hubbard* we considered a labor contract under the RLA and reserved for another day the question of whether LMRA precludes RICO claims, that day has come. We hold that a RICO claim is precluded by § 301 of the LMRA when the right or duty upon which the claim is based is created by a CBA or resolution of the claim substantially depends on analysis of a CBA.

We have previously suggested this extension. Notably, two years ago our court, sitting en banc, observed that "the RLA and LMRA § 301 preemption standards are 'virtually identical' in purpose and function, [and] they are, for the most part, analyzed under a single test and a single, cohesive body of case law." *Alaska Airlines*, 898 F.3d at 913 n.1 (quoting *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994)). After discussing the development of the two-step test applying to claims under state law that require interpretation of a CBA, we explained that "[t]he same principle applies to federal law claims, although they might be better described as 'precluded.'" *Id*. at 920 n.10. The labor contract at issue in *Alaska Airlines,* like the contract involved in *Hubbard*, was governed by the RLA. The fact that the plaintiff had asserted a claim under a federal statute rather than a state law did not alter the outcome. The claim could not proceed, regardless of whether it was described as precluded or preempted.

B. CST's RICO claims require analysis of the CBA.

Applying the two-step test, we conclude that CET's RICO claims are precluded by § 301 because resolution of the claims is substantially dependent on interpretation of the CBA. CET's RICO claims are premised on allegations that timesheets submitted by ILWU workers were inflated. To prove its case, CET must demonstrate that ILWU workers committed the predicate acts of mail and wire fraud by knowingly overbilling CET for time not worked. However, ILWU contends that the billed hours were expressly authorized by CET and charged in accordance with the CBA.

There are a host of CBA provisions that could excuse the workers from being present at the time of work reported on the timesheets or could explain why workers are compensated for time not actually worked. For instance, ¶ 4-1 guarantees a minimum of 8 hours of pay for employees who arrive at work and are put to work even if released before the 8-hour shift concludes. Paragraph 4-5 guarantees a minimum 4 hours of pay for those sent home upon arrival. Further, Section XII of the CBA details special rules for "steady" employees: ¶ 12-3 guarantees 40 hours' work per week, and ¶ 12-4 sets maximum durations for lay-off periods. Finally, ¶ 8-1 of the CBA lists paid holidays, ¶ 9-1 alludes to paid vacation time, and ¶ 6-4 provides for paid meal periods with minimum durations.

Resolution of the RICO claims will also require interpretation of the CBA to determine how it applies, if it does, to an issue which its express terms do not appear to discuss: whether employees can claim all of their compensable hours in their weekly timesheets,

or whether they must simply list time actually worked and await a forensic recalculation of their pay.

These issues are not, as the dissent suggests, at 38–39, merely "speculative" or "hypothetical." Rather, they are intrinsic to CET's claims as pleaded and argued to the district court and to us. Permitting the district court to proceed before the grievance process has been exhausted would "eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lueck*, 471 U.S. at 220.

Notably, CET has not argued that its claims are unrelated to the CBA. That is not surprising, for the subject of its claim, the number of hours for which its employees are entitled to claim payment, is at the core of an employment relationship and is something a CBA could be expected to govern. Instead, CET contends that the CBA is unambiguous. That is an argument that CET can make within the grievance process. The claims cannot be resolved by mere reference to the CBA.

We thus conclude that CET's RICO claims substantially depend on interpretation of the CBA. The LMRA thus precludes them and requires that federal courts ensure "specific performance of promises to arbitrate grievances under collective bargaining agreements." *Lincoln Mills*, 353 U.S. at 451. Accordingly, we turn next to what, exactly, the CBA promises.

C. The CBA's arbitration provision applies to RICO claims.

CET argues that even if § 301 could preclude its RICO claims, it should have no preclusive effect in this instance because the CBA's arbitration provision does not contemplate RICO claims and does not bind CET with regard to the ILWU or the individually-named defendants. CET argues that the CBA's arbitration provision should be interpreted to exclude any statutory claims or any disputes between the employer and the ILWU umbrella organization, or between the employer and the 154 individually-named defendants. These arguments fail for several reasons.

CET's preferred reading of the arbitration provision directly contradicts the plain text of the CBA. By its own terms, the CBA's arbitration provision applies to "any controversy or disagreement or dispute . . . as to the interpretation, application, or violation" of "any" of its provisions. ¶ 16-2. It then sets forth a process for the resolution of "all grievances." ¶ 16-4. The text of the CBA does not say, as it could, that RICO—or any other statutory claim—is excluded from the grievance process, even if it involves "the interpretation, application, or violation" of the CBA.

Rather, the CBA explicitly contemplates a dispute resolution mechanism covering the exact conduct alleged as the basis of CET's current claims. For example, Section XIV lays out the standard of work expected of individual employees (*e.g.*, "not leaving their work station in advance of the designated quitting time") and goes on to state that "[a]ny Employer may file with the union a complaint in writing against any member of the grain section of the Union" and allows the aggrieved employer to proceed before the

Joint Labor Relations Committee if it does not receive a satisfactory response.

Further, the ILWU is a signatory to the agreement and is capable of enforcing the agreement on its own behalf, and the employees, through their bargaining representatives, are also treated as parties to the agreement.

At most, CET's preferred interpretation could create some doubt as to the scope of the CBA's grievance procedures. Even so, "[t]he party contesting arbitrability bears the burden of demonstrating how the language in the collective bargaining agreement excludes a particular dispute from arbitration." *Standard Concrete Prods., Inc. v. Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952*, 353 F.3d 668, 674 (9th Cir. 2003) (quoting *Phx. Newspaper, Inc. v. Phx. Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993)). Any "[d]oubts should be resolved in favor of coverage." *Id.* at 674 (citations omitted). CET, as the party refuting the plain reading of the CBA's scope, has not met its burden of persuasion.

The dissent reaches a different conclusion in large because it disregards the presumption in favor of arbitration under federal law. It contends, at 39, that the parties must "expressly consent" to arbitrate RICO claims, citing *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 298 n.6, 297 (2010). But it does not consider or account for what else *Granite Rock* says.

Like this case, *Granite Rock* was a dispute between an employer and a union. The CBA governing the relationship between the parties expired in April 2004. *Id.* at 292. When negotiations for a new CBA

reached an impasse, the union workers initiated a strike in June 2004. *Id.* Granite Rock and the union ultimately reached an agreement on a new CBA on July 2. *Id.* at 292–93. However, the new CBA did not include a provision to hold the union and its members harmless for any strike-related damages that the employer may have incurred in the interim. *Id.* at 293. In an effort to secure the waiver of liability, the local union, under the instruction of its parent, the International Brotherhood of Teamsters ("IBT"), resumed the strike even though the new CBA contained a no-strike provision. *Id.* Granite Rock brought a § 301 action in federal court seeking an injunction against the ongoing strike, and seeking damages against both the local union and IBT. *Id.* at 294. The strike ultimately ended in September, but Granite Rock continued to seek damages. *Id.* at 294–95.

During the litigation, a factual dispute arose as to the date that the new CBA became effective, with Granite Rock claiming that the agreement was ratified by union members on July 2, and the union claiming that it was ratified later, on August 22. *Id.* at 295. The district court held that the issue was for a court to decide, and submitted the question to a jury, which reached a unanimous verdict that the local had ratified the CBA on July 2. *Id.* at 295. The Ninth Circuit reversed, reasoning that the parties' dispute was governed by the CBA's arbitration clause, which covered strike-related claims. *Id.*

The Supreme Court granted certiorari, and reversed, viewing the case as an opportunity to "reemphasize the proper framework for deciding when disputes are arbitrable." *Id.* at 297. The Court began with the proposition that "[i]t is well settled in both

commercial and labor cases that whether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination." *Id.* at 296 (internal quotation marks and brackets omitted). More specifically, "where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." *Id.* But where, as here, the formation and validity of the contract is not at issue, and the parties "have agreed to arbitrate some matters pursuant to an arbitration clause, the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." *Id.* at 298 (internal quotation marks and emphasis omitted). In such cases, reviewing courts must proceed by:

> (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption and ordering arbitration only where the presumption is not rebutted.

Id. at 301 (internal quotation marks omitted).

The parties in our case do not dispute that there is a valid CBA and that the CBA includes a grievance provision under which they have agreed to arbitrate some matters. The dissent does not contend otherwise. Rather, there is only a dispute as to whether the agreement's scope covers CET's RICO claims. *Granite Rock* directs us, therefore, to resolve any doubts concerning the scope of issues to be referred to arbitration in favor of arbitration. That is the process that the district court followed to reach the conclusion that we affirm.

We do not hold, as the dissent suggests, at 45, that RICO claims are preempted by the LMRA and subject to arbitration in every instance, simply by virtue of being an "employment-related dispute." Like state-law fraud claims, RICO claims are not preempted or precluded by § 301 unless they are (1) based on a right or duty created by the CBA, or (2) require interpretation of the CBA. *See, e.g.*, *Operating Eng'rs Pension Tr. v. Wilson*, 915 F.2d 535, 537–39 (9th Cir. 1990) (holding that § 301 does not preempt state tort claim for fraud in the inducement of a CBA).[4] Even then, reviewing courts must still look to the scope of the CBA's arbitration provision to determine if those claims are arbitrable under the framework established in *Granite Rock*.

The dissent's argument that there is no presumption in favor of arbitration, such that it must be established that the parties agreed to each specific type of claim, is simply inconsistent with *Granite Rock*, the authority it purports to rely on, and decades of caselaw. *See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960) ("[Under § 301, an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.")[5]

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[4] Similarly, we have already held that federal labor law does not preclude criminal RICO action. *See, e.g.*, *United States v. Thordarson*, 646 F.2d 1323, 1331 (9th Cir. 1981).

[5] *See also Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377–78 (1974); *Nolde Bros. v. Bakery & Confectionery Workers*

Finally, we note that CET is not permanently barred from pursuing its claims. The dismissal by the district court was without prejudice and properly so. CET is simply required to exhaust the grievance process to which it agreed in the CBA before it can proceed in federal court with those claims.

D. The *Buell* exception does not apply.

We address one final point. CET argues that another precedent, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), should control. We disagree.

In *Buell*, the Supreme Court held that an employee's claims under an independent federal statute, the Federal Employers Liability Act, were not precluded by the RLA. *Id.* at 565–67. In that decision, however, the Supreme Court reiterated the general rule in favor of compelling arbitration in labor disputes, while recognizing an exception for claims based on federal statutes that contain specific substantive guarantees for workers. *Id.* at 565 ("[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" (quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981))); *see also id.* (citing *McDonald v. West Branch*, 466 U.S. 284 (1984)

Union, 430 U.S. 243, 254–55 (1977); *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 650 (1986); *Inlandboatmens Union of the Pac. v. Dutra Grp.*, 279 F.3d 1075, 1078 (9th Cir. 2002); *SEIU v. St. Vincent Med. Ctr.*, 344 F.3d 977, 985 (9th Cir. 2003); *Int'l All. of Theatrical Stage Emple. v. Insync Show Prods., Inc.*, 801 F.3d 1033, 1042 (9th Cir. 2015).

(CBA arbitration decision does not preclude § 1983 claims); *Barrentine*, 450 U.S. 728 (CBA arbitration decision does not preclude FLSA claims); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (CBA arbitration decision does not preclude Title VII claims)).

This reading of *Buell* is consistent with decisions that have stressed that "§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees [even under] state law." *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994). "Setting minimum wages, regulating work hours and pay periods, requiring paid and unpaid leave, protecting worker safety, prohibiting discrimination in employment, and establishing other worker rights remains well within the traditional police power of the states." *Alaska Airlines*, 898 F.3d at 919. Therefore, "claims alleging violations of such protections will not necessarily be preempted, even when the plaintiff is covered by a CBA." *Curtis*, 913 F.3d at 1152.

We have consistently observed this exception. *See, e.g.*, *Felt v. Atchison, Topeka & Santa Fe Ry. Co.*, 60 F.3d 1416 (9th Cir. 1995) (RLA does not preclude Title VII claims); *Saridakis v. United Airlines*, 166 F.3d 1272 (9th Cir. 1999) (RLA does not preclude ADA claims).

The exception does not apply here, however. The current claims have been brought by an employer, and the federal statute at issue, RICO, does not establish substantive guarantees for workers.

III. Conclusion

We affirm the dismissal of this action without prejudice by the district court. CET's RICO claims

are subject to the CBA's arbitration provision, and are precluded by LMRA § 301.

AFFIRMED.

DISSENTING OPINION OF JUDGE IKUTA

IKUTA, Circuit Judge, Dissenting:

The majority today makes two serious errors that will throw our Labor Management Relations Act (LMRA) jurisprudence into disarray. First, it holds that any federal claim that is related to a collective-bargaining agreement (CBA) is preempted or precluded by § 301 of LMRA and must automatically be dismissed by the district court and sent for arbitration. Majority at 22. This ruling mistakenly applies our jurisprudence developed for Railway Labor Act (RLA) claims to LMRA claims. Second, the majority contradicts itself by holding that even if a federal claim is "precluded," a court "must still look to the scope of the CBA's arbitration provision to determine if those claims are arbitrable." Majority at 26. Here, the majority errs by applying a presumption of arbitrability, even though the Supreme Court has made clear that such a presumption does not apply where the arbitration provision is unambiguous. *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 301 (2010). In light of these and other errors, I dissent.

I

The primary purpose of § 301 of LMRA is to ensure that federal courts can apply federal common law to CBA disputes even when a claim is pleaded as a state-law claim. On its face, § 301 gives federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce."

29 U.S.C. § 185(a).[1] The Supreme Court has interpreted this section as directing federal courts to create and apply a federal common law for interpreting CBAs, *see Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957), so as to ensure that uniform federal labor law prevails over inconsistent interpretations of CBAs by state courts, *see Loc. 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104–05 (1962). We refer to state claims covered by § 301 of LMRA as "pre-empted" and federal claims covered by § 301 of LMRA as "precluded." *Alaska Airlines, Inc. v. Schurke*, 898 F.3d 904, 920 n.10 (9th Cir. 2018) (en banc). These terms do not mean "typical conflict preemption" or preclusion, *id.* at 922, but merely refer to claims that, pursuant to § 301 of LMRA, must be decided in federal court under federal labor law.

If a plaintiff brings a state-law claim in state court, courts apply a two-part inquiry, asking whether (1) the claim alleges a breach of a CBA or (2) requires the interpretation of the CBA. *See, e.g.*, *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–07 (1988); *Schurke*, 898 F.3d at 920. If the court finds that § 301 of LMRA applies under this two-part test, then the defendants may remove the case to federal

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[1] Section 301 of LMRA, 29 U.S.C. § 185(a), states in full:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

court through the jurisdictional doctrine of "complete preemption," which is "an exception to the well-pleaded complaint rule." *Schurke*, 898 F.3d at 923 n.15. Once the federal court determines that removal under § 301 of LMRA was proper, the jurisdictional inquiry for preemption is over. By contrast, when a federal claim is brought in federal court in the first instance, no jurisdictional inquiry under § 301 of LMRA is necessary. Therefore, in this context, § 301 has little work to do.[2]

Once a claim (state or federal) is properly in federal court, the court's inquiry under LMRA is, at its core, a question of contract interpretation. *See id.* at 918 n.7.[3] If the claim alleges a breach of the CBA or requires interpretation of the CBA, then the federal court need only read, apply, and enforce the CBA, including any applicable arbitration provision. There

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[2] Indeed, given the limited nature of LMRA's impact in this context, a sister circuit has concluded that "the motivating purpose of § 301 preemption simply does not apply" to federal claims. *Watts v. United Parcel Serv., Inc.*, 701 F.3d 188, 190–93 (6th Cir. 2012). We have not directly ruled on this point. *Cf. Schurke*, 898 F.3d at 920 & n.10.

[3] Although the majority claims that other circuits apply a "preemption" or "preclusion" test to consider federal claims in the context of labor disputes, Majority at 18 n.3, the LMRA cases cited by the majority merely determined that an employee's Fair Labor Standards Act claims required an interpretation of the CBA, and therefore were subject to LMRA's statute of limitations. *See Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 266 (3d Cir. 1990); *Martin v. Lake Cnty. Sewer Co.*, 269 F.3d 673, 679 (6th Cir. 2001). These cases do not affect the conclusion that, after federal jurisdiction exists, we are tasked only with deciding a question of contract interpretation to determine whether the federal claims must be arbitrated. *See Granite Rock*, 561 U.S. at 310–11.

is no "presumption that labor disputes are arbitrable whenever they are not expressly excluded from an arbitration clause." *Granite Rock*, 561 U.S. at 301 n.8. If the CBA or labor contract does not require that the dispute be resolved by arbitration, then the court must resolve the dispute itself by applying the terms of the CBA pursuant to federal common labor law. *See, e.g.*, *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm.*, 707 F.2d 1067, 1070–72 (9th Cir. 1983).

This contractual focus differentiates LMRA from the RLA, 45 U.S.C. §§ 151–65, which covers the railroad and airline industries. The standard for determining when a state-law claim is preempted by the RLA is "virtually identical to the pre-emption standard the Court employs in cases involving § 301 of the LMRA." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994). But if the RLA's dispute-resolution provisions apply to a claim, then the statute itself "requires submission of such disputes to internal dispute-resolution processes and then to a division of the National Adjustment Board or an arbitration board selected by the parties." *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245 (9th Cir. 2009). Because the text of the RLA mandates arbitration of any covered claim, it provides no guidance in determining whether a claim precluded by LMRA must be arbitrated. *Cf. Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1097–98 (9th Cir. 1991), *abrogated in part*, *Norris*, 512 U.S. at 263 n.9.[4]

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[4] Thus, the majority's reliance on RLA cases that required federal RICO claims to go to RLA-mandated adjustment boards, Majority at 18 & n.3, is inapposite, as these cases do not provide guidance on the question whether LMRA can "preclude"

Here, Columbia Export Terminal (CET) brought federal claims in federal court, so no jurisdictional inquiry is required to ensure the propriety of removing the case from state court. And because § 301 of LMRA applies, rather than the RLA, this case presents only a question of contract interpretation, *see Granite Rock*, 561 U.S. at 311, and we must determine whether CET's claims as pleaded are subject to the CBA's grievance and arbitration procedures. In short, the only question at issue here is whether CET's complaint raises claims that the parties intended to be decided in the arbitral forum established by the CBA among the parties.[5] Accordingly, to the extent the majority holds that if a federal claim is "grounded in the provisions of a CBA or requiring interpretation of a CBA," Majority at 14, then the claim is precluded by § 301 of LMRA and must be dismissed by the district court for arbitration, Majority at 22, it is wrong.

CET's RICO claims. *Cf. Underwood v. Venango River Corp.*, 995 F.2d 677, 685 (7th Cir. 1993), *overruled in part*, *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 317–18 (7th Cir. 1994). And the majority's reliance on ERISA cases involving RLA mandated arbitration proves even less persuasive, because ERISA itself disclaims any effect on or conflict with earlier enacted federal laws. *See* 29 U.S.C. § 1144(d).

[5] The majority implicitly acknowledges that the only question here is whether the parties agreed to arbitrate the types of claims raised in CET's complaint. Thus, the majority explains that the "LMRA requires disputes arising from the CBA to be funneled, *if so required by the CBA*, to arbitration," Majority at 17 n.2, and the majority's "preclusion" analysis is merely intended to "direct the [federal statutory claim] to the proper adjudicator," Majority at 17.

II

After consuming multiple pages with its theory that RICO claims are "precluded by § 301" and subject to the two-part test for preemption, Majority at 12–22, the majority suddenly shifts gear and indicates that this conclusion is irrelevant, because, even after the two-step preemption test, "reviewing courts must still look to the scope of the CBA's arbitration provision to determine if those claims are arbitrable under the framework established in *Granite Rock*." Majority at 26. Although this conclusion is correct (and makes the majority's lengthy preclusion analysis mere dicta), the majority errs by misunderstanding *Granite Rock*'s analysis of how courts must determine whether an arbitration provision in a CBA covers the claim at issue.

A

In *Granite Rock*, the Ninth Circuit made the same mistake the majority makes here: it applied the presumption that "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration," and erroneously held that a LMRA dispute was governed by a CBA's arbitration clause. 561 U.S. at 298. The Supreme Court reversed. As *Granite Rock* explained, the Supreme Court has never "held that courts may use policy considerations as a substitute for party agreement," *id.* at 303, or "held that this policy overrides the principle that a court may submit to arbitration 'only those disputes . . . that the parties have agreed to submit,'" *id.* at 302 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). Rather, a court must apply "the proper

framework for deciding when disputes are arbitrable." *Id.* at 297.

Under the *Granite Rock* framework, a court must first use ordinary principles of contract interpretation to determine if the arbitration provision is "best construed to encompass the dispute." *Id.* at 303. "[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." *Id.* at 297. This means that a court must first "resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.*

Then, only "where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand," may a court apply "the presumption of arbitrability" and ask whether the arbitration provision is reasonably construed as covering the asserted dispute. *Id.* at 301. Even if the court concludes the arbitration provision is susceptible to such an interpretation, and therefore the presumption of arbitrability applies, a court may order arbitration "only where the presumption is not rebutted." *Id.*

B

Applying this framework here, we begin by construing the text of the CBA, using ordinary principles of contract interpretation, to determine which claims must be decided by the CBA's grievance and arbitration procedures. Section XVI of the CBA provides "procedures for handling grievances and disputes." The CBA defines a grievance as follows:

> A grievance shall be defined as any controversy or disagreement or dispute between the applicable ILWU Local Union and the Employer for the particular grain elevator(s) involved as to the interpretation, application, or violation of any provision of this Agreement.

The CBA provides that all grievances between the local unions and CET must be resolved pursuant to the procedures in Section XVI of the CBA. Under Section XVI, the parties must attempt to resolve the grievance informally. If it is not resolved, it must be referred to a "Joint Labor Relations Committee" comprised of representatives from "the applicable ILWU Local Union" and "the applicable Employer." The committee has "the power and duty to investigate and adjudicate all grievances or disagreements or disputes arising under this Agreement." If the committee is unable to resolve the dispute, then the committee defines "the question or questions in dispute," and either party may refer the question "to an impartial arbitrator." The CBA then outlines the procedure for conducting arbitration. Finally, CET "shall also have the right to file a grievance and to follow the above grievance procedure in an effort to resolve it."

C

After reviewing the relevant provisions of the CBA regarding which claims are subject to its grievance and arbitration procedures, we next consider the nature of CET's claims, beginning with an accurate description of CET's claims "as pleaded." *See Schurke*, 898 F.3d at 924 (holding that, in determining whether a state law claim requires the interpretation of a

CBA, a federal court must consider the claim "as pleaded"). According to the operative complaint, CET employs union-represented workers to load grain for international shipping at a terminal in Portland, Oregon (Terminal 5). CET sued the International Longshore and Warehouse Union (ILWU) and approximately 160 individual hourly workers who are members of two local labor organizations chartered by ILWU. According to the complaint, the defendants, "with specific intent to defraud, jointly entered into a conspiracy and scheme" to "routinely and systematically, over a period of more than four years," understaff jobs and submit time sheets "indicating time worked for employees who did not work, and were not even at Terminal 5, for some or all of the indicated time." The complaint alleged that workers "billed hours and received unearned payment" for time claimed on their time sheets when they were not present at Terminal 5. Among other practices, workers split shifts "with one working the first half and the other working the second half, yet submitting time sheets indicating falsely that both had worked the full shift." Another practice involved workers who were present at the terminal submitting time sheets showing that an absent worker, who had not showed up, "worked a full shift." The complaint alleged that through these fraudulent practices, workers illegally obtained over $5 million from CET.

Based on these factual allegations, the complaint brought seven RICO claims.[6] The complaint alleged

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[6] These claims include allegations that the defendants invested income derived from a pattern of racketeering activity in violation of 18 U.S.C. § 1962(a), that ILWU acquired an indirect interest in and indirect control of CET through a pattern of racketeering

that each submission of a fraudulent time sheet constituted a predicate act of mail or wire fraud under 18 U.S.C. § 1341 and § 1343, and that the defendants engaged in a pattern of racketeering activity.

D

The key question is whether CET's claims, as pleaded, must be arbitrated under the CBA. To make this determination, we apply principles of contract interpretation, as informed by the common law of federal labor law and labor arbitration precedents. *See Standard Concrete Prods., Inc. v. Gen. Truck Drivers, Office, Food & Warehouse Union, Loc. 952*, 353 F.3d 668, 673–75 (9th Cir. 2003); *see also M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015); *Granite Rock*, 561 U.S. at 298 n.6.

Federal common law provides important guidance for interpreting the key terms in the CBA. Under federal common law, we construe the word "interpretation" narrowly as meaning "something more than 'consider,' 'refer to,' or 'apply.'" *Schurke*, 898 F.3d at 921 (quoting *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1002, 1108 (9th Cir. 2000)). Because a plaintiff's claim, "as pleaded," drives the analysis, there must be an "active dispute" as to the interpretation of a CBA provision and not simply a "'*hypothetical* connection between the claim and the terms of the CBA.'" *Schurke*, 898 F.3d at 921 (quoting *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir.

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activity in violation of 18 U.S.C. § 1962(b), that the defendants participated in the conduct of the local unions through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), and that the defendants conspired to violate the prior three sections in violation of 18 U.S.C. § 1962(d).

2001) (en banc)). A court must wait until an active dispute arises; it cannot rely on the "speculative possibility" of an interpretive dispute or the "possibility that things could change down the road." *McCray v. Marriott Hotel Servs., Inc.*, 902 F.3d 1005, 1013 (9th Cir. 2018). Nor does an interpretive dispute exist merely because a defendant relies on CBA provisions as a defense to a plaintiff's claim. *See, e.g.*, *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 997–99 (9th Cir. 2007); *Detabali v. St. Luke's Hosp.*, 482 F.3d 1199, 1203–04 (9th Cir. 2007); *Matson v. United Parcel Serv., Inc.*, 840 F.3d 1126, 1134–35 (9th Cir. 2016).

Using ordinary principles of contract interpretation, it is immediately apparent that the arbitration provision in the CBA does not cover CET's claims against ILWU. The CBA's interpretation of "grievance" is limited to controversies, disagreements, or disputes "between the applicable ILWU Local Union and the Employer for the particular grain elevator(s)." Therefore, it is unambiguous that CET's claims against ILWU falls outside the definition of a grievance. *See, e.g.*, *Standard Concrete*, 353 F.3d at 674–75. Accordingly, CET has no obligation to arbitrate its claims against ILWU. The majority errs in holding otherwise. Majority at 22–27.

Second, it is immediately apparent that the parties did not agree to arbitrate federal statutory claims in general, or RICO claims in particular. The parties to the CBA could have agreed to do so, because courts will enforce agreements to arbitrate federal statutory claims, *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 263–64 (2009). But, for such an agreement to be enforceable, the parties must expressly consent to such a provision, *see id.*; *Granite Rock*, 561 U.S. at 300,

and any CBA requirement to arbitrate such claims "must be particularly clear," *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79–80 (1998). The CBA's grievance and arbitration provisions here do not expressly agree to arbitrate RICO claims, or any other statutory claims, or authorize the arbitrators to resolve such claims.

Therefore, unless the CBA's arbitration provision is ambiguous, it would apply to CET's claims only if the CBA's definition of "grievance" is best construed as covering the claims. The word "grievance" is defined in the CBA as "any controversy or disagreement or dispute" involving "the interpretation, application, or violation of any provision of this Agreement." Under federal labor law, a dispute over "the interpretation or application" of a CBA refers to "a claim arising out of a CBA." *Norris*, 512 U.S. at 254. Because CET does not allege a violation of the CBA, and there is no dispute over how a CBA provision applies to CET's claims, the key question is whether litigating CET's RICO claim "requires interpretation of a CBA." *Schurke*, 898 F.3d at 921. As noted above, under federal common labor law, "'interpretation' is construed narrowly," and covers claims only "to the extent there is an active dispute over 'the meaning of contract terms.'" *Id.* (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994)).

Based on a straightforward application of ordinary contract interpretation principles, resolving CET's RICO claims does not require interpretation of the CBA. The complaint simply alleges that the individual workers submitted fraudulent time sheets claiming hours worked at Terminal 5 during periods in which they were not physically present at the terminal.

Proving the elements of mail and wire fraud here requires only a factual inquiry into whether employees claimed they were working when they were not physically on site. "The need for a 'purely factual inquiry that does not turn on the meaning of any provision of a collective-bargaining agreement,' however, is not cause for preemption under section 301," *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1072 (9th Cir. 2007) (quoting *Lingle*, 486 U.S. at 407) (cleaned up), meaning that a purely factual inquiry does not require an interpretation of a CBA under our two-part test.

The defendants' arguments to the contrary fail. Because it is not possible to explain how CET's claims, "as pleaded," require construing the CBA, *Schurke*, 898 F.3d at 924, the defendants take the easier route of recharacterizing the complaint. While CET's complaint alleges that defendants conspired to defraud CET by making false claims about their presence for work at Terminal 5, the defendants reinvent the complaint as alleging instead that CET overpaid the individual defendants for not working hard enough while on site. The majority follows this same approach, pretending that CET is merely disputing whether defendants billed hours that were or were not "expressly authorized by CET and charged in accordance with the CBA." Majority at 20.

Having recharacterized CET's complaint in this way, the defendants then argue that interpretation of the CBA is necessary to address their defense that the CBA's pay guarantees, minimum staffing levels, longstanding industry practices, and the parties' bargaining discussions justify the employees' wage claims, because employees are entitled to compensation

for certain time not worked. The majority again echoes this approach, identifying hypothetical defenses that the defendants could raise to "excuse the workers from being present at the time of work reported on the timesheets" or to "explain why workers are compensated for time not actually worked." Majority at 20. Indeed, the majority goes so far as to suggest there could be an interpretive dispute over whether defendants were entitled to compensation for paid holidays.[7] Majority at 21. The majority concludes that the mere existence of these hypothetical defenses in the CBA means that adjudication of CET's re-imagined claims will substantially depend on interpretation of the CBA. Majority at 20–22.

These arguments are meritless. We must consider CET's claims "as pleaded," and those claims allege only that defendants engaged in fraud by claiming they were present at Terminal 5 when they were not. No contract terms in the CBA authorize that sort of fraud, so interpretation of the CBA is not required. The defendants' possible future defenses do not turn CET's claims into "grievances" as defined in the CBA. The Supreme Court has made clear that a party cannot manufacture a CBA dispute through raising a defense. *See Caterpillar, Inc v. Williams*, 482 U.S. 386, 398–99 (1987); *Schurke*, 898 F.3d at 921. While defendants may defend themselves on the ground that CET's allegations are factually erroneous (for instance, because workers arrived at the terminal but then were released from work as permitted under the CBA, because weather prevented work, because workers get

[7] Given that the CBA helpfully defines Christmas Day as December 25, there is unlikely to be an interpretive dispute over the defendants' entitlement to payment for this holiday.

a paid holiday for Christmas Day, or because CET could not provide sufficient work), such factual questions or excuses do not create any disputes about the interpretation of CBA provisions at this stage of the litigation. Nor does the defendants' defense that the alleged fraud did not result in overbilling raise an interpretive dispute. As our en banc court has explained, a defendant's allegation of "a hypothetical connection between the claim and the terms of the CBA is not enough" to conclude that the claim "cannot be resolved without interpreting the applicable CBA." *Cramer*, 255 F.3d at 691.

The majority's further arguments that CET's claims are grievances under the CBA are meritless. First, the majority places weight on CET's alleged failure to argue "that its claims are unrelated to the CBA." Majority at 21. It then argues that CET's claims are related to the CBA because "the subject of its claim, the number of hours for which its employees are entitled to claim payment, is at the core of an employment relationship." Majority at 21. Factually, of course, the majority is wrong: CET argued on appeal that "the district court erred in finding that CET's RICO claim required substantial analysis of the CBA," because "CET's complaint makes no reference to the CBA," "does not rely on" the CBA, and the complaint "alleges simply that the ILWU and Members submitted fraudulent timecards claiming they worked time that they did not work." But more important, for purposes of determining whether CET's claims are "grievances" subject to resolution under the CBA, the existence of an employment relationship between CET and the defendants is not dispositive. As the Supreme Court has explained, "not every

dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Caterpillar*, 482 U.S. at 396 n.10 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)). CET must only argue (as it did persuasively) that resolving its RICO claims does not require resolving any active interpretive dispute as to the particular meaning of CBA provisions. Our task, in turn, is merely to consider whether CET's claims are "grievances" for purposes of the CBA.

Second, the majority argues that CET's claims are "grievances" covered by the CBA because the CBA provisions "could excuse" workers from being present or "could explain" compensation for time not worked. Majority at 20. But the CBA does not define a "grievance" as including possible defenses that may be raised by a defendant. The majority's ruling is contrary to federal common labor law, which holds that unless there is a currently existing, active dispute requiring interpretation of the CBA, such a claim does not require interpretation of the CBA. *See Cramer*, 255 F.3d at 691–92. Rather, "we have held that a CBA provision does not trigger preemption when it is only potentially relevant to the state law claims, without any guarantee that interpretation or direct reliance on the CBA terms will occur." *Humble v. Boeing Co.*, 305 F.3d 1004, 1010 (9th Cir. 2002); *see also Dent v. Nat'l Football League*, 902 F.3d 1109, 1116–17 (9th Cir. 2018) (same). If CET broadens its theory of liability later in litigation, the defendants may again raise an argument under § 301 of LMRA, and the court can then decide whether to refer interpretive disputes to the CBA's arbitration procedures

at that time. *See McCray*, 902 F.3d at 1013 & n.3. Likewise, if disputes arise in the calculation of damages, then relevant interpretive disputes may be referred to the CBA's arbitration procedures. *See, e.g.*, *Lingle*, 486 U.S. at 413 n.12; *Schurke*, 898 F.3d at 922 & n.14. But because no active interpretive dispute exists at this time as CET's claims are pleaded, these claims are not subject to resolution under the CBA.[8] Nor would analogous state law claims be removable under § 301 of LMRA if CET had raised the claims in state court.

Because CET's RICO claims are not a "dispute . . . as to the interpretation, application, or violation of any provision of" the CBA, there is no "grievance," as defined in the CBA. The arbitration agreement is not "ambiguous about whether it covers the dispute at hand," *Granite Rock*, 561 U.S. at 310, because the CBA is not susceptible to an interpretation that CET's RICO claims require an interpretation of the CBA. There is no ambiguity that would give rise to a presumption of arbitrability. Because "a court may submit to arbitration only those disputes that the parties have agreed to submit," *id.* at 302 (cleaned up), the majority errs in holding that CET's claims

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[8] Therefore, the majority has it backward in saying that CET must first "exhaust the grievance process" and then return to federal court with its claims. Majority at 27. Moreover, the majority's promise that CET can return to federal court after arbitration is an empty one. This promise would make sense if the majority held it was necessary for arbitration to resolve a key issue in CET's RICO claims, and then CET could litigate the remainder. *Cf. Schurke*, 898 F.3d at 922 & n.14. But because the majority does not and cannot do so—because there is no such key issue—its promise is empty.

are subject to the CBA's grievance and arbitration procedure.

E

The majority opinion is both erroneous and internally inconsistent. First, it presents an erroneous theory of LMRA preclusion. Under the majority's new rule, almost any employment-related dispute between parties covered by a CBA is precluded and sent to arbitration, even though the Supreme Court has expressly disclaimed this approach and, unlike the RLA, LMRA itself does not require arbitration of every precluded claim. *See Schurke*, 898 F.3d at 918 n.7.[9] Second, even though the majority goes on to hold that it remains necessary to determine whether CET's claims are covered by the arbitration provision, the majority fails to apply the *Granite Rock* framework correctly, and instead holds that the CBA applies based on meritless, hypothetical connections to CBA provisions. *Cf. Schurke*, 898 F.3d at 921; *Cramer*, 255 F.3d at 691–92. This approach is directly contrary to the Supreme Court's labor arbitration precedents, which prevent a court from compelling arbitration of disputes that the parties have not agreed to arbitrate.

The majority offers the reassurance that workers, at least, will not be compelled to arbitrate all their disputes, because our cases allow workers to litigate

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[9] The majority disputes this characterization, Majority at 26–27, but the majority points to no basis for its conclusion that CET's RICO claims are "substantially dependent on interpretation of the CBA" (Majority at 20) other than its reasoning that the defendants who allegedly defrauded CET were parties to a CBA and can now manufacture CBA-based defenses to compel arbitration.

claims based on statutes that provide "substantive guarantees for workers." Majority at 27–28. Under this rationale, only employers will have to arbitrate their claims without their consent. But the Supreme Court's labor arbitration precedent does not permit this lopsided interpretation of LMRA. If the CBA expressly requires the arbitration of a federal statutory claim, the worker is bound to arbitration, regardless of any "substantive guarantee." *See Penn Plaza*, 556 U.S. at 256 n.5, 263–64. And by the same token, if the employer did not consent to arbitrate a federal statutory claim, then no labor policy considerations can require the employer to do so. *See Granite Rock*, 561 U.S. at 299, 303.

Taken together, the majority's many misstatements of law upend the carefully limited scope of § 301 of LMRA that our circuit has so consistently upheld and give future defendants new, previously rejected, ways of depriving CBA-covered plaintiffs of their rights to a judicial forum and to vindication of independent statutory rights. I therefore dissent.

DISSENT FROM ORDER TO DENY REHEARING BY JUDGE BENNETT

BENNETT, Circuit Judge, joined by IKUTA, R. NELSON, BUMATAY, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

Our Labor Management Relations Act ("LMRA") § 301 preemption doctrine developed to prevent state courts from interpreting collective bargaining agreements ("CBAs") inconsistently under state law. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) ("[I]n enacting [§] 301 [of the LMRA,] Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." (emphasis added)). We have never applied that reasoning to preempt (or "preclude") a federal statutory claim. But in *Alaska Airlines Inc. v. Schurke*, we erroneously suggested in a footnote that § 301 "precludes" federal statutory claims in the same way it preempts state law claims. 898 F.3d 904, 920 n.10 (9th Cir. 2018) (en banc) ("The same principle [of LMRA preemption] applies to federal law claims, although they might better be described as 'precluded.'"). Led astray by this footnote, the panel entrenches the position that § 301 can preclude federal statutory claims.

But the footnote was wrong, and the panel is wrong. "Whether called 'preemption' or 'preclusion,'" Op. 18, the LMRA does not bar a federal statutory claim brought in federal court. Today, the barred claim is a Racketeer Influenced and Corrupt Organizations Act ("RICO") claim alleging a $5.3 million mail and wire fraud racketeering scheme. Tomorrow, the barred claim may be based on the Americans with Disabilities Act ("ADA") or Title VII of the Civil

Rights Act of 1964. We should have reheard this case en banc to excise this erroneous preclusion notion from our jurisprudence, and I respectfully dissent from our failure to do so.

I start with what ought to be a very straightforward premise—preclusion of federal claims is inconsistent with the purpose of § 301, which is primarily a jurisdictional statute intended to ensure the uniform interpretation of CBAs. And because preclusion of federal statutory claims is so divorced from the purpose of § 301, the panel's idea of preclusion creates absurd and confusing results, as this case shows. But the most fundamental problem is the most obvious. A statute passed by Congress to help maintain a uniform body of federal labor law does not somehow nullify a different statute passed by Congress to, among other objectives, eradicate organized attempts to defraud through a pattern of racketeering activity. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49–50 (1974) ("In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress.").

Though this is the panel's most fundamental error, it is not the only one. The panel applies a presumption of arbitrability contrary to Supreme Court precedent and creates an agreement to arbitrate RICO claims, even though the parties never signed such an agreement.[1] By doing so, the panel invents a new

[1] Even if plaintiff Columbia Export Terminal, LLC ("CET") and the International Longshore and Warehouse Union ("ILWU") had contracted to arbitrate such a dispute, which they did not, CET's RICO claim would still not be precluded.

rule. Absent an explicit arbitration exclusion clause, every issue that could relate to a CBA must be arbitrated—even if the parties never specifically agreed to arbitrate that issue. *Contra Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute."). The panel also does not provide any coherent principle that limits its new rule. If alleged fraud must be arbitrated as the panel claims, which other RICO predicate acts and federal statutory claims must be arbitrated? We should have reheard this case en banc to correct all these errors.

I.

The purpose of LMRA preemption of state law claims is to prevent divergent interpretations of a CBA. "The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). And our test for § 301 preemption reflects that purpose: state law claims are preempted if they are "founded directly on rights created by collective-bargaining agreements" or are "substantially dependent on analysis of a [CBA]." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quotation marks omitted); *see also, e.g.*, *McCray v. Marriott Hotel Servs., Inc.*, 902 F.3d 1005, 1010 (9th Cir. 2018).

When a plaintiff brings federal claims in federal court, the need for LMRA preemption disappears. The

supposed preclusion inquiry is whether the application of a federal statute would be plainly inconsistent with or frustrate the purpose of another federal statute. *See United States v. Est. of Romani*, 523 U.S. 517, 533 (1998). But how can *any* federal claim (much less a RICO claim) brought in federal court cause interpretations or applications of a CBA that conflict with § 301? A federal claim brought in federal court will necessarily be consistent with § 301's jurisdictional rule. And even if adjudicating a federal claim requires interpretation of a CBA, the court would simply apply federal common law, thus eliminating the risk of divergent interpretations of the CBA. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 451, 456 (1957). As Judge Ikuta noted in her dissent, "§ 301 has little work to do" here. Dissent, 31.

The panel conflates LMRA and Railway Labor Act ("RLA") preemption[2] in an attempt to justify the untenable position that "[w]hether called 'preemption' or 'preclusion,' [this] approach applies whether the conflicting statute is a federal or state provision." Op. 18. The panel claims that "[i]n *Hubbard* [*v. United Airlines, Inc.*, 927 F.2d 1094, 1098 (9th Cir. 1991)] . . . we held that the RLA, which . . . preceded the enactment of RICO, preempted a fraud claim under RICO." Op. 18. The panel also claims that *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), "reiterated the general rule in favor of compelling arbitration in labor disputes." Op. 27 (quoting 480 U.S. at 565–67).

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[2] "The RLA establishes a comprehensive scheme governing labor relations on railroads and airlines." *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1007 (9th Cir. 1990) (per curiam).

But there is no basis to the panel's claim that preemption under the RLA and LMRA is the same, or its claim that this incorrect premise somehow allows the LMRA to preclude federal statutory claims. Although both "RLA and LMRA § 301 preemption are, in effect, a kind of 'forum' preemption," *Alaska Airlines*, 898 F.3d at 922, the two statutes are very different. In the RLA, Congress established a mandatory arbitral forum superintended by the National Railroad Adjustment Board for disputes relating to the formation, interpretation, or application of relevant CBAs. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 74 (2009). Thus, some federal claims brought in federal court that involve the interpretation of such CBAs are in the wrong forum. *See Hubbard*, 927 F.2d at 1098.

In contrast, § 301 was enacted to ensure "specific performance of promises to arbitrate grievances under [CBAs]." *Lincoln Mills*, 353 U.S. at 451; *see id.* at 452 ("Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p.42)). That is, the LMRA itself does not prescribe the arbitration mechanism that parties must use, but merely facilitates the enforcement of CBAs through federal courts.[3]

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[3] Of course, a federal court may be unable to decide a federal claim if the parties have agreed to arbitrate it. But an agreement to arbitrate a claim does not mean the claim is preempted or precluded. A party, for example, cannot bring any claim that the party has released or that is barred by issue or claim

Unlike the RLA, the LMRA "does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements." *Hawaiian Airlines*, 512 U.S. at 263 n.9. So even though we use the same test to determine preemption under the RLA and the LMRA, the results are different. When a claim is preempted under the RLA, the plaintiff's claim is sent to the RLA's mandatory arbitration process. *See Hawaiian Airlines*, 512 U.S. at 252–53. But when a state law claim is preempted under the LMRA, it "must either be treated as a § 301 claim" under the complete preemption doctrine "or dismissed as pre-empted by federal labor-contract law," thus extinguishing the state law claim. *Allis-Chalmers*, 471 U.S. at 220. If the claim is treated as a federal common law contract claim, we might dismiss it "for failure to make use of the grievance procedure established in the collective-bargaining agreement." *Id.* at 220–21 (emphasis added).[4] But there is no basis for precluding a federal statutory claim under the LMRA or RLA. Indeed, contrary to the panel's position, *Buell* held that "[t]he fact that an injury otherwise compensable under the [Federal Employers' Liability Act ("FELA")] was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his

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preclusion. *See, e.g.*, *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020). But that doesn't mean the claim is "precluded," as the panel uses the term.

[4] "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis added).

opportunity to bring an FELA action." 480 U.S. at 564.

Because the panel's erroneous extension of LMRA preemption to federal law claims contravenes long-standing Supreme Court caselaw, the panel opinion creates a circuit split. The Sixth Circuit has correctly recognized that, when a claim is "based on a federal cause of action and is in federal court, there is no danger of divergent application of a CBA's provisions by state courts; thus, the motivating purpose of § 301 preemption simply does not apply." *Watts v. United Parcel Serv., Inc.*, 701 F.3d 188, 192 (6th Cir. 2012). The Sixth Circuit declined to extend § 301's preemption analysis to plaintiff's ADA claim and instead concluded that "§ 301 of the LMRA does not preempt a claim brought in federal court under the ADA." *Id.* at 193. It is unclear how the panel believes that "[its] holding here is entirely consonant with *Watts*," Op. 17 n.2, while also acknowledging *Watts*'s holding that "the motivating purpose of § 301 preemption simply does not apply" when a federal statutory claim is brought in federal court, Op. 16.

The panel claims that "at least two circuits have held that the LMRA precludes FLSA [Fair Labor Standards Act] claims," Op. at 18 n.3, citing *Martin v. Lake County Sewer Co., Inc.*, 269 F.3d 673 (6th Cir. 2001), and the case it relied on, *Vadino v. A. Valey Engineers*, 903 F.2d 253 (3d Cir. 1990). But those cases applied the National Labor Relations Act's ("NLRA") six-month statute of limitations to a particular class of claims brought under the LMRA and FLSA. Although applying the NLRA's statute of limitations may lead to the dismissal of a late-filed

FLSA claim, that result is assuredly not § 301 preclusion.

The panel opinion claims that § 301 both preempts state law claims *and sub silentio* precludes federal law claims. In an attempt to justify this position, the panel conflates LMRA and RLA preemption. Because there is no basis for conflating preemption under the LMRA and RLA, or for extending that preemption to preclude federal law claims, the panel opinion needlessly creates a circuit split.

II.

The panel creates a presumption of arbitrability contrary to Supreme Court precedent and, in doing so, rewrites the CBA to require arbitration of RICO claims—despite conceding that "[r]esolution of the RICO claims will . . . require interpretation of the CBA to determine how it applies, if it does, to an issue which its express terms do not appear to discuss." Op. 21 (emphasis added). But *Granite Rock* held that the presumption applies "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." 561 U.S. at 301 (emphasis added). As I discuss below, the CBA here is not ambiguous—its arbitration provision does not cover CET's RICO claims. Thus, the presumption does not apply.

The panel suggests that the presumption in favor of arbitration applies whenever the parties have agreed to arbitrate some matters under a CBA and dispute only whether the CBA covers the claims alleged. Op. 26. But *Granite Rock* specifically rejected such an argument. "Although [*United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S.

574 (1960)] contains language that might in isolation be misconstrued as establishing a presumption that labor disputes are arbitrable whenever they are not expressly excluded from an arbitration clause . . . the opinion elsewhere emphasizes that even in LMRA cases, 'courts' must construe arbitration clauses because 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Granite Rock*, 561 U.S. at 301 n.8.

Perhaps recognizing the difficulty of applying the presumption to the CBA at issue, the panel attempts to rewrite it. Under the CBA here, "grievances" must be arbitrated. The CBA defines a grievance as any dispute about the "interpretation, application, or violation" of the CBA and the panel claims that interpretation and application of the CBA are involved here. Op. 20–27. But CET's dispute with the defendants concerns the alleged submission of fraudulent timesheets, and proof of such fraud does not require any interpretation or application of the CBA. That is especially so because CET's complaint alleges that some employees did "not show[ ] up at all and yet those who did show up submit[ted] time sheets indicating that the absent employee worked a full shift."

The panel points to various provisions of the CBA that require an employee who is sent home early to be paid for a half or full shift, as well as provisions that require paid meal periods, paid holidays, and paid vacation time. Op. 20–22. These hypothetical defenses may explain why employees may receive pay for time they do not work, but these hypothetical defenses do not authorize an employee to submit a timesheet on behalf of an absent employee. Nor do the provisions of the CBA explain why an employee

might submit a timesheet claiming hours that were not actually worked—especially if that employee did not show up to work.

The panel states that an issue may be "whether employees can claim all of their compensable hours in their weekly timesheets, or whether they must simply list time actually worked." Op. 21. But, in the panel's own words, the CBA's "express terms do not appear to discuss" this issue, *id.*, thus admitting that CET's RICO claims likely depend on an issue that the CBA does not discuss. This is not merely a dispute over the hours that an employee worked and logged on a timesheet, but an allegation of a $5.3 million fraudulent scheme executed by approximately 150 employees over four years. As Judge Ikuta's dissent states, "[p]roving the elements of mail and wire fraud here requires only a factual inquiry into whether employees claimed they were working when they were not physically on site." Dissent, 40. That inquiry does not require interpretation of the CBA. The panel errs both in applying a presumption in favor of arbitration and in finding that the CBA requires arbitration of CET's RICO claims.

III.

The panel's creation of a presumption in favor of arbitration and an agreement to arbitrate where none exists is not only legally erroneous, but also practically harmful. First, as plaintiff points out, the panel opinion "creates a new standard under which statutory claims are subject to arbitration unless a CBA expressly excludes statutory claims from the CBA's arbitration procedures." PFREB 3. The notion that any claim that is not expressly excluded is

arbitrable largely defeats the point of negotiating a CBA; the scope of arbitration would become comprehensive no matter what the CBA says, unless it explicitly excludes from arbitration a laundry list of claims. And typical CBAs (those without a laundry list of exclusions) will prove no less troublesome in litigation, forcing courts to deduce parties' arbitration intent from what they didn't say, rather than read the written agreement to determine what they specifically agreed to arbitrate. The panel's opinion will lead to a mass of arbitrations never contemplated by a CBA.

Second, there would be no objectively discernible rule to decide which federal statutory claims must be sent to arbitration and which can proceed in court. The panel argues that CET tried to circumvent arbitration by presenting "claims which are, in substance, labor disputes" as federal statutory claims. Op. 17. But the panel fails to explain how "Individual Defendants not showing up at all and yet those who did show up submitting time sheets indicating that the absent employee worked a full shift," is a contractual claim that was "artful[ly] plead[ed]" as a RICO claim. Op. 17. CET's claim describes precisely the kind of activity that RICO prohibits: "It shall be unlawful for any person employed by . . . any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). If fraud of this nature must be sent to arbitration in the panel's view, a CBA's arbitrability scope would be almost limitless, as almost any claim would relate to

the CBA. If there is any limiting principle as to which claim must be arbitrated, I don't discern it.[5]

IV.

Section 301 of the LMRA is a far-reaching provision that affects every CBA in "an industry affecting commerce." 29 U.S.C. § 185(a). Until now, we have consistently applied § 301 preemption to further the statute's purpose of promoting uniform interpretations of CBA provisions. Today, the panel wrongly strips federal courts of jurisdiction to hear federal claims under the guise of "preclusion." The panel's error is magnified by the lack of a limiting principle that explains which claims must be arbitrated and which can proceed to litigation, and by the panel's misconception of how to determine when a CBA mandates arbitration. The actual standard requires a court to submit to arbitration only disputes that the parties have specifically agreed to submit. *See Granite Rock*, 561 U.S. at 302. Because of the panel opinion, the standard in our Circuit will require us to submit to arbitration any claims that were not expressly excluded, even if there was no agreement to arbitrate such claims. This erroneous change will harm both labor and management.

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[5] This case involved alleged mail and wire fraud. But crimes such as arson, bribery, extortion, theft, embezzlement, obstruction of justice, and witness tampering can also be predicate acts under 18 U.S.C. § 1961(1). It takes little imagination to foresee how each of these predicate criminal acts by management or labor could be related to a CBA. It also takes little imagination to see how a vast number of other federal statutory claims brought by labor or management could also be related to a CBA.

For all these reasons, I respectfully dissent from our decision not to rehear this case en banc.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON ADOPTING MAGISTRATE REPORT AND DISMISSING WITHOUT PREJUDICE (DECEMBER 20, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA EXPORT TERMINAL, LLC,

Plaintiff,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; ET AL.,

Defendants.

Case No. 3:18-cv-2177-JR

Before: Michael H. SIMON,
United States District Judge.

Michael H. Simon, District Judge.

United States Magistrate Judge Jolie A. Russo issued Findings and Recommendation ("F&R") in this case on June 12, 2019. ECF 103. Magistrate Judge Russo recommended that the motion to dismiss filed by Defendant International Longshore and Warehouse

Union ("ILWU") and joined by the individual defendants be granted and this case dismissed.[1]

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although without objections no review is required, the Magistrates Act "does not preclude further review by the district judge[ ] *sua sponte* . . . under

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[1] Plaintiff objects that this case should not be dismissed with prejudice because Plaintiff may want to proceed with the grievance process that Judge Russo found was not properly exhausted. Judge Russo, however, did not recommend that this case be dismissed with prejudice. The F&R is silent with respect to whether the recommended dismissal is with or without prejudice. Absent a specific recommendation to dismiss with prejudice, the Court does not construe a recommended dismissal as one with prejudice.

a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

For those portions of Magistrate Judge Russo's F&R to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent, and those portions are adopted.

Plaintiff timely filed an objection. ECF 109. Plaintiff argues that Judge Russo applied the incorrect "preemption" standard instead of the "preclusion" standard when considering whether § 301 of the Labor-Management Relations Act ("LMRA") precludes Plaintiff from bringing claims in federal court under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff argues that the "preclusion" test requires evaluating whether there is a true "conflict" between RICO and the LMRA and, if there is, the later-passed RICO must be given supremacy unless there is some indication of Congressional intent that the LMRA should govern.

Judge Russo noted that when two federal statutes are at issue, the proper term is "preclusion" instead of "preemption," but that the analysis under the LMRA is the same as with preemption. She also noted that the terms often are used interchangeably, and thus she used them interchangeably. Judge Russo cited many cases under the LMRA and the Railway Labor Act ("RLA") that apply the same "preemption" test in deciding questions of preclusion

between federal statutes.[2] Judge Russo described and applied the relevant two-part test—first examining whether the asserted cause of action involves a right conferred by law independent of the parties' collective bargaining agreement ("CBA") and, if so, asking whether the right is nevertheless substantially dependent on the CBA.

Plaintiff argues that Judge Russo, the cases she cited, and the cases cited by ILWU all applied the incorrect test, either improperly considering preemption instead of preclusion or without directly considering the issue because the differences between the two were not raised. Plaintiff also asserts that the Ninth Circuit has "*sub silentio*" overruled *Hubbard v. United Airlines*, 927 F.2d 1094 (9th Cir. 1991), which applied the preemption test in finding that the RLA preempted claims under RICO. Besides the generally disfavored concept of silent reversals, the Ninth Circuit recently held that "[i]n evaluating RLA or LMRA § 301 preemption we are guided by the principle that if a state law claim 'is either grounded in the provisions

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[2] RLA and LMRA cases are evaluated under the same test for preemption and preclusion, and the Court rejects Plaintiff's objection that the differences in the statutes' arbitration standards require a different test for preclusion. *See, e.g.*, *Alaska Airlines, Inc. v. Schurke*, 898 F.3d 904, 918 n.7, 920 (2018) (*en banc*) (applying the same test despite noting the differences in the "source of the obligation to arbitrate" between the two statutes, and noting that "in practice" nearly all disputes are arbitrated under the LMRA despite the difference in text, and that the "end purposes of LMRA § preemption and RLA preemption are the same—to enforce 'a central tenet of federal labor-contract law . . . that is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance'" (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)).

of the labor contract or requires interpretation of it,' the dispute must be resolved through grievance and arbitration." *Alaska Airlines, Inc. v. Schurke*, 898 F.3d 904, 920 (2018) (*en banc*). The Ninth Circuit expressly stated: "The same principle applies to federal law claims, although they might better be described as 'precluded.'" *Id.* at 920 n.4 (emphasis added).[3] The court detailed the two-step test applied by Judge Russo arising from that governing principle applicable to both state and federal law claims and then explained:

> As this two-step preemption inquiry suggests, RLA and LMRA § 301 preemption differ from typical conflict preemption because they are not driven by substantive conflicts in law. Rather, RLA and LMRA § 301 preemption are grounded in the need to protect the proper forum for resolving certain kinds of disputes (and, by extension, the substantive

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[3] The Seventh Circuit has also similarly explained federal labor "preemption," including LMRA preemption of federal claims. *See United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 864 (1998) (noting that the Supreme Court has explained that interpretative uniformity and predictability require that labor-contract disputes be resolved by reference to federal law and uniform federal interpretation and "to maintain that 'uniformity and predictability,' the preemptive force of § 301 displaces any independent federal or state cause of action when the claim concerns a legitimate labor dispute and involves the breach of a collective bargaining agreement" (emphasis added) (quoting *Allis-Chalmers Corp. Lueck*, 471 U.S. 202, 211 (1985)). The Seventh Circuit also explained that federal courts may decide labor law questions that are "collateral issues in suits brought under independent federal remedies" and § 301 preemption does not apply if claims involve the application of "independent federal statutes" that "concern only collateral issues of labor law." *Id.*

> law applied thereto). RLA and LMRA § 301 preemption are, in effect a kind of 'forum' preemption, resembling the doctrine of primary jurisdiction or the reference of disputes to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

Id. at 922 (emphasis in original). Thus, the Ninth Circuit has not silently overruled applying the preemption test to analyzing whether federal claims are precluded by the RLA and LMRA, but has, sitting *en banc*, expressly reaffirmed that test.

If Plaintiff believes that a different test should be applied when evaluating whether a federal law claim is precluded by the RLA or LMRA, that is an issue for Plaintiff to take up with the Ninth Circuit. This Court must follow Ninth Circuit precedent. Thus, Plaintiff's objection that Judge Russo applied the incorrect preemption test is rejected. That portion of Judge Russo's F&R is adopted.

Plaintiff also objects that Judge Russo incorrectly concluded that Plaintiff's claims would require substantial analysis of the CBA because Judge Russo failed to appreciate that the CBA only applies to Defendants' defense and Judge Russo identified no "ambiguous" term of the agreement. Plaintiff further argues that the grievance process of the CBA does not apply to RICO claims, does not apply to claims against ILWU but only claims against the local unions, and is not a mandatory requirement for claims brought by Plaintiff as the employer, but is only mandatory for claims brought by employees.

Plaintiff's objection that the CBA is only relevant to Defendants' defense misunderstands how RICO

claims are considered in the context of evaluating mail and wire fraud predicate crimes in these types of cases. The alleged acts are not mail or wire fraud unless they were fraudulent or part of a scheme to defraud, cheat, or deceive. The acts were not fraudulent if they were permitted under the CBA. Thus, as explained by Judge Russo, interpretation of the CBA is necessary to determine whether the disputed time entries were or were not appropriate and compensable under the CBA. *Accord Underwood v. Venango River Corp.*, 995 F.2d 677, 685 (7th Cir. 1993) ("The only rights the plaintiffs seek to vindicate through their RICO claim, *i.e.*, seniority and severance benefits, originate in the CBA."); *Merryman Excavation, Inc. v. Int'l Union of Operating Eng'rs.*, 552 F. Supp. 2d 745, 750 (N.D. Ill. 2008) ("Local 150's acts in sending mailings are only illegal if Local 150 had no contractual right to send them, a fact that is contingent upon determination of the terms of the CBA. Put another way, whether Defendants committed mail fraud and extortion allegations hinges upon a finding that the underlying decision of the JHC were invalid or were otherwise inconsistent with the terms and spirit of the CBA." (citation omitted)).

Nor is it required for § 301 preclusion that the case involve an "ambiguous" term of the CBA. The parties dispute whether the allegedly improper time entries are fraudulent and not compensable under the CBA, as asserted by Plaintiff, or are appropriate and compensable under the CBA, as Defendants contend. Thus, this case essentially involves a claim that is substantially dependent upon an analysis of the CBA, as Judge Russo found. The Court also has considered, and rejected, Plaintiff's other objections,

and adopts Judge Russo's F&R in full after conducting a *de novo* review.

The Court ADOPTS Magistrate Judge Russo's Findings and Recommendation, ECF 103. ILWU's Motion to Dismiss (ECF 23) is GRANTED and this case is dismissed without prejudice.

IT IS SO ORDERED.

DATED this 20th day of December, 2019.

/s/ Michael H. Simon
United States District Judge

FINDINGS AND RECOMMENDATION OF THE MAGISTRATE JUDGE (JUNE 12, 2019)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA EXPORT TERMINAL, LLC,

Plaintiff,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; ET AL.,

Defendants.

Case No. 3:18-cv-2177-JR

Before: Jolie A. RUSSO,
United States Magistrate Judge.

FINDINGS AND RECOMMENDATIONS

RUSSO, Magistrate Judge:

Plaintiff Columbia Export Terminal, LLC ("CET") brings this action against defendant International Longshore and Warehouse Union ("ILWU"), as well as approximately 150 individually named ILWU members, asserting violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). ILWU moves to dismiss CET's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, ILWU moves for partial sum-

mary judgment. The individually named defendants subsequently joined in ILWU's motion. For the reasons stated below, ILWU's motion to dismiss should be granted, ILWU's motion for partial summary judgment should be denied as moot, and this case should be dismissed.

BACKGROUND

CET operates a grain export terminal, Terminal 5, at the Port of Portland. Am. Compl. ¶ 5 (doc. 61).[1] CET receives grain from inland areas via rail or barge, unpacks the grain at the Port, and then loads it onto ocean-going ships for transport to customers in Asia. *Id.* The individually named defendants are current or former hourly employees who were dispatched from the Pacific Maritime Association ("PMA")/ ILWU hiring hall to work at Terminal 5. *Id.* at ¶¶ 1, 7, 8, 58. They are each members of one of two ILWU local chapters, Local 8 or Local 92, and are therefore governed by a collective bargaining agreement ("CBA"). That Agreement dictates the terms and conditions of their work for CET. *Id.* at ¶ 8; Williams Decl. Ex. A (doc. 27).

Employees are tasked with submitting timesheets to their walking boss, or foreman, indicating the

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[1] After briefing on ILWU's motion was complete, CET filed an unopposed motion to amend the complaint in order to "correct the names of certain defendants whose proper names were not apparent from the time sheets available to CET at the time it initiated this lawsuit, and to make related and minor correction to the damages calculations," which the Court granted. CET's Mot. Am. 1-2 (doc. 59). The parties subsequently stipulated that the filing of the Amended Complaint did not moot the present motion. *See generally* Joint Stipulation (doc. 76).

hours worked. Am. Compl. ¶ 9 (doc. 61). The walking boss then delivers each timesheet to CET, who forwards the timesheets via interstate wire to PMA in California. *Id.* at ¶ 10. Based on those timesheets, PMA compensates the longshore workers (by depositing wages to their bank accounts) and charges CET for the payments. *Id.* PMA also uses the timesheets to charge CET for assessments used to contribute to employee PMA/ ILWU benefit funds. *Id.*

In 2014, the individually named defendants began furnishing timesheets "indicating time worked for employees who did not work, and were not even at Terminal 5, for some or all of the indicated time," as revealed by the "Terminal 5 guard logs." *Id.* at ¶ 11. According to CET, these "inflated" timesheets led to "overbilling" in the amount of $5,319,509 as of 2018. *Id.* at ¶¶ 12–13.

In December 2018, CET commenced this lawsuit alleging seven claims under 18 U.S.C. § 1962. *See generally id.* In March 2019, ILWU filed the present motion to dismiss. Briefing was completed on that motion in May 2019.

STANDARDS

Where the plaintiff "fails to state a claim upon which relief can be granted," the court must dismiss the action. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For the purposes of the motion to dismiss, the complaint is liberally construed in favor of the plaintiff and its allegations are taken as true. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983). Regardless, bare

assertions that amount to nothing more than a "formulaic recitation of the elements" of a claim "are conclusory and not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009). Rather, to state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Bacca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show "that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Substantive law on an issue determines the materiality of a fact. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the non-moving party determines the authenticity of the dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply when evaluating a summary judgment motion: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts

must be viewed in the light most favorable to the nonmoving party. *T.W. Elec.*, 809 F.2d at 631.

DISCUSSION

ILWU argues that CET's claims should be dismissed for three reasons. First, ILWU asserts this lawsuit is preempted under § 301 of the Labor Management Relations Act ("LMRA") because CET's RICO claims require interpretation of the underlying CBA; inasmuch as CET's RICO claims are supplanted by § 301, they fail because CET has not exhausted the CBA's grievance procedures.[2] Def.'s Mot. Dismiss 12-16 (doc. 23). Second, ILWU contends the complaint offers only conclusory allegations that fail to state a claim. *Id.* at 16-28. Third, ILWU argues that it is entitled to summary judgment on Counts One, Two, Four, and Five "because undisputed record facts establish that ILWU did not receive increased dues payments as a result of the alleged timecard scheme." *Id.* at 28-31.

I. Whether CET's RICO Claims Are Preempted by Section 301 of the LMRA

Section 301 of the LMRA states: "Suits for violation of contracts between an employer and a labor

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[2] ILWU produced the CBA between CET and Locals 8 and 92, which the Court can consider in evaluating whether dismissal is appropriate in this context. *Stallcop v. Kaiser Found. Hosp.*, 820 F.2d 1044, 1048 (9th Cir. 1987); *see also Marcus v. United Postal Serv.*, 2014 WL 3421552, *3 (N.D. Cal. July 14, 2014) ("[t]he CBA need not be directly mentioned in the complaint in order for any of its claims to be preempted by the LMRA") (collecting cases). CET does not dispute the authenticity of the CBA attached as Exhibit A to the Williams' Declaration.

organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a).[3] Although "§ 301 reads as a jurisdictional statute [it] is not simply jurisdictional." *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1032 (9th Cir. 2016) (citation and internal quotations omitted). Rather, § 301 is "a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Id.* (citation and internal quotations omitted).

State and federal claims "grounded in the provisions of a CBA or requiring interpretation of a CBA" are preempted by the LMRA.[4] *Id.*; *see also Underwood v. Venango River Corp.*, 995 F.2d 677, 684-85 (7th Cir.

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[3] Both parties rely on precedent arising under another federal labor law, the Railway Labor Act ("RLA"). Def.'s Mot. Dismiss 12-13 (doc. 23); Pl.'s Resp. to Mot. Dismiss 8 (doc. 40). "The standard for preemption under the RLA is virtually identical to the pre-emption standard under § 301 of the Labor Management Relations Act," such that the Court's analysis relies on both RLA and LMRA cases. *Wolfe v. BNSF Ry. Co.*, 749 F.3d 859, 865 n.2 (9th Cir. 2014) (citation and internal quotations omitted).

[4] Preclusion, not preemption, is technically the correct term for describing the relationship between two federal laws. *Felt v. Atchison, Topeka & Santa Fe Ry. Co.*, 60 F.3d 1416, 1418-19 (9th Cir. 1995). However, as denoted herein, the preclusion inquiry in this context "is similar to the preemption analysis . . . because both preemption of state law and preclusion of federal statutory remedies are questions of congressional intent." *Id.* at 1419; *see also Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 922-24 (9th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 1445 (2019) (describing the Congressional purpose behind the LMRA). With this in mind, the Court uses these terms interchangeably for ease of reference.

1993), *overruled on other grounds by Hawaiian Airlines Inc. v. Norris*, 512 U.S. 246 (1994) (applying the analytical framework outlined in *Kobold* to evaluate whether the plaintiff's RICO claims were preempted by federal labor law). "In addition to promoting the development of a uniform federal labor law, [this rule] is designed in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state [and federal] law and lingering hostility toward extrajudicial dispute resolution." *Kobold*, 832 F.3d at 1032 (citation and internal quotations omitted).

To determine whether a claim is preempted or precluded, the court applies a two-part test. First, the court examines whether the asserted cause of action involves a right conferred by law independent of the CBA. *Id.* If the right underlying the plaintiff's claims exists independently of the CBA, the court "moves to the second step, asking whether the right is nevertheless substantially dependent on analysis of a collective-bargaining agreement." *Id.* (citations and internal quotations omitted). This inquiry "turns on whether the claim can be resolved by 'looking to' versus interpreting the CBA. If the latter, the claim is preempted; if the former, it is not." *Id.* at 1033 (citations and internal quotations and brackets omitted). In the context of § 301, "the term 'interpret' is defined narrowly–it means something more than 'consider,' 'refer to,' or 'apply.'" *Id.* (citation and internal quotations omitted).

If a state or federal claim is grounded in the CBA or substantially dependent upon analysis of its terms, it "must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law."

Id. at 1034 (citation and internal quotations omitted). If the CBA prescribes mandatory grievance or arbitration procedures for the resolution of CBA-related disputes, a party governed by the CBA "usually cannot succeed in a suit under § 301 to vindicate personal contract-based rights unless the contractual grievance-arbitration procedure is invoked." *Id.* (citation omitted). The exhaustion requirement prevents parties bound by the CBA "from sidestepping available grievance procedures [and ensures that any] arbitration provisions do not lose their effectiveness." *Truex v. Garrett Freightliners, Inc.*, 785 F.2d 1347, 1353 (9th Cir. 1985) (citation omitted).

The parties here do not dispute that this case involves a right conferred upon CET by federal law. Def.'s Mot. Dismiss 14-15 (doc. 23); Pl.'s Resp. to Mot. Dismiss 1-23 (doc. 40). The Court then initially must decide whether—under the second step—CET's RICO claims can be resolved by mere reference to, as opposed to interpretation of, the CBA. CET wholly failed to address this issue, despite being afforded the opportunity to submit both excess and supplemental briefing.[5] *See Justice v. Rockwell Collins. Inc.*, 117

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[5] Because CET's 43-page opposition did not address critical aspects of ILWU's motion, the Court ordered supplemental briefing in regard to: (1) whether the CBA in this case made the grievance process mandatory for CET, assuming resolution of its RICO claims did require interpretation thereof; and (2) what preclusive impact, if any, § 301 has if the grievance process is not unambiguously mandatory in regard to an employer. In response to these questions, CET reiterated arguments raised in its opposition, as well as clarified its position that ILWU's invocation of a defense based on the CBA does not trigger § 301 even if it applied to federal claims. Pl.'s Suppl. Br. 1-5 (doc. 81). CET also asserted for the first time that ILWU cannot now rely on the CBA because it failed to move to compel arbitration. *Id.*

F.Supp.3d 1119, 1134 (D. Or. 2015), *aff'd*, 720 Fed. Appx. 365 (9th Cir. 2017) ("if a party fails to counter an argument that the opposing party makes . . . the court may treat that argument as conceded") (citation and internal quotations and brackets omitted). Instead, CET primarily contends that RICO is not "implicitly repealed" by the LMRA because those statutes are not in conflict and, in any event, RICO is the later enacted statute. Pl.'s Resp. to Mot. Dismiss 1-5 (doc. 40).

Essentially, CET maintains that the doctrine of § 301 preemption is inapplicable, as a matter of law, to federal RICO claims. *See* Pl.'s Suppl. Br. 2 (doc. 81) ("it is simply not possible for § 301 to have any 'preclusive' effect on CET's RICO claims"). In support of this assertion, CET relies on cases involving Title VII or Fair Employment and Housing Act claims (or other independent statutory rights that are not grounded in a CBA or substantially dependent upon analysis of a CBA's terms), or *Garmon* preemption,[6]

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at 3, 5-7. Concerning the latter, the precedent cited throughout makes clear that no such motion is required under the present circumstances.

[6] Pursuant to the doctrine of *Garmon* preemption, "state and federal courts must defer to the exclusive jurisdiction" of the National Labor Relations Board ("NLRB") if "an activity is arguably prohibited or protected by sections 7 or 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq." *Milne Emps. Ass'n v. Sun Carriers*, 960 F.2d 1401, 1413 (9th Cir. 1991) (as amended). There is no indication in the present case that CET's claims fall within the ambit of the NLRA and/or the NLRB's primary jurisdiction. *See* Def.'s Reply to Mot. Dismiss 10 (doc. 58) ("ILWU has never contended that the NLRB has jurisdiction . . . CET's claims require CBA interpretation to resolve; an arbitrator, not the NLRB, has authority to so interpret"). As such, CET's contentions concerning primary jurisdiction are wholly irrelevant to the issue of § 301 preemption;

and repeatedly asserts that *Hubbard v. United Airlines*, 927 F.2d 1094 (9th Cir. 1991) (the primary Ninth Circuit authority cited by ILWU) is no longer good law. Pl.'s Resp. to Mot. Dismiss 7-9, 16, 19-23 (doc. 40). Additionally, CET contends arbitration is not proper because the CBA "does not apply to statutory claims," ILWU and the individually named defendants are not parties to the CBA, and the CBA's grievance process is not mutually mandatory. *Id.* at 5-20.

Thus, CET either side-steps the issues before the Court or relies on inaccurate statements of law. As ILWU observes, "CET's opposition brief reads as though ILWU invented the doctrine of Section 301 preemption and preclusion out of whole cloth." Def.'s Reply to Mot. Dismiss 4 (doc. 58). As addressed herein, it is well-established that the LMRA supplants federal causes of action grounded in or requiring interpretation of a CBA. *See Pearson v. N.W. Airlines, Inc.*, 659 F. Supp. 2d 1084, 1087-89 (C.D. Cal. 2009) ("[it] is a matter of settled law in the Ninth Circuit, as well as all other circuits to have considered the question," that the RLA applies to and can preempt federal claims dependent on a CBA) (collecting cases).

This form of preemption or preclusion "is not driven by substantive conflicts of law" as CET main-

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by extension, cases arising under *Garmon* or relating to the NLRA/NLRB are inapplicable. *See Brennan v. Chestnut*, 973 F.2d 644, 647 n.3 (8th Cir. 1992) (preemption under § 301 presents a "separate issue" from "preemption under *Garmon* and the NLRA" or, in other words, the NLRB's primary jurisdiction); *see also Milne*, 960 F.2d at 1408-18 (addressing *Garmon* preemption as an alternate basis for dismissal only after concluding that "four of [the plaintiff's] seven state law claims are not preempted by section 301").

tains, but rather by "the need to protect the proper forum for resolving certain kinds of disputes (and, by extension, the substantive law applied thereto)." *Alaska Airlines*, 898 F.3d at 922. In the context of the LMRA, "the purpose of Congress is to protect the role of grievance and arbitration and of federal labor law in resolving CBA disputes," meaning that § 301 procedurally effectuates "forum preemption" that does not risk "wholesale invalidation" of any state or federal law; it challenges only "the plaintiff's pleading." *Id.* at 923-26 (citations omitted).

As such, CET's first argument is misguided. This is especially true given that *Hubbard* has not, in fact, been overruled in regard to the proposition for which it is cited. The sole point *Hubbard* has been criticized for is its holding that "preemption under the RLA is broader than under § 301." *Hubbard,* 927 F.2d at 1097-98; *see also Hawaiian Airlines*, 512 U.S. at 263 n.9 (clarifying that the LMRA's preemption standard applied to RLA cases, in contravention of *Hubbard*). The Supreme Court thus did not overturn *Hubbard's* conclusion that the RLA or the LMRA could preempt a RICO claim. *Id.*

Significantly, cases emanating *post-Hawaiian Airlines* have continually reaffirmed § 301's preclusive effect where the plaintiff's federal claims were grounded in the CBA or required interpretation thereof. *See, e.g.*, *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 864-72 (7th Cir. 1998) ("the preemptive force of § 301 displaces any independent federal or state cause of action when the claim concerns a legitimate labor dispute and involves the breach of a collective bargaining agreement"); *Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 836 (10th Cir. 1996) (in deciding

§ 301 preemption, "the threshold question remains whether resolution of the federal and state law claims of the plaintiffs requires interpretation or application of the CBA"); *see also Chicago Dist. Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc.*, 915 F.Supp. 939, 944-45 (N.D. Ill. 1996) (noting that, although the Supreme Court had not directly decided the issue, it was nonetheless clear following *Hawaiian Airlines* that "Congress intended the [LMRA] to preempt RICO claims"); *Johnson v. D.M. Rothman Co., Inc*, 861 F.Supp.2d 326, 332-33 (E.D. N.Y. 2012) (LMRA precluded employee's federal claim relating to certain wages because resolving that claim necessitated interpretation of the CBA).

Moreover, the fact that defendants are not signatories to the CBA is immaterial. *Painting & Decorating Contractors Ass'n of Sacramento v. Painters & Decorators Joint Comm. of E. Bay Ctys.*, 707 F.2d 1067, 1068-71 (9th Cir. 1983); *see also Bloom v. Universal City Studios, Inc.*, 734 F.Supp. 1553, 1559 (C.D. Cal. 1990), *aff'd*, 933 F.2d 1013 (9th Cir. 1991) (state law claim alleging breach of CBA against non-signatory defendant was subject to § 301 preemption). This is especially true considering that CET and the relevant local ILWU unions are named therein, and the CBA expressly creates an avenue of redress for both union members and employers. Williams Decl. Ex. A, at 1, 14-16 (doc. 27).

As discussed in greater detail below, the fact that the grievance process may not be unambiguously mandatory in regard to CET does not excuse CET from following that process. CET's remaining argument—that the CBA does not require it to arbitrate a violation of statutory rights (only violations of the CBA)—

merely presumes that the complaint's RICO claims are not precluded under § 301.

Moving on to the substantive merits of ILWU's motion, CET alleges the existence of an inflated timecard scheme perpetuated through the predicate acts of mail and wire fraud. Am. Compl. ¶¶ 8-17, 24-25, 27, 32-33, 39, 44, 47, 54-55, 64, 66 (doc. 61). In essence, the issue presented by the complaint is whether the individually named defendants were entitled, in whole or in part, to any of the approximately five million dollars in regular and overtime wages tendered between 2014 and 2018.

Several provisions of the CBA govern the circumstances under which employees are required to report to Terminal 5 for work, as well as the wages that are authorized once on-site. Williams Decl. Ex. A (doc. 27). Notably, Section 3-1 permits CET to "schedule work as needed to meet production needs." *Id.* at 3. Section 13-4 clarifies:

> All employees shall be dispatched through the ILWU-PMA Dispatching Hall. When the Employer orders employees from the dispatcher, the Employer shall specify the classifications needed and how many of each classification the Employer requires. It is solely within the Employer's discretion how many employees it requires and what classifications it requires . . .

Id. at 12. Section 19-4 reiterates that CET has sole discretion to determine "the number of employees required to perform an operation." *Id.* at 19.

Pursuant to Section 4, once an employee is dispatched and reports to Terminal 5, he or she "shall

be paid" for a certain amount of work, irrespective of whether such work is available:

> 4-1 There shall be a guarantee of 8 hours of work to employees when ordered and turned to work . . .
>
> 4-3 In the event that the Employer cannot provide a full 8 hours of work, the time not worked shall be defined herein as dead time. Dead time on the day shift Monday through Friday shall be paid for at the straight time rate of pay.
>
> 4-4 All other dead time-nights, weekends and holidays-shall be paid at the prevailing rate of pay.
>
> 4-5 For employees ordered, reporting for work and not turned to, the 4-hour minimum shall apply, except where inability to turn to is a result of insufficient employees to start the operation . . .

Id. at 3.

The CBA goes on to articulate that employees breach the CBA by not timely arriving at "their assigned work station at the commencement time of their shift" or at the conclusion of a relief period, and by not "being there until the end of their assigned shift (not leaving their work station in advance of the designed quitting time)." *Id.* at 13. Yet the CBA also contemplates that employees may be ordered to Terminal 5 but "fail to report to work at all or on time," in which case replacement employees may be ordered and work will commence when "there are sufficient employees to work"; different rules apply

concerning what amount of work is compensable and the rate of pay in these scenarios. *Id.* at 4, 12-13. CET may file a written complaint with ILWU regarding any employee who fails to meet the CBA's timeliness and work-site reporting standards. *Id.* at 13. Likewise, CET "shall have the right to discharge any employee for," amongst other reasons, "failure to perform the work as required in accordance with the provisions of this Agreement."[7] *Id.* at 17.

The Court finds that, given the legal character of CET's allegations, its RICO claims can only be resolved by interpreting the CBA. Indeed, substantial analysis of the CBA's provisions would be required to decipher whether defendants committed the predicate acts of mail and wire fraud. Namely, the Court would need to ascertain if any of the individually named defendants had the right to dead time pay when they reported to Terminal 5 pursuant to either the 8-hour guarantee (if turned to work) or 4-hour minimum (if not turned to work). Stated differently, the circumstances under which the CBA prohibited employees from leaving their worksites in advance of the scheduled stop time and the effect, if any, of that prohibition on their pay are far from straightforward.

Similarly, the Court would need to weigh the parties' 2014 discussions about employees' freedom to coordinate breaks on a continuous 12-hour shift, as well as the fact that shift splitting and related prac-

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[7] The Court notes that the majority of cases invoking § 301 preemption (except those involving breach of no-strike provisions) involve claims brought by an employee as opposed to an employer, likely for the very reason that employers generally possess the additional contractual remedy of termination.

tices have been longstanding, open, and widespread throughout the longshore industry. Williams Decl. ¶¶ 6-8 (doc. 27); *see also Fry*, 88 F.3d at 836 ("a CBA . . . comprises express provisions, industry standards, and norms that the parties have created but have omitted from the collective bargaining agreement's explicit language") (citation and internal brackets and emphasis omitted); *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 215-16 (1985) (CBAs may contain implied as well as express terms).

In sum, while CET argues defendants engaged in an enterprise to overbill for hours not worked (implicitly in contravention of the CBA), ILWU contends these same hours were authorized expressly by CET (via personnel orders through the ILWU/PMA labor hall) and billed in accordance with the express and implied terms of the CBA that authorize shift splitting, compensation for dead time, etc. Both contentions conclusively establish, if nothing else, that CET's RICO claims are substantially dependent upon analysis of the CBA. *See Merryman Excavation, Inc. v. Int'l Union of Operating Eng'rs, Local 150, AFL-CIO*, 552 F.Supp.2d 745, 752 (N.D. Ill. 2008) (employer's "RICO claim is preempted by § 301" because resolving whether the defendants committed the requisite predicate act was "contingent upon determination of the terms of the CBA").

II. Whether CET was Required to Exhaust Available Grievance Procedures Before Filing Suit

Because the Court must look to and interpret the CBA to determine whether the alleged fraud occurred, CET's RICO claims are precluded by § 301

of the LMRA and the question becomes whether CET has exhausted any mandatory grievance procedures. As discussed above, federal labor policy dictates that a party alleging CBA-related claims is "[o]rdinarily . . . required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement" before filing suit. *DelCostello v. Int'l Bro. of Teamsters*, 462 U.S. 151, 163-64 (1983) (citation omitted). CET's briefs are silent as to this issue, such that the Court presumes the grievance process has not been attempted or perfected in regard to the present claims. Pl.'s Resp. to Mot. Dismiss 1-23 (doc. 40); Pl.'s Suppl. Br. 1-7 (doc. 81).

Accordingly, CET is foreclosed from proceeding with this lawsuit unless the parties to the CBA "expressly agreed that arbitration was not the exclusive remedy."[8] *Republic Steel Corp. v. Maddox*, 379 U.S.

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8 CET intimates that § 301 preclusion and the corresponding exhaustion requirement are irrelevant and the only issue is whether its "claims are arbitrable," which, in turn, hinges on whether ILWU moved to compel arbitration. Pl.'s Suppl. Br. 3, 5-6 (doc. 81). Section 301 merely ensures enforcement of the CBA and "[c]ourts are not to usurp those functions." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). Where, as here, the parties have mutually agreed to a mandatory grievance process, the failure to exhaust that process "precludes judicial relief for breach of the collective bargaining agreement." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 986 (9th Cir. 2007); *see also* Pl.'s Suppl. Br. 3 (doc. 81) (CET acknowledging that a motion to compel arbitration is not required if "the contract makes it a 'condition precedent' for the party seeking relief to initiate arbitration in the first instance"). Further, a party seeking to establish waiver must demonstrate, amongst other things, acts inconsistent with an existing right to compel arbitration and prejudice, and CET has not met this "heavy burden," especially given that ILWU's first substantive pleading was the

650, 657-58 (1965). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). A strong presumption nonetheless exists in favor of arbitration to effectuate "the federal policy favoring arbitration" in labor disputes. *Granite Rock Co. v. Int'l Bro. of Teamsters*, 561 U.S. 287, 301 (2010) (citation and internal quotations omitted); *see also Republic Steel,* 379 U.S. at 652-53 ("Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant").

Thus, "[a]part from matters that the parties specifically exclude, all [CBA-related disputes] come within the scope of the grievance and arbitration provisions of the collective agreement" and "doubts should be resolved in favor of coverage." *United Steelworkers*, 363 U.S. at 579-85; *see also AT&T Techs., Inc. v. Comm'cns Workers of Am.*, 475 U.S. 643, 650 (1986) ("only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail" where the CBA's grievance procedures are "broad" and provide "for arbitration of any differences" arising under the CBA) (citation and internal quotations omitted).

Where there is a question of coverage, "it is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning a particular matter." *Granite Rock*, 561 U.S. at 301 (citation and internal quotations

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subject motion. *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694-98 (9th Cir. 1986).

omitted). The court discharges "this duty by: (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption and ordering arbitration only where the presumption is not rebutted." *Id.* (collecting cases). "The party contesting arbitrability bears the burden of demonstrating how the language in the collective bargaining agreement excludes a particular dispute from arbitration." *Standard Concrete Prods. Inc. v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 353 F.3d 668, 674 (9th Cir. 2003) (citations and internal quotations omitted). The Court must therefore look again to the CBA to resolve whether CET's claims may proceed in federal court under § 301.

Section 16-2 of the CBA defines "grievance as any controversy or disagreement or dispute between the applicable ILWU Local Union and the Employer for the particular grain elevator(s) involved as to the interpretation, application, or violation of any provision of this Agreement." Williams Decl. Ex. A, at 14 (doc. 27) (emphasis added). Section 16-3 establishes the existence of a "Joint Labor Relations Committee for each port consisting of representatives of the applicable ILWU Local Union and representatives of the applicable Employer for the particular grain elevator(s) involved." *Id.* The Joint Labor Relations Committee "shall have the power and duty to investigate and adjudicate all grievances or disagreements or disputes under this Agreement." *Id.* at 15.

Sections 16-4 through 16-8 of the CBA go on to specify that "[a]ll grievances"—except for "health and safety disputes"—"shall be processed" in accordance

with the procedures outlined therein, which are initiated by the presentation of a grievance "by a Union representative to the Elevator Superintendent" (*i.e.*, Section 16-4(a)); referred to the Joint Labor Relations Committee if not settled (*i.e.*, Sections 16-4(b) and 16-6); and culminate with final and binding arbitration by "an impartial arbitrator" (*i.e.*, Sections 16-7 and 16-8). *Id.* at 14-15. In regard to the latter, "either party" may refer the matter to arbitration in the event the grievance "is not resolved by the Joint Labor Relations Committee in a manner satisfactory to both parties." *Id.* at 15. Section 16-10, which is the final provision within the "Procedures for Handling Grievances and Disputes" module, states: "The Employer shall also have the right to file a grievance and to follow the above grievance procedure in an effort to resolve it." *Id.*

Sections 16-2 and 16-4 clearly mandate that all CBA-related disputes be resolved via the written grievance process. As ILWU observes, the aforementioned grievance provisions are "universal"—in that they require utilization of the grievance process in regard to "any controversy or disagreement or dispute . . . as to the interpretation, application, or violation" of the CBA–and "bilateral" and "mandatory"—in that the process applies to "[a]ll grievances" involving CET and the individually named defendants. Def.'s Suppl. Br. 2-3 (doc. 80).

In contrast, Section 16-10 is susceptible to various interpretations. The Court nonetheless finds that this section can most reasonably be read as indicating that CET, as an employer entity, possesses the same rights as individual, Union-represented employees when pursuing the mandatory grievance process. Sup-

port for this interpretation is found in both the plain language of the "Procedures for Handling Grievances and Disputes" module, as well as in other provisions of the CBA. *See Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241-43 (1962), *overruled on other grounds by Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (court may consider entirety of CBA in determining applicability of grievance procedures to a particular dispute). For instance, Section 14-2, which falls more generally within the module regarding employee work standards, provides that the "Employer may file with the Union a complaint in writing against any member of the grain section" and proceed before the Joint Labor Relations Committee (*i.e.*, the second step of the grievance process) if the complaint is not acted upon. Williams Decl. Ex. A, at 13 (doc. 27). Likewise, Section 19-5 contemplates that either the employer or the Union may pursue a grievance "should disputes arise under the provisions of this Section 19," which obligates the Union to protect "the Employer . . . against reprisals for making changes" to operations and introducing new methods, and to "cooperate with the Employer for the enforcement under the contract of such changes." *Id.* at 19.

In other words, Sections 16-2 through 16-10, especially when read in conjunction with the CBA's other provisions, demonstrate that CET is bound by the mandatory grievance process. Even when read in isolation (as CET advocates), Section 16-10 does not reveal a clear understanding between the contracting parties that CET is free to avoid the CBA's grievance process in favor of a judicial suit. Pl.'s Resp. to Mot. Dismiss 4-5 (doc. 40). In fact, courts have construed virtually identical language as indicating a clear

intent to arbitrate. *See, e.g., Local 771, I.A.T.S.E. v. RKO General, Inc.*, 546 F.2d 1107, 1115-16 (2d 1977) (arbitration "was the exclusive remedy available to a party with a grievance" where the CBA stated that either party "shall have the right to refer the matter to arbitration"); *see also Allis–Chalmers*, 471 U.S. at 204 n.1 (use of permissive language in the CBA "is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures") (citation omitted).

At most, CET's proffered interpretation creates some doubt as to the reach of the CBA's grievance procedures. This ambiguity is inadequate to overcome the strong presumption in favor of arbitrating labor disputes. *See, e.g., Kaiser Found. Hosps. & the Permanente Grp., Inc. v. Cal. Nurses Assoc.*, 2012 WL 440634, *3-4 (N.D. Cal. Feb. 10, 2012) (distinguishing *Standard Concrete* and concluding that similar CBA grievance procedures were, at best, ambiguous where those procedures expressly applied to "all disputes," such that the plaintiff employer possessed the right to file a grievance and compel arbitration); *Contemporary Servs. Corp. v. Serv. Emp. Int'l Union*, 50 Fed. Appx. 851, 851 (9th Cir. 2002) (grievance procedures applied to employer-initiated claims where "nothing in . . . the CBA specifically states that it does not apply to claims brought by [the employer]"); *Alaska Maritime Emp'rs Assoc. v. Int'l Longshore & Warehouse Union,* 2016 WL 6022709, *2-3 (D. Alaska Oct. 13, 2016) (dismissing the plaintiff employer's § 301 claim based on analogous grievance language).

Critically, at no point does the CBA suggest, either explicitly or implicitly, that CET may seek some other remedy beyond the grievance process articulated

therein. Accordingly, CET failed to either demonstrate that the CBA excludes the present dispute or rebut the strong presumption in favor of arbitration. *See Ceres Marine Terminals, Inc. v. Int'l Longshoremen's Assoc.*, 683 F.2d 242, 246-48 (7th Cir. 1982) (rejecting the plaintiff employer's argument that the CBA's permissive language, and discussion of other remedies, allowed it to forgo the CBA's grievance procedures, explaining that, even though "ambiguities in the [CBA] offer some support for [the plaintiff employer's] contention . . . the principle that doubts must be resolved in favor of arbitration would lead us to conclude that" exhaustion was required prior to filing suit).

Therefore, CET's failure to exhaust the CBA's grievance procedures is fatal in this case. Because CET's RICO claims are precluded by § 301 and the CBA's mandatory grievance process does not explicitly exclude employer-brought disputes from its reach, dismissal is warranted and the Court need not address the remaining grounds advanced by ILWU in support of its motion.

RECOMMENDATION

For the foregoing reasons, ILWU's Motion to Dismiss (doc. 23) should be granted and judgment should be prepared dismissing this case. ILWU's request for oral argument is denied as unnecessary.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen

(14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment.

DATED this 12th day of June, 2019.

/s/ Jolie A. Russo
United States Magistrate Judge

RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 185
Suits By and Against Labor Organizations

(a) Venue, Amount, and Citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Organized Crime Control Act of 1970
Public Law 91-452—Oct. 15, 1970 (RICO)

AN ACT
RELATING TO THE CONTROL OF
ORGANIZED CRIME IN THE UNITED STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Organized Crime Control Act of 1970."

Statement of Findings and Purpose

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major

portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden inter-state and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

18 U.S.C. § 1962
Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

CET FIRST AMENDED COMPLAINT (MARCH 28, 2022)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON PORTLAND DIVISION

COLUMBIA EXPORT TERMINAL, LLC,

Plaintiff,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; KANE AHUNA, an individual; JASON ANDREWS, an individual; JESUS ARANGO, an individual; MIKE AYERS, an individual; BRIAN BANTA, an individual; KEITH BANTA, an individual; ANDRE BARBER, an individual; CRYSTAL BARNES, an individual; CRAIG BITZ, an individual; LISA BLANCHARD, an individual; RANDY BOOKER, an individual; BRAD BOYD, an individual; LARRY BROADIE, an individual; FELIX BROWN, an individual; JIMMY BROWN, an individual; JON BUDISELIC, an individual; WILLIAM BURRIS, an individual; DOUGLAS CAREY, an individual; GREG CARSE, an individual; ANTHONY CERRUTTI, an individual; HUGH COLSON, an individual; TIM COPP, an individual; JAMES COTHREN, an individual; STEVEN COX, an individual; BOBBY CRANSTON, an individual; JAMES DAW, an individual; ADAM DAY, an individual; JAMES DEGMAN, an individual; TORRAE DE LA CRUZ, an individual; FRANK DE LA ROSA, an individual;

THOMAS DEMUTH, an individual; JAMES DINSMORE, an individual; BRIAN DIRCKSEN, an individual; TERENCE DODSON, an individual; GARY DOTSON, an individual; OLIVER EDE, an individual; RAY ELWOOD, an individual; TODD ENGLERT, an individual; CHRIS EUBANKS, an individual; DAVID FAMBRO, an individual; LARRY FAST, an individual; JAMES FINCH, an individual; GREG FLANNERY, an individual; MIKE GARDNER, an individual; BRETT GEBHARD, an individual; RICHARD GILSTRAP, an individual; TED GRAY, an individual; KURTIS HANSON, an individual; MIKE HARMS, an individual; RANDY HARPER, an individual; TERRY HICKMAN, an individual; JAMES HOLLAND, an individual; BRUCE HOLTE, an individual; RONALD HUSEMAN, an individual; NATHAN HYDER, an individual; TROY JAMES, an individual; MALACHI JASON, an individual; SAM JAURON, an individual; ANTHONY JEFFRIES, an individual; KEVIN JOHNSON, an individual; PAT JOHNSON, an individual; TEREK JOHNSON, an individual; TIM JONES, an individual; JON JULIAN, an individual; LEROY KADOW, an individual; GEORGE KELLY, an individual; ERIC KING, an individual; WAYNE KING, an individual; KEVIN KNOTH, an individual; KENNETH KYTLE, an individual; MIKE LACHAPELLE, an individual; JIMMY LAI, an individual; TOM LANGMAN, an individual; TYLER LAUTENSCHLAGER, an individual; JACK LEE, an individual; KEN LEE, an individual; DAN LESSARD, an individual; SHANTI LEWALLEN, an individual; DANNY LOKE, an individual; THOMAS LOVE, an individual; WILFRED LUCH, an individual; KARL LUNDE, an

individual; CRAIG MAGOON, an individual; MIKE MAHER, an individual; LEVI MANNING, an individual; RICKIE MANNING, an individual; JAY MANTEI, an individual; PAT MARONAY, an individual; ANGELA MARTIN, an individual; GARRY MATSON, an individual; PATRICK MCLAIN, an individual; MATTHEW MCMAHON, an individual; MIKE MCMURTREY, an individual; DONALD MEHNER, an individual; CURTIS MEULER, an individual; KARL MINICH, an individual; JOSH MORRIS, an individual; JOHN MULCAHY, an individual; TOM NEITLING, an individual; MARTIN NELSON, an individual; GREG NEMYRE, an individual; RIAN NESTLEN, an individual; CHRIS OVERBY, an individual; KEN OVIATT, an individual; THOMAS OWENS, an individual; JOHN PEAK, an individual; SHANN PEDERSON, an individual; JEFF PERRY, an individual; JOHN PERRY, an individual; ARNOLD PETERSON, an individual; TERRY PLAYER, an individual; JAMES POPHAM, an individual; DAVID PORTER, an individual; MIKE RAPACZ, an individual; JOHN RINTA, an individual; WILLIAM ROBERTS, an individual; JOSEPH ROBINSON, an individual; MARK ROBINSON, an individual; CHRIS SCHEFFEL, an individual; THEODORE SCHUH, an individual; MICHAEL SEXTON, an individual; MARK SIEGEL, an individual; COURTNEY SMITH, an individual; JEFF SMITH, an individual; JEFFERY SMITH, an individual; MIKE SMITH, an individual; SCOTT STEIN, an individual; DONALD STYKEL, an individual; MIKE SUHR, an individual; LEAL SUNDET, an individual; LAURENCE THIBEDEAU, an individual; MARK THORSFELDT, an individual;

SHAWN THORSTAD, an individual; JAMES THORUD, an individual; DAVID TRACHSEL, an individual; WILLIAM UNDERWOOD, an individual; JASON VANCE, an individual; PAN VARNON, an individual; MIKE WALKER, an individual; DWAYNE WAMSHER, an individual; EUGENE WEBB, an individual; MIKE WEHAGE, an individual; KEVIN WELDON, an individual; SPENCER WHITE, an individual; RICHARD WIDLE, an individual; NURAL WILLIS, an individual; RONALD WOODS, an individual; MARK WRIGHT, an individual; CAROL WURDINGER, an individual; JERRY YLONEN, an individual; PAUL YOCHIM, an individual; RICHARD ZATTERBERG, an individual; and FRED ZOSKE, an individual,

Defendants.

Case No. 3:18-cv-2177

I. Preliminary Statement

1. By this action, Plaintiff, Columbia Export Terminal, LLC ("CET"), an employer of union-represented workers in the loading of grain for international shipping, seeks relief against the international union and union workers for their systematic hourly billing for time of workers who were not present at the work site, in violation of the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a)-(d) an § 1964. CET estimates the overbilling at approximately five million three hundred nineteen thousand five hundred nine dollars ($5,319,509). CET

seeks treble damages, punitive damages, attorney fees and injunctive relief.

II. Jurisdiction and Venue

2. This Court has subject matter jurisdiction over this federal RICO action pursuant to 28 U.S.C. § 1337 relating to "any civil action or proceeding arising under any act of Congress regulating commerce," and 28 U.S.C. § 1331 (federal question).

3. This Court has personal jurisdiction over each Defendant because Defendants' fraudulent conduct out of which this RICO action arises was committed at Terminal 5, a grain export terminal, at the Port of Portland in Portland, Oregon ("Terminal 5"). *See*, *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Group*, 905 F.3d 597, 606 (9th Cir. 2018) ("well-settled understanding that the commission of an intentional tort within the forum state usually supports the exercise of personal jurisdiction").

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this action occurred in the District of Oregon, namely Terminal 5.

III. The Parties

5. CET is a Delaware corporation with its principal place of business in Omaha, Nebraska. CET operates Terminal 5, a grain export terminal, at the Port of Portland in Portland, Oregon. CET unloads grain that it receives from inland areas by rail and barge, then loads that grain onto ocean-going ships for transport to customers throughout Asia. CET's business contin-

uously and substantially effects interstate and international commerce.

6. Defendant, International Longshore Warehouse Union ("ILWU"), is a labor organization that represents more than 40,000 members working in international and interstate shipping, in over 60 local unions and 5 states.

7. The individual defendants ("Individual Defendants"), each of whom is of the full age of majority, committed mail/wire fraud at Terminal 5 and, upon information and belief, reside within one hundred miles of the courthouse, are:

a. Kane Ahuna;

b. Jason Andrews;

c. Jesus Arango;

d. Mike Ayers;

e. Brian Banta;

f. Keith Banta;

g. Andre Barber;

h. Crystal Barnes;

i. Craig Bitz;

j. Lisa Blanchard;

k. Randy Booker;

l. Brad Boyd;

m. Larry Broadie;

n. Felix Brown;

o. Jimmy Brown;

p. Jon Budeselic;

q. William Burris;
r. Douglas Carey;
s. Greg Carse;
t. Anthony Cerrutti;
u. Hugh Colson;
v. Tim Copp;
w. James Cothren
x. Steven Cox;
y. Bobby Cranston;
z. James Daw;
aa. Adam Day;
bb. James Degman;
cc. Torrae De La Cruz;
dd. Frank De La Rosa;
ee. Thomas Demuth;
ff. James Dinsmore;
gg. Brian Dircksen;
hh. Terrence Dodson;
ii. Gary Dotson;
jj. Oliver Ede;
kk. Ray Elwood;
ll. Todd Englert;
mm. Chris Eubanks;
nn. David Fambro;
oo. Larry Fast;
pp. James Finch;

qq. Greg Flannery;
rr. Mike Gardner;
ss. Brett Gebhard;
tt. Richard Gilstrap;
uu. Ted Gray;
vv. Kurtis Hanson;
ww. Mike Harms;
xx. Randy Harper;
yy. Terry Hickman;
zz. James Holland;
aaa. Bruce Holte;
bbb. Ronald Huseman;
ccc. Nathan Hyder;
ddd. Troy James;
eee. Malachi Jason:
fff. Sam Jauron;
ggg. Anthony Jeffries;
hhh. Kevin Johnson;
iii. Pat Johnson;
jjj. Terek Johnson;
kkk. Tim Jones;
lll. Jon Julian;
mmm. Leroy Kadow;
nnn. George Kelly;
ooo. Eric King;
ppp. Wayne King;

qqq. Kevin Knoth;
rrr. Kenneth Kytle;
sss. Mike LaChapelle;
ttt. Jimmy Lai;
uuu. Tom Langman;
vvv. Tyler Lautenschlager;
www. Jack Lee;
xxx. Ken Lee;
yyy. Dan Lessard;
zzz. Shanti Lewallen;
aaaa. Danny Loke;
bbbb. Thomas Love;
cccc. Wilfred Luch;
dddd. Karl Lunde;
eeee. Craig Magoon;
ffff. Mike Maher;
gggg. Levi Manning;
hhhh. Rickie Manning;
iiii. Jay Mantei;
jjjj. Pat Maronay;
kkkk. Angela Martin;
llll. Garry Matson;
mmmm. Pat McLain;
nnnn. Matthew McMahon;
oooo. Mike McMurtrey;
pppp. Donald Mehner;

qqqq. Curtis Meuler;
rrrr. Karl Minich;
ssss. Josh Morris;
tttt. John Mulcahy;
uuuu. Tom Neitling;
vvvv. Martin Nelson;
wwww. Greg Nemyre;
xxxx. Rian Nestlen;
yyyy. Chris Overby;
zzzz. Ken Oviatt;
aaaaa. Thomas Owens;
bbbbb. John Peak;
ccccc. Shann Pederson;
ddddd. Jeff Perry;
eeeee. John Perry;
fffff. Arnold Peterson;
ggggg. Terry Player;
hhhhh. James Popham;
iiiii. David Porter;
jjjjj. Mike Rapacz;
kkkkk. John Rinta;
lllll. William Roberts;
mmmmm. Joseph Robinson;
nnnnn. Mark Robinson;
ooooo. Chris Scheffel;
ppppp. Theodore Schuh;

qqqqq. Michael Sexton;
rrrrr. Mark Siegel;
sssss. Courtney Smith;
ttttt. Jeff Smith;
uuuuu. Jeffery Smith;
vvvvv. Mike Smith;
wwwww. Scott Stein;
xxxxx. Donald Stykel;
yyyyy. Mike Suhr;
zzzzz. Leal Sundet;
aaaaaa. Laurence Thibedeau;
bbbbbb. Mark Thorsfeldt;
cccccc. Shawn Thorstad;
dddddd. James Thorud;
eeeeee. David Trachsel;
ffffff. William Underwood;
gggggg. Jason Vance;
hhhhhh. Pan Varnon;
iiiiii. Mike Walker;
jjjjjj. Dwayne Wamsher;
kkkkkk. Eugene Webb;
llllll. Mike Wehage;
mmmmmm. Kevin Weldon;
nnnnnn. Spencer White;
oooooo. Richard Widle;
pppppp. Nural Willis;

qqqqqq. Ronald Woods;
rrrrrr. Mark Wright;
ssssss. Carol Wurdinger;
tttttt. Jerry Ylonen;
uuuuuu. Paul Yochim;
vvvvvv. Richard Zatterberg; and
wwwwww. Fred Zoske.

IV. General Factual Allegations

8. The Individual Defendants are hourly workers who are dispatched from a Pacific Maritime Association ("PMA")/ILWU hiring hall to perform work at CET. They are members of ILWU Local 8 ("Local 8"), a labor organization chartered by ILWU in Portland, Oregon, or ILWU Local 92 ("Local 92"), a labor organization chartered by ILWU in Portland, Oregon.

9. The Individual Defendants, through the Walking Boss for a given shift, submit to CET time sheets indicating hours each claims to have worked.

10. CET submits the time sheets to PMA in California, via use of interstate wire, for payment. The PMA processes and issues, via use of United States Mail and/or interstate wire, payroll payments to union workers' individual checking or savings accounts held by banks in various states, and charges CET for all such payments. Using the hours reported on the time sheets, the PMA also charges CET for PMA assessments, which are then contributed to various PMA/ILWU benefit funds on behalf of the employees. Also via use of interstate wire, union members pay union dues to ILWU and Local 8 and Local 92. Each such use of the mail and interstate wire was, at all relevant

times, known to or reasonably foreseeable by Defendants.

11. The Defendants, with specific intent to defraud, jointly entered into a conspiracy and scheme to conduct, and participate in the conduct of the affairs of Local 8 and Local 92, through a pattern of racketeering activity by which they routinely and systematically, over a period of more than four years, short-manned jobs and yet submitted time sheets indicating time worked for employees who did not work, and were not even at Terminal 5, for some or all of the indicated time. The Terminal 5 guard logs show that employees were not at Terminal 5 at times for which they billed hours and received unearned payment. One practice involved Individual Defendants routinely splitting shifts, with one working the first half and the other working the second half, yet submitting time sheets indicating falsely that both had worked the full shift. Another practice involved Individual Defendants not showing up at all and yet those who did show up submitting time sheets indicating that the absent employee worked a full shift.

12. The Defendants' coordinated and systematic practice of submitting inflated time sheets over a period of more than four years is their regular way of conducting the business of Local 8 and Local 92 and is ongoing and continuing.

13. The overbilling known so far totals five million three hundred nineteen thousand five hundred nine dollars ($5,319,509). Attached hereto as Exhibit A is a spreadsheet listing in detail the overbilling that is presently known.

14. Despite repeated receipt of substantial excess and unearned payment over a period of years, no Individual Defendant ever advised CET of the overpayment and each knowingly retained the unearned payments. Attached hereto as Exhibit B is the total amount of overpayments to each Individual Defendant.

15. ILWU organized and orchestrated the scheme to submit falsified time sheets. ILWU never advised CET of the overpayments and retained all of the benefits of this scheme that it received.

16. Each submission of inflated time sheets constitutes the racketeering offense of mail fraud, pursuant to 18 U.S.C. § 1341 and/or wire fraud, pursuant to 18 U.S.C. § 1343.

17. It was reasonable for CET to rely on the time sheets. In reliance on the time sheets, CET did cause to be issued payments based on the inflated time sheets, which proximately caused CET damages of at least five million three hundred nineteen thousand fix hundred nine dollars ($5,319,509).

V.

a. First Count—Violation of 18 U.S.C. § 1962(a) Against ILWU

18. CET incorporates the allegations of paragraphs 1-17.

19. ILWU is a person within the meaning of 18 U.S.C. § 1962(a).

20. ILWU has received income derived from the above-described pattern of racketeering in the form of member dues, including member dues inflated by reason of the above-described pattern of racketeering.

Each submission of an inflated time sheet constitutes the racketeering offense of mail fraud, pursuant to 18 U.S.C. § 1341 and/or wire fraud, pursuant to 18 U.S.C. § 1343.

21. ILWU has used and invested that income in the operation of ILWU.

22. ILWU is engaged in, and its activities affect interstate and foreign commerce.

23. ILWU's conduct violates 18 U.S.C. § 1962(a) and gives rise to civil action under 18 U.S.C. § 1964.

24. CET has been damaged by reason of this violation. CET has lost the illegally gotten income diverted to ILWU. Also, CET has been weakened, and ILWU has been strengthened, in its ability to indirectly bargain and maintain its pattern of racketeering at CET's expense.

b. Second Count—Violation of 18 U.S.C. § 1962(a) Against Individual Defendants

25. CET incorporates the allegations of paragraphs 1-17.

26. Each Individual Defendant is a person within the meaning of 18 U.S.C. § 1962(a).

27. Each Individual Defendant has received income derived from the above-described pattern of racketeering in the form of wages and benefits, including wages and benefits inflated by reason of the above-described pattern of racketeering. Each submission of an inflated time sheet constitutes the racketeering offense of mail fraud, pursuant to 18 U.S.C. § 1341 and/or wire fraud, pursuant to 18 U.S.C. § 1343.

28. Each Individual Defendant has used and invested that income in the operation of ILWU, including through payment of dues.

29. Each Individual Defendant is engaged in, and his activities affect interstate and foreign commerce.

30. Each Individual Defendant's conduct violates 18 U.S.C. § 1962(a) and gives rise to civil action under 18 U.S.C. § 1964.

31. CET has been damaged by reason of this violation. CET has lost the illegally gotten income paid to Defendants. Also, CET has been weakened, and the Individual Defendants and their union, has been strengthened, in their ability to indirectly bargain and maintain their pattern of racketeering at CET's expense.

c. Third Count—Violation of 18 U.S.C. § 1962(b) Against ILWU

32. CET incorporates the allegations of paragraphs 1-17.

33. Each submission of inflated time sheets constitutes the racketeering offense of mail fraud, pursuant to 18 U.S.C. § 1341 and/or wire fraud, pursuant to 18 U.S.C. § 1343.

34. ILWU is a person within the meaning of 18 U.S.C. § 1962(b).

35. ILWU, through the above-described pattern of racketeering, has acquired and maintains an indirect interest in, and indirect control of CET, in the form of owning substantial rights to control the labor at Terminal 5 that CET necessarily employs.

36. CET is engaged in, and its activities affect interstate and foreign commerce.

37. ILWU's conduct violates 18 U.S.C. § 1962(b) and gives rise to civil action under 18 U.S.C. § 1964.

38. CET has been damaged by reason of this violation. CET has lost the illegally obtained excess wages and benefits stolen through the pattern of racketeering. Also, CET has been weakened, and ILWU has been strengthened, in its ability to indirectly bargain and maintain its pattern of racketeering at CET's expense.

d. Fourth Count—Violation of 18 U.S.C. § 1962(c) Against All Defendants

39. CET incorporates the allegations of paragraphs 1-17.

40. ILWU and each Individual Defendant is a person within the meaning of 18 U.S.C. § 1962(c).

41. ILWU and each Individual Defendant is associated with Local 8 or Local 92.

42. Local 8 and Local 92 are enterprises within the meaning of 18 USC §§ 1961(4) and 1962(c), and, at all relevant times, have engaged in activities affecting interstate commerce.

43. ILWU and each Individual Defendant conducts, and participates in the conduct of, the affairs of Local 8 and/or Local 92, and has done so through the above-described pattern of racketeering, which is ongoing and continuing.

44. Each submission of an inflated time sheet constitutes the racketeering offense of mail fraud, pursuant to 18 U.S.C. § 1341 and/or wire fraud, pursuant to 18 U.S.C. § 1343.

45. Defendants conduct violates 18 U.S.C. § 1962 (c) and gives rise to civil action under 18 U.S.C. § 1964.

46. CET has been damaged by reason of Defendants' pattern of racketeering in the amount of at least five million three hundred nineteen thousand five hundred nine dollars ($5,319,5095,311,627) in overpayments to Defendants. It was reasonable for CET to rely on the time sheets for their intended purpose. And CET did issue payment based on the inflated time sheets.

e. Fifth Count—Violation of 18 U.S.C. § 1962(c) Against Individual Defendants

47. CET incorporates the allegations of paragraphs 1-17.

48. Each Individual Defendant is a person within the meaning of 18 U.S.C. § 1962(c).

49. Each Individual Defendant is associated with Local 8 or Local 92.

50. Local 8 and Local 92 are enterprises within the meaning of 18 USC §§ 1961(4) and 1962(c), and, at all relevant times, have engaged in activities affecting interstate commerce.

51. Each Individual Defendant conducts, and participates in the conduct of, the affairs of Local 8 and/or Local 92, and has done so through the above-described pattern of racketeering, which is ongoing and continuing.

52. Each submission of an inflated time sheet constitutes the racketeering offense of mail fraud,

pursuant to 18 U.S.C. § 1341 and/or wire fraud, pursuant to 18 U.S.C. § 1343.

53. The Individual Defendants' conduct violates 18 U.S.C. § 1962(c) and gives rise to civil action under 18 U.S.C. § 1964.

54. CET has been damaged by reason of the Individual Defendants' pattern of racketeering in the amount of at least five million three hundred nineteen thousand five hundred nine dollars ($5,319,5095,311, 627) in overpayments to Defendants. It was reasonable for CET to rely on the time sheets for their intended purpose. And, in reliance, CET did issue payment based on the inflated time sheets.

f. Sixth Count—Violation of U.S.C. § 1962(c) Against All Defendants

55. CET incorporates the allegations of paragraphs 1-17.

56. ILWU and each Individual Defendant is a person within the meaning of 18 U.S.C. § 1962(c).

57. ILWU is associated with CET in that it indirectly exercises substantial control over the labor at Terminal 5 that CET necessarily employs.

58. Each Individual Defendant is or has been employed by CET.

59. CET is an enterprise within the meaning of 18 USC §§ 1961(4) and 1962(c), and, at all relevant times, has engaged in activities affecting interstate commerce.

60. ILWU and each Individual Defendant conducts, and participates in the conduct of, the affairs of CET, and has done so through the above-described

pattern of racketeering, which is ongoing and continuing.

61. Each submission of an inflated time sheet constitutes the racketeering offense of mail fraud, pursuant to 18 U.S.C. § 1341 and/or wire fraud, pursuant to 18 U.S.C. § 1343.

62. Defendants' conduct violates 18 U.S.C. § 1962(c) and gives rise to civil action under 18 U.S.C. § 1964.

63. CET has been damaged by reason of Defendants' pattern of racketeering in the amount of at least five million three hundred nineteen thousand five hundred nine dollars ($5,319,509) in overpayments to Defendants. It was reasonable for CET to rely on the time sheets for their intended purpose. And CET did rely and issue payment based on the inflated time sheets.

g. Seventh Count—Violation of 18 U.S.C. § 1962(d) Against All Defendants

64. CET incorporates the allegations of paragraphs 1-62.

65. ILWU and each Individual Defendant knew about, and agreed to participate in the above-alleged RICO violations.

66. Defendants' overbilling scheme involved a high level of coordination in terms of who would show up for work and when they would show up for work, who would not show up for work and when they would not show up for work, and what false time would nevertheless be included on time sheets. This scheme was participated in by each Defendant

routinely over a period of years in a highly systematic and coordinated fashion.

67. Defendants conduct violates 18 U.S.C. § 1962 (d) and gives rise to civil action under 18 U.S.C. § 1964.

68. CET has been damaged by reason of Defendants' conspiracy in the amount of at least five million three hundred nineteen thousand five hundred nine dollars ($5,319,509) in overpayments to Defendants.

V. Requested Relief

WHEREFORE, CET requests entry of judgment in its favor, and jointly and severally against all Defendants, in the amount of five million three hundred nineteen thousand five hundred nine dollars ($5,319,509), trebled to fifteen million nine hundred fifty-eight thousand five hundred twenty-seven dollars ($15,958,527), together with punitive damages, attorney fees and costs.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
By: /s/ Jacqueline M. Damm
Jacqueline M. Damm,
OSB No. 004623
jacqueline.damm@ogletree.com
503.552.2140

Thomas A. Lidbury, ISB No. 6211158
(Pro Hac Vice Application Pending)
thomas.lidbury@ogletree.com
312-558-1230

Attorneys for Plaintiff
COLUMBIA EXPORT TERMINAL, LLC

Dated: March 28, 2022

COLLECTIVE BARGAINING AGREEMENT (AUGUST 27, 2014)

GRAIN HANDLERS AGREEMENT

DATED AS OF AUGUST 27, 2014

BETWEEN

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND ITS LOCALS 4, 8, AND 19

AND

COLUMBIA GRAIN, INC.,
LD COMMODITIES SERVICES, LLC,
AND UNITED GRAIN CORPORATION,
EACH INDIVIDUALLY

I. Scope and Term of Agreement.

1-1 This Collective Bargaining Agreement ("CBA"), dated as of August 27, 2014, is by and between the International Longshore and Warehouse Union and Locals 4, 8, and 19 on behalf of themselves and each of their members (hereinafter collectively called "the Union") and Columbia Grain, Inc., LD Commodities Services, LLC, and United Grain Corporation, each individually (hereinafter collectively called "the Employer"). This Agreement shall be jointly binding on the Union as to every individual Employer and on all signatory Employers as to the Union.

1-2 The purpose of this Agreement is to govern the hiring, wages, hours and working conditions of members of the Union to work in export grain elevators of the Employer as grain handlers on the Pacific Ocean coasts of Oregon and Washington, Puget Sound, the Willamette River and lower Columbia River

(downstream of Bonneville Dam). This Agreement covers only the operations of the Employer at the above sites and has no application to any other operations carried on by the signatory Employers at any other sites or locations.

1-3 This Agreement shall become effective upon ratification by the parties and shall remain in effect until 12:00 midnight of May 31, 2018, Thereafter, this Agreement shall continue in effect, unless terminated in accordance with other provisions of this Agreement, from year-to-year unless either party gives notice to the other of a desire to modify or terminate this Agreement. Such notice shall be given at least 60 days prior to expiration of the Agreement.

1-4 The management of the Employer's plants and the direction of the working forces is vested solely in the Employer; provided, however, that these functions will not be exercised in any manner contrary to other provisions of this Agreement. To aid in prompt settlement of grievances and to observe Agreement performance, it is agreed that Business Agents or Union Representatives shall have access to the properties of the Employer. In order that the Employer may cooperate with the Union in the settlement of disputes, the Union shall notify the Employer prior to entering any facility.

Except as specifically limited by specific provisions of this Agreement, the Employer shall have the exclusive right to take any and all action it deems necessary in the management of its business and the direction of its workforce, and such rights exclusively reserved for the Employer shall include, but not be limited to:

a) To expand, reduce, alter, or discontinue all or any part of its business operation; and

b) To direct the workforce and to make and enforce reasonable rules and regulations not in conflict with the provisions of this Agreement. Such rules and regulations shall be subject to the grievance procedure herein if such rule or regulation is grieved as to its reasonableness within five (5) days of delivery to the Union.

1-5 ILWU Business. Employees shall not conduct Union business during hours of work, excluding lunch and break periods, unless by mutual agreement of management. Any time spent on Union business shall not be considered time worked or compensated by the Employer.

Because the Employer's facility is not a public area, Union representatives may not access the Employer's facility without permission from the Employer. A Union representative may enter work areas to observe conditions of work, but must be accompanied by a member of management and may not disrupt work.

II. Definition of Grain Handling Work.

2-1 This Agreement applies to grain handling work which covers handling grain in bulk from points of ingress to points of egress from Employer's export grain elevators during such time as the grain is delivered to and is within the Employer's care, custody and control. Grain handler jobs are defined to include all grain handling work including all handling of grain and use of grain handling equipment in and about the Employer's terminal grain elevators and related

premises, including the loading and unloading of rail cars, trucks, vessels and cleanup, which includes all handling of grain and grain handling equipment, loading and unloading cars, trucks, and vessels at the point where the carrier delivers grain to Employer's care, custody and control at the grain terminal, dock, elevator or warehouse, and includes any other occupation already covered by the Longshoremen's National Labor Relations Board Award governing grain handlers, excluding office clerical, guards, quality control, professional and supervisory personnel.

2-2 All employees employed by the Employer, who work on grain barges on the Lower Columbia or Willamette Rivers or Puget Sound, loading or unloading grain, shall come within the provisions of this Agreement. Unloading and loading of barges shall be accomplished within the work force of the employees at the elevator.

2-3 Supervisory personnel of the Employer may perform bargaining unit work where necessary due to emergencies or training, or when bargaining unit employees are unavailable or unwilling to work.

2-4 The Employer has the responsibility for quality and quantity control to furnish and deliver grain of a quality and quantity to meet its contractual requirements and to conform to United States laws. Such quality and quantity control is excluded from the coverage of this Agreement and involves management personnel performing the functions, whether for receiving, export or in-house purposes, of (a) grading of grain and the drawing of samples for determining grade factors and grade qualities (including, without limitation, protein, foreign material, dockage, heat damage, total damage, wheat of other classes, total

defects, shrunken and broken, dark, hard and vitreous, moisture, odor, unknown foreign substances, and similar quality factors in accordance with the requirements of the United States Grain Standards Act and the Regulations issued thereunder); (b) using grading and sampling equipment; and (c) interpreting quality and quantity data.

2-5 The parties agree that notwithstanding anything in this Agreement, non-bargaining unit employees may perform console operator duties.

2-6 The Employer shall have the right to subcontract emergency, environmental or hazardous clean-up work after notifying the Union of its intentions. Such clean-up work shall not include the following non-hazardous clean-up: grain or other commodities routinely moved through the facility, dust, screenings, chaff or other commodity by-products. The Employer also shall have the right to engage the services of an outside contractor if the proper equipment required to perform such work is not readily available on a reasonable cost basis. In such instances the outside contractor shall assist bargaining unit personnel in performing cleanup work.

III. Hours.

3-1 The Employer may schedule work as needed to meet production needs, providing such scheduling does not conflict with other sections of the Agreement. The basic, normal or regular workday and workweek consists of the first eight (8) hours of work, Monday through Friday, subject to the provisions of Section 6.

IV. 8-hour Guarantee/Reporting Pay.

4-1 There shall be a guarantee of 8 hours of work to employees when ordered and turned to work, Accompanying the obligation placed upon the Employer to furnish 8 hours of work each shift is the obligation on the part of the employee to shift from one job to another when such work is ordered by the Employer. Exception: employees shall not shift from shipside to elevator.

a) Elevator employees may only be shifted to shipside work on the 1st and 2nd shifts when properly allocated and ordered shipside employees are not dispatched.

4-2 The 8-hour guarantee of work must be provided within the starting and quitting times as provided in Section VI, excluding the meal period.

4-3 In the event that the Employer cannot provide a full 8 hours of work, the time not worked shall be defined herein as dead time. Dead time on the day shift Monday through Friday shall be paid for at the straight time rate of pay.

4-4 All other dead time-nights, weekends and holidays-shall be paid at the prevailing rate of pay.

4-5 For employees ordered, reporting for work and not turned to, the 4-hour minimum shall apply, except where inability to turn to is a result of insufficient employees to start the operation.

4-6 The inclement weather exception to the 8-hour guarantee shall be as follows:

A. When employees are ordered to return to work after a midshift meal and cannot

resume work because of inclement weather (such determination to be made by Employer), a second 4-hour minimum shall apply.

B. Dead time resulting from inclement weather shall be paid for as provided in Section 4-3.

4-7 Each Longshore local shall have the right to hold one regularly scheduled stop work meeting each month during overtime hours. Any other stop work meeting shall be by mutual agreement, or as approved by the Employer and the Union, and in any event, shall not occur more often than once a month. Any hours lost as a result of such meeting are deductible from contract minimums. Similarly, any hours lost as a result of short shifts resulting from union unilateral action or mutual agreement of the parties are also deductible. On a stop work meeting night, the second or third shift may be worked from 11:00 pm to 7:00 am at the prevailing shift differential.

4-8 On stop work meeting nights, employees desiring to work during a stop work meeting will be allowed to do so; employees desiring to be excused to attend such meetings will be given a 5 p.m. stop. The minimum guarantee on such days shall be from the starting time, which for payroll purposes can be not later than 9 a.m. to such 5 p.m. stop.

4-9 When employees are called in on an emergency, the 4-hour guarantee shall prevail. Only emergency work shall be accomplished within the 4-hour guarantee.

4-10 When employees have been ordered and fail to report to work at all or on time, thus delaying the start of an operation, the time lost thereby until replacements have been provided or until the employee

or crew has turned to shall be deducted from the guarantee.

4-11 An employee who quits, becomes sick or injured, is discharged for cause, or who refuses to shift, shall be paid only for time worked, and his replacement, if deemed necessary by the Employer, shall be entitled to pay for time worked or to the 4-hour minimum, whichever is greater.

V. Maneuverability and Flexibility of the Work Force.

5-1 The Employer shall have the right to exercise the maximum maneuverability and flexibility of the work force and shall have the right to assign employees to any type of work covered by this Agreement and to shift such employees from one type of work to any other type as the Employer sees fit, including during meal periods, in order to maintain operations without interruption.

VI. Extensions-Initial Starts-Meal Period.

6-1 Extensions. The Employer may schedule work as needed to meet production needs. The parties agree that the normal shift is eight (8) hours. The Employer agrees that an effort shall be made to contain the shift to eight (8) hours. However, the parties agree that there may be circumstances when the Employer deems it necessary to extend the working time of a shift for all or a part of the workforce. The Union agrees to a shift extension of up to four (4) hours (excluding emergencies-see below) to perform any grain elevator activities, including ship loading.

(a) Employer will notify the employees through the general foreman of intent to extend the shift past normal quitting time no later than 3:00 p.m. on 1st shift, 1:00 a.m. on 2nd shift. The notification extends the shift guarantee accordingly to those employees affected.

6-2 Emergencies. When an emergency occurs that would, or could disrupt the normal operation of an elevator the four (4) hour extended provision does not apply. At the option of the Employer, work to correct the emergency may continue beyond the four (4) hour extension period provided that no employee shall work more than six (6) hours without a meal.

6-3 Starts. The normal starting time shall be 8:00 a.m. and 6:00 p.m. The Employer has the option of starting a shift between 7:00 a.m. and 9:00 a.m. on the day shift and 5:00 p.m. and 7:00 p.m. on the night shift in one-half hour increments for all or a portion of the crew. (Start times outside of the above time-frames may be mutually agreed upon, on an elevator-by-elevator basis.) In those cases, the Employer will provide notice to the dispatch hall, as soon as reasonably possible, but no later than 6:00 a.m. for day shift and 4:00 p.m. for night shift (for Puget Sound, no later than 4:00 p.m. the day before for day shift, and 2:00 pm for night shift.) The Employer also shall have the option of setting alternative start times for all or part of the employees for each shift, on a call-back basis. For call-backs, the Employer will provide notice of the change in start time for the next shift prior to the end of the employee's shift.

6-4 Meal Period. There shall be one established meal period per shift of twelve (12) hours or less. The

meal period shall commence no earlier than three (3) hours after the start of the shift. The Employer may designate the meal periods as less than one hour in length, by mutual agreement with the employees involved, in which case, the meal period will be paid.

6-5 Meal Period Relief. The Employer has the right to shift employees during meal periods in order to maintain operations, but a meal period shall be provided to each employee. Meal periods may be staggered so as to provide for a continuous operation. If the Employer decides to have a meal period of less than one hour, it will notify employees no later than two (2) hours after the start of the shift. (By mutual agreement of the local parties, a continuous operation may be worked whereby meal and relief periods are liberalized and coordinated by the General Foreman. The employees shall be paid through the meal hour but should be entitled to an opportunity to eat.)

6-6 No employees shall work more than six (6) hours without a meal.

6-7 When working extended shifts the Dayside shall not extend beyond 7:00 p.m. (Exception: When no manpower is available on the second shift, the extension may extend to 8:00 p.m.) nor shall the night side be extended beyond 7:00 a.m. This limitation shall not apply to finishing a train when no crew is hired on an adjacent subsequent shift.

6-8Three (3) eight-hour shifts may be worked by mutual agreement on an elevator by-elevator basis. Appropriate shift rates shall apply.

VII. Wages.

7-1 The rates of pay for employees covered by this Agreement shall be in accordance with the Wage Schedule which is attached hereto and made a part hereof.

7-2 Overtime work shall be paid as follows: (a) at 1.5 of the base wage rate for all hours over 8 hours on the day shift and on the night shift, Monday to Friday; (b) 1.5 of the base wage rate for all hours worked on Saturday, Sunday, and Holidays; and (c) 1.5 of the regular rate of pay for all hours over 40 straight time hours in one week (the work week consisting of 40 hours commencing on Monday and ending on Sunday).

7-3 Shift Premium. A shift premium of $10.50 per hour will be paid for each hour worked on second (night) shift or third shift Monday through Friday, excluding holidays.

7-4 Payment for time worked shall be in quarter-hour increments.

VIII. Holidays.

8-1 The following shall be recognized as Paid Holidays: New Year's Day, Martin Luther King's Birthday, Washington's Birthday, Memorial Day, Independence Day, Harry Bridges' Birthday, Labor Day, Caesar Chavez Day, Veterans' Day, Thanksgiving Day, Christmas Eve Day, Christmas Day, and New Year's Eve Day.

(a) Lincoln's Birthday, February 12, shall be recognized as a holiday, but shall not be a paid holiday.

8-2 The Employer shall determine whether or not to work on any paid holidays, as referred to in 8-1. There shall be no discrimination against an employee for refusal to work on a paid holiday.

8-3 Holiday observance and work schedule. The observance of holidays and the work schedule on the holidays listed in Section 8-1 and 8-1(a) shall be as follows:

New Year's Eve Day, December 31 and New Year's Day, January 1-No work shall be performed between 3:00 p.m., December 31 and 7:00 a.m., January 2.
Exceptions: (a) an extended shift will be worked from 3:00 p.m. to 5:00 p.m. on December 31 for the purpose of finishing a ship; and (b) the provision for "no work" shall not apply to emergencies as defined in Section 8-6.

Martin Luther King's Birthday
Normal work day.

Lincoln's Birthday
Normal work day.

Washington's Birthday,
3rd Monday in February-Normal work day.

Caesar Chavez Day,
March 31-Normal work day.

Memorial Day, last Monday in May
Normal work day.

Independence Day, July 4
Normal work day.

July 5
No work day. (No work to be performed between 8:00 a.m. July 5 and 7:00 a.m. July 6.)

Exception: The provisions of "no work" shall not apply to emergencies as defined in Section 8-6.

Harry Bridges' Birthday, July 28
Normal work day.

Labor Day, 1st Monday in September
No work shall be performed between 8:00 a.m. on Labor Day and 7:00 a.m. the day after Labor Day.

Exception: The provisions of "no work" shall not apply to emergencies as defined in Section 8-6.

Veterans' Day, November 11
Normal work day.

Thanksgiving Day, 4th Thursday in November No work shall be performed between 8:00 a.m. Thanksgiving Day and 7:00 a.m. the following day.

Exception: The provision for "no work" shall not apply to emergencies as defined in Section 8-6.

Christmas Eve Day, December 24 and Christmas Day, December 25
No work shall be performed between 3:00 p.m. December 24 and 7:00 a.m., December 26.

Exceptions: (a) An extended shift will be worked from 3:00 p.m. to 5:00 p.m. on December 24 for the purpose of finishing a ship; and (b) the pro-

vision for "no work" shall not apply to emergencies as defined in Section 8-6.

8-4 When a holiday falls on Saturday or Sunday, the work schedule provided in Section 8-3 shall apply on Saturday or Sunday, respectively; however, the holiday shall be observed on Monday.

8-5 When work ceases at 3:00 p.m. (December 24 and December 31), the day shift guarantee shall be six (6) hours on an 8:00 a.m. start and five (5) hours on a 9:00 a.m. start.

8-6 Any work schedule restriction provided in Section 8-3 shall not apply in the event of an emergency involving the safety of a vessel, life or property.

8-7 Eligibility for paid holidays shall be determined by the ILWU/PMA Agreement.

8-8 Workforce availability. The Union agrees that employees shall be available to meet the Employers work requirements on all holidays in accordance with the work schedule contained in 8-2.

8-9 On Election Day, the work shall be arranged so as to enable the employees to vote as provided by law.

8-10 It is recognized that the Employers are party to the ILWU/PMA Holiday Fund.

8-11 The provision of "no work holidays" shall not apply to rail or barge unloading operations.

IX. Vacations.

9-1 ILWU-PMA Vacation Fund. The parties hereto agree to become parties to the ILWU-PMA Vacation

Fund for employees dispatched through the dispatch hall.

X. Pensions, Welfare & Fringes.

10-1 The parties to this Agreement shall remain parties to the ILWU-PMA Pension Plan, and to the ILWU-PMA Welfare Plan, and fringe benefit plans.

10-2 The Employer shall make all contributions required to provide the benefits for all registered employees under the Pension Plan, Welfare Plan and other fringe benefit plans provided for herein. The parties agree that this does not include Employer participation in the ILWU-PMA 401k Plan.

10-3 The Employer as a nonmember of the Pacific Maritime Association is currently making payments to the Pacific Maritime Association to fund all fringe benefits provided for under this Agreement, including contributions to the ILWU-PMA Welfare Plan, such assessment being paid by the Employer upon every man-hour worked by a registered employee. Such man-hour assessment is set or established from time to time by the Pacific Maritime Association.

XI. Fund provisions.

11-1 Failure of the Employer to make contributions to the ILWU-PMA Funds for fringe benefits provided for in this Agreement, or the legal non-availability of such Funds to the Employer will require the renegotiation of this Agreement relating thereto at the request of either party. In such renegotiation, the contributions to be made by the Employer shall not in any event exceed the rate paid by PMA members or the rate which would be paid by

the Employers signatory hereto if they were PMA members, subject to the provisions of Section 10-3.

11-2 In connection with its contribution to the Trusteed ILWU-PMA Funds, the Employer needs to be assured that the Employer contributions to the Funds will be currently deductible by it for income tax purposes. The Union agrees to support the Employer in obtaining such assurances from the proper governmental agencies. Failure to obtain resolution of these problems will require renegotiation of these issues.

11-3 It is agreed that the Employer shall not be required to become a member of the Pacific Maritime Association in order to participate in and make the contributions to the existing ILWU-PMA Vacation Fund, Pension Plan and Welfare Plan, it being understood that the Union takes no position on this matter and it is the prerogative of the Employer whether it wishes to apply to and become a member of the Pacific Maritime Association.

11-4 The Employer agrees to the establishment and operation by the Union of a Section 401(k) savings program without Employer contributions, but allowing elective contributions by employees.

XII. Hiring of Steady Employees.

12-1 The Employer has the right to select registered employees who are qualified as steady employees, without regard to seniority provided they are selected from the Union. The local that provides the employees for the Employer will cooperate in working out a satisfactory plan to keep this program in effect. All work covered by this Agreement is work that shall

be performed by ILWU employees unless otherwise provided. The Employer has the right to select steady employees, and their temporary replacements (five consecutive calendar days or longer (subject to Section 12-7)), for all categories of work. Individual facilities and locals may agree to a number of jobs and/or job classifications to be dispatched as non-steady jobs. This does not limit the Employer's ability to assign required work to steady employees to fulfill the work guarantee, or the number of steady positions an individual facility may choose to employ. Unless other skills are required by the Employer, all millwrights and millwright replacements must be qualified to cut and/or weld as defined by the Employer, or to otherwise be qualified as determined by the Employer. Any employee, who in the opinion of the Employer is qualified to do millwright work, can be used for millwright work, but no employee will be required to become a millwright against their will. Millwrights and electricians are to furnish their own light hand tools such as may be required to satisfactorily perform their work.

12-2 The Employer may name and number any employee for steady status in accordance with 12-1 above. In addition, upon request, the Union shall post for and provide the Employer with a list of employees interested in steady status. The Union shall not interfere with the posting and any allegation of such shall be subject to the grievance and arbitration procedure.

The Employer also shall have the right to determine which employees from the list to select for steady status, without regard to seniority, providing that A-registered employees shall be selected before

B-registered employees. There shall be no bumping of steady employees. For legitimate business reasons which are not arbitrary or capricious, the Employer may elect not to select any employee from the list provided.

Any steady employee under this Agreement shall serve a probationary period of ninety (90) working days following selection as a steady, during which he may be discharged by the Employer for any reason without recourse to the grievance procedure.

12-3 A steady employee must be given forty (40) hours' work opportunity or pay during the standard PMA payroll week (currently Saturday through Friday). This guarantee does not apply to a steady employee's replacement. Work opportunities offered but not accepted by the employee will count toward the guarantee. Work performed during extended hours or on night shifts during seven-day period shall be countable. In exchange for this guarantee, such steady employees shall be available not less than sixteen (16) days per calendar month, subject to the provisions of 12.4 and 12.5. Steady employees failing to meet the sixteen (16) day requirement may be subject to removal from steady status. The Union agrees to work with the Employer at the local level in which this work opportunity may need to be modified.

12-4 Steady Employees Call Back. On an elevator-by-elevator basis, the Employer shall determine the number and job classification for steady employees who will be called back by name and number after an elevator shut down or layoff.

a) Any steady employee who has been so designated by the Employer may be called

back by the Employer by name and number provided he shall have worked at the elevator no less than thirty (30) days under the above guarantee in Section 12-3. If such continuous work opportunity has not been afforded, then such steady employee shall have to work said thirty-day period subsequent to designation in order to be eligible for callback.

b) When (a) above is complied with, steady employees so designated carry layoff seniority for up to sixty (60) days during layoff and may be called back by name and number during that period. Steady employees returning from layoffs of less than 60 days duration shall not be required to re-establish the requirements in paragraph (a) above.

c) Layoff beyond sixty (60) days may be allowed with seniority by local agreement.

12-5 A steady employee who wishes to take his vacation and/or time off shall give the Employer reasonable notice. The Employer will determine if a replacement for this position shall be ordered. The steady grain handler shall retain his seniority rights for the duration of the vacation or the time off.

12-6 A steady employee who is unable to work due to injury or illness shall retain steady status and seniority through his absence.

12-7 When a steady employee takes time off or is ill, one of the steady employees from within the elevator may replace him, or if he is not replaced from within the elevator, the short-term replacement

(less than five days), if any, shall be called from the Joint ILWU-PMA Dispatch Hall.

12-8 For purposes of layoff only within job categories (such categories to be established on an elevator-by-elevator basis at the local level), all steady employees shall have plant seniority under the principle that the last to come is the first to go. Seniority is established by having the longest continuous employment for one company, including layoffs and callbacks as provided for in Section 12-4. The replacement of steady employees who die, retire, or otherwise become unavailable shall be made at the option of the Employer as provided in Section 124.

XIIA. Maintenance and repair.

Maintenance and repair work on equipment in and about the grain elevators shall be performed by the millwright/electrician, insofar as he possesses the necessary experience and competence. For new structural construction and for any new electrical, mechanical or other equipment, the Employer shall have the right to contract out the necessary contractual construction and the installation of the new equipment into warranted operating condition by the manufacturer, distributor or their representative or knowledgeable contractor. This, however, shall not be construed to include long-term service contracts for this equipment. In the event of emergency repair and/or unusual maintenance work, if an elevator's millwrights do not possess the necessary expertise or if the proper equipment required to perform such work is not readily available on a reasonable cost basis as determined by the Employer, the Employer shall have the right to engage the services of an outside contractor after first

notifying the Union of its intentions. Any grievance shall be resolved under the grievance and arbitration procedure.

XIII. Hiring of Employees Other than Steady Employees.

13-1 Because of the unusualness of the operation of grain elevators, and in order to make it convenient for people seeking employment in the grain handling industry, and so that the Employer may have a reserve labor pool from which to call employees to work, the parties hereto agree that all hiring shall be from one central location, which shall be known for the purpose of this Agreement as a "Dispatch Hall." Said dispatch hall shall be the hall maintained by the Longshoremen's Division of the I.L.W.U. and the Pacific Maritime Association, and under the control of their Joint Labor Relations Committee. First preference of work shall be given to registered longshoremen.

13-2 In establishing the following procedure, the Employer and the Union believe that they are complying with the provisions of the Labor Management Relations Act of 1947. Should it later be proved that such conditions do not meet the requirements of the said Act, then that section of this Agreement shall be open to negotiations to bring that condition into compliance with the Act,

13-3 When employees are dispatched in the Columbia River area the Employer shall abide by the revised transportation, travel time and subsistence rates for the Columbia River District.

13-4 All employees shall be dispatched through the ILWU-PMA Dispatching Hall. When the Employer orders employees from the dispatcher, the Employer shall specify the classifications needed and how many of each classification the Employer requires. It is solely within the Employer's discretion how many employees it requires and what classifications it requires. If the Dispatch Hall cannot supply sufficient qualified employees from the ILWU-PMA registered or casual work force, the Employer shall have the right to secure such other non-ILWU-PMA personnel and employ them as casuals under the Agreement, or to utilize its supervisory personnel to perform the work. Such non-ILWU-PMA personnel shall be hired on a day-to-day basis and paid for the actual time worked by the Employer, subject to the right of the Union to substitute on a next day basis qualified ILMU-PMA personnel, when available, for non-ILWU personnel. The foregoing does not apply to the hiring of steady employees, which is covered by Section 12-1.

On an elevator-by-elevator basis, the parties may by mutual agreement establish certain categories which shall not be steadily employed, but may be called back from day to day, provided they are released to the Dispatch Hall no later than Sunday each week. In the absence of such agreement, Section XII shall apply.

13-5 Should an Employer choose to work on a "no work" holiday as provided in Section VIII, the Employer shall notify the hiring hall not later than 12:00 p.m. in the Columbia River and 2:00 p.m. in the Puget Sound on the day before the holiday which employees are to be used and a definite starting time.

13-6 When employees are standing by because of shortage of employees through the failure of employees to report at the time specified, pay shall not commence until there are sufficient employees to work; provided, however, if sufficient employees are on the dock and ready for work, whenever employees are ordered to work, or back to work, they shall be paid at the full time rate from the time specified for work and not merely from the time work is provided.

13-7 When employees are working on the job and the work is suspended and employees are not released, time continues at the full rate of pay.

13-8 At the option of the Employer on an elevator-by-elevator basis, a training program, including scope and length, may be instituted by the Employer and the Union shall cooperate and participate in the implementation and administration of this program by furnishing the Employer, on request, the names of prospective candidates who the Employer will interview, select and hire at the lowest applicable wage rate. There shall be a probationary period not to exceed sixty (60) working days, to be paid at the applicable rate for that particular job, during which time the employer may determine whether the trainee is properly qualified to perform that particular skilled work classification. When deemed qualified he shall be dispatched to the employer by request.

XIV. Standard of Work Required.

14-1 Employees employed under this Agreement shall perform their work conscientiously and safely and with sobriety, be at (not on the way to) their assigned work station at the commencement time of their shift and being there until the end of their

assigned shift (not leaving their work station in advance of the designated quitting time).

14-2 Any Employer may file with the Union a complaint in writing against any member of the grain section of the Union and the Union shall act thereon and notify the Employer of the decision. Any failure on the part of any local of the Union to comply with this provision may be taken up by the aggrieved Employer before the Joint Labor Relations Committee.

XV. Working Conditions.

15-1 The General Foreman shall act in a supervisory capacity under the direction of the Employer, provided, however, that the Employer shall maintain its rights of direct supervision of the elevator's work force when the General Foreman is not working or readily available. The General Foreman may be assigned and utilized to perform temporary work (including relief) as may be required by the Employer. A General Foreman shall not be necessary when the elevator is performing a single operation, provided, however, that this rule to apply to a one job per shift only, excluding cleanup and maintenance work which is not part of a single operation.

15-2 Relief Periods. Employees are entitled to a 15-minute relief period around the midpoint of each work period, having due regard for the continuity and nature of the work. The Union agrees that there shall be specific contract language to prevent the abuse of such relief periods, and to ensure that employees will observe specified times for starting, resuming and finishing work. Asking for relief for cause is not quitting and should not be confused with

it. When an employee asks for a relief; he is entitled to get it as promptly as conditions permit.

15-3 A scoopmobile operator while operating a scoopmobile shall be allowed ten minutes relief each half hour. When this employee is not offered this relief, a second employee will be employed and the two employees shall relieve each other.

15-4 The Employer shall supply and launder coveralls for all steady oilers, millwrights and electricians.

15-5 The Employer shall maintain all toilet facilities in a clean, sanitary and operative condition, in conformance with applicable government regulations.

15-6 Personal Effects. Employees shall be reimbursed for reasonable damages (other than usual wear and tear) to personal effects, which are damaged on the job, as determined by the Employer.

15-7 Manning for non-vessel operations shall be determined by the Employer in accordance with other provisions of this Agreement. Such manning shall be based on a determination of employees necessary to perform each operation. The Employer shall, have the right to put into effect its desired manning, subject to final resolution through the grievance procedure, not including arbitration.

XVI. Procedures for Handling Grievances and Disputes.

16-1 Disputes between ILWU and Employer other than grain elevator operator's signatory hereto shall

not directly interfere with work of employees employed within or about the elevator.

16-2 A grievance shall be defined as any controversy or disagreement or dispute between the applicable ILWU Local Union and the Employer for the particular grain elevator(s) involved as to the interpretation, application, or violation of any provision of this Agreement.

16-3 There shall be established a Joint Labor Relations Committee for each port consisting of representatives of the applicable ILWU Local Union and representatives of the applicable Employer for the particular grain elevator(s) involved. Each side shall vote as a group.

16-4 All grievances shall be processed as set forth below:

(a) Within seven (7) working days after the occurrence of the event out of which the grievance arises, it shall be presented by a Union representative to the Elevator Superintendent who shall then attempt to satisfactorily adjust it. If such attempted adjustment fails, the Union representative shall then write out and sign the grievance on the form for that purpose provided by the Employer and present it to the Elevator Superintendent. Any grievance not reduced to writing within two (2) working days after the failure of the Elevator Superintendent to resolve it informally shall be waived.

(b) If the grievance is not settled as provided in (a) above, it shall be referred to the Joint Labor Relations Committee, which shall

meet within five (5) working days from the written submission of the grievance and resolve the grievance, if possible. Pending investigation and adjudication of any such grievance, work shall continue and be performed as directed by the Employer.

(c) The foregoing time limitations may be extended by mutual agreement of the parties in writing.

16-5 Except for health and safety conditions, there shall be no stoppage of work (as defined in Section 17-1) on account of any grievances or disagreements or disputes arising on the job and all employees must perform all work as ordered by the Employer in accordance with the terms of this Agreement. In the case of health and safety disputes, the matter shall be taken up immediately by the applicable Joint Labor Relations Committee during the shift on which the claim was made; and if the matter cannot be so resolved, the area arbitrator under the Pacific Coast Longshore and Clerks Contract Document shall make an immediate ruling as to how the work shall proceed, and the Employer may utilize supervisory employees to perform the work at issue. After the work with bargaining unit employees proceeds, the arbitrator shall make a further ruling as to whether a bona fide health and safety issue did or did not exist. If it did, standby time shall be paid; if it did not, no standby pay shall be paid. If the Arbitrator determines that the claim of a health and safety condition was not made in good faith, the employees involved may be subject to discipline, up to and including discharge. Additionally, if the arbitrator decides an unsafe condition exists, which can be cor-

rected, employees shall work as directed to correct such condition, but if the condition claimed to be unsafe is found to be safe, employees shall resume work as directed and failure to do so shall be cause to remove such employees from the payroll as of the time of standby.

16-6 The Joint Labor Relations Committee shall have the power and duty to investigate and adjudicate all grievances or disagreements or disputes arising under this Agreement. The hearing and investigation of grievances relating to the discharge of an employee shall be given preference over all other business before the joint Labor Relations Committee.

16-7 In the event the grievance of disagreement or dispute is not resolved by the joint Labor Relations Committee in a manner satisfactory to both parties, the Committee shall immediately determine and agree in writing on the question or questions in dispute. Such question or questions may then be referred by either party within not less than ten (10) nor more than ninety (90) days to an impartial arbitrator, unless these time periods are waived or altered by mutual agreement of the parties.

16-8 In the event a dispute is referred to arbitration, the arbitrator shall be selected, by coin flip, from a panel of two arbitrators: Arnie Schaufler and James Norton. The selected arbitrator will hear the grievance within thirty (30) days; at the grieving party's option this time period may be extended to sixty (60) days. The rules of evidence shall be liberally applied, and no licensed attorney shall present for either party at this step.

The above procedure in Section 16-8 shall not preclude the parties from mutually agreeing to select an arbitrator by some other method or from agreeing to use the area arbitrator designated under the Pacific Coast Longshore and Clerks Contract Document. No more than one issue may be submitted to an arbitrator in a single hearing, except by mutual agreement of the parties, in writing.

The arbitrator shall have no power to add to, nor subtract from, or modify any of the terms of this Agreement. No decision of the arbitrator shall require the payment of wages different from, or the payment of any wages in addition to, those expressly set forth in this Agreement; but where an employee has been discharged or suspended in violation of this Agreement, the arbitrator may order reinstatement, with back pay for any day the employee can prove that he or she would have worked for the employer but for the disciplinary action.

Either party may elect to have a transcript made of the arbitration hearing and if a copy of such transcript is desired by the other party, the cost of such copy, the original, and the arbitrator's copy, shall be shared equally by the parties. The fee of the arbitrator and the expenses incidental to such arbitration shall be borne equally by the parties to such an arbitration. The arbitrator shall be required within thirty (30) days of the final submission to reduce his award to writing and shall state as explicitly as possible the reasons for reaching that award. The decision of the arbitrator shall be final and binding upon both parties unless it is appealed as set forth below, in which event non-disciplinary awards will be stayed until the appellate arbitrator renders her

award. Disciplinary awards shall be implemented pending appeal.

Within 20 days from the receipt of the arbitrator's award, either party shall have the right to appeal such an award by giving notice to the other within such 20-day period of its intent to do so, together with a request to the non-appealing party to join with it in requesting from the Federal Mediation and Conciliation Service a panel of not less than seven arbitrators. Such written request to the FMCS shall be made within five (5) days of the date of sending such notice of appeal. From the submitted panel of names from the FMCS, each party shall alternately cross off a name until there remains one name who shall be the appeal arbitrator. The first party to cross off a name shall be decided by the toss of a coin.

The appeal arbitrator shall hear the case de novo. The appeal arbitration shall be, at the discretion of either party, a new evidentiary hearing with a representative or attorney of each party's choice. In the absence of a new evidentiary hearing, the appeal arbitrator may review the record available to the initial arbitrator, including without limitation, the submission of the parties, the transcript of the testimony and the exhibits at the arbitration hearing, the briefs of the parties, the initial arbitrator's award and decision and, if requested by either party, oral argument before the appeal arbitrator and the submission of further briefs, the time scheduling for any oral arguments and the submission of briefs to be agreed upon by the parties, or in the absence of such agreement, by the appeal arbitrator. The rules of evidence shall be liberally applied.

The expenses of the appeal arbitrator, as well as other joint expenses of holding the appeal arbitration, shall be borne by the moving party, provided, however, that each party shall bear the expenses of its own representatives and the preparation and presentation of its own case. The appeal arbitrator will have the power to affirm, reverse or modify the award and decision of the initial arbitrator and shall render his written decision and award with the reasons therefore within 30 days of the final submission to him of the matter. The decision of the appeal arbitrator shall be final and binding upon the parties to this Agreement.

16-9 The Union and the Employers agree that as of the date of the execution of this Agreement there are no unsettled grievances.

16-10 The Employer shall also have the right to file a grievance and to follow the above grievance procedure in an effort to resolve it.

XVII. No Strikes, Lockouts, or Work Stoppages.

17-1 There shall be no strike, sympathy strike, work stoppage, stop work meetings not authorized by this Agreement, picket lines, slowdowns, boycotts, disturbances, or concerted failure or refusal to perform assigned work not authorized by this Agreement (collectively, "Work Stoppage"), and there will be no lockouts by the Employer, for the life of this Agreement or extension thereof and the Union or the Employer, as the case may be, shall be required to secure observance of the Agreement.

17-2 Refusal to cross a legitimate and bona fide picket line as defined in this paragraph shall not be deemed a violation of this Agreement. Such picket line

is one established and maintained by a union, acting independently of the ILWU longshore locals, about the premises of an employer with whom it is engaged in a bona fide dispute over wages, hours, or working conditions of employees, a majority of whom it represents as the collective bargaining agency. Collusive picket lines, jurisdictional picket lines, hot cargo picket lines, secondary boycott picket lines, and demonstration lines are not legitimate and bona fide picket lines within the meaning of this Agreement.

XVIII. Discharges.

18-1 The Employer shall have the right to discharge any employee for incompetence, insubordination or failure to perform the work as required in accordance with the provisions of this Agreement.

18-2 Any employee who is guilty of deliberate bad conduct in connection with his work, or through illegal stoppage of work shall cause the delay or interruption of any operations of his Employer, may be discharged by the Employer,

18-3 Any employee (a) found on the job or reporting for work in an intoxicated condition, (b) possessing or drinking alcoholic beverages on the job, (c) failing to wear a hard hat in accordance with the requirements of the company safety program and the regulations issued thereunder, (d) failing to wear a life jacket while working aboard or in conjunction with unloading or loading a barge, (e) smoking in an unauthorized area, and (f) violating the Substance Abuse/Testing Policy attached at Appendix A shall be subject to immediate discharge from the job. The Employer shall also have the right to refuse to accept the employee for work again in accordance with 18-4

below. The Employer's safety regulations shall be provided to each steady employee and shall be posted in a conspicuous location in the elevator and such safety regulations shall be acknowledged in writing.

18-4 Any employee who is discharged by an Employer shall immediately be placed on non-dispatch to that Employer. Such employee may grieve the discharge in keeping with Section 16-4, but shall remain on non-dispatch until reinstated by the parties or the arbitrator.

Penalties for selected violations:

Assault: For first offense assault: minimum penalty: 1 year denial of work under this Agreement. Maximum penalty: discretionary. For second offense assault: mandatory denial of work under this Agreement upon request of either party.

Pilferage: For first offense pilferage: minimum penalty: 60 days' suspension from work. Maximum penalty: discretionary. For second offense pilferage: mandatory denial of work under this Agreement.

Smoking in prohibited areas: For first offense: minimum penalty: 1 year denial of work under this Agreement. Maximum penalty: discretionary. For second offense: mandatory denial of work under this Agreement.

Sale and/or peddling of controlled substances: For first offense: minimum penalty: 1 year denial of work under this Agreement. Maximum penalty: discretionary. For second offense: mandatory denial of work under this Agreement.

Safety Violations:

A. An employee found to be in violation of reasonable verbal instructions or posted employee safety rules shall be subject to the following minimum penalty: First offense: Letter of Warning; Second offense: suspension for 15 days; Third offense: Minimum penalty: suspension for 60 days; Maximum penalty: discretionary. Fourth offense: Subject to denial of work under this Agreement.

B. An employee who knowingly and flagrantly disregards reasonable verbal instructions or posted employee safety rules, or who intentionally causes damage to equipment or cargo, or who intentionally injures himself or others, shall be subject to the following minimum penalty, which shall be applied uniformly and without favoritism or discrimination: First offense: suspension from work for 90 days; maximum penalty: discretionary. Second offense: subject to denial of work under this Agreement.

18-5 It is recognized by the parties that the Employer at the various grain elevators covered by this Agreement is subject to the Drug-Free Workplace Act of 1988 (PL100-690) and must comply with the statutory obligations to have a Drug-Free Workplace Policy and Awareness Program with its prohibitions against controlled substances. Controlled substances are those specified in Schedules S I-V of Section 202 of the Controlled Substances Act (21 U.S.C. 812) as further defined in the implementing regulation at 21 C.F.R. 1308.1-1308.15 and includes such substances as opiates and their derivatives; hallucinogenic; narcotics; cocoa and its derivatives; and depressants and stimulants not available over the counter or not prescribed by a physician. The parties have agreed to adopt and

abide by the ILWU/PMA Alcohol and Drug-Free Workplace Policy, except as modified in Appendix A, with the understanding that marijuana is considered an illegal drug under the policy regardless of any state law to the contrary.

18-5.1 An employee who violates the Alcohol and Drug-Free Workplace/Substance Abuse/Testing Policy will be referred to the ILWU-PMA Welfare Plan's Alcohol/Drug Recovery program and subject to the following penalties, which shall be applied uniformly and without favoritism or discrimination: First offense: suspension of work for 30 days. Second offense: suspension of work for 60 days. Third offense: discretionary.

18-6 When the Employer discharges an employee and refuses to accept him for work again, he must be so notified in writing by the Employer, setting forth the reasons for discharge, and his case shall be dealt with by the Joint Labor Relations Committee within 5 working days.

18-7 If any employee feels that he has been unjustly discharged or dealt with, his grievances shall be taken up as provided in Section 16.

XIX. Provision for Efficient Operations.

19-1 The Employer shall have the right to make such changes as are deemed necessary in its operations to operate more efficiently and to use labor-saving devices, restricted, however, by observance of rules, prohibiting unsafe conditions.

19-2 The Employer shall have the right to introduce new methods of operation without interference from the Union. When new methods of operation are introduced, the Employer shall have the right to

determine appropriate manning, in its sole discretion, except where specific manning levels are provided in this Agreement (*e.g.*, Shipside Addendum). Except as otherwise provided in this Agreement (Section 2-5), any remaining work or its functional equivalent that has historically been performed by the bargaining unit will be assigned to the bargaining unit.

19-3 The Union guarantees the Employer protection against reprisals for making changes, and will cooperate with the Employer for the enforcement under the contract of such changes if and when made under the terms of this Agreement.

19-4 It is the intent of this section of the Agreement that the contract and working and dispatching rules shall not be construed so as to require the hiring of unnecessary employees. The question of whether or not employees are necessary shall be based on a determination by the Employer of the number of employees required to perform an operation, subject to the provisions of 19-1 hereof.

19-5 The parties agree that should disputes arise under the provisions of this Section 19, all employees shall continue to work as directed by the Employer and that such disputes shall be settled through the grievance machinery of this Agreement.

XX. New Equipment or Methods of Operations.

20-1 It is recognized that the Employer has the right to introduce improved or different methods of operations, and to select competent employees for all operations. When new types of equipment are introduced in connection with grain handling covered by the contractual definitions of work, such new

equipment shall be operated by employees under this contract, with the understanding that competent employees shall be made available by the ILWU, and the Employer will train all necessary employees for jobs or new equipment and for job replacements, provided that the Employer determines after consultation with the Union that said employee(s) can be fully qualified to operate such new equipment. This shall not change the status quo as to assignment of other than ILWU employees on existing equipment, however, when non-ILWU employees presently employed under said status quo retire, die, or are discharged, they shall be replaced by employees from the Union.

XXI. Safety Program

21-1 The Employer shall conduct at least one safety meeting per month and all employees at each elevator shall attend. When needed, such meeting shall include fumigation information and safety equipment and safeguards therefore if the Employer conducts such fumigation operations. The schedule and agenda of such meeting(s) shall be determined by the Employer, but the Union agrees that it will cooperate and assist the Employer as requested in the conduct of such safety meetings

21-2 The Employer shall conduct at least two fire drills per contract year at each elevator covered by this Agreement. The time and manner of conducting such fire drill shall be determined by the Employer at the elevator involved.

21-3 Should the Employer determine that any employee is creating a dangerous or unsafe condition to himself or others, the Employer shall have the right to discharge such employee.

21-4 The Employer pledges in good faith that discharge for safety reasons will not be used as a gimmick, and the Union pledges in good faith that "health and safety" reasons will not be used as a gimmick to avoid performing work. No employee shall be required to work under unsafe conditions.

21-5 Smoking is governed by rules of the individual signatory Employers hereto.

21-6 When employees are required to work inside tanks there shall be two employees at all times. Any work in confined spaces shall comply with OSHA regulations for confined spaces.

21-7 The Employer may hire any professional fumigators to apply fumigants in and about all grain facilities, or, if it sees fit, to employ employees and shall furnish necessary safety equipment.

21-8 If any agency of the federal or state government gives an order or takes control, regarding fumigation or sanitation of grain facilities, such order shall control.

21-9 It is agreed that where protective clothing or devises are currently being furnished even though not specifically required by the safety code, the Employer will continue to furnish them and the employees shall be required to continue to wear and use such equipment.

21-10 The parties agree that an automatic external defibrillator program meeting the American Heart Association guidelines shall be implemented at all terminals. The program shall cover vessel, dock and rail operations.

21-11 Employees covered by this Agreement shall at all times while in the employ of the Employer be bound by reasonable verbal instructions, reasonable posted Employer safety rules and procedures established by the Employer, as amended from time to time, including policies and procedures on personal protective equipment (PPE). The Union agrees to support the Employer in the implementation and the carrying out of its safety policies and procedures.

XXII. Agreement and local rules.

22-1 This Agreement, supplemented by any written executed Memorandum of Understanding, contains the full and complete agreement between the parties. No provision of this Agreement may be amended, modified, altered or waived except by written document executed by all of the parties to this Agreement.

22-2 Any and all local agreements, written or oral, by any of the individual employers hereto with any local are in all respects mutually canceled and superseded by this Agreement, unless any such local agreements have been reduced to writing and signed by the parties thereto concurrently with the execution of this Agreement. Unless specifically provided to the contrary in this Agreement or in any such newly-executed written local agreement, if any, past customary practices, past work rules, past practices imposed or enforced, by past arbitration awards, and past arbitration decisions between the parties, shall not be binding on the parties hereto and shall have no force or effect in the interpretation, construction or enforcement of this Agreement.

22-3 In the event that any provision of this Agreement shall at any time be declared invalid by

any court of competent jurisdiction or through governmental regulation or decree, such decision shall not invalidate the entire Agreement, it being the express intention of the parties hereto that all other provisions not declared invalid shall remain in full force and effect. The parties agree that if any provision of this Agreement shall be declared invalid or otherwise become unlawful, the parties shall enter into negotiations to attempt to reach a mutually satisfactory replacement for the unlawful provision(s).

XXIII. No Discrimination.

23-1 Neither the Union nor the Employer nor any employee will discriminate against any employee or applicant for employment with regard to hiring, tenure of employment, promotions, transfers, work assignments or other conditions of employment because of race, creed, color, sex, age, marital status, national origin, religious or political affiliation, veteran-military status, disability, sexual orientation or union membership status. Discrimination, as defined by this agreement, includes harassment on the basis of sex, sexual orientation, race, or other legally protected status, and includes conduct of any nature which substantially interferes with an individual's employment or right to seek employment, or creates an intimidating, hostile or offensive environment. All persons associated with the employers, including but not limited to union and non-union personnel, hourly and salaried employees, foremen, supervisors and/or superintendents, such behavior and persons who violated this policy may be subject to appropriate discipline, up to and including termination. The employers shall follow the procedures set forth in Section 18 of this Agreement in imposing discipline

on bargaining unit employees pursuant to this provision. All disciplinary action taken pursuant to this provision shall be designed to punish the specific nature of the conduct which forms the basis of the violation.

23-2 All words, terms, or definitions of employees used in this Agreement are used as being words of common gender, and not as being words of either male or female gender, and hence have equal applicability to female and male person wherever such words are used.

XXIV. Good Faith Guarantee.

24-1 As an explicit condition of agreement, the parties exchanged commitments that the Agreement as amended will be observed in good faith in answer to the Employer's demand for such a guarantee, the Union Negotiating Committee unanimously voted to commit every local and every member to observe such commitment without resort to gimmicks or subterfuge. The Employer gives a similar guarantee of good faith on its part.

XXV. Contract Property Rights.

25-1 All property rights in and to the Grain Handlers Agreement when ratified by the parties are entirely and exclusively vested in the Employer and the International Longshore and Warehouse Local Unions signatory hereto and their respective members. In the case of the International Longshore and Warehouse Union, a majority of the members of both the individual and combined locals by this Agreement shall be necessary to designate any successor organization holding property rights and all benefits of this

Agreement, and if an election is necessary to determine a majority of both individual and combined locals in order to establish the possessors of all rights and benefits under this Agreement, such election shall be conducted under the auspices and the supervision of the coastwide arbitrator provided for in the Coast Longshore Agreement, provided that such designation or election is not in conflict with any paramount authority or lawful or statutory requirement.

25-2 The obligations of this Agreement shall be binding upon any person, firm or corporation who, as a successor company or employer, shall take over the operation of any of the grain elevator terminals and related facilities presently being operated by any of the individual employers signatory to this Agreement.

XXVI. Notice

Notice will be considered as having been properly given to terminate, change or modify this Agreement if such written notice is mailed or delivered (a) to the Pacific Northwest Grain Elevator Operators, do Lindsay, Hart, Neil & Weigler, LLP, 1300 S.W. Fifth Avenue, Suite 3400, Portland, Oregon 97201, or to each Employer, individually, by the Union; or (b) to the International Longshore & Warehouse Union, 1188 Franklin Street, Fourth Floor, San Francisco, California 94109, and to each ILWU Signatory Local, individually, by the Employer.

WAGE SCHEDULE

For All "A" & "B" Registered Long-shoremen	Effective the first pay period following ratification	Effective June 1, 2015	Effective June 1, 2016	Effective June 1, 2017
General Foreman	$37.25	$37.50	$37.75	$38.25
Lead Millwright/ Electrician	$37.25	$37.50	$37.75	$38.25
Oiler	$37.25	$37.50	$37.75	$38.25
Console Operator	$37.25	$37.50	$37.75	$38.25
Truck Dump and Gallery Operator	$36.25	$36.50	$36.75	$37.25
Pay Loader	$36.25	$36.50	$36.75	$37.25
Locomotive Operator/ Switch	$36.25	$36.50	$36.75	$37.25
Millwright/ Electrician	$36.25	$37.00	$37.25	$37.75
Bargeman	$35.25	$35.50	$35.75	$36.25
Car Door Opener	$35.25	$35.50	$35.75	$36.25
Basic	$35.25	$35.50	$35.75	$36.25

For All Non Registered Long-shoremen	Effective the first pay period following ratification	Effective June 1, 2015	Effective June 1, 2016	Effective June 1, 2017
	$27.50	$27.50	$28.00	$28.50

Preservation of Rate

Any employee who is temporarily transferred from his assigned job to a job having a higher rate of pay shall receive such higher rate of pay provided he performs such job for in excess of two (2) hours, otherwise his regular rate will apply. In the event he is temporarily transferred to a job having a lower rate of pay, he shall receive his regular rate.

"EMPLOYER"

Individual Pacific Northwest Grain Elevator Operators

Columbia Grain Inc.
By: {signature not legible}
Date: 12/5/14

LD Commodities Services, LLC
By: {signature not legible}
Date: _____

United Grain Corporation,
By: {signature not legible}
Date: 12/2/14

"UNION"

International Longshore and Warehouse Union
By: {signature not legible}
Date: 11/3/2014

Local 4
By: {signature not legible}
Date: 11/12/2014

Local 8
By: {signature not legible}
Date: 11/12/14

Local 19
By: {signature not legible}
Date: 11/3/2014

GRAIN HANDLER'S AGREEMENT
APPENDIX A

ALCOHOL AND DRUG-FREE WORKPLACE POLICY SUBSTANCE ABUSE/TESTING POLICY

The parties have agreed to this policy as a means of maintaining a safe, healthful and efficient working environment for employees and to provide for an alcohol and drug-free workplace as required by the Drug-Free Workplace Act and other applicable federal, state and local laws and collective bargaining agreements.

The parties are concerned with those situations wherein use of alcohol or drugs may interfere with an employee's health and job performance, adversely affect job performance of others, or is considered detrimental to the industry. The parties recognize the industry's welfare and future depend on the health of its employees and that this Policy assists in achieving that goal.

Both parties recognize that alcoholism and substance abuse problems cause great economic loss and much physical and mental anguish to individuals and families. Persons suffering from these problems can, with the aid of appropriate diagnosis and treatment, be given the kind of help they need to lead a normal, healthy life.

To achieve the aim of this policy, the parties endorse the following:

1. The workplace at each facility party to this agreement shall be free of alcohol and drug use and abuse and possession or sale of drugs.

2. The union will assist the employers in instituting an educational campaign to inform all employees of this program and the impacts of alcohol, drug and substance abuse.

3. Superintendents, General Foremen, Lead Millwrights and management personnel, and other responsible people mutually agreed to shall be trained to recognize and respond appropriately to prohibited alcohol/drug use by workers.

4. Alcohol and drug screening shall be administered to:

    a. employees involved in an accident or conduct on the job or in the workplace that indicates there is reasonable cause to believe that they are under the influence of alcohol or drugs.

5. If management orders a test for reasonable cause and the employee disagrees with the order, the following procedure shall apply: the employee may request that his/her union representative report to the job. If the union representative, having observed the employee, believes the employee was improperly ordered to test, he/she will discuss the case immediately with the Employer. If the Employer and union representative are unable to reach an agreement, or if the union representative does not immediately respond to the request to come to the job, the case shall be immediately referred at the request of either party to the Area Arbitrator, who shall be immediately called to the job to

decide if the employee was properly ordered to test. The Area Arbitrator's decision must be issued within 90 minutes of the Employer's order to test. If the employee fails to contact his/her union representative, or if the employee leaves the job, the employee shall be deemed to have refused the test.

6. Rehabilitation services are available through the ILWU-PMA Welfare Plan's Alcohol/Drug Recovery Program and is available for registered employees. Employees with alcohol or drug dependency problems are urged to seek recovery.

Definition of terms:

1. Drugs (illegal)—any drug which (a) is not legally obtainable under federal law, or (b) is legally obtainable which has not been legally obtained. The term includes prescribed drugs not legally obtained and legal drugs being used in dosages in excess of that prescribed or not being used for prescribed purposes.

2. Employee—an individual engaged in the performance of work under this Collective Bargaining Agreement

3. Individual—person covered by the Collective Bargaining Agreement.

4. Reasonable Cause—Requires objective evidence regarding the employee's behavior or appearance, which would lead a reasonable person to believe he or she is under the influence of drugs or alcohol while at work

or whose job performance is being adversely affected by the possible abuse of drugs or alcohol.

5. Under the Influence—An employee who is affected by a drug or alcohol or the combination of drugs and/or alcohol or tests positive for a drug or alcohol in violation of this Policy.

The parties agree the education campaign should include published statements notifying employees of this policy and specify actions that will be taken for violations of the policy in the workplace.

The parties also agree to the 2011 FIRST Advantage ILWU/PMA Testing Procedures and Processes included as part of this appendix, except that screening for illegal drugs shall be by urine sample. Collection and screening of urine samples shall be conducted in accordance with collection and screening procedures, including cut-off levels for positive tests, established under US Department of Transportation regulations (49 CFR Part 40). The parties agree to use the PMA-recognized testing labs, which will confirm that they are certified to conduct DOT drug testing.

Violations of this Policy include:

1. Refusal to consent to a drug/alcohol test under any provision of this policy.
2. Being "under the influence" as defined in this Policy.
3. Possessing or purchasing any illegal drug or alcohol on Employer property.

4. Attempting to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample.

5. Adulterating synthetic or human substances with the intent to defraud a drug or alcohol screening test.

6. Selling, giving away, distributing or possessing synthetic or human substances or other adulterants that are intended to be used to defraud a drug or alcohol screening test.

7. Testing positive for drugs or alcohol under this policy.

SHIPSIDE ADDENDUM

BETWEEN

INDIVIDUAL PACIFIC NORTHWEST GRAIN ELEVATOR OPERATORS AND INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND ITS LOCALS 4,8, AND 19

AND

INDIVIDUAL PACIFIC NORTHWEST GRAIN ELEVATOR OPERATORS

1. Introduction

This Agreement is an Addendum to the collective bargaining agreement between the parties effective August 27, 2014 (the "Primary CBA"). This Addendum addresses terms and conditions of employment applicable to the ship loading work performed at the Employers' facilities. In addition to the terms and conditions stated in this Addendum, the terms and conditions set forth in the Primary CBA shall apply to shipside work. The parties understand that line-handling work is performed in keeping with the PCLCD as traditionally ordered, and not by the signatory Employers; therefore, such work is not covered by the Primary CBA or this Shipside Addendum, except relevant to its assignment.

The parties agree that longshore work, which includes but is not limited to the following, shall be performed exclusively by the Elevator operator, if performed while at the berth or at the direction of the Employer:

Loading and unloading of cargo

Handling mooring lines from the dock

Loading ship's stores from the dock with ship's gear

Lashing and unlashing of cargo

Uncovering or covering hatches for loading and unloading, and all traditionally-associated work (*e.g.*, leveling, raking, etc.)

Rigging ship's gear

Winging in and out of ship's gear

Laying separations

The foregoing work is waived in any particular instance where a longshore employee directs the ship's crew to perform the work.

2. Manning and Classification

2.1For purposes of this Agreement, the maiming for basic loading shall consist of:

One-Spout Operation:

Three (3) Ship Loaders

One (1) Ship Foreman

Two-Spout Operation:

Four (4) Ship Loaders

One (1) Ship Foreman

Three-Spout Operation:

Five (5) Ship Loaders

One (1) Ship Foreman

The term "Ship Loader" shall be considered an employee paid at the skill I PCLCD wage rate, except that Ship Loaders operating a rail mounted

bulk loader shall be paid at skill II. Regardless of the classification dispatched, the Employer shall pay all Ship Loaders at the rate of the classification requested. All Ship Loaders shall be required to perform all duties as directed necessary for ship loading operations, regardless of skill level, including placement, rigging and moving the gangway; the foregoing does not include extended shoveling (greater than 30 minutes) in the event of a spill.

The employees set forth above will be required to handle the spouts or such other manning as the Employer may deem necessary for continuous operations. Ship Loaders shall perform such work as the Employer may require in connection with the loading operation, and shall work interchangeably and simultaneously on any such work.

Using whatever spouts are necessary for efficient loading of the vessel, the parties agree that the loading of ocean going vessels of any type shall be staffed by workers belonging to or represented by Local 4 (Vancouver), 8 (Portland), or 19 (Seattle) or, as to Foremen, belonging to Local 92 (Columbia River) or 98 (Puget Sound).

2.2It is understood that elevator personnel, including supervisors, may be assigned to ship loading functions when properly allocated and ordered ship loaders or extra men are not dispatched, or if dispatched ship loaders or extra men are unwilling to perform the work.

Placement, rigging and movement of gangways, and attachment of spout extensions, may be assigned to elevator millwrights, provided such work is confined to the dock.

2.3 When any one or more of the below listed operations occur, additional (to the maiming described in 2.1, above) extra men (unskilled) shall be hired in minimum numbers as follows:

–Wire pull hatches–two extra men (when required to be opened or closed)

–Hanging Jewelry one extra man (less than two pieces); two extra men (two or more pieces)

–Pontoon Hatches–four extra men (when required to be opened or closed)-Laying Separations –four extra men

–Shoveling and Leveling–extra man/men as determined by management in its discretion

Extra men hired in the above instances may be used to cover all operational needs of the Employer on bulk grain vessel operations.

Example: Extra man hired for wire pull hatches may be shifted and required to lay separations, shovel, hang jewelry, etc. In the event that an extra man or extra men are needed for the above operations, or other operations deemed necessary at the discretion of the Employer, such extra men will be hired on an as needed basis.

3. Meal Periods

Employees working on ship loading operations shall provide their own relief during the fifteen (15) minute relief periods and mid-shift meals on continuous operations. The foreman shall provide his own relief.

Employees shall be paid for mid-shift meal periods during continuous operations.

On non-continuous operating shifts, meal periods shall be in accordance with Section 6.4 of the Primary CBA.

Employees may not be required to work over six (6) hours without an opportunity to eat on any of the shifts.

4. Allocations.

Allocations and orders for shipboard work shall be in keeping with the PMA allocation system and local ILWU-PMA working and dispatching rules, except to the extent such rules conflict with this Addendum.

5. Pay and Benefits

Hourly rates of pay and basic fringe benefits for time actually worked will be as specified in the ILWU-PMA Pacific Coast Longshore Agreement (PCLCD) at the time the work is performed. The parties agree that this does not include participation in the ILWU-PMA 401k Plan.

6. Safety Rules

This Addendum incorporates Section 21 of the Primary CBA and applicable OSHA regulations including but not limited to 29 CFR Parts 1910, 1917, and 1918 (Longshoring and Marine Terminals). The PACIFIC COAST MARINE SAFETY CODE (PCMSC) sets forth the following rules and procedure that must be followed during loading operations:

- Vessel Radar secured in "OFF" (not STANDBY) MODE. Ensure that the scanner does not rotate.
- Ship's Gear necessary to loading maintained in safe condition as defined by PCMSC.
- Relevant deck equipment and rigging secured.
- Gangway access is safe and fitted with properly rigged safety net.
- Hatch access and escape ladders in good condition and clear of obstructions.
- Ship's crew to seek permission from personnel prior to commencing ship work in areas where longshore operations are being conducted.
- Ensure that a Ship's Officer is on hand at all times during longshore operations to observe work and to ensure vessel stability and security.

7. Miscellaneous

Any matter not addressed by this Addendum shall be governed by the parties' Primary CBA.

"EMPLOYER"

Individual Pacific Northwest Grain Elevator Operators

Columbia Grain Inc.

By: {signature not legible}
Date: 12/5/14

LD Commodities Services, LLC

By: {signature not legible}
Date: _____

United Grain Corporation,

By: {signature not legible}
Date: 12/2/14

"UNION"

International Longshore and Warehouse Union

By: {signature not legible}
Date: 11/3/2014

Local 4

By: {signature not legible}
Date: 11/12/2014

Local 8

By: {signature not legible}
Date: 11/12/14

Local 19

By: {signature not legible}
Date: 11/3/2014

SHIPBOARD FOREMEN'S ADDENDUM

SHIPBOARD FOREMEN'S ADDENDUM BETWEEN INDIVIDUAL PACIFIC NORTHWEST GRAIN ELEVATOR OPERATORS AND INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND ITS LOCALS 92 AND 98

This Collective Bargaining Addendum dated as of August 27, 2014 is by and between the International Longshore and Warehouse Union Locals 92 and 98 on behalf of themselves and each of their members (hereinafter collectively called the "Union") and the individual Pacific Northwest Grain Elevator Operators.

1. Scope.

1.1

Using whatever spouts are necessary for efficient loading of the vessel, the parties agree that the loading of ocean going vessels shall be directed and supervised by ILWU Foremen as provided herein.

1.2 Jurisdiction.

The Employers recognize the Walking Bosses/ Foremen as representatives of the Employer in the performance of all cargo loading activities covered under Section 1.1 of this Addendum. The Foremen shall have the responsibility and authority to supervise, place or discharge employees, to direct work activities on the job in a safe, efficient, and proper manner and to perform such other duties as continuity of operations may require. They will perform their duties in accor-

dance with this Agreement and the direction of their Employer with due respect to the interests and requirements of the job. The Employer retains the ability to provide direct supervision in accordance with other provisions of the Grain Handlers Agreement between ILWU Locals 4, 8 and 19 and the individual Pacific Northwest Grain Elevator Operators, including its Shipside Addendum.

2. Hours.

This Addendum incorporates the Shipside Addendum and Section 6 of the Grain Handlers Agreement between ILWU Locals 4, 8 and 19 and the individual Pacific Northwest Grain Elevator Operators.

3. Manning.

Manning shall be one Foreman to direct and supervise the loading of oceangoing vessels. Foremen shall provide their own relief for breaks and meals.

4. Orders.

Orders for Foremen shall be through the ILWU-PMA Foremen's dispatch hall, and will follow local dispatch order time deadlines. Nothing in this Addendum shall preclude the employment of foremen outside of regular hiring periods in cases of emergency or in circumstances beyond the Employer's control. The Employer shall be entitled to hire and employ steady Foremen in accordance with local dispatch rules.

5. Grievance Procedure.

This Addendum incorporates Section 16 of the Grain Handlers Agreement between ILWU Locals 4, 8 and 19 and the Individual Pacific Northwest Grain Elevator Operators.

6. No Strikes, Lockouts or Work Stoppages.

This Addendum incorporates Section 17 of the Grain Handlers Agreement between ILWU Locals 4, 8 and 19 and the Individual Pacific Northwest Grain Elevator Operators.

7. Pay and Benefits.

Hourly rates of pay, guarantees, skilled rates and shift differentials shall be paid as specified in the ILWU-PMA Pacific Coast Walking Boss and Foremen's Agreement (PCWB & FA). The parties agree that this does not include participation in the ILWU-PMA 401k Plan.

8. Term of Agreement.

This Addendum incorporates Section 1-3 of the Grain Handlers Agreement between ILWU Locals 4, 8 and 19 and the Individual Pacific Northwest Grain Elevator Operators.

LD Commodities Services, LLC
By: {signature not legible}

ILWU Local 92
By: {signature not legible}

Columbia Grain Inc.
By: {signature not legible}

ILWU Local 98
By: {signature not legible}

United Grain Corporation
By: {signature not legible}

SIDE LETTER OF AGREEMENT REGARDING SHIPBOARD MANNING

SIDE LETTER OF AGREEMENT

BETWEEN COLUMBIA GRAIN AND THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND ITS LOCAL 8

REGARDING SHIPBOARD MANNING

ILWU Local 40 has filed a lawsuit against Columbia Grain, seeking to compel Columbia Grain to arbitrate ILWU Local 40's claim under the PCLCD that Columbia Grain must employ a Local 40 supercargo in its ship-loading operations.

Columbia Grain denies that it has any obligation to or relationship with Local 40 whatsoever and it intends to continue to vigorously defend itself against Local 40's claims.

In the unlikely event that Columbia Grain at some point is ordered by a court or an arbitrator to employ a Local 40 supercargo as a result of Local 40's current lawsuit against Columbia Grain, then upon the hiring of a Local 40 supercargo, the ILWU and its Local 8 agree that Shipboard manning levels will be reduced by one (1).

Dated: August 11, 2014

Columbia Grain Inc.
By: {signature not legible}
Date: 12/4/14

ILWU
By: {signature not legible}
Date: 11/3/2014

ILWU Local 8
By: {signature not legible}
Date: 11/12/14

LETTER OF UNDERSTANDING RE: ELECTRICAL MAINTENANCE WORK

Re: Electrical Maintenance Work at United Grain Corporation Vancouver, WA

The parties recognize that the Employer has a collective bargaining agreement/relationship with the IBEW Local 48 covering its electrical maintenance work. This agreement/relationship constitutes a limited exception to the ILWU' s jurisdiction over maintenance and repair work.

United Grain Corporation
By: {signature not legible}
Date: 12/2/14

ILWU
By: {signature not legible}
Date: 11/3/2014

ILWU Local 4
By: {signature not legible}
Date: 11/12/2014

MEMORANDUM OF AGREEMENT

MEMORANDUM OF AGREEMENT

BETWEEN

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION AND ITS LOCALS 4,8, AND 19

AND

INDIVIDUAL PACIFIC NORTHWEST
GRAIN ELEVATOR OPERATORS

The International Longshore and Warehouse Union and its Locals 4, 8, and 19 (collectively, "the Union"), on behalf of themselves and all their members, and LD Commodities Services, LLC, Columbia Grain, Inc., and United Grain Corporation (collectively, "the Employer") (including any corporate parent, subsidiaries or other affiliates, past or present officers, directors, employees, shareholders, attorneys, agents and insurers, and their successors) do hereby agree to the following:

In consideration of and as a material condition of the Grain Handlers Agreement executed on August 27,2014 and this Memorandum of Agreement, and as a part of a settlement and compromise, the Union agrees to waive, release and discharge the Employer, collectively, and each company individually, from any and all claims, including any court claims, administrative claims, unfair labor practice charges, or labor relations related claims, whether known or unknown, asserted or unasserted, which have arisen before the effective date of this Agreement.

Further, the Union agrees to file a motion/request for dismissal of any pending claims or charges with

prejudice and without any damages, award, remedy, attorney fees or costs of any kind or nature to any party within ten (10) calendar days.

Likewise, the Employer agrees to waive, release and discharge the Union (collectively, each Local individually, and its members) from any and all claims, including any court claims, administrative claims, unfair labor practice charges or labor relations related claims, whether known or unknown, asserted or unasserted, which have arisen before the effective the date of this Agreement.

Further, Employer agrees to file a motion/request for dismissal of any pending claims or charges with prejudice and without any damages, award, remedy, attorney fees or costs of any kind or nature to any party within ten (10) calendar days.

This Memorandum of Agreement shall become effective on the effective date of the Grain Handlers Agreement and remain in full force and effect unless expressly modified by the parties in writing.

LD Commodities Services, LLC
By: {signature not legible}

Columbia Grain Inc.
By: {signature not legible}

United Grain Corporation
By: {signature not legible}

ILWU Local
By: {signature not legible}
11/3/2014

ILWU Local 19
By: {signature not legible}
11/3/2014

ILWU Local 4
By: {signature not legible}
11/12/2014

ILWU Local 8
By: {signature not legible}