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MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APRIL 7, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MENDOZA, JR.,

Plaintiff-Appellant,

and

ROBBIE HARRIS; ET AL.,

Plaintiffs,

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL; ET AL.,

Defendants-Appellees.

No. 20-16079

D.C. Nos.
2:18-cv-00959-JCM-DJA
2:17-cv-02485-JCM-CWH

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

JOSE MENDOZA, JR.; ET AL.,

Plaintiffs-Appellants,

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL; ET AL.,

Defendants-Appellees.

No. 20-16080

D.C. No.
2:18-cv-00959-JCM-DJA
2:17-cv-02485-JCM-CWH

Appeal from the United States District Court for the District of Nevada James C. Mahan, District Judge, Presiding

Before: W. FLETCHER, WATFORD, and COLLINS, Circuit Judges.

Jose Mendoza is the former President of Local 1637, an affiliate of Amalgamated Transit Union International (ATU) that represents bus drivers and mechanics in Las Vegas. After Mendoza was accused of financial malfeasance, ATU imposed a trusteeship on Local 1637 and removed Mendoza, as well as his fellow executive board members, from office. Mendoza filed suit against ATU and associated individuals (collectively, the ATU defendants) in Nevada state court, asserting various state law tort and breach-of-contract claims (*Mendoza I*). The ATU defendants removed the case to federal court on the ground that

all of the claims were premised on ATU's alleged breach of the union constitution and thus were preempted by Section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a). The district court dismissed the tort claims without prejudice and allowed the two breach-of-contract claims to proceed as Section 301(a) claims.

Shortly after discovery closed in *Mendoza I*, Mendoza and seven other former members of the executive board filed a second lawsuit in federal district court (*Mendoza II*). ATU and associated individuals were once again named as defendants, but so too were Miller Kaplan & Arase (MKA), an accounting firm that conducted an audit of Local 1637's finances, and two of its employees (collectively, the MKA defendants), as well as Mendoza's employer, Keolis Transit America (KTA), and a KTA employee (collectively, the KTA defendants). After consolidating the two actions, the district court granted summary judgment to the ATU defendants on the two remaining breach-of-contract claims in *Mendoza I* and dismissed the claims against the ATU defendants in *Mendoza II* on the basis of claim splitting. The court also dismissed all of the claims against the MKA defendants for failure to state a claim and all of the claims against the KTA defendants for failure to state a claim or on motion for summary judgment. Although we address the claim-splitting issue in a concurrently filed opinion, we affirm the district court's decisions in their entirety.

1. The district court correctly concluded that Mendoza's claims in *Mendoza I* are preempted by Section 301(a) of the LMRA, 29 U.S.C. § 185(a). Mendoza argues that claims based on breach of a

union's constitution cannot be preempted by Section 301(a). This court has squarely rejected that argument, holding that Section 301(a) "completely preempts state law claims based on contracts between labor unions, which may include union constitutions." *Garcia v. Serv. Emp. Int'l Union*, 993 F.3d 757, 762 (9th Cir. 2021).

The district court also properly granted summary judgment in favor of the ATU defendants on Mendoza's two breach-of-contract claims in *Mendoza I*. Even construing the evidence in the light most favorable to Mendoza, no reasonable jury could conclude that ATU improperly amended Local 1637's bylaws or failed to follow the proper procedures in implementing a trusteeship.

2. As to the claims against the MKA and KTA defendants in *Mendoza II*, the district court properly granted the defendants' motions to dismiss for failure to state a claim and for summary judgment. We affirm the dismissal of all claims against the MKA and KTA defendants for the reasons articulated by the district court in its well-reasoned orders. We also affirm the district court's judgment dismissing the claims against the ATU defendants in *Mendoza II* in a concurrently filed opinion.

AFFIRMED.

JUSTICE COLLINS—CONCURRING IN PART AND DISSENTING IN PART

I concur in the memorandum disposition except to the extent that it affirms the district court's grant of summary judgment to the KTA Defendants on Plaintiffs' tenth cause of action—*viz.*, the civil RICO claim. As to that claim, I would vacate the grant of summary judgment to the KTA Defendants and remand.

To prevail on a civil RICO claim, a plaintiff must establish five elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996) (citations omitted). Here, the KTA Defendants' motion for summary judgment argued that Plaintiffs had failed to establish the necessary predicate acts and the element of injury. Plaintiffs were therefore apprised of the need, in opposing summary judgment, to come forward with evidence to support those elements of their RICO claim. But the district court instead granted Keolis's motion on the alternative ground that the underlying illicit quid pro quo between the KTA Defendants and the ATU Defendants, on which this claim was based, was a "singular 'transaction'" that did not constitute "an enterprise or an ongoing pattern of racketeering" for RICO purposes. As Plaintiffs correctly contend on appeal, the grounds invoked by the district court were different from the ones urged by Defendants in their motion. The disparity is underscored by the fact that the only aspect of the district court's reasoning that the KTA Defendants defend on appeal is that

Plaintiffs failed to establish the "existence of an Enterprise."

A litigant must be given "reasonable notice" that "the sufficiency of his or her claim will be in issue"—which requires "adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993) (quoting *Portsmouth Square v. Shareholders Protective Comm'n*, 770 F.2d 866, 869 (9th Cir. 1985)); *see also Fountain v. Filson*, 336 U.S. 681, 683 (1949). Summary judgment may be granted "on grounds not raised by a party" only "[a]fter giving notice and a reasonable time to respond." *See* Fed. R. Civ. P. 56(f)(2). Because the district court departed from this procedure, I would vacate its summary judgment to the KTA Defendants on the RICO claim and would remand that one aspect of the case for further consideration.[1]

[1] Although the KTA Defendants argue that we should affirm the district court's summary judgment on a variety of other grounds, I would leave those points for the district court to consider in the first instance.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APRIL 7, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOR PUBLICATION

JOSE MENDOZA, JR., INDIVIDUALLY AND AS A MEMBER AND REPRESENTATIVE OF THE AMALGAMATED TRANSIT UNION LOCAL 1637,

Plaintiff-Appellant,

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL; JAMES LINDSAY III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ATU INTERNATIONAL VICE PRESIDENT AND TRUSTEE; LAWRENCE HANLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS INTERNATIONAL UNION PRESIDENT; ANTONETTE BRYANT, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS INTERNATIONAL REPRESENTATIVE AND HEARING OFFICER; TERRY RICHARDS; CAROLYN HIGGINS; KEIRA MCNETT; DANIEL SMITH; TYLER HOME,

Defendants-Appellees.

No. 20-16079

D.C. Nos.
2:17-cv-02485-JCM-CWH
2:18-cv-00959-JCM-DJA (Consol.)

JOSE MENDOZA, JR.; ROBBIE HARRIS; ROBERT NAYLOR; MYEKO EASLEY; DENNIS HENNESSEY; GARY SANDERS; LINDA JOHNSON-SANDERS; CESAR JIMENEZ, INDIVIDUALLY AND EACH AS MEMBERS AND ON BEHALF OF AMALGAMATED TRANSIT UNION LOCAL 1637 OPINION MEMBERSHIP, AND AS MAJORITY OF THE LOCAL 1637 EXECUTIVE BOARD,

Plaintiffs-Appellants,

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL; JAMES LINDSAY III, INDIVIDUALLY AND AS ATU INTERNATIONAL VICE PRESIDENT AND TRUSTEE; LAWRENCE HANLEY, INDIVIDUALLY AND AS ATU INTERNATIONAL UNION PRESIDENT; ANTONETTE BRYANT, INDIVIDUALLY AND AS HEARING OFFICER; RICHIE MURPHY, INDIVIDUALLY AND AS INTERNATIONAL VICE PRESIDENT; KEIRA MCNETT, INDIVIDUALLY AND AS ATU ASSOCIATE GENERAL COUNSEL; DANIEL SMITH, INDIVIDUALLY AND AS ATU ASSOCIATE GENERAL COUNSEL; TYLER HOME, INDIVIDUALLY AND AS ATU AUDITOR; KEOLIS TRANSIT AMERICA INC.; KEVIN MANZANARES, INDIVIDUALLY, AND AS AN EMPLOYEE OF KEOLIS; MILLER KAPLAN & ARASE, A LIMITED LIABILITY PARTNERSHIP; ANN

SALVADOR, INDIVIDUALLY AND AS AN EMPLOYEE OF MKA; ALEXANDER CHERNYAK, INDIVIDUALLY AND AS AN EMPLOYEE OF MKA,

Defendants-Appellees.

No. 20-16080

D.C. No. 2:18-cv-00959-JCM-DJA

Appeal from the United States District Court for the District of Nevada James C. Mahan, District Judge, Presiding

Before: William A. FLETCHER, Paul J. WATFORD, and Daniel P. COLLINS, Circuit Judges.

COLLINS, Circuit Judge:

These consolidated appeals arise from two overlapping suits challenging a national union's imposition of a trusteeship over one of its local unions. After discovering apparent financial malfeasance by Jose Mendoza, then president of Local 1637, the Amalgamated Transit Union ("ATU") imposed the trusteeship, thereby removing Mendoza and the other Local 1637 executive board members from office. In September 2017, Mendoza filed a single-plaintiff action ("*Mendoza I*") against ATU and several of its officers. In May 2018, while that action was still pending, Mendoza filed a second, multi-plaintiff action ("*Mendoza II*") in which he and a majority of the other former executive board members of Local 1637 asserted related claims against ATU, the same ATU officers, and several other defendants. The district court dismissed all claims

against ATU and its officers in *Mendoza II*, concluding that they were barred by the doctrine of claim-splitting. After rejecting all remaining claims in rulings on motions to dismiss or for summary judgment, the district court entered judgment in favor of Defendants. Plaintiffs timely appealed.

In this opinion, we address only the district court's ruling on claim-splitting, and we resolve all remaining issues in a concurrently filed memorandum disposition. As to claim-splitting, we hold that, under the unusual facts of this case, the district court correctly concluded that, with respect to the claims against ATU and its officers, the additional Plaintiffs in *Mendoza II* were adequately represented by Mendoza in *Mendoza I*. Because the claims against these Defendants in the two cases otherwise involved the same causes of action and the same parties, the assertion of those claims in the second suit (*Mendoza II*) violated the doctrine of claim-splitting. We therefore affirm the district court.

I

A

Because the claim-splitting issue was raised in a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), we may "consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice," as well as any "writing referenced in [the] complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned." *Swartz v. KPMG LLP*, 476

F.3d 756, 763 (9th Cir. 2007). Based on those materials, we take the following facts as true for purposes of reviewing the district court's ruling on the claim-splitting issue.

Local 1637, an affiliate of ATU, is a union in Las Vegas, Nevada that represents coach operators and mechanics. After receiving various complaints from Local 1637 members Terry Richards and Carolyn Higgins about alleged financial malfeasance by the Local's President, Jose Mendoza, the ATU on April 10, 2017 imposed a temporary trusteeship over Local 1637. The letter from ATU International President Lawrence Hanley that informed Local 1637 of the temporary trusteeship cited a variety of alleged "issues severely impacting the effective administration and functioning of Local 1637." Chief among these was the allegation that Mendoza had been overpaid in terms of his salary and vacation pay. The letter further stated that, by operation of the ATU's Constitution and General Laws ("CGL"), this "imposition of the trusteeship automatically suspends all officers and executive board members of the local union from office." ATU International Vice President James Lindsay was designated as the trustee of Local 1637.

In May 2017, the ATU held a two-day evidentiary hearing to determine whether the trusteeship was justified and should be continued. The hearing was overseen by Antonette Bryant, an ATU representative, together with assistance from two members of ATU's General Counsel's Office, Keira McNett and Daniel Smith. Mendoza represented Local 1637 at the hearing. Mendoza presented an opening statement, sworn testimony, and a closing statement, and he submitted

a post-hearing statement as well. Mendoza also cross-examined several witnesses called by ATU. Bryant concluded that the trusteeship was justified, and her conclusions were upheld by the ATU General Executive Board in June 2017. As a result, pursuant to the CGL, the board members were formally removed from their positions and the trusteeship remained in place until new officer elections were held in May 2018.

In her report explaining why the trusteeship was warranted, Bryant relied on the following five grounds, all of which exclusively or overwhelmingly rested upon malfeasance on the part of Mendoza.

First, Mendoza had been overpaid more than $140,000 over an approximately six-year period. Specifically, Mendoza's salary was at a rate of pay higher than the bylaws allowed, and he was paid for more vacation time than he was entitled.

Second, Local 1637 had failed for years to conduct required annual audits, despite ATU's specific reminders to Mendoza and the Local 1637 board. When an ATU auditor, Tyler Home, conducted a thorough accounting, he uncovered a pattern of improper expense reimbursements, particularly to Mendoza. He also learned that Mendoza had been improperly receiving a $250 monthly advance on reimbursable expenses as well as reimbursement "for the cost of his home internet service," and that Mendoza and another local officer had made improper withdrawals of cash.

Third, Local 1637 persistently failed to achieve a quorum at its meetings, with the result that, as one ATU official put it, "Whatever the president [Mendoza] wants, the executive board goes along with." Members

of the Local also complained that, at meetings, Mendoza referred to "female members in derogatory terms," such as "bitch," and that Mendoza showed "favoritism . . . toward particular officers and executive board members."

Fourth, Local 1637 persistently failed to process grievances in a timely manner, and in at least once instance there was evidence that Mendoza had held up a member's grievance to retaliate against that member's vocal criticism of Mendoza.

Fifth, Local 1637 failed to obey direct orders from ATU's leadership. In particular, Mendoza was repeatedly instructed that the position of secretary-treasurer was required to be a full-time position, but he ignored these directives. Mendoza also ignored a directive informing him that delegates to the ATU International Convention must be elected; instead, he proceeded to appoint those delegates himself. After further intervention by ATU forced the Local to back down, Mendoza still required the Local to cover the non-refundable airfare and registration fee of a delegate he had wrongly appointed.

After the ATU board upheld the trusteeship, Mendoza's employer, Keolis Transit America, Inc. ("KTA"), made clear that it expected Mendoza to return to work immediately. (Mendoza had been on a leave of absence from his position as a coach operator while serving as president of Local 1637.) However, in October 2016, before the trusteeship proceedings began, Mendoza was convicted of driving under the influence, which resulted in the suspension of his commercial driver's license. In response to KTA's threat to terminate him, Mendoza asked Local 1637

to file a grievance against KTA on his behalf. Pursuant to a subsequent settlement between KTA and Local 1637 (which Trustee Lindsay accepted on Mendoza's behalf but without his consent), Mendoza was offered an opportunity to resume work for KTA if he could recertify his license within five to seven days. After he failed to do so, he was terminated by KTA in 2017.

B

In September 2017, Mendoza filed *Mendoza I* in state court against ATU, Lindsay, Hanley, Bryant, McNett, Smith, and Home (the "ATU Defendants"), as well as Local 1637 members Higgins and Richards. In his complaint in that case, Mendoza challenged the imposition of the trusteeship and the removal of the executive board members on a variety of grounds, including breach of the ATU Constitution, fraudulent misrepresentation, and malicious prosecution. In its prayer for relief, the complaint sought, *inter alia*, an order declaring "that the process for placing the Local Union under trusteeship was invalid" and directing "that the trusteeship over Local 1637 be terminated, and that Mr. Mendoza and the rest of Local 1637's Executive Board be restored to their positions." ATU removed the action to federal court several days later, asserting, *inter alia*, that the breach-of-contract claims based on the ATU Constitution were "completely preempted" by § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), and therefore necessarily arose under federal law. *See Garcia v. Service Emps. Int'l Union*, 993 F.3d 757, 762 (9th Cir. 2021) (holding that § 301(a) "completely preempts state law claims based on contracts between labor unions, which may include union constitutions").

After discovery closed in *Mendoza I*, Mendoza filed *Mendoza II* in May 2018 in federal court, asserting similar claims against the same ATU Defendants.[1] This new suit, however, added seven of the former executive board members of Local 1637 as co-plaintiffs (the "Executive Board Plaintiffs"). The complaint also named several additional defendants—*viz.*, KTA; Miller Kaplan & Arase ("MKA"), a firm that had audited Local 1637's finances; and several of KTA's and MTA's employees.

The ATU Defendants moved to dismiss the claims against them in *Mendoza II* on claim-splitting grounds. While that motion was still pending, and without prejudice to its disposition, the district court ordered *Mendoza I* and *Mendoza II* to be otherwise consolid-

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[1] The operative complaint in *Mendoza II* added as a defendant an additional ATU vice president named Richie Murphy, and it dropped Higgins and Richards as defendants. The complaint alleges that Mendoza had previously asked Hanley in 2015 to bring certain charges against Murphy and that the actions ATU took against Mendoza in 2017 were in retaliation for his complaints about Murphy. This same contention had been raised and rejected during the trusteeship proceedings before ATU hearing officer Bryant, and it was also alluded to in the *Mendoza I* complaint even though Murphy was not named as a defendant there. Under these circumstances, the naming of Murphy as an additional ATU Defendant does not affect the application of preclusion or claim-splitting principles. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992). In any event, the *Mendoza II* complaint pleads no facts that would plausibly establish that Murphy played a role in the events in 2017 that led to the imposition of the trusteeship over Local 1637. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ated.[2] On September 5, 2019, the district court dismissed Plaintiffs' *Mendoza II* claims against the ATU Defendants, holding that they were barred by the doctrine of claim-splitting. After the district court entered final judgment against Plaintiffs on all claims on May 4, 2020, Plaintiffs timely appealed.

II

Plaintiffs "generally have 'no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.'" *Adams v. California Dep't of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007) (citation omitted). To determine when such improper claim-splitting is present, "we borrow from the test for claim preclusion." *Id.* Under the federal claim-preclusion principles that apply in these federal-question-based suits, the bar of claim-splitting is applicable if the second suit involves (1) the same causes of action as the first; and (2) the same parties or their privies. *Id.* at 689.[3] Reviewing de novo the district court's determination that both requirements are satisfied in this

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[2] We reject Plaintiffs' suggestion that, by first consolidating *Mendoza I* and *Mendoza II*, the district court somehow lost the ability to apply claim-splitting principles. The district court made sufficiently clear, on the record, that its consolidation of the cases was subject to the then-pending motion to dismiss the portions of *Mendoza II* that were asserted to be impermissibly duplicative of *Mendoza I*.

[3] *Adams*'s expansive conception of the "same party" requirement was rejected by the Supreme Court in *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008), but *Adams* remains good law for the particular points for which we cite it here.

case, *see*, *e.g.*, *Guild Wineries & Distilleries v. Whitehall Co.*, 853 F.2d 755, 758 (9th Cir. 1988), we affirm.

A

Whether two suits involve the same causes of action turns, at least in federal-question cases, on the application of the Restatement of Judgments' same-transaction test. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982); *Adams*, 487 F.3d at 689. That test directs us to consider four factors:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Adams, 487 F.3d at 689 (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). Each of these factors confirms that *Mendoza I* and *Mendoza II* involve the same causes of action.

The "most important" factor is "whether the two suits arise out of the same transactional nucleus of facts." *Adams*, 487 F.3d at 689 (citations and internal quotation marks omitted). That is obviously true here: the gravamen of both suits is that, based on its findings concerning Mendoza's extensive malfeasance, ATU was able to place Local 1637 into receivership and to oust its then-existing board. And given that core overlap, it is equally obvious that the two suits

involve "infringement of the same right"; that litigation of the suits would involve "substantially the same evidence"; and that continued litigation of a second suit could impair any "rights or interests" that might be established in a judgment in the first. *Id*. The fact that *Mendoza II* involves somewhat different legal theories and a somewhat broader range of related conduct and damages does not alter the underlying fundamental identity of the suits under the Restatement's same-transaction test. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 n.22 (1982) ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes.") (citing RESTATEMENT (SECOND) OF JUDGMENTS § 61(1) (Tentative Draft No. 5, Mar. 10, 1978) (additional citations omitted)).

B

The more difficult question concerns whether the two cases involve the same parties or their privies. Ordinarily, a different set of parties—such as the additional Plaintiffs in *Mendoza II*—would be entitled to bring their own suit concerning the very same events that are the subject of an existing suit by a different plaintiff or plaintiffs. *See*, *e.g.*, *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999) (claim preclusion could not be applied as between two suits brought by separate corporations challenging constitutionality of state tax in different tax years). But under the Supreme Court's decision in *Taylor*, a nonparty to a first action may nonetheless be subject to claim preclusion—and therefore also to the bar against claim-splitting—when, *inter alia*, that nonparty was "adequately represented by someone with

the same interests who was a party" to the first suit. *Taylor*, 553 U.S. at 894 (simplified). Under the unique facts of this case, the district court correctly held that the Executive Board Plaintiffs were adequately represented by Mendoza in *Mendoza I*.

As the Supreme Court has explained, a nonparty is adequately represented in a prior suit when, "at a minimum: (1) [t]he interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Taylor*, 553 U.S. at 900 (citations omitted). "In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented." *Id*. All three of these requirements are satisfied here.

1

First, the Executive Board Plaintiffs' interests completely aligned with Mendoza's. *Mendoza I* expressly sought to have the trusteeship terminated and to have all prior board members—including both Mendoza *and* the Executive Board Plaintiffs—be reinstated to the board. Moreover, all of the relevant claims and injuries in *Mendoza II* arose from the trusteeship that was challenged in *Mendoza I*.[4] And, as our review

[4] The only possible exception is Plaintiffs' defamation claim, which alleges that the ATU Defendants falsely accused them of embezzlement by circulating the campaign literature of competing candidates in a subsequent board election. But that claim also rests on the asserted falsity of the underlying allegations of wrongdoing against Mendoza, and so it provides no basis for concluding that the interests of Mendoza and the Executive Board Plaintiffs were not aligned. In any event, the defamation

of the ATU hearing officer's findings confirms, the ruling upholding the trusteeship rested dispositively, if not exclusively, on misconduct committed by Mendoza. *See supra* at 8-9. Indeed, all seven of the Executive Board Plaintiffs submitted declarations in *Mendoza I* with identical language attesting to the fact that the "trusteeship was imposed *solely* to remove Jose [Mendoza] from office" (emphasis added). Given that all of the Executive Board Plaintiffs' injuries rested on the validity of the ATU Defendants' findings concerning Mendoza's misconduct, it follows that Mendoza's interests were aligned with those of the Executive Board Plaintiffs when, in *Mendoza I*, he challenged those findings, the resulting imposition of a trusteeship, and the accompanying removal of the entire board.

Furthermore, because the trusteeship was imposed as a result of Mendoza's malfeasance, as opposed to any wholly independent conduct by other individual Plaintiffs, the Executive Board Plaintiffs' claims necessarily rise and fall with Mendoza's claims—further confirming that their interests are aligned. Indeed, on every cause of action the Executive Board Plain-

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claim cannot salvage the claims against the ATU Defendants in *Mendoza II*, because it improperly seeks to impose liability on conduct that is mandated by federal regulations governing union elections. *See* 29 C.F.R. § 452.70 (expressly stating that "a union's contention that mailing of certain campaign literature may constitute libel for which it may be sued has been held not to justify its refusal to distribute the literature, since the union is under a statutory duty to distribute the material").

tiffs allege, they are joined together with Mendoza and they seek relief on identical grounds.[5]

The Executive Board Plaintiffs, even after amending their complaint to add fourteen additional causes of action, make no claims that are independent of Mendoza's, and the gravamen of their shared claims is that the trusteeship, and the concomitant removal of Plaintiffs from their positions, was based on allegations that were "unsupported by evidence or facts." Thus, the Executive Board Plaintiffs' argument is that the trusteeship was wrongly imposed because Mendoza did not commit misconduct, not that they were improperly removed for alleged misconduct of their own of which they were innocent. This is also consistent with the CGL: Section 12.6 of the ATU Constitution makes clear that, once a trusteeship is imposed, individual board members are automatically suspended, and if the trusteeship is subsequently upheld after a hearing (as occurred here), those board members are automatically removed from office. Once ATU imposed a trusteeship over Local 1637 on account of Mendoza's extensive misconduct, the other board members were automatically stripped of their responsibilities, regardless of whether they, individually, committed any misconduct. And under the applicable procedures governing review of the trusteeship, the

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[5] The sixth claim in *Mendoza II*—which alleged breach of the duty of fair representation—is the sole claim that is asserted only by Mendoza. Because that claim is asserted by the same party who is the plaintiff in *Mendoza I*, it is unquestionably barred by the claim-splitting doctrine. The claim is therefore irrelevant to the analysis with respect to the Executive Board Plaintiffs.

Executive Board Plaintiffs could regain their positions only if the imposition of the trusteeship was itself invalidated. Accordingly, the Executive Board Plaintiffs' claims concerning their ouster rise and fall with Mendoza's. Put simply, the allegations of the operative complaint in *Mendoza II* provide no basis upon which to conclude that the Executive Board Plaintiffs' interests were *not* aligned with those of Mendoza.

2

It is also clear that, in *Mendoza I*, Mendoza understood himself to be acting in a representative capacity on behalf of the other board members and that the other board members had notice that he was doing so. The second and third elements of the adequate-representation test, *see supra* at 15, are thus also satisfied here.

In *Mendoza I*, Mendoza specifically requested that, *inter alia*, the court declare that the trusteeship and the removal of Mendoza and "the rest of Local 1637's Executive Board" was unlawful—the same core remedy those board members seek in *Mendoza II*. Before the district court in *Mendoza I*, Mendoza clarified his own view of the relationship between *Mendoza I* and the claims of the Executive Board Plaintiffs in *Mendoza II* as follows (emphases added):

> Plaintiff Mendoza brought this action individually, and *on behalf of* Local 1637, of which the *Mendoza 2* Plaintiffs are members. As such, the Mendoza 2 Plaintiffs have an interest in this case as members of Local 1637, and this Motion will proceed by referencing

> the *Mendoza 1* and *Mendoza 2* Plaintiffs collectively as "Plaintiffs."

Moreover, as noted earlier, all of the Executive Board Plaintiffs themselves submitted declarations in support of Mendoza's effort to get them restored to their positions—thereby confirming, not only that they were aware of *Mendoza I*, but that they supported Mendoza's efforts in that suit on their behalf. *See supra* at 15-16. This is the rare situation in which the litigants in the two suits, despite not sharing a formal legal relationship, cannot be characterized as "'strangers' to one another." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 802 (1996) (citation omitted).

III

Accordingly, we agree with the district court that Mendoza viewed himself as acting in a representative capacity in *Mendoza I* and that he was an adequate representative of the Executive Board Plaintiffs in that suit. The district court therefore properly dismissed the duplicative claims against the ATU Defendants in *Mendoza II*.

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (MAY 4, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE MENDOZA, JR., ET AL,

Plaintiff(s),

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL, ET AL.

Defendant(s).

Case No. 2:18-CV-959 JCM (DJA)

Before: James C. MAHAN, United States District Judge.

Presently before the court is Jose Mendoza ("Mendoza"), Robbie Harris, Robert Naylor, Myeko Easley, Dennis Hennessey,[1] Gary Sanders, Linda Johnson-Sanders, Caesar Jimenez's (collectively "plaintiffs") first motion to amend/correct. (ECF No. 67). Amalgamated Transit Union International ("ATU"),

[1] Dennis Hennessey appears individually and "on behalf of Amalgamated Transit Union Local 1637 membership, and as majority of the Local 1637 Executive Board."

Antonette Bryant, Lawrence J. Hanley, Tyler Home, James Lindsay III, Keira McNett, Richie Murphy, and Daniel Smith (collectively "the ATU defendants") filed a response (ECF No. 73). Magistrate Judge Carl Hoffman issued a report and recommendation ("R&R"), recommending that the court deny plaintiffs' motion to amend. (ECF No. 117).

Also before the court is Judge Hoffman's order denying plaintiffs' motion to compel (ECF No. 107) and granting their motion to clarify (ECF No. 114). (ECF No. 117). Plaintiffs objected to the order. (ECF No. 121).

Also before the court is Miller Kaplan Arase, LLP, Anne Salvador, and Alexandra Chernyak's (collectively "the MKA defendants") motion for summary judgment. (ECF No. 112). Plaintiffs filed a response (ECF No. 115), to which the MKA defendants replied (ECF No. 120).

Also before the court is plaintiffs' countermotion to strike. (ECF No. 125). The MKA defendants did not file a response, and the time to do so has passed.

Also before the court are the ATU defendants' motions for summary judgment regarding the claims filed in *Mendoza I* (ECF No. 135) and *Mendoza II* (ECF No. 136). Plaintiffs responded to both motions (ECF Nos. 147; 148), to which the ATU defendants replied (ECF Nos. 155).

Also before the court is Keolis Transit America, Inc. ("Keolis") and Kelvin Manzanares's (collectively the "KTA Defendants") motion for summary judgment.

(ECF No. 137).[2] Plaintiffs filed a response (ECF No. 149), to which the KTA defendants replied (ECF No. 156).

Also before the court are plaintiffs' motions for partial summary judgment against the MKA defendants (ECF No. 139) and the ATU defendants (ECF No. 140). The MKA defendants filed a response (ECF No. 146), to which plaintiffs replied (ECF No. 158). The ATU defendants filed a response (ECF No. 145), to which plaintiffs replied (ECF No. 157).

Also before the court is plaintiffs' motion to reconsider. (ECF No. 151).[3] The ATU defendants filed a response (ECF No. 159), to which the KTA defendants joined (ECF No. 160) and plaintiffs replied (ECF No. 164).

I. Background

This action arises from the investigation into, and subsequent imposition of trusteeship over, Amalgamated Transit Union Local 1637 ("Local 1637").

Article 4 of Local 1637's bylaws provided that the president would "be paid at a daily rate of 8 hours times the highest hourly rate paid to an employee in their job classification for 40 hours per week to perform the duties of the office." (ECF Nos. 135 at 4; 135-26 at 57). This means that the president would be paid at one of two rates: either the "operator rate" or the higher "mechanic rate." (ECF No. 135 at 4-5).

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[2] The KTA defendants separately filed a statement of facts in support of its motion for summary judgment. (ECF No. 138).

[3] Plaintiffs file a corrected image of its motion. (ECF No. 152).

Thus, if a president was a coach operator, he would be paid at "the highest hourly rate paid to" a coach operator; if he was a mechanic, he would be paid at "the highest hour rate paid to" a mechanic. *Id.* In July 2011, Local 1637 rejected an amendment that would remove the reference to "their job classification," allowing the president to be paid the highest mechanic rate regardless of whether he or she was an operate or a mechanic. *Id.* at 4.

Plaintiff Jose Mendoza was the president of Local 1637. (ECF No. 8). Mendoza was a coach operator for Keolis.[4] (ECF No. 137 at 2). However, as president of Local 1637, "Mendoza was on leave from Keolis and delegated to full-time union work while receiving the standard benefits of the collective bargaining agreement between Keolis and Local 1637."[5] *Id.* In July 2011, Mendoza increased his salary to the highest mechanic rate, which amounted to a 40% pay raise, despite Local 1637 rejecting the amendment to the bylaws that would allow him to do so. (ECF No. 135 at 5). Mendoza contends that he paid himself the mechanic rate based because "at some point in 2012 or 2013 he told International Representative Stephan M[a]cDougall about his interpretation of the bylaw

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[4] Mendoza was initially employed by Veolia Transportation, the predecessor employer to Keolis and MV Transportation, to drive buses on Las Vegas Metropolitan Transit Authority bus lines. (ECF Nos. 135 at 4; 138 at 2). When the bus lines Mendoza worked were assigned to Keolis and MV around 2013, Mendoza chose Keolis as his employer. (ECF Nos. 135 at 4; 138 at 2).

[5] Because Mendoza was already the president of Local 1637 when he became employed by Keolis, his union leave meant that he never actually reported to Keolis for work.

and that Representative M[a]cDougall approved of [plaintiff] Mendoza's decision to authorize himself a salary at the higher mechanic's rate."[6] (ECF No. 147 at 14-15).

In 2012, Local 1637's financial secretary-treasurer sent Hanley, ATU's international president, a copy of their most recent bylaws. (ECF No. 135 at 5). Mendoza personally contacted Hanley on two occasions to confirm that those were the operative bylaws. *Id.* Those bylaws changed the language—but not the effect—of the provision governing the president's pay by adding the word "respective" before "job classification."[7] *Id.* at 6. Mendoza continued paying himself the mechanic rate.

In July 2016, a member of Local 1637 contacted Hanley regarding Mendoza's potentially over-paying himself. *Id.* Hanley opened an inquiry into the matter and contacted Mendoza regarding the situation. *Id.* Mendoza admitted that he had been paying himself at the mechanic rate, argued that he was entitled to the mechanic rate, and noted that International Representative MacDougall had purportedly agreed. *Id.* at 6-7. MacDougall "did not recall any such discussion,"

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[6] The court notes, like ATU did, that this conversation occurred, if at all, only after Mendoza began paying himself the mechanic rate. (ECF No. 135 at 11).

[7] Thus, the amended bylaws provided as follows: "The President-Business Agent shall be paid at a daily rate of 8 hours times the highest hourly rate paid to an employee in their respective job classification for 40 hours per week to perform the duties of the office." (ECF No. 135-26 at 80) (emphasis added).

and Mendoza could provide no documentation showing that his salary increase had been approved. *Id.* at 7.

Hanley concluded that Mendoza was entitled only to the operator rate, not the mechanic rate, and instructed Mendoza to reimburse[8] Local 1637 for the overpayment. *Id.* Notably, Hanley directed payment of only $5,865.60, "which was the amount of overpayment during the 13-week period after . . . Hanley first raised the matter with [Mendoza]. . . . " *Id.* at 7 n.6. ATU auditor Tyler Home calculated that Mendoza received roughly $144,909.08 in salary and vacation overpayments. (ECF No. 147 at 3).

Mendoza then disputed the veracity of the 2012 version of the Local 1637 bylaws. (ECF No. 135 at 8). In response, Hanley noted that Mendoza had previously indicated that Local 1637 adhered to the 2012 bylaws and, more to the point, that he was overpaid regardless of whether the 2008 or 2012 bylaws were operative. *Id.*

Then, in 2017, ATU received another complaint about the administration of Local 1637. *Id.* In response, Hanley, ATU internal auditor Tyler Home, and ATU International Vice President James Lindsay examined Local 1637's financial practices and records. *Id.* That review showed that Mendoza had been cashing out too much vacation time—5 weeks, rather than the maximum 2—and cashed out all of his vested leave every year, including vacation, paid time off, and holiday pay. *Id.* at 8-9. Mendoza claimed that he never took vacations, never took paid time off, and worked on every

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[8] Mendoza argues that this reimbursement request constitutes a disciplinary fine. (ECF No. 147).

holiday. *Id.* at 9. Mendoza did not maintain any sort of timesheet or weekly activity log to verify or support his assertion. *Id.*

In light of this apparent financial malfeasance, ATU imposed a temporary trusteeship over Local 1637, as authorized by the ATU constitution and general laws ("CGLs"). *Id.* at 9-10. When the temporary trusteeship was instituted, Local 1637's executive board members were "suspended from their functions" by operation of ATU's CGLs; those functions were taken over by the trustee. *Id.* at 9.

In accordance with ATU CGLs, ATU held an evidentiary hearing to determine whether the trusteeship was justified and whether it should be continued. *Id.* at 10. A hearing officer, ATU Representative Antonette Bryant, who was not involved in the decision to establish the temporary trusteeship was appointed to oversee the hearing. *Id.* After an evidentiary hearing—wherein Mendoza "made an opening statement, provided testimony on two separate occasions . . . and gave a closing argument" and later "submitted a ten-page, single-spaced post-hearing statement with 79 pages of attached exhibits"—Bryant issued her written report and recommendation to ATU's General Executive Board ("GEB"). *Id.* at 10-11.

Bryant made detailed factual findings, determined that there was substantial evidence of financial malfeasance, and ultimately concluded that the trusteeship was justified under ATU's CGLs. *Id.* at 11-14. Thus, by operation of the CGLs, Local 1637's executive board members were removed from their positions. *Id.* at

14-15. The trusteeship continued until new officer elections were held in May 2018. *Id.* at 15.

When Mendoza was suspended from his position as president, he was no longer engaging in full-time union work and, consequently, "ATU instructed him to report to Keolis for work and notified Keolis of the trusteeship and Mendoza's removal from office." (ECF No. 138 at 2). Mendoza contacted Keolis and requested a personal leave of absence in order to defend and appeal the imposition of the trusteeship, which Keolis granted. (ECF No. 149 at 2). However, Mendoza's commercial driver's license ("CDL")—which was required to return to work—had been suspended after Mendoza was convicted of driving under the influence in October 2016. (ECF No. 138 at 3). Mendoza never recertified for his CDL. *Id.*

During Mendoza's personal leave of absence, Keolis attempted to contact Mendoza regarding his DUI, CDL, and return-to-work date to no avail. (ECF Nos. 137 at 3; 156 at 4-8). After several attempts to get in contact with Mendoza, who did not have a CDL at the time, Keolis terminated Mendoza's employment. (ECF No. 138 at 3). Mendoza filed a grievance with Local 1637, which was forwarded to Keolis. (ECF No. 149 at 7).

ATU and Keolis ultimately negotiated a settlement on Mendoza's behalf that allowed for his reinstatement with Keolis provided that he recertify his CDL within five to seven days of the ATU's receipt of this notice. *Id.* at 8-9. Mendoza did not accept the settlement. *Id.* at 10. At the grievance hearing that followed, defendant Lindsay accepted the settlement on Mendoza's behalf and without Mendoza's consent. *Id.* Mendoza's termin-

ation was finalized after he did not recertify his CDL within the time limit set by the settlement. *Id*.

Mendoza believes that the conduct described above was the result of a conspiracy by the ATU defendants "to commit fraud in order to impose this trusteeship over Local 1637." (ECF No. 8 at 2). On September 22, 2017, Mendoza initiated the first iteration of this action in state court, which was removed to federal court on September 25, 2017. *See Mendoza, Jr. v. Amalgamated Transit Union International, et al.*, case no. 2:17-cv-2485-JCM-CWH, ECF No. 1 ("*Mendoza I*").

In *Mendoza I*, Mendoza's complaint set forth ten separate causes of action on behalf of himself individually and on behalf of Local 1637 against the ATU defendants (excluding Murphy): (1) breach of contract regarding defendants' alleged amending of Article 4 of the Local 1637 Constitution and failure to follow procedure in charging Mendoza; (2) breach of contract regarding defendants' alleged fraudulent contravention of the ATU International Constitution and Bylaws in implementing the trusteeship; (3) breach of implied covenant of good faith and fair dealing; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) legal malpractice as to defendants Keira McNett and Daniel Smith; (7) breach of fiduciary duty; (8) constructive fraud; (9) malicious prosecution; and (10) civil conspiracy. *Id*.

On May 25, 2018, plaintiffs filed the present action. (ECF No. 1).[9] Plaintiffs initially sued defendants ATU

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[9] Because both *Mendoza I* and *Mendoza II* arose from the same controversy and involved exactly the same underlying facts, the

International, Lindsay, Hanley, Bryant, Murphy, McNett, Smith, and Home. *Id*. On July 13, 2018, plaintiffs filed a prolix amended complaint, adding thirteen (13) new causes of action and adding the MKA and KTA defendants. (ECF No. 8). Plaintiffs' amended complaint asserts a total of twenty-seven (27) causes of action indiscriminately against defendants.[10] *Id.* These claims are based on various federal and state statutes, including, *inter alia*, the Labor Management Relations Act ("LMRA"), the Labor-Management Reporting and Disclosure Act ("LMRDA"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id*.

On September 5, 2019—as the parties began filing and briefing the instant motions for summary judgment—the court granted various motions to dismiss. (ECF No. 142). The court dismissed all *Mendoza II* claims against the ATU defendants, dismissed all claims against the MKA defendants, and dismissed most claims against the KTA defendants. *Id.* Thus, only claims 1 and 2 from *Mendoza I* remain pending against the ATU defendants and only claims 10, 13, and 19 remain pending against the KTA defendants. *Id.* at 19. The motions for summary judgment are now ripe, and the court considers them as they pertain to the remaining claims.

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court, after a hearing, consolidated the cases *sua sponte*. (ECF Nos. 71; 74; 76).

[10] To be clear, plaintiff brings certain claims against certain defendants, but the court and parties are left to guess as to the applicability of the remainder. (*See generally* ECF No. 8).

II. Legal Standard

a. R&Rs

This 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). Where a party timely objects to a magistrate judge's report and recommendation, then the court is required to "make a de novo determination of those portions of the [report and recommendation] to which objection is made." 28 U.S.C. § 636(b)(1).

Where a party fails to object, however, the court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth Circuit has recognized that a district court is not required to review a magistrate judge's report and recommendation where no objections have been filed. *See United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review employed by the district court when reviewing a report and recommendation to which no objections were made).

b. Review of magistrate judge orders

A district judge may affirm, reverse, or modify, in whole or in part, a magistrate judge's order, as well as remand with instructions. LR IB 3-1(b).

Magistrate judges are authorized to resolve pretrial matters subject to the district judge's review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a);

LR IB 3-1(a) ("A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case under LR IB 1-3, when it has been shown the magistrate judge's order is clearly erroneous or contrary to law."). The "clearly erroneous" standard applies to a magistrate judge's factual findings, whereas the "contrary to law" standard applies to a magistrate judge's legal conclusions. *See, e.g.*, *Grimes v. Cty. of San Francisco*, 951 F.2d 236, 240 (9th Cir. 1991).

A magistrate judge's finding is "clearly erroneous" if the district judge has a "definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "[R]eview under the 'clearly erroneous' standard is significantly deferential." *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993).

"An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *United States v. Desage*, 2017 WL 77415, at *3, ___ F. Supp. 3d___, ___ (D. Nev. Jan. 9, 2017) (quotation omitted); *see also Grimes*, 951 F.2d at 241 (finding that under the contrary to law standard, the district judge reviews the magistrate judge's legal conclusions *de novo*).

c. Reconsider

A motion for reconsideration "should not be granted, absent highly unusual circumstances." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). "Reconsideration is appropriate if the district court (1) is presented with

newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see* Fed. R. Civ. P. 60(b).

Rule 59(e) "permits a district court to reconsider and amend a previous order," however "the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal quotations omitted). A motion for reconsideration is also an improper vehicle "to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in litigation." *Marlyn Nutraceuticals*, 571 F.3d at 880.

d. Summary judgment

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party

must "set forth specific facts showing that there is a genuine issue for trial." *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence

of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249-50.

III. Discussion

As an initial matter, the court granted the MKA defendants' motion to dismiss (ECF No. 31) and granted the KTA defendants' motion to dismiss (ECF No. 51) in part. (ECF No. 142). As a result, the court denies the MKA defendants' motion for summary

judgment (ECF No. 112) as moot. Because the court denies the MKA defendants' motion as moot, the court need not consider the motion to strike attached therewith. As a result, the court also denies plaintiffs' countermotion to strike (ECF No. 125) as moot. The court also denies the KTA defendants' motion for summary judgment (ECF No. 137) as moot as it pertains to the now-dismissed sixth, eighth, and ninth causes of action.

a. Plaintiff's appeal of Judge Hoffman's order and R&R

First, plaintiffs appeal Judge Hoffman's order only insofar as it denies plaintiffs' motion to compel and grants plaintiffs' motion to clarify. (ECF No. 121). Plaintiffs do not object to Judge Hoffman's R&R that plaintiff's motion to amend (ECF No. 67) be denied. (ECF No. 117). Further, plaintiffs filed a second motion for leave to file a second amended complaint (ECF No. 154), which Magistrate Judge Albregts denied at a December 12, 2019, hearing (ECF No. 171). Accordingly, the court adopts Judge Hoffman's recommendation (ECF No. 121) and denies the motion to amend (ECF No. 67).

In the course of litigating *Mendoza II*, plaintiffs have moved to compel five times. (ECF Nos. 77; 80; 81; 84; 106; 107; 130). The first time plaintiffs moved to compel, they filed a "motion for sanctions against ATU International Defendants; motion to compel; for protective order; and for an order directing counsel to cease obstructionist tactics during oral depositions." (ECF No. 77). Thus, plaintiffs' motion requested multiple forms of relief, and the clerk's

office indicated that "Counsel is advised to refile the Motion to Compel and the Motion for Protective Order contained within ECF No. 77, each as separate entries, in accordance with the Local Rules." (ECF No. 78 (emphasis added)).

Rather than file a motion to compel and a motion for protective order, plaintiffs filed separate motions for sanctions (ECF No. 80) and to compel (ECF No. 81). Thereafter, plaintiffs filed only motions to compel. (ECF Nos. 84; 106; 107; 130). At issue here is plaintiffs' "emergency motion to compel noticed 30(b)(6) witnesses [sic] testimony" (ECF No. 107), which Judge Hoffman denied for failing to meet and confer (ECF No. 117). Plaintiffs moved to compel because the parties disagreed on, *inter alia*, whether the ATU defendants' 30(b)(6) witness was noticed to testify "regarding compliance with the LMRDA" or "on ATU policies and procedures." *Id.* at 9; (*see also* ECF No. 107).

After filing the instant motion to compel, plaintiffs also moved for clarification of the clerk's notice instructing them of the local rules. (ECF No. 114). Plaintiffs articulated their uncertainty as follows:

> The three remedies sought, to compel resuming of the deposition, monetary sanctions for having to hold the resumed disposition, and a protective order including admonishments for misconduct are all sanctions available for deposition misconduct. However, it now appears that though each of the requested relief in that case are considered available sanctions, the operation of Local Rule 2-2(b) now supposedly requires the filing of three separate motions despite all the relief being

> requested are considered available sanctions. For this reason, Plaintiffs request the Court clarify if the operation of Local Rule 2-2(b) does, indeed, require the filing of three separate Motions for deposition misconduct.

Id. at 7.

Judge Hoffman clarified that "[t]he Local Rule at issue requires the filer to file the same document on the docket more than once, depending on the number of requests contained in the document" and that "[e]ach time the document is filed, the filer must select a different type of event." (ECF No. 117 at 11). Judge Hoffman also provided an example: "if plaintiffs prepare a motion to compel, and if within that motion is a request for sanctions, plaintiffs must file that motion twice on the docket. Each filing must reflect a different event. The first filing event being a 'motion to compel' and the second, a 'motion for sanctions.'" *Id.*

Thus, plaintiffs' understanding—that each requested *sanction* required a separate motion—was clarified. Instead, each type of relief—compel, sanctions, a protective order, etc.— must be in a separate document. Plaintiffs take umbrage with this explanation because, by their estimation, this creates a conflict between the local rules and Federal Rules of Civil Procedure. (ECF No. 121). Plaintiffs take Judge Hoffman's explanation to mean that Local Rule IC 2-2 "requir[es] that the motion be filed as a [m]otion to [c]ompel," which "imposes a meet and confer certification requirement that is inconsistent with the Federal Rules of Civil Procedure." *Id.* at 8.

The court disagrees. First, plaintiffs correctly note that Local Rules are valid only if they do not conflict with the federal rules. *Id.* at 3 (citing Fed. R. Civ. P. 83; *Reese v. Herbert*, 527 F.3d 1253, 1266 n.20 (11th Cir. 2008)). However, the Ninth Circuit is "under an obligation to construe local rules" so they do not conflict with the federal rules. *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995). Indeed, "[t]he district court has considerable latitude in managing the parties' motion practice and enforcing local rules that place parameters on briefing." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002).

Assuming *arguendo* that plaintiffs' interpretation of this court's local rules is correct such that they must file a meet-and-confer certification along with any motion to compel redeposition, this does not amount to a conflict with the Federal Rules of Civil Procedure. The Central District of California, addressing its analogous local rule, reasoned as follows:

> Even if the Court were to adopt Plaintiff's interpretation of Rule 37(d), at most the Federal Rule is silent as to whether a party seeking sanctions based on the failure to appear at a deposition must meet and confer. There is no express statement in the Rule affirmatively exempting a party from meeting and conferring in such circumstances. Accordingly, the Central District's requirement–under Local Rule 37-1 or Local Rule 7-3—that parties must meet and confer prior to filing any motion (with certain exceptions not relevant here), does not conflict with Federal Rule 37(d).

DarbeeVision, Inc. v. C&A Mktg., Inc., No. CV 18-0725 AG (SSX), 2019 WL 2902697, *5 (C.D. Cal. Jan. 28, 2019) (emphasis in original). The *DarbeeVision* court thus upheld the requirement that parties "meet and confer pursuant to Local Rule 37-1 before filing a sanctions motion under Federal Rule 37(d) based on the failure to appear at a deposition." *Id.*

The *DarbeeVision* court's analysis is persuasive. Conversely, plaintiffs' citation to *Nelson v. Willden*, No. 2:13-CV-00050-GMN-VCF, 2014 WL 4471628, at *1 (D. Nev. Sept. 10, 2014), is unavailing. In *Nelson*, there was a direct conflict between the language of Rule 37(a)(d), which applies to "parties and all affected persons," and Local Rule 26-7(b), which applied only to "the parties." 2014 WL 4471628, at *1.

There is no such contradiction between the language of LR 26-7 and Rule 37(d). Although Rule 37(d) does not expressly require the parties to meet and confer, its silence on the issue does not prohibit district courts from implementing local rules that impose that requirement. Therefore, there is no conflict between Local Rules 2-2(d), 26-7(b), and Federal Rule 37(d).

The court's interpretation is not as patently unreasonable as plaintiffs claim. Plaintiffs' argument relies on the premise that they do not, and should not, need to meet and confer prior to a filing of a motion for sanctions, including "the sanction of redeposition." To support this argument, plaintiffs cite *Brincko v. Rio Properties, Inc.*, 278 F.R.D. 576 (D. Nev. 2011), and *Cardinali v. Plusfour, Inc.*, No. 2:16-cv-02046-JAD-NJK, 2019 WL 1598746 (D. Nev. Apr. 15, 2019), neither of which are apposite.

In *Brincko*, the defendant moved to compel plaintiff's expert "to appear and answer questions at a second session of his deposition that he was instructed not to answer at his July 31, 2011, deposition." *Brincko*, 278 F.R.D. at 578. There, the defendant completed the deposition and then attempted to meet and confer with the opposing party:

> After the deposition concluded, counsel for [defendant] wrote to [opposing] counsel . . . requesting a telephonic meet-and-confer concerning the instructions not to answer, and inquiring whether the [opposing party] would agree to make [the expert witness] available for a continuation of his deposition at the [opposing party]'s expense. Counsel engaged in extensive written communications and phone conversations, but the [opposing party] continues to refuse to make [the expert witness] available for a continuation of his deposition.

Id.

Next, in *Cardinali*, Magistrate Judge Koppe found "that attorney and deponent misconduct is rife in the transcript, and [after] review[ing] that transcript, [Judge Dorsey] agree[d]." *Cardinali*, 2019 WL 1598746, at *2. However, regarding the "sanction of redeposition" in that case, Judge Dorsey indicated that "ordering the [plaintiff's law firm] to reappear for deposition wasn't a sanction—it was an order directing the Firm to comply with [defendant's] Rule 45 subpoena." *Id.* at *1. Notably, the defendant in *Cardinali* filed separate motions for sanctions and to compel; it also included a meet-and-confer certification and declara-

tion along with its motion to compel. *See Cardinali v. Plusfour, Inc.*, No. 2:16-cv-02046-JAD-NJK, ECF Nos. 129; 130; 131 at 9.

Here, plaintiffs did not request to meet and confer, unlike the defendants in *Brincko* and *Cardinali*. Nor did they attempt to reschedule a follow-up deposition on the disputed topics, like the *Brincko* defendant did. The defendant in *Cardinali* abided by the exact procedure that plaintiffs claim is irreconcilable with the Federal Rules of Civil Procedure. Rather than abide by that procedure, plaintiffs summarily contend that a brief tête-à-tête during the deposition, which did not touch upon the majority of the problems articulated in their motion (*see* ECF No. 107), satisfies the meet and confer requirement.

Consequently, the court finds that Judge Hoffman's order was not clearly erroneous or contrary to law. The court denies plaintiffs' objection. (ECF No. 121).

b. Reconsider

i. Procedural background

The court finds that further procedural explanation is necessary before delving directly into the instant motion for reconsideration. In *Mendoza I*, Mendoza brought state-law claims that were preempted by the Labor Management Relations Act ("LMRA"). (*See Mendoza I*, ECF No. 30 at 7). The ATU defendants[11]

[11] The ATU defendants in *Mendoza I* include all of the current ATU defendants except ATU International Vice President Richie Murphy.

moved to dismiss the claims against them. (*Mendoza I*, ECF No. 38). The court granted that motion in part and dismissed all but Mendoza's first and second claims. (*Mendoza I*, ECF No. 82).

In opposition to the ATU defendants' motion to dismiss, Mendoza argued that the Labor-Management Reporting and Disclosure Act's ("LMRDA") "presumption of validity" should not apply to his claims. (*Mendoza I*, ECF No. 44 at 6-9). In virtually the same breath, Mendoza also argued that his state-law claims against individual ATU defendants "should not be dismissed because [he would] simply amend the complaint alleging the same claims under the LMRDA and state law." *Id.* at 29-30 (capitalization removed). The court held that "[Mendoza] [could not] have it both ways" and declined his invitation to "apply a theory of liability under the LMRDA . . . while simultaneously refusing to apply the 'presumption of validity' standard set forth by the LMRDA to plaintiff's claims regarding the imposition of the trusteeship." (*Mendoza I*, ECF No. 82 at 9).

Notably, the court denied Mendoza's motion to stay the deadline to amend pleadings on March 23, 2018, while the ATU defendants' motion to dismiss was pending. (*See* ECF Nos. 53; 58). Plaintiff requested the deadline be stayed because:

> There is currently pending before this Court a Motion to Dismiss that, due to this Court's prior ruling on Plaintiff's Motion to Remand, will result in the dismissal of at least some of Plaintiff's causes of action. Plaintiff was waiting on the Court to issue its ruling on the Motion to Dismiss in order to amend his

> Complaint to add claims that will likely be dismissed under the LMRA, that also fall under the LMRDA numerous provisions addressing breaches of union constitutions. However, Plaintiff cannot amend his Complaint effectively without first knowing which of Plaintiff's state law claims this Court is going to find are preempted by the LMRA. As such, Plaintiff requests that this Court stay the deadline to amend pleadings until after this Court resolves the Motion to Dismiss.

(*Mendoza I,* ECF No. 53 at 2).

When declining Mendoza's motion, the court specifically noted that Mendoza "was made aware of the deadline to amend the pleadings on November 11, 2017, when the [c]ourt issued its scheduling order," and that he "therefore knew of both the deadline to amend pleadings and the likelihood that he would need to do so well in advance of the deadlines." (*Mendoza I*, ECF No. 58 at 5). Further, Judge Hoffman reasoned that Mendoza "cite[d] no authority in support of his argument that he is unable to amend the pleadings until the [c]ourt issues its order on the motion to dismiss, and the [c]ourt is unpersuaded." *Id*. Two months later, on May 25, 2018, plaintiffs filed *Mendoza II*. (ECF No. 1).

Although the deadline to amend the pleadings had passed by the time the court granted the ATU defendants' motion, the court dismissed Mendoza's claims without prejudice and expressly allowed him to file a motion for leave to amend. (*Mendoza I*, ECF No. 82 at 9 n.4 ("Because the court recognizes that

the plaintiff is the master of the complaint, the court will dismiss plaintiff's claims without prejudice so that plaintiff may file a motion for leave to amend.")).

In *Mendoza II*, the ATU defendants moved to dismiss all of the *Mendoza II* claims against them on the basis of this circuit's prohibition against "claim splitting" (ECF No. 33), which the court granted (ECF No. 142). In the initial motion briefing, the ATU defendants argued as follows:

> A plaintiff generally has "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." *Adams v. Calif. Dep't of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007) (citation omitted). By the same token, "the fact that [a] plaintiff was denied leave to amend does not give [him] the right to file a second lawsuit based on the same facts." *Id.* (quoting *Hartel Springs Ranch of Colo. v. Bluegreen Corp.*, 296 F.3d 982, 989 (10th Cir. 2002)). Where a plaintiff seeks to circumvent this principle, district courts may dismiss the second complaint with prejudice. *Fairway Rest. Equip. Contracting, Inc. v. Makino*, 148 F. Supp. 3d 1126, 1128 (D. Nev. 2015) (Mahan, J.).

(ECF No. 33 at 6).[12]

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[12] The ATU defendants' buttressed this argument by showing Mendoza's intent to bring these claims in *Mendoza I*: "In a[n] . . . appeal to the Ninth Circuit, Mendoza criticized this [c]ourt's decision . . . and acknowledged that he and 'the other ousted Local 1637 Executive Board officers must now file a Second

Plaintiffs responded by claiming this argument was "fundamentally flawed" and "meritless" because they could not have been trying to circumvent the court's order after "the [c]ourt recently rescinded its prior [o]rder on the issue of adding the LMRDA claims in *Mendoza I*." (ECF No. 43 at 5). But this argument does not address the fact that plaintiffs filed *Mendoza II* just two months after the court declined to extend the deadline to amend his pleadings in *Mendoza I*. Mendoza represented that he would amend his *Mendoza I* complaint. The court gave him an opportunity to do so. Mendoza never did.

ii. Claim splitting

The court now turns to the instant motion for reconsideration. The claim splitting doctrine bars a party from subsequent, duplicative litigation where the "same controversy" exists. *See, e.g., Single Chip Sys. Corp. v. Intermec IP Corp.*, 495 F.Supp.2d 1052, 1057 (S.D. Cal. 2007) (quoting *Nakash v. Superior Court*, 196 Cal.App.3d 59 (Cal. Ct. App. 1987)). To determine whether a suit is duplicative, courts in the Ninth Circuit borrow from the test for claim preclusion. *Adams v. Cal. Dep't of Health Servs.,* 487 F.3d 684, 689 (9th Cir. 2007), *overruled on other grounds by Taylor v. Sturgell*, 553 U.S. 880, 904 (2008).

A district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to

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Complaint under the LMRDA. . . . " (ECF No. 33 at 7); (*see also* ECF No. 33-3 at 25)).

consolidate both actions. *See Adams*, 487 F.3d at 688; *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138-39 (2d Cir. 2000); *Russ v. Standard Ins. Co.*, 120 F.3d 988, 990 (9th Cir. 1997). In determining whether a later-filed action is duplicative, a court must examine "whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams*, 487 F.3d at 688.

1. Propriety of Claim Splitting Dismissals in a Consolidated Action

As an initial matter, plaintiffs argue that the court's options when faced with duplicative litigation—dismiss, stay, enjoin, or consolidate—are mutually exclusive. (ECF No. 152 at 19-25). Plaintiffs rely principally on the out-of-circuit case *Bay State HMO Mgmt., Inc. v. Tingley Sys., Inc.*, 181 F.3d 174 (1st Cir. 1999). Plaintiffs contend that the *Bay State* holding stands for the proposition that this court could not both consolidate this action and dismiss the *Mendoza II* claims against the ATU defendants on the basis of claim splitting because both actions are now considered a single case.

The court disagrees. First, *Bay State* is not binding on this court. Second, even if it were, the *Bay State* court held that applying *res judicata* to the second action in a consolidated case was reversible error because dismissal of the first action did not constitute a "final judgment." *Bay State HMO Mgmt., Inc.*, 181 F.3d at 177 ("Because we find that the first element [a final judgment on the merits in an earlier action] is not satisfied, we do not address Tingley's other contentions."). The First Circuit explained that "[t]here

was no final judgment on the merits in an earlier action; there was only a final judgment on a portion of the aggregate case. Therefore, the application of res judicata in this case was inappropriate." *Id.* at 182. Even then, the *Bay State* court was careful to note that actions retain their separateness despite consolidation and rejected the notion "that consolidated actions must always be treated as separate actions *for all purposes*." *Id.* at 178 (emphasis in original).

Although claim splitting is a facet of *res judicata*, it is not identical. Importantly, claim splitting, unlike *res judicata*, does not require a final judgment on the merits in the prior case. *Single Chip Sys. Corp.*, 495 F.Supp.2d at 1058. Thus, the *Bay State* holding is not dispositive in the claim-splitting context.

The court finds that claim splitting is still available, the consolidation of *Mendoza I* and *Mendoza II* notwithstanding. While dismissal of either *Mendoza I* or *Mendoza II* would not result in a "final judgment" for the purposes of *res judicata*, claim splitting is concerned with the filing of *Mendoza II* as a duplicative action. Thus, the court still has discretion to dismiss the *Mendoza II* claims against the ATU defendants if warranted.

2. Claim Splitting Analysis

Plaintiffs claim that the interaction between their state-law claims, the LMRA, and the LMRDA means that certain legal theories and remedies were "unavailable" in *Mendoza I* such that their claims against the ATU defendants are not subject to the prohibition against claim splitting. (ECF No. 152 at 11-19).

The court disagrees. Put plainly, this court finds that Mendoza is once again trying to have his cake and eat it, too. Mendoza pleaded *Mendoza I* under state law in state court, where he wanted the case to remain. The case was properly removed based on preemption under § 301(a) of the LMRA. Mendoza wanted to maintain his claims against individuals under the LMRA, despite the statutory prohibition thereon.

But Mendoza did not want to plead LMRDA claims in *Mendoza I* because, as he now argues in support of his motion for reconsideration, "if he had chosen to amend the *Mendoza I* [c]omplaint, by clearly indicating that doing so would cause [p]laintiff Mendoza's LMRA claims to be governed by the legal theories that govern the LMRDA." (ECF No. 152 at 12). By plaintiffs' estimation, this means that they "would have forfeited th[e] entire ['straight breach of contract' LMRA] legal theory in *Mendoza I* forcing the entire action to be governed by the LMRDA, and the ATU International Defendants would have succeeded on summary judgment in regards to the LMRA trusteeship claim." *Id.* at 13. In response, the ATU defendants urge that Mendoza's "strategic decision to plead breach-of-contract claims rather than LMRDA claims in *Mendoza I* was not a legal barrier to their recovery"; instead, Mendoza "w[as] faced with 'two choices' and elected to forgo certain avenues of relief in order to, in [his] view, increase [his] chances of winning." (ECF No. 159 at 7).

Whether one of Mendoza's claims was meritorious or would ultimately be successful in light of his other claims—and the legal framework governing his case—

is not dispositive of claim splitting's applicability. To the contrary, "[t]he 'same transactional nucleus of facts' factor is commonly held to be outcome determinative." (ECF No. 142 at 13 (citing *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005)). Although that factor is often dispositive virtually on its own, the court also considers "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; [and] (3) whether the two suits involve infringement of the same right. . . . " *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982).

Importantly, plaintiffs do not dispute or otherwise ask the court to reconsider its determination that "the transaction test factors weigh in favor of finding that *Mendoza I* and *Mendoza II* are the same causes of action with the same relief sought." (ECF No. 142 at 13); (*see generally* ECF No. 152). Instead, plaintiffs now argue only the second prong of the claim-splitting analysis: whether the parties or privies to the action are the same. *Id.*

Supreme Court precedent establishes six exceptions to the general rule "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor*, 553 U.S. at 884 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (quotation marks omitted). As relevant here, a nonparty's suit is precluded when the nonparty was "adequately represented by someone with the same interests who was a party." *Id.* at 894 (quoting *Rich-*

ards v. Jefferson Cty., Ala., 517 U.S. 793 (1996)) (quotation marks and alteration omitted). Regarding the adequate representation exception, the *Taylor* court explained as follows:

> A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.

Id. at 900.[13]

Similarly, "a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy," such that a nonparty's suit is precluded when it "later brings suit as the designated representative of a person who was a party to the prior adjudication." *Id.* at 895 (citing *Chicago, R.I. & P.Ry. Co. v. Schendel,* 270 U.S. 611, 620 (1926); 18A Wright & Miller § 4454, at 433-434).

Plaintiffs contend that "[t]he adequate representation exception that this [c]ourt has applied does

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[13] The Court also noted that "adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented," *Taylor*, 533 U.S. at 900, but the plaintiffs here do not dispute that they received notice of *Mendoza I*, (*see generally* ECF Nos. 43; 142; 164). Nor can they argue they did not receive notice of *Mendoza I* because, as the court previously noted, plaintiffs "all attached declarations supporting Mendoza's motion for partial summary judgment." (ECF No. 142 at 15 (citing *Mendoza I,* ECF No. 68)).

not apply because this case is not one of the enumerate [sic] representative actions the United States Supreme Court has found the exception can applicable [sic]." (ECF No. 152 at 9). In particular, plaintiffs contend that "[t]he only claim that could possibly be considered as being brought in a representative capacity in . . . *Mendoza I* and *Mendoza II* are the trusteeship claims, which . . . must always be brought on behalf on the local union and its membership as a whole." *Id.* at 10.

Plaintiffs believe that "[w]hat appears to be occurring here is that this [c]ourt is dismissing the *Mendoza II* [p]laintiffs' LMRDA, RICO, and state law defamation claims because they retained the same attorney, not because they involve the same parties and claims." (ECF No. 152 at 18). Not so. What is, in fact, happening here is that the court is dismissing plaintiffs' *Mendoza II* claims because they were adequately represented by Mendoza in *Mendoza I*. To the extent they were not adequately represented, plaintiffs are nothing but proxies for Mendoza, who wants as many bites at the apple as he can get.

Plaintiffs in this action consistently blurred the lines between *Mendoza I* and *Mendoza II* prior to the court consolidating the actions on March 27, 2019. For instance, plaintiffs moved in this action for a temporary restraining order that relied on discovery material that Mendoza received in *Mendoza I*. (ECF No. 4). Further, as the ATU defendants point out, the *Mendoza II* plaintiffs amended their complaint, adding 13 new causes of action and four new defendants, the day after briefing on the summary judgment motions in *Mendoza I* was completed. (ECF No. 33 at 4); (*see*

also ECF No. 8; *Mendoza I*, ECF No. 68). In fact, "[m]any of the Amended Complaint's allegations are taken verbatim from one of Mendoza's motions for summary judgment in *Mendoza I*." (ECF No. 33 at 4); (*Compare* ECF No. 8, *with Mendoza I*, ECF No. 68).

Moreover, plaintiffs' prolix complaint in *Mendoza II* further evinces that plaintiffs were adequately represented by and are proxies for Mendoza. For the first 30 pages, the complaint simply reiterates the controversy underlying *Mendoza I*. (ECF No. 8 at 1-30). Plaintiffs' first allegation of harm to anyone but Mendoza is on page 31 as follows:

> 143. The Plaintiffs, Plaintiff Mendoza excluded, have been permitted to run for the May 30, 2018 election, and many of them were nominated for their former positions on the Local 1637 Executive Board.
>
> 144. Defendant Lindsay permitted those opposing Plaintiffs in this action who ran for this election to run a campaign promising prosecution of Plaintiffs for embezzlement of union money without informing the membership that none of them were officially charged or found guilty of stealing money from Local 1637.

Id. at 31.

The complaint then continues to allege harm that is entirely duplicative of *Mendoza I*. For instance, plaintiffs' eighth cause of action is illustrative of the redundancy between these actions: "receiving and accepting something of value from a union employer in violation of LMRA 29 U.S.C. § 186," brought against

the ATU and KTA defendants. *Id.* at 66-69. Although claim 8 does not specify which plaintiffs bring the claim and refers to "plaintiffs," the only harm alleged in that claim pertains to Mendoza. *See, e.g., id.* at 68 ("As a direct and proximate result of Defendants' actions . . . Plaintiff Mendoza has been harmed . . .individually and as members [sic] of Local 1637, which Plaintiff Mendoza would have received if Defendants had never removed Plaintiffs from office and imposed this trusteeship." (emphasis added)). Claim 18 likewise relates only to Mendoza. *Id.* at 84-86. Plaintiffs assert "[t]hat [the ATU d]efendants initiated a criminal investigation against [p]laintiffs with Department of Labor," *id.* at 84, but the Department of Labor ("DOL") Office of Labor-Management Standards ("OLMS") investigation was against only Mendoza, (*see* ECF No. 140-4 at 7).

Thus, the court finds that plaintiffs were adequately represented by Mendoza in *Mendoza I*. Plaintiffs urge that certain *Mendoza II* claims could not have been brought by Mendoza in the first action to no avail. Those claims, as they have been brought in the second action, amount to little more than a recitation the prior claims that Mendoza indicated he would "forfeit" if he also brought LMRDA claims.

Accordingly, the court denies plaintiffs' motion to reconsider. (ECF No. 152). Because the court denies plaintiffs' motion to reconsider, the court denies the ATU defendants' motion for summary judgment regarding *Mendoza II* (ECF No. 136) as moot.

c. Summary Judgment

i. Summary Judgment as to the Remaining Claims Against the KTA Defendants

In its prior order, the court noted that three claims could proceed against the KTA defendants: the tenth, thirteenth, and nineteenth causes of action for RICO, defamation, and civil conspiracy, respectively. (ECF No. 142 at 19). The court will address the defamation claim and then turn to the RICO and civil conspiracy claims.

1. Claim 13: Defamation

Neither party argued the thirteenth or nineteenth causes of action in the initial briefing for the KTA defendants' motion for summary judgment. (ECF Nos. 137; 149). After the court's order, KTA indicated in its reply that "it appears [p]laintiffs never intended their defamation claim to apply to KTA [d]efendants" and that the claim should be dismissed as against them because "the [t]hirteenth [c]ount contains no specific allegation of any defamation of any kind purportedly perpetrated by the KTA [d]efendants." (ECF No. 156 at 2, 20). The court finds that plaintiffs' defamation claim against KTA—if plaintiffs intended to plead such a claim in the first place—fails for the same reasons articulate in the court's prior order regarding the MKA defendants. (ECF No. 142 at 8-9).

Accordingly, the court dismisses the thirteenth cause of action against the KTA defendants. Thus, the court is left to determine whether summary judg-

ment is appropriate regarding plaintiffs' RICO and civil conspiracy claims.

2. Claim 10: RICO

The RICO Act "provides a private right of action for treble damages to '[a]ny person injured in his business or property by reason of a violation" of the Act's criminal prohibitions." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 641 (2008) (quoting 18 U.S.C. § 1964(c)). Thus, to plead a civil RICO claim, plaintiff must demonstrate: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quoting *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996)).

Further, because RICO claims involve underlying fraudulent acts, Federal Rule of Civil Procedure 9(b)'s heightened pleading standard applies. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-66 (9th Cir. 2004); *see also* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Thus, to sufficiently plead its RICO claim, a plaintiff must specify the time, place, and content of the alleged underlying fraudulent acts and statements, as well as the parties involved and their individual participation. *Edwards*, 356 F.3d at 1066.

A plaintiff proves the existence of an "enterprise" by providing "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States*

v. Turkette, 452 U.S. 576, 583 (1981). The United States Supreme Court was careful to clarify that "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Id.*

Further, the Ninth Circuit has clarified what constitutes a "continuing unit" for the purposes of being a RICO "enterprise." *See Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007). In *Odom*, the Ninth Circuit explained that the "continuity requirement focuses on whether the associates' behavior was 'ongoing' rather than isolated activity." *Id.*

Taken together with the "pattern of racketeering" element, plaintiffs must "show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992) (emphasis in original) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). Thus, a defendant that engages in "a single episode with a single purpose which happened to involve more than one act taken to achieve that purpose" is not liable for RICO. *Sever*, 978 F.2d at 1535.

Here, plaintiffs' RICO claim against the KTA defendants fails because plaintiff does not show either an enterprise or an ongoing pattern of racketeering. Plaintiffs' RICO theory is premised on the insinuation that the KTA defendants and ATU defendants conspired together. (ECF No. 149 at 5-13). By plaintiffs' estimation, Keolis terminated Mendoza's employment so that ATU could use such termination as an affirm-

ative defense to suit[14] and, in return, ATU made concessions to the Keolis when negotiating their 2017 collective bargaining agreement ("CBA"). *Id.* at 12-13.

The court finds that this singular "transaction"—although it may have involved a series of distinct actions in furtherance thereof—does not show the existence of an ongoing enterprise or a pattern of racketeering activity. Instead, this evidence is more appropriately discussed in the context of a civil conspiracy claim.[15] Thus, summary judgment in favor of the KTA defendants is appropriate as to this claim.

3. Claim 19: Civil Conspiracy

"In Nevada, an actionable civil conspiracy is defined as 'a combination of two or more persons, who by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage.'" *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (quoting

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[14] Plaintiffs also contend that Keolis terminating Mendoza allowed it to "maintain control over Local 1637," but this argument does not hold water in light of plaintiffs' concession that "KTA [d]efendants have no ability to impact proceedings dealing with the ATU constitution." (ECF No. 149 at 20).

[15] The court notes the lack of specificity regarding plaintiffs' civil conspiracy claim. While plaintiffs' complaint does not elaborate on which defendants conspired together for what unlawful purpose, this termination-for-concessions conspiracy arguably falls within plaintiffs' allegation that "[d]efendants, acting in concert, intended to accomplish an unlawful objective for the purpose of harming [p]laintiffs the aforementioned unlawful objectives [sic]." (ECF No. 8 at 86).

Collins v. Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 622 (Nev. 1983)).

The court considers "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). To survive a motion for summary judgment, plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986)). Thus, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

As discussed above, plaintiffs contend that Keolis terminated Mendoza as part of a *quid pro quo* with ATU. (*See generally* ECF No. 149). Plaintiffs argue that the ATU and KTA defendants' agreement also caused irregularities in the grievance and settlement process when Mendoza disputed his termination. *Id.* at 7-12. These irregularities include rescheduling the "step 1 meeting" for Lindsay but not Mendoza, Keolis making a settlement offer after only one hour, and Lindsay accepting the settlement offer on Mendoza's behalf. *Id.*

Regarding the supposed concessions during CBA negotiations, the KTA defendants argue that, "[r]eviewing [KTA's representative, Michael] James' extensive charge of negotiation items clearly shows

that both side compromised on multiple elements of the CBA, with the union gaining certain pay increases, contributions to pension benefits and terms of leave." (ECF No. 156 at 15 (citing ECF No. 149-22)). As it pertains to Mendoza's termination, the KTA defendants note that "Mendoza testified during his deposition that he had no desire or intention to return to driving." *Id.* at 12 (emphasis in original). Finally, the KTA defendants aver that firing Mendoza to supposedly give ATU an affirmative defense to suit is belied by the fact that "Mendoza filed the *Mendoza I* lawsuit on Sept. 21, 2017, more than one year after KTA [d]efendants notified him of his job abandonment. Given the timing, [p]laintiffs' creative theory is utterly implausible." *Id.* at 14 (emphasis in original).

Mendoza does not dispute that "Section 21.6 of the Keolis CBA requires an employee convicted of DUI to report such conviction by the next work day." (ECF No. 149 at 6 (citing ECF No. 138 at 3)). Mendoza never informed Keolis of his DUI, never told Keolis that his CDL had been revoked, and never attempted to recertify his CDL. Then, when Keolis attempted to contact him regarding his return-to-work date and his CDL, Mendoza refused to talk to Keolis.

Any irregularities Mendoza complains of do not raise anything more than some metaphysical doubt as to the material facts. As this court noted in *Mendoza I*,[16] Mendoza voluntarily chose not to return to work at Keolis. In fact, Mendoza was adamant that he did not intend to return to work for Keolis; instead,

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[16] *See Mendoza, Jr. v. Amalgamated Transit Union International, et al.*, case no. 2:17-cv-2485-JCM-CWH, at ECF No. 62.

Mendoza insisted on being granted a personal leave of absence to continue disputing the trusteeship over Local 1637. (ECF No. 156 at 13). Consequently, the KTA defendants had every right to terminate an employee who (1) was not qualified to perform the job and (2) refused to work.

A handful of concessions in a collective bargaining agreement negotiation—even taken together with the supposed irregularities in the grievance process—is not enough to genuinely create an issue of whether that termination was part of a *quid pro quo*. Mendoza was fired only after the trusteeship had been approved, well before Mendoza filed his first lawsuit, and with good cause. There is simply not enough evidence for any reasonable juror to find that a conspiracy existed between the KTA and ATU defendants.

Accordingly, the court grants KTA's motion for summary judgment as to the remaining civil conspiracy claim. The court has now dismissed all claims against the KTA defendants, who are dismissed from this action entirely.

ii. Summary Judgment as to the Remaining Claims Against the ATU Defendants

Only two breach of contract claims remain against the ATU defendants, both of which stem from purported violations of ATU's CGLs. The first claim is predicated on the ATU defendants' surreptitiously amending article 4 of Local 1637's bylaws—which deals with officer compensation—and subsequently failing to follow the proper procedure when charging Mendoza with malfeasance. The second claim

stems from the fraudulent contravention of the ATU International CGLs when implementing the trusteeship.

The court will address each of Mendoza's claims in turn. However, the court once again notes that both claims are predicated on the ATU defendants' alleged violation of the ATU CGLs and, as a result, are within the scope of LMRA § 301.[17] *See Wooddell v. Int'l Bhd. Of Elec. Workers, Local 71*, 502 U.S. 93, 101-02 (1991). Thus, when adjudicating these claims, the "review of a union's interpretation of its own governing documents and regulations is highly deferential, absent bad faith or special circumstances." *Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 511 (9th Cir. 1989) (citations omitted).

1. Claim 1

a. Surreptitious Amendment of the Bylaws

Plaintiff Mendoza alleges that the accusation that he overpaid his salary was "intentionally fraudulent." (ECF No. 147 at 14). In particular, Mendoza argues as follows:

> [T]here were multiple conflicting versions of the Local 1637 Bylaws in the possession of both ATU International and Local 1637, some of which gave the PBA the highest rate of pay of any employee in the union, some that

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[17] And, to the extent that Mendoza brings a state law tort claim, those claims are preempted by § 301. *See AllisChalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

> gave the PBA the highest pay in their respective job classification, some which granted the PBA the same rate received under their CBA, and all of which were not sufficiently clear to make a determination that Appellant was overpaid.

Id.[18]

This argument is unavailing. The evidence clearly shows that Mendoza requested Local 1637's operative bylaws on Tuesday, March 5, 2013. (ECF No. 135-26 at 72). Kristi Adams, assistant to the international executive vice president, sent Mendoza the Local 1637 bylaws as approved in February 2012. *Id.* at 72-78. Mendoza forwarded the same set of bylaws along to Hanley and ATU, indicating that they were Local 1637's "current local bylaws" and that they "are the bylaws that our local has on file and we go by." *Id.* at 79. The bylaws Mendoza forwarded and affirmed as operative are the same as the bylaws Raske emailed to ATU in 2012. (*Compare* ECF No. 135-26 at 79-85, *with* ECF No. 135-29).

Each and every iteration of these bylaws—from Adams to Mendoza, from Mendoza to Hanley, and from Raske to Tracy Oliver on behalf of ATU—includes the provision that the president "shall be paid at a

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[18] Notably, Mendoza does not argue that the ATU defendants unilaterally amended the bylaws in his response. (ECF No. 147 at 14). Instead, Mendoza now argues that Hanley "brought the false charge of overpayment of appellant's [sic] salary based on inapplicable versions of the Local 1637 bylaws he unilateral [sic] interpreted without consulting the ATU GEB." *Id.* (capitalization omitted and emphasis added).

daily rate of 8 hours times the highest hourly rate paid to an employee in their respective job classification for 40 hours per week to perform the duties of the office." (ECF Nos. 135-26 at 73, 80; 135-29 at 3). Indeed, Mendoza quoted this same provision, including the word "respective," to justify his salary at the mechanic rate when discussing it with defendant Hanley in August 2016. (ECF No. 135-7 at 3-4).

Accordingly, Mendoza was aware of the bylaws as they were adopted by Local 1637 in 2012. Mendoza acknowledged that the 2012 bylaws were operative on several occasions. He disputes their authenticity and points to the existence of a variety of other versions only now that he has filed suit. This argument is a nonstarter, and summary judgment is appropriate—particularly because, regardless of which version of the bylaws were operative, Mendoza was entitled only to the operator rate.[19]

Therefore, the court grants the ATU defendants' motion as to the alleged amendment of Local 1637's bylaws.

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[19] As the court recounted above, Local 1637's 2008 bylaws provided that the president would "be paid at a daily rate of 8 hours times the highest hourly rate paid to an employee in their job classification for 40 hours per week to perform the duties of the office." (ECF No. 135 at 4). Local 1637 rejected an amendment that would remove the reference to "their job classification," which would have allowed presidents to be paid the highest mechanic rate, in 2011, and, in 2012, added the word "respective" before "job classification." *Id.* at 4-5. Thus, every operative version of the bylaws prohibited Mendoza, an operator, from paying himself the mechanic rate.

b. Improper Procedure for Disciplinary Action

Section 12.5 of the ATU constitution provides that "[t]he GEB's power to deal with members found guilty of violations of this section shall include the power to suspend, expel, fine, declare ineligible for holding office or otherwise discipline such members." (ECF No. 135-2 at 9). ATU CGLs also allow the GEB to discipline a member only after he or she is afforded a hearing. *Id.*

Plaintiff Mendoza argues that "ATU IP Hanley . . . exercised the GEB's exclusive power to discipline local union officers by imposing a disciplinary fine, directing Mendoza to repay Local 1637 $5,865.60." (ECF No. 147 at 10). Mendoza contends he was wrongfully "fined" because "ATU IP Hanley never served Mendoza with formal charges, Mendoza was not given time to defend the charges, and he was never accorded a fair hearing in violation of 29 U.S.C. 411(a)(5)." *Id.* Further, Mendoza urges that the ATU defendants "violated the ATU CGL Sec. 12.6 by failing to formally charge [p]laintiffs [the Local 1637 executive officers], and failing to hold a hearing on those charges as required by the trusteeship section" before instituting a trusteeship. *Id.*

i. Repayment

To the first point, the ATU defendants argue that "a directive that a local union officer repay money that he was not authorized to receive in the first place does not constitute a 'fine' under [s]ection 12.5 of the Constitution." (ECF No. 135 at 19). Instead, Hanley and ATU Assistant General Counsel Daniel

Smith both characterize the repayment request as "an instruction to repay a debt that [p]laintiff owed to the Local." *Id.* The ATU defendants argue that this interpretation is "plainly reasonable" and supported by case law, namely *Mack v. Transp. Workers Union of Am.*, No. 00 CIV. 9231 (JSR), 2002 WL 500377 (S.D.N.Y. Mar. 29, 2002), and *In re Scheer*, 819 F.3d 1206 (9th Cir. 2016).

In *Mack*, a union officer was disciplined for the wrongful use of her union credit card. *See generally Mack*, 2002 WL 500377. After a disciplinary hearing, the union ordered the officer to repay the union for the improper credit-card charges. *Id.* at *2. The officer sued the union and "argue[d] that the order requiring her to repay the union for the improper credit-card charges is tantamount to a fine or other discipline relating to a union member's rights and therefore subject to the specific due process guarantees of § 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5)." *Id.* at *4. The court held that "the record is clear that what was ordered was restitution—the re-payment of monies improperly charged to the union—rather than a penalty affecting membership rights," and granted summary judgment in favor of the union. *Id.*

In re Scheer did not address union discipline. *See generally In re Scheer*, 819 F.3d 1206. Instead, that case dealt with an attorney who had failed to refund a client $5,775 pursuant to the terms of an arbitration award. *Id.* at 1208. The State Bar of California suspended the attorney's law license and, after she discharged the underlying debt in bankruptcy, the attorney sought reinstatement. *Id.* at 1208-09. Although the bankruptcy court held that the order to

repay $5,775 was nondischargeable as a fine under 11 U.S.C. § 523(a)(7), the Ninth Circuit concluded that the arbitration award was purely compensatory. *Id.* at 1209-11. The Ninth Circuit, emphasizing the fact that the $5,775 award did not include costs or fees assessed for disciplinary reasons, held as follows:

> [T]he debt at issue was effectively the amount that Scheer improperly received from a client, but did not pay back. At its core, the $5775 is not a fine or penalty, but compensation for actual loss. Try as we might, we cannot stretch the language of section 523(a)(7) to cover the fee dispute at issue here, even though we may disapprove of Scheer's conduct.

Id. at 1211.

The court finds that Hanley instructing Mendoza to repay Local 1637 $5,865.60 for overpayment of his salary is purely compensatory. No additional costs or fees assessed for disciplinary reasons when computing that amount. (*See* ECF No. 155-3 at 11 ("[I]n the case of Jose Mendoza, I think you are trying to inaccurately characterize overpayments that he received, and the money that he needs to pay back . . . as . . . a fine. Well, that's not a fine at all. That is money that he owed the local union.")). Indeed, the $5,865.60 accounted for "overpayment during the 13-week period after . . . Hanley first raised the matter with [Mendoza]" (ECF No. 135 at 7 n.6); it was only a fraction of the estimated $144,909.08 that Mendoza overpaid himself (ECF No. 147 at 3).

Thus, the court concludes that the order to repay Local 1637 is, as the orders in *Mack* and *Scheer* were, purely compensatory. Because the repayment order is compensatory, it is not a disciplinary action subject to section 12.5 of the ATU CGLs. As a result, summary judgment is appropriate as to claim 1 on the basis of the repayment order.[20]

ii. Removal from Office

The last basis for Mendoza's first claim is the allegation that his—and the rest of the executive board's—removal from office was a disciplinary action in which the officers were not afforded a hearing. Plaintiffs buttress their argument by relying on Hanley's deposition, in which he testified that he "almost always imposes trusteeships because of the actions of a union officer, never files charges, and never accords those officers a full and fair hearing." (ECF No. 147 at 11). By Mendoza's estimation, "[t]his evidences an epidemic of improper process when this international labor union imposes trusteeships." *Id.*

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[20] The court notes that Mendoza relies heavily on the DOL OLMS report, which was issued in September 2018, well after the actions underlying this controversy concluded. (*See, e.g.*, ECF No. 140 at 6–7). As Mendoza acknowledges, *id.*, the OLMS report concluded that "[o]verall, the investigation revealed too much contradiction concerning Mendoza's authorized salary rate and not enough evidence to make a determination that Mendoza was willfully overpaid." (ECF No. 140-4 at 9). The fact that the OLMS determined that Mendoza was not willfully overpaid for the purposes of a criminal investigation does not change the court's analysis as it pertains to the reasonableness of the ATU defendants' actions at the time or the merits of Mendoza's civil claims.

The evidence mandates the opposite conclusion. The executive board's removal was not the result of an "epidemic of improper process," it resulted from the operation of the ATU CGLs. As the ATU defendants correctly note, "it is [s]ection 12.6 of the CGL[s]—not [s]ection 12.5—that governs trusteeships, and [s]ection 12.6 makes clear that [p]laintiff was not disciplined when the trusteeship was established." (ECF No. 135 at 20 (emphasis in original)). The ATU defendants explain that "the suspension of the individual officers was the necessary consequence of the fact that the functions of the local union passed to the trustee after the trusteeship was established." *Id.* (citing ECF No. 135-2 at 13).

A reading of section 12.6's plain language does not suggest that any of the officers are automatically charged with wrongdoing when a trusteeship is imposed, nor does it even suggest that such officers have done anything wrong. Indeed, although a trusteeship may be imposed "to correct corruption or financial malpractice, including mishandling or endangering union funds or property," a trusteeship may be imposed to "carry out the legitimate objectives of the IU. . . . " (ECF No. 135-2 at 10-11). Nothing in section 12.6 suggests that further disciplinary actions must be or can be taken against the individual officers. Instead, Section 12.6 of the ATU CGLs expressly provide as follows:

> When a trusteeship is imposed, the functions of the officers of the subordinate body shall be suspended and their functions shall pass to the trustee. . . . If the GEB determines after a hearing that the trusteeship is

> justified, and thereby ratifies the trusteeship, all offices within the subordinate body shall immediately become vacant. If the GEB determines that the trusteeship was not justified, or should not continue, the suspended officers shall be restored to their prior offices without loss of salary or benefits, unless otherwise determined in accordance with the procedures set forth in this Constitution.

(ECF No. 135-2 at 13). Thus, the executive officers' suspension and possible removal from their respective positions are not a disciplinary action, they are an ancillary consequence of a trusteeship—a consequence that occurs automatically by operation of the CGLs.

Therefore, the court finds that Mendoza was not "disciplined" within the meaning of section 12.5. Accordingly, the court grants summary judgment as to the removal of the executive officers. The court, having granted summary judgment as to both grounds, dismisses claim 1.

2. Claim 2

First, the court notes that Mendoza's second claim is moot insofar as it requests injunctive relief because the trusteeship has terminated. *See Mendoza I*, district court case no. 2:17-cr-02485-JCM-CWH, Ninth Cir. case no. 17-17429 (ECF No. 76) (Ninth Circuit order holding that Mendoza's interlocutory appeal regarding injunctive relief is moot). However, Mendoza argues that his claim remains valid because he pleaded damages stemming from the ATU defendants' alleged "breach of the ATU International Constitution in imposition of the trusteeship in [c]ount two." (ECF

No. 147 at 7). Thus, the court now determines whether the ATU defendants fraudulently contravened the ATU CGLs when implementing the trusteeship.

The ATU defendants respond to Mendoza's argument regarding the claim 2 as follows:

> The record clearly establishes that all procedural requirements of Section 12.6 were satisfied. On April 10, 2017, Local 1637 was placed into temporary trusteeship upon a vote by a majority of the GEB, in response to IP Hanley's recommendation. The ATU held a hearing within 30 days after the establishment of the temporary trusteeship; the officers and members of Local 1637, including Plaintiff, received notice of the time, place, and subject of the hearing; the hearing was presided over by a hearing officer who was not involved in the decision to impose the temporary trusteeship; Plaintiff testified at the hearing, cross-examined each of the witnesses called by the ATU, called an additional witness of his own, introduced documentary evidence into the record, and presented extensive argument both at the hearing and in a post-hearing brief; the Hearing Officer submitted a detailed report with her findings and recommendations to the GEB; and the GEB issued its decision within 45 days of the hearing. None of these facts can reasonably be disputed. While Plaintiff asserts that ATU breached its constitution by "refusing to permit Mr. Mendoza to cross-examine ATU's witnesses,"

> this is plainly contradicted by the trusteeship hearing transcript, which shows that Plaintiff conducted extensive cross-examination of every witness called by ATU during the hearing.

(ECF No. 135 at 23 (footnote and internal citations omitted)).

The court has already reviewed and articulated the facts of this case as they pertained to the institution of the trusteeship and need not reiterate them here. *See supra* Section I. The court has already discussed that the 2012 bylaws were the operative Local 1637 bylaws and that, regardless of which set of bylaws were operative, Mendoza was entitled only to the operator rate. *See generally supra*. Although Mendoza contends otherwise, this overpayment was grounds for ATU to impose a trusteeship over Local 1637,[21] and ATU complied with the procedural requirements of section 12.6.

Accordingly, the court grants the ATU defendants' motion for summary judgment as to claim 2.[22]

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[21] The court again notes the express language of section 12.6, which allows ATU to impose a trusteeship "to correct corruption or financial malpractice, including mishandling or endangering union funds or property." (ECF No. 135-2 at 10-11).

[22] As a result of this ruling, the court also denies Mendoza's motion for partial summary judgment. (ECF No. 140)

3. Whether the ATU Defendants' Interpretation of the ATU CGLs Is in Bad Faith

Mendoza argues that the ATU defendants "are not entitle[d] to deference in the interpretation of the ATU CGLs if that interpretation conflicts with documentary evidence demonstrating that [its] interpretations are being made in bad faith." (ECF No. 147 at 21 (capitalization omitted)). Mendoza further argues that "there is an overwhelming amount" of such evidence and that the ATU defendants' interpretation of the CGLs is "self-serving." *Id.* at 21-30. Admittedly, the court's analysis of Mendoza's two claims relied on a deferential review of ATU's interpretation of the CGLs. Thus, the court finds it necessary to explain why it does not find the ATU defendants' interpretation to be in bad faith.

Rather than argue the interpretation of either section 12.5 or 12.6, Mendoza argues that ATU is interpreting the CGLs in bad faith because it did not have authority under section 8 to respond to the Local 1637 members' complaints in the first place. (ECF No. 147 at 21-30). Mendoza's meandering argument also incorporates a variety of other cases filed against ATU regarding the operation of other sections of the CGLs. *See id.*

Section 8 of the ATU CGLs provide that "[t]he [International President] shall decide all questions and appeals from the [Local Unions]." (ECF No. 135-2 at 5). Although section 8 lists only "local unions," ATU Assistant General Counsel Daniel B. Smith testified, as ATU's Rule 30(b)(6) witness, that "a local union member can bring an issue of concern to the

International president. And the International president, exercising his authority under Section 8 of the CGL[s], can answer a question." (ECF No. 155-3 at 9). Smith later reemphasized this interpretation, explaining that "[local union members] have the right to bring a question to the attention of the International president." *Id.* at 14.

First, the court accords no weight to Mendoza's arguments and authorities pertaining to sections of the CGLs which are patently inapplicable to the instant case. The ATU defendants note as follows:

> Plaintiff first cites to instances of a challenge or potential challenge to a local union election. Election challenges, however, are governed by a specific provision of the CGL[s]—Section 14.8—which expressly requires that such challenges be submitted to the local union's executive board for a decision and are "subject to final ruling by the [local union] membership." That the ATU has interpreted Section 14.8 to require a final local-union decision on an election challenge before the ATU can adjudicate an appeal thus has no bearing on the ATU's interpretation of Section 8, which contains no similar requirement
>
> Plaintiff next cites to challenges to disciplinary charges that were being processed within a local union. Like election challenges, disciplinary charges filed within local unions are governed by a specific section—Section 22.6—of the ATU Constitution. Section 22.6 requires that when a local union member contests a

> trial board's decision on charges, the local union membership must decide whether to uphold the decision by majority vote, subject to appeal to the ATU under Section 23 of the ATU Constitution. Pursuant to this provision, the International President will not interject himself into ongoing disciplinary charges within the local union. Because there were no disciplinary charges pending against Plaintiff at Local 1637 when IP Hanley investigated the member-complaints . . . , the examples of how IP Hanley has handled situations in which disciplinary charges were pending within the local is simply irrelevant to the member-complaints at issue here.

(ECF No. 155 at 12-13).

Thus, the court is left with Mendoza's summary argument that section 8 did not authorize Hanley or ATU to get involved when ATU received complaints from Local 1637 members. This does not address—and certainly does not constitute "an overwhelming amount" of evidence regarding—the interpretation of section 4, regarding the president's pay, section 12.5, which addresses disciplinary actions, or section 12.6, which governs the imposition of trusteeships. Nonetheless, the court notes that ATU Assistant General Counsel Smith testified that the complaints sent by Local 1637 members were considered "questions." (ECF No. 155-3 at 15 ("I'm not aware if she had an appeal, but I do know she had a question.")). Smith explained the difference between a "question" and an "appeal" as follows:

> I would characterize what I understand to be [the Local 1637 member's] letter as it's been described—now we haven't seen it here today, as a question, not as an appeal. I would take an appeal to be an appealing what we sometimes will call a final decision of a local union. And that suggests either the vote of the membership, or the vote of the executive board, where there's been no quorum in the meeting following that executive board meeting provide that that business would have been reported to the membership at that meeting, had there been a quorum.

Id. at 23. When explaining that determination, Smith specifically contrasted the question posted to Hanley and ATU by the Local 1637 member with an "appeal" under Section 23. *See id.* at 24. Smith also affirmed that ATU has stood by this interpretation "for decades." *Id.* at 22-23.

Therefore, Mendoza's argument rests on an interpretation of section 8 in which the international president could respond only to "appeals." Mendoza's interpretation disregards the international president's ability to answer "questions." Mendoza's disagreement with ATU's interpretation of section 8 does not amount to evidence of bad faith.

Accordingly, the court finds that the ATU defendants' interpretations of the provisions of the CGLs at issue in this case were reasonable and properly afforded deference under this circuit's precedent. Mendoza's arguments to the contrary are unavailing and inapposite.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion to amend (ECF No. 67) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that Judge Hoffman's R&R (ECF No. 117) be, and the same hereby is, ADOPTED, consistent with the foregoing.

IT IS FURTHER ORDERED that plaintiffs' objections to Judge Hoffman's order (ECF No. 121) be, and the same hereby are, OVERRULED.

IT IS FURTHER ORDERED that the MKA defendants' motion for summary judgment (ECF No. 112) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that plaintiffs' countermotion to strike (ECF No. 125) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that the ATU defendants' motion for summary judgment (ECF No. 135) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the ATU defendants' motion for summary judgment (ECF No. 136) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that the KTA defendants' motion for summary judgment (ECF No. 137) be, and the same hereby is, DENIED in part as moot and GRANTED in part, consistent with the foregoing.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (ECF No. 139) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (ECF No. 140) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion to reconsider (ECF No. 151) be, and the same hereby is, DENIED.

The clerk is instructed to enter judgment against plaintiffs and in favor of defendants on all claims and close the case.

/s/ James C. Mahan
United States District Judge

Dated May 4, 2020.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA CONSOLIDATING CASES (MARCH 27, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE MENDOZA, JR., ET AL,

Plaintiff(s),

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL, ET AL.

Defendant(s).

Case No.
2:17-CV-2485 JCM (CWH)
2:18-CV-959 JCM (NJK)

Before: James C. MAHAN,
United States District Judge.

Presently before the court are related matters *Mendoza v. Amalgamated Transit Union International et al*, case no. 2:17-cv-02485-JCM-CWH and *Mendoza et al v. Amalgamated Transit Union International et al*, case no. 2:18-cv-00959-JCM-CWH.

On March 26, 2019, the court held a hearing to give the parties an opportunity to show cause why the court should not consolidate these related cases. (ECF No. 92). The parties did not raise any objection to the court's consolidation proposal.

It is well established that the district courts enjoy an inherent power to manage and control their own dockets. *See, e.g., Landis v. N.Am. Co.*, 299 U.S. 248, 254 (1936) (affirming "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). Federal Rule of Civil Procedure 42(a) specifically provides that "[w]hen actions involving a common question of law or fact are pending before the court, it . . . may order all the actions consolidated." Fed. R. Civ. P. 42(a). "The district court, in exercising its broad discretion to order consolidation of actions presenting a common issue of law or fact under Rule 42(a), weighs the saving of time and effort consolidation would produce against any inconvenience, delay or expense that it would cause." *Huene v. U.S.*, 743 F.2d 703, 704 (9th Cir. 1984).

The court has reviewed the pleadings on file in this matter and concludes that consolidation of case no. 2:17-cv-02485-JCM-CWH and case no. 2:18-cv-00959-JCM-CWH is warranted. These actions involve significant overlap as to questions of fact and law. As such, the court finds that consolidating the actions will be significantly more efficient than trying the cases individually, will eliminate the substantial duplication of labor which would otherwise result

from trying the cases separately, and will avoid the risk of potentially inconsistent outcomes.

Accordingly,

IT IS HEREBY ORDERED THAT case no. 2:17-cv-02485-JCM-CWH and case no. 2:18 cv-00959-JCM-CWH shall be CONSOLIDATED, with no. 2:18-cv-00959-JCM-CWH serving as the lead case. All further filings in these cases must be filed in the lead case.

IT IS SO ORDERED.

The clerk is instructed to file this order in this case and in the related case, no. 2:18-cv-00959-JCM-CWH.

/s/ James C. Mahan
United States District Judge

Dated March 27, 2019.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (SEPTEMBER 5, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE MENDOZA, JR., ET AL,

Plaintiff(s),

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL, ET AL.

Defendant(s).

Case No. 2:18-CV-959 JCM (NJK)

Before: James C. MAHAN,
United States District Judge.

Presently before the court are three separate motions to dismiss filed by defendants Miller Kaplan Arase, LLP, Anne Salvador, and Alexandra Chernyak ("MKA defendants") (ECF No. 31); Amalgamated Transit Union International, James Lindsay III, Lawrence J. Hanley, Antonette Bryant, Richie Murphy, Keira McNett, Daniel Smith, and Tyler Home ("ATU defendants") (ECF No. 33); and Keolis Transit America, Inc. and Kelvin Manzanares ("KTA defendants") (ECF No. 51). Plaintiffs filed a response to each motion to

dismiss (ECF Nos. 43, 44, 56), to which the MKA, ATU, and KTA defendants replied (ECF Nos. 53, 54, 59).

Also before the court is the ATU defendants' motion for leave to file excess pages. (ECF No. 28).

Oral argument has been requested, but it is not necessary in order for the court to resolve these motions.

I. Background

This action arises from the investigation into, and subsequent imposition of trusteeship over, Amalgamated Transit Union Local 1637 ("Local 1637"). The complaint contains the following allegations:

Plaintiff Jose Mendoza was the president of Local 1637, which is a local union that is affiliated with Amalgamated Transit Union International ("ATU International"). (ECF No. 8). The remaining plaintiffs in this action consist of Robbie Harris, Robert Naylor, Myeko Easley, Dennis Hennessey, Gary Sanders, Linda Johnson-Sanders, and Ceasar Jimenez. *Id*. These plaintiffs held various positions on the former Local 1637 executive board. *Id*.

Between 2010 and 2016, Mendoza had multiple disputes with ATU International, many of which revolved around the appropriate way to read Local 1637's bylaws. *Id*. Two primary disagreements between Mendoza and ATU International concerned the appropriate rate of pay for the president of Local 1637 and whether the president could designate the secretary-treasurer position as less than full-time. *Id*.

In August 2016, Local 1637 entered into an agreement with Miller Kaplan Arase, LLP ("Miller Kaplan Arase"), a certified public accounting firm, to conduct an audit of Local 1637. *Id*. The individual auditors, Chernyak and Salvador, engaged in communications with plaintiffs Home and Lindsay (without informing Local 1637) to produce the audit report. *Id*. The audit report was used by the ATU defendants to support ATU's own audit, discussed below. *Id*.

On March 10, 2017, Home, an internal auditor, and Lindsay, international vice president of ATU International, produced an internal audit report of Local 1637. *Id*. The report found that Mendoza was overpaid and had committed financial malfeasance. *Id*. On April 10, 2017, Hanley, the international president of ATU International, removed plaintiffs from their positions by imposing a trusteeship over Local 1637. *Id*. On June 24, 2017, the ATU International general executive board ratified the trusteeship. *Id*.

Mendoza had been previously employed as a coach operator before assuming full-time employment as president of Local 1637. *Id*. After imposition of the trusteeship, Mendoza was directed to present for work as a coach operator with Keolis Transit America, Inc. ("Keolis Transit"), a company with which Local 1637 had previously contracted. *Id*. At this time, Mendoza did not have an active commercial driver's license ("CDL"), a requirement for this type of work, and was thus unable to commence employment. *Id*. Five days after the trusteeship was ratified, Keolis Transit terminated Mendoza "for job abandonment."

Id. Mendoza filed a grievance with Local 1637, which was forwarded to Keolis Transit. *Id*.

ATU International and Keolis Transit ultimately negotiated a settlement on Mendoza's behalf that allowed for his reinstatement with Keolis Transit provided that he recertify his CDL "within five (5) business days of the ATU's receipt of this notice." *Id*. Mendoza did not accept the settlement. *Id*. At the grievance hearing that followed, defendant Lindsay accepted the settlement on Mendoza's behalf and without Mendoza's consent. *Id*. Mendoza's termination was finalized after he did not recertify his CDL within the time limit set by the settlement. *Id*.

On September 22, 2017, Mendoza initiated the first iteration of this action in state court, which was removed to federal court on September 25, 2017. *See Mendoza, Jr. v. Amalgamated Transit Union International, et al*., case no. 2:17-cv-2485-JCM-CWH, ECF No. 1 ("*Mendoza I*"). In *Mendoza I*, Mendoza's complaint set forth ten separate causes of action on behalf of himself as an individual, and on behalf of Local 1637, against the ATU defendants (excluding Murphy): (1) breach of contract regarding defendants' alleged amending of Article 4 of the Local 1637 Constitution and failure to follow procedure in charging Mendoza; (2) breach of contract regarding defendants' alleged fraudulent contravention of the ATU International Constitution and Bylaws in implementing the trusteeship; (3) breach of implied covenant of good faith and fair dealing; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) legal malpractice as to defendants Keira McNett and Daniel Smith; (7)

breach of fiduciary duty; (8) constructive fraud; (9) malicious prosecution; and (10) civil conspiracy. *Id*.

On May 25, 2018, plaintiffs filed the present action. (ECF No. 1). Plaintiffs initially named as defendants ATU International, Lindsay, Hanley, Bryant, Murphy, McNett, Smith, and Home. *Id*. On July 13, 2018, plaintiffs filed an amended complaint, adding thirteen (13) new causes of action and naming as defendants the MKA and KTA defendants. (ECF No. 8). Plaintiffs' amended complaint asserts twenty-seven (27) causes of action in total. *Id*. These claims are based on various federal and state statutes, including the Labor Management Relations Act ("LMRA"), the Labor-Management Reporting and Disclosure Act ("LMRDA"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), among others. *Id*.

Now, the MKA defendants move to dismiss the ninth, tenth, thirteenth, nineteenth, twenty-third, twenty-fourth, and twenty-fifth causes of action pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 31). The ATU defendants move to dismiss all but the twenty-fifth cause of action pursuant to the same. (ECF No. 33). The KTA defendants move to dismiss the sixth, eighth, ninth, and tenth causes of action pursuant to the same. (ECF No. 51).

II. Legal Standard

a. Motion to Dismiss

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain state-

ment of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering a motion to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id*. at 678-79. Mere recital of the elements of a cause of action, supported only by conclusory statements, does not suffice. *Id*.

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id*. at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id*. at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged – but it has not shown –

that the pleader is entitled to relief." *Id*. at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-Iqbal pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court held,

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

b. FRCP 9(b) – Claims Alleging Fraud

Allegations of fraud are subject to a heightened pleading standard. *See* Fed. R. Civ. P. 9(b) ("[A] party must state with particularity the circumstances constituting fraud. . . . "). Rule 9(b) operates "to give defendants notice of the particular misconduct which is alleged," requiring plaintiffs to identify "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (citations omitted).

"The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Id*. (citations omitted). Rule 9(b) provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id*.

III. Discussion

Plaintiffs' amended complaint sets forth twenty-seven causes of action: (1) breach of ATU International's constitution and general laws in violation of LMRDA safeguards against improper disciplinary action; (2) violation of LMRDA equal rights (pursuant to LMRDA Title I § 101, 29 U.S.C. § 411 and 412); (3) violation of LMRDA free speech; (4) breach of ATU International's constitution and general laws in violation of LMRDA trusteeship provisions; (5) violation of LMRDA indirect election provisions; (6) breach of duty of fair representation; (7) violation of LMRDA equal rights (pursuant to LMRDA Title I § 101 and 29 U.S.C. § 411(a)(1)); (8) violation of LMRDA prohibition on receiving and accepting something of value from a union employer; (9) wire fraud and mail fraud; (10) federal RICO violation (pursuant to 18 U.S.C. § 1962); (11) LMRA breach of contract; (12) negligence; (13) defamation and defamation *per se*; (14) fraudulent misrepresentation; (15) legal malpractice; (16) breach of fiduciary duty; (17) constructive fraud; (18) malicious prosecution; (19) civil conspiracy; (20) false pretenses (pursuant to Nevada Revised Statutes § 205.380); (21) perjury; (22) offering false evidence; (23) false pretenses (pursuant to Nevada Revised Statutes § 205.377); (24) state RICO violation (pursuant to Nevada Revised Statutes § 207.470 *et seq*); (25) accounting malpractice

and professional negligence as to the MKA defendants; (26) accounting malpractice and professional negligence as to defendant Tyler Home; and (27) breach of fiduciary duty.[1] (ECF No. 8).

a. MKA Defendants' Motion to Dismiss

The MKA defendants argue in their motion to dismiss that plaintiffs' ninth, tenth, thirteenth, nineteenth, twenty-third, twenty-fourth, and twenty-fifth claims should be dismissed for failing to state a claim upon which relief can be granted. (ECF No. 31).

1. Ninth Cause of Action as to MKA Defendants

Plaintiffs' ninth cause of action alleges that all defendants conspired to, and in fact did, use wire transmissions and mail services to defraud plaintiffs of their rights guaranteed by the LMRDA. (ECF No. 8). These statutes do not expressly confer a private right of action, and the weight of authority has concluded that no implied private right of action exists.

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[1] Claims 1, 2, 3, 4, 5, 7, 11, 12, 14, 16, 17, 18, 20, 22, and 27 are brought by all plaintiffs against the ATU defendants. Claim 6 is brought by plaintiff Jose Mendoza against the ATU and KTA defendants. Claim 8 is brought by all plaintiffs against the ATU and KTA defendants. Claims 9, 10, 13, and 19 are brought by all plaintiffs against all defendants. Claim 15 is brought by all plaintiffs against defendants McNett and Smith. Claim 21 is brought by all plaintiffs against defendants Hanley, Lindsay, and Home. Claims 23 and 24 are brought by all plaintiffs against the MKA and ATU defendants. Claim 25 is brought by all plaintiffs against the MKA defendants. Claim 26 is brought by all plaintiffs against defendant Home.

E.g., Wisdom v. First Midwest Bank of Popular Bluff, 167 F.3d 402, 407-08 (8th Cir. 1999) (no implied private right of action under mail fraud or wire fraud statutes); *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178 (6th Cir. 1979) (no implied private right of action under mail fraud statute); *Napper v. Anderson, Henley, Shields, Bradford and Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) (no implied private right of action under wire fraud statute), cert. denied, 423 U.S. 837 (1975).

Accordingly, plaintiffs' ninth claim is dismissed with prejudice.

2. Tenth Cause of Action as to MKA Defendants

Plaintiffs' tenth cause of action alleges a RICO violation pursuant to 18 U.S.C. § 1962. (ECF No. 8). Specifically, plaintiffs allege that the criminal offenses pleaded in the eighth and ninth causes of action serve as predicate offenses under the RICO statute. *Id*. The MKA defendants' motion to dismiss asserts that plaintiffs have not sufficiently established that the MKA defendants participated in the management of a RICO enterprise or engaged in a pattern of racketeering activity. (ECF No. 31). Further, the MKA defendants argue that plaintiffs lack standing to assert a RICO claim. *Id*.

To survive a motion to dismiss, a federal RICO civil complaint must plausibly allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996) (citing 18

U.S.C. §§ 1964(c), 1962(c)). Under the *Reves v. Ernst & Young* "operation or management" test, to participate in the "conduct" of an enterprise, one must participate in the operation or management of the enterprise itself. 507 U.S. 170, 185 (1993). RICO liability is not limited to those with primary responsibility for the enterprise's affairs, and it is not limited to those with a formal position in the enterprise; one need only play "some part" in directing the enterprise's affairs for liability to attach. *Id*. at 179.

Plaintiffs' only allegation of RICO conduct by the MKA defendants concerns the reliance of the ATU defendants on the Miller Kaplan Arase audit report. (*See* ECF No. 8). The mere preparation of an audit report and the nondescript alleged reliance of the ATU defendants upon that report is insufficient to plausibly state that the MKA defendants played at least "some part" in directing the alleged enterprise. *See Reves*, 507 U.S. at 179; *see also Univ. Of Md. at Balt., et al. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993) ("Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise. The operation or management test goes to that nexus."). Moreover, plaintiffs' allegation that the audit report was defective due to professional misconduct has no bearing on the operation or management test. *Cf. Baumer v. Pachl*, 8 F.3d 1341, 1344 (9th Cir. 1993) (holding that whether the professional services at issue were rendered "well or

poorly, properly or improperly, is irrelevant to the *Reves* test").

Accordingly, the court will dismiss the plaintiffs' tenth claim without prejudice as to the MKA defendants.

3. Thirteenth Cause of Action as to MKA Defendants

Plaintiffs' thirteenth cause of action alleges defamation and defamation per se. (ECF No. 8). To pursue an action for defamation, plaintiffs must plausibly allege: "(1) a false and defamatory statement. . . ; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Clark County School Dist. v. Virtual Educ, Software, Inc.*, 125 Nev. 374, 385 (Nev. 2009). If a defamatory communication pertains to a "'person's lack of fitness for trade, business, or profession,'" or tends to injure the plaintiff in his or her business," it is defamation per se and damages are presumed. *Id.* (citing *K–Mart Corporation v. Washington*, 109 Nev. 1180, 1192 (Nev. 1993).

Plaintiffs' defamation claim appears to rely solely on the allegation that "Defendants made a false a [sic] defamatory statements [sic] alleging that Plaintiffs committed a criminal offense of embezzlement of $144,909.08 in Local 1637 dues money." (ECF No. 8). Plaintiffs provide no additional support for this allegation, and at no point in the complaint do plaintiffs allege that the MKA defendants published to a third person the allegedly defamatory statement. Because the mere recital of the elements of a defamation claim, absent any factual support, is

insufficient to "state a claim to relief that is plausible on its face," plaintiffs' thirteenth cause of action is insufficiently pleaded. *See Iqbal*, 556 U.S. at 678 (citation omitted).

Therefore, the court will dismiss without prejudice the thirteenth claim as it pertains to the MKA defendants.

4. Nineteenth Cause of Action as to MKA Defendants

Plaintiffs' nineteenth cause of action alleges civil conspiracy. (ECF No. 8). This claim is nearly identical to the tenth cause of action pleaded in *Mendoza I*. *See Mendoza, Jr. v. Amalgamated Transit Union International, et al.*, case no. 2:17-cv-2485-JCM-CWH, ECF No. 1.

Where a plaintiff brings a contract claim under Section 301 of the LMRA, any state-law tort claims that are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract . . . must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

Indeed, where a plaintiff's contract and tort claims stem from the same facts, the duties and rights at issue in a state-law tort claim "derive from the rights and obligations established by the contract." *Id.* at 216-217. Thus, a contract claim brought under Section 301 of the LMRA precludes the need for duplicative state-law tort claims.

In *Mendoza I*, this court held that Mendoza's state-law tort claims "relate to the process by which

[ATU] International imposed a trusteeship over Local 1637 and removed Mendoza from his position as president of Local 1637." *Mendoza I*, case no. 2:17-cv-2485-JCM-CWH, ECF No. 30. This court also held that resolution of Mendoza's state-law tort claims is "substantially dependent upon analysis of the terms of [the relevant] labor contract[s]." *Id*. On this basis, the court dismissed Mendoza's civil conspiracy claim as preempted by Section 301(a) of the LMRA. *Id*.

Here, plaintiffs have, in their eleventh cause of action, alleged a general breach of contract claim under Section 301 of the LMRA. (ECF No. 8). Plaintiffs' civil conspiracy claim is derived from the same facts that underlie their Section 301 contract claim, and it is essentially the same claim as the civil conspiracy claim brought in *Mendoza I*. Plaintiffs' nineteenth cause of action is therefore preempted by Section 301(a) of the LMRA.

Accordingly, the court will dismiss without prejudice plaintiffs' nineteenth claim against the MKA defendants.

5. Twenty-Third Cause of Action as to MKA Defendants

Plaintiffs' twenty-third cause of action alleges, as a Nevada state law RICO predicate offense, the crime of obtaining something of value by false pretenses pursuant to Nevada Revised Statutes § 205.377. (ECF No. 8). Section 205.377 provides that:

> A person shall not, in the course of an enterprise or occupation, knowingly and with the intent to defraud, engage in an act,

> practice or course of business or employ a device, scheme or artifice which operates or would operate as a fraud or deceit upon a person by means of a false representation or omission of a material fact that:
>
> (a) The person knows to be false or omitted;
>
> (b) The person intends another to rely on; and
>
> (c) Results in a loss to any person who relied on the false representation or omission,
>
> in at least two transactions that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents within 4 years and in which the aggregate loss or intended loss is more than $650.

Nev. Rev. Stat. § 205.377 (emphasis added).

In accepting as true all well-pled factual allegations in the complaint, plaintiffs have failed to plausibly allege an § 205.377 violation. The statute requires not only that the fraud or deceit result in a loss, but also that the loss be attributable to a person who relied on the false representation or omission. *See id*. Here, plaintiffs have provided no factual support plausibly evincing that any plaintiff relied on MKA's allegedly false representations to their detriment. Rather, plaintiffs have shown only that the ATU International general executive board and the U.S. Department of Labor relied on the allegedly false representations in the audit.

Because plaintiffs have failed to plausibly allege a necessary element of a Nevada Revised Statutes § 205.377 violation, the court will dismiss without prejudice plaintiffs' twenty-third claim against the MKA defendants.

6. Twenty-Fourth Cause of Action as to MKA Defendants

Plaintiffs' twenty-fourth cause of action alleges a violation of Nevada's RICO act pursuant to Nevada Revised Statutes § 207.470 *et seq*.

To survive a motion to dismiss, a civil complaint under Nevada's RICO act must plausibly allege three elements: "(1) the plaintiff's injury must flow from the defendant's violation of a predicate Nevada RICO act; (2) the injury must be proximately caused by the defendant's violation of the predicate act; and (3) the plaintiff must not have participated in the commission of the predicate act." *Allum v. Valley Bank of Nevada*, 109 Nev. 280, 283 (Nev. 1993).

Of the Nevada RICO predicate acts identified in the twenty-fourth cause of action, only one—obtaining property under false pretenses pursuant to Nevada Revised Statutes § 205.377—pertains to alleged conduct by the MKA defendants. For the reasons discussed in the analysis of plaintiffs' twenty-third cause of action above, plaintiffs have failed to plausibly allege a § 205.377 violation, and therefore have failed to plausibly allege a violation of a Nevada RICO predicate act. As such, plaintiffs have not stated a plausible claim for relief under the Nevada RICO act.

Accordingly, the court will dismiss without prejudice plaintiffs' twenty-fourth claim against the MKA defendants.

7. Twenty-Fifth Cause of Action as to MKA Defendants

The twenty-fifth cause of action alleges accounting malpractice and professional negligence. (ECF No. 8). The MKA defendants argue in their motion to dismiss that plaintiffs' lack standing to bring this claim, and that even if they have standing, they have failed to plausibly allege the elements of a professional negligence claim. (ECF No. 31).

Plaintiffs have made no showing of why they, as individual union members, have standing to bring an accounting malpractice and professional negligence claim. Plaintiffs have alleged that "Local 1637 entered into the agreement with [Miller Kaplan Arase] to conduct an independent audit of Local 1637," which supports standing only for Local 1637 itself. (See ECF No. 8). Although plaintiffs assert that they are bringing this claim on behalf of the Local 1637 executive board and general membership, plaintiffs have acknowledged that they were removed from office and are no longer members of the executive board. *See id*.

Further, plaintiffs have not alleged that any demand was made on the Local 1637 executive board, or that they have any other source of authority to bring this claim. Because plaintiffs have not established standing to bring this claim, plaintiffs have failed to plausibly state an accounting malpractice and

professional negligence claim upon which relief can be granted.

Thus, the court will dismiss without prejudice plaintiffs' twenty-fifth claim against the MKA defendants.

b. ATU Defendants' Motion to Dismiss

The ATU defendants first contend that all of plaintiffs' claims against them should be dismissed because they represent impermissible claim splitting. (ECF No. 33). The ATU defendants assert in the alternative that none of plaintiffs' causes of action plausibly state a claim upon which relief can be granted. *Id.*

The claim splitting doctrine bars a party from subsequent, duplicative litigation where the "same controversy" exists. *See, e.g., Single Chip Sys. Corp. v. Intermec IP Corp.*, 495 F.Supp.2d 1052, 1057 (S.D. Cal. 2007) (quoting *Nakash v. Superior Court*, 196 Cal.App.3d 59 (Cal. Ct. App. 1987)). To determine whether a suit is duplicative, courts in the Ninth Circuit borrow from the test for claim preclusion. *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 689 (9th Cir. 2007), overruled on other grounds by *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008). But claim splitting, unlike res judicata, does not require a final judgment on the merits in the prior case. *Single Chip Sys. Corp.*, 495 F.Supp.2d at 1058.

A district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to

consolidate both actions. *See Adams*, 487 F.3d at 688; *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138–39 (2d Cir. 2000); *Russ v. Standard Ins. Co.*, 120 F.3d 988, 990 (9th Cir. 1997). In determining whether a later-filed action is duplicative, a court must examine "whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams*, 487 F.3d at 688.

1. Same Causes of Action and Relief Sought

To determine whether successive causes of action are the same, the court must apply the transaction test: "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Id.* at 689 (quoting *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 870 (9th Cir. 1992)). The transaction test requires the court to evaluate four criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Costantini v. Trans World Airlines, 681 F.2d 1199, 1202 (9th Cir. 1982). The "same transactional nucleus of facts" factor is commonly held to be outcome deter-

minative. *Cf. Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005).

With regard to all plaintiffs, the transaction test factors weigh in favor of finding that *Mendoza I* and *Mendoza II* are the same causes of action with the same relief sought.

First, the court holds that the present action will impinge on, and consequently impair, rights or interests that would be established in *Mendoza I*. A finding on the breach of contract claim in *Mendoza I* would, for example, be impaired by a contrary finding as to plaintiffs' eleventh claim in the present action.

Second, substantially the same evidence to be presented in *Mendoza I* underlies all of the claims in the present action. Plaintiffs' claims are predicated on essentially the same evidence as the original ten (10) claims included in the *Mendoza I* complaint. The court holds that the evidence presented in this action is no different than that to be presented in *Mendoza I*.

Third, that the LMRA claims of the *Mendoza I* complaint and LMRDA claims of the present complaint establish different rights is not sufficient to differentiate the actions. *See Adams*, 487 F.3d at 691 (holding that separate federal statutes "establish[ing] distinct rights enforceable by litigants" are not alone sufficient to differentiate prior and later filed actions). Moreover, the same relief is sought in both suits: compensatory and punitive damages, declaratory relief, restoration of the Local 1637 board, and attorney's fees.

Fourth, *Mendoza I* and *Mendoza II* arise from the same transactional nucleus of facts. The allegations

contained in the *Mendoza I* complaint all concern ATU International's investigation into, and subsequent imposition of trusteeship over, Local 1637. The present complaint concerns the exact same facts, with the only differences being the addition of Murphy and the MKA and KTA defendants, and the inclusion of additional claims, all of which are based on the same conduct alleged in *Mendoza I*.

Having considered the foregoing factors, the court finds that plaintiffs' suit is based on the same events as those set forth in *Mendoza I*. Therefore, under the claim splitting doctrine, these are the same causes of action with the same relief sought.

2. Same Parties or Privies to the Action

The second determination in assessing whether a successive action is impermissibly duplicative is whether the parties or privies to the action are the same. "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor*, 553 U.S. at 892. In *Taylor*, the Supreme Court stated that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id*. at 893 (quoting *Hansberry v. Lee*, 311 U.S. 32, 39 (1940)).

The *Taylor* Court enumerated six narrow exceptions to the rule that preclusion only applies to parties and parties by service. *Id*. One such exception in which nonparties qualify as parties for the purpose of a claim splitting analysis applies here.

The *Taylor* court held that "'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Id*. at 894 (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). A party's representation of a nonparty is "adequate" for preclusion purposes only if: "(1) The interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id*. at 900 (internal citations omitted). The Ninth Circuit has also recognized that adequate representation may sometimes require "(3) notice of the original suit to the persons alleged to have been represented." *Id*.

With regard to Mendoza alone, he is a plaintiff in both *Mendoza I* and *Mendoza II*, and his claims are asserted against the same ATU defendants in both actions, except for Murphy, who is named only in *Mendoza II*. That neither Murphy, or for that matter the MKA or KTA defendants, were named as defendants in the initial action is of no consequence. *Cf. U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992) (holding that the naming of additional parties does not eliminate the preclusive effect of a prior judgment "so long as the judgment was rendered on the merits, the cause of action was the same and the party against whom the doctrine is asserted was a party to the former litigation"). Thus, both actions involve the same parties.

With regard to the remaining plaintiffs, Mendoza and the other plaintiffs' interests are aligned—all plaintiffs seek reinstatement to their positions on the Local 1637 board and damages for alleged state and federal law violations resulting from imposition of the ATU International trusteeship. (*See* ECF No. 8). Mendoza also understood himself to be acting in a representative capacity in *Mendoza I*. In the *Mendoza I* complaint, Mendoza requested "[t]hat this Court determine and declare that the trusteeship over Local 1637 be terminated, and that Mr. Mendoza and the rest of Local 1637's Executive Board be restored to their positions. *Mendoza I*, case no. 2:17-cv-2485-JCM-CWH, ECF No. 1 (emphasis added).

Further, the remaining plaintiffs (except Jimenez) appear to have had actual notice that Mendoza was representing their interests in *Mendoza I*, as they all attached declarations supporting Mendoza's motion for partial summary judgment. *Mendoza I*, case no. 2:17-cv-2485-JCM-CWH, ECF No. 68.19-68.25.

All of the remaining plaintiffs are thus subject to the preclusive effect of *Mendoza I* as adequately represented parties.

3. Conclusion

The court holds that the instant action is duplicative of the earlier-filed action, *Mendoza I*, and thus constitutes impermissible claim splitting. The court will therefore dismiss plaintiffs' amended complaint with prejudice as it pertains to the ATU defendants.

c. ATU defendants' Motion for Leave to File Excess Pages

The ATU defendants have also moved for leave to file excess pages, so as to file a thirty-six (36) page motion to dismiss plaintiffs' amended complaint. (ECF No. 28). Having now dismissed the ATU defendants pursuant to the foregoing, this motion is dismissed as moot.

d. KTA Defendants' Motion to Dismiss

The KTA defendants first argue in their motion to dismiss that plaintiffs' sixth and eighth claims should be dismissed as time barred under the National Labor Relations Act ("NLRA") and as precluded under the LMRA. (ECF No. 51). Second, the KTA defendants contend that plaintiffs' sixth, eighth, ninth, and tenth claims fail to state a claim upon which relief can be granted. *Id*.

1. Sixth Cause of Action as to KTA Defendants

As it pertains to the KTA defendants, the sixth cause of action's demand for damages, brought solely by Mendoza, may be properly brought only against Keolis Transit, as Manzanares, an individual union member, cannot be sued for damages under Section 301(a) of the LMRA. *See SEIU v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061 (9th Cir. 2010). Accordingly, the sixth cause of action is dismissed as to Manzanares.

However, Mendoza cannot maintain this claim against Keolis Transit either because it is barred by

the applicable statute of limitations. A 12(b)(6) motion to dismiss may raise a statute of limitations defense where the statute's running is apparent on the complaint's face. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

The sixth cause of action alleges a hybrid fair representation/29 U.S.C. § 301 claim, which is subject to a six-month limitations period. *See Del Costello v. Teamsters*, 462 U.S. 151, 163-164 (1983) (holding that in an action against both a union for breach of its duty of fair representation and against an employer for breach of contract, the six-month statute of limitations from the NLRA, section 10(b), applies); *Pencikowski v. Aerospace Corp*., 340 F. App'x 416, 417-18 (9th Cir. 2009) (same). This hybrid claim is asserted against both a union (ATU International) and Mendoza's employer (Keolis Transit), so it must satisfy section 10(b).

The parties dispute the appropriate accrual date for Mendoza's hybrid fair representation/29 U.S.C. § 301 claim, but none of the potential options avoid the statute of limitations bar. This action was initiated on May 25, 2018, approximately eleven (11) months after Mendoza concedes that he had actual notice of termination of his employment with Keolis Transit, and approximately ten (10) months after Mendoza concedes he had actual notice of the alleged misconduct of the KTA defendants during the grievance process. (*See* ECF Nos. 1, 8). And in Mendoza's response to the KTA defendants' motion to dismiss, he concedes that he had actual notice of the denial to arbitrate his grievance on September 5, 2017, approx-

imately nine (9) months before this action was filed. (ECF No. 56).

In taking the factual allegations contained in the complaint as true, the court concludes that Mendoza's sixth cause of action is time-barred under the applicable statute of limitations. Accordingly, the court will dismiss with prejudice the sixth cause of action as it pertains to the KTA defendants.

2. Eighth Cause of Action as to KTA Defendants

The eighth cause of action's demand for damages, brought by all plaintiffs, is based upon an alleged violation of 29 U.S.C. §§ 186(a)(2) and 186(d)(1). (ECF No. 8). Monetary damages are unavailable under this section; only injunctive relief may be obtained. *Souza v. Trustees of W. Conference of Teamsters Pension Trust*, 663 F.2d 942, 945 (9th Cir. 1981) ("Nowhere is it shown that the section [29 U.S.C. § 186] intended to provide anything more than injunctive relief."). Thus, the court will dismiss without prejudice plaintiffs' eighth cause of action.

3. Ninth Cause of Action as to KTA Defendants

As is discussed above, no private right of action exists for claims alleged under 18 U.S.C. §§ 1341, 1343, or 1346. Thus, with regard to the KTA defendants, the ninth cause of action will be dismissed with prejudice.

4. Tenth Cause of Action as to KTA Defendants

Plaintiffs' tenth cause of action alleges a RICO violation pursuant to 18 U.S.C. § 1962. (ECF No. 8). The KTA defendants' motion to dismiss asserts that plaintiffs have failed to plead with sufficient specificity that they were injured by the allegedly improper racketeering activity. (ECF. No. 51).

As is stated above, to survive a motion to dismiss, a federal RICO civil complaint must plausibly allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Grimmett*, 75 F.3d at 510 (citing 18 U.S.C. §§ 1964(c), 1962(c)). Plaintiffs' complaint sets forth twenty-four pages of alleged facts common to all claims, as well as another four pages of allegations to support each element of their RICO claim against the KTA defendants. (ECF No. 8). In particular, plaintiffs allege that:

> ATU International Defendants sought and received assistance from Defendant Keolis to terminate Plaintiff Mendoza in order to use that termination as an affirmative defense to suit and maintain control over Local 1637, a thing of both monetary and political value to the ATU International Defendants. In return, the ATU International Defendants have granted concessions to Keolis in grievances, in bargaining, and in the interpretation of existing CBA provisions that have caused injury [sic]

> Local 1637 members through lost wages, and contractual benefits.

Id.

Plaintiffs also allege mail and wire fraud as RICO predicate acts (*Id.*), which is permissible here. There is no requirement that a private action under § 1964(c) can proceed only where a defendant has been previously convicted of a predicate act. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 488 (1985). Moreover, a RICO predicate act need only involve conduct that is "indictable" under certain federal criminal statutes. *Id.* There is no requirement that the predicate act be enforceable through a private right of action, or that such a right actually be enforced. *See* 18 U.S.C. § 1961.

These facts and allegations, when read together, sufficiently indicate to the court and the parties the circumstances that give rise to each of the elements required for plaintiffs' tenth cause of action. And to the extent plaintiffs' RICO claim alleges fraudulent behavior by the KTA defendants in engaging in wire and mail fraud, plaintiffs have met their burden under Rule 9(b) to allege facts regarding the persons, places, times, dates, and other details of the alleged fraudulent activity. *See Neubronner*, 6 F.3d at 671.

Accordingly, the court will deny the KTA defendants' motion to dismiss the tenth cause of action.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the MKA defendants' motion to dismiss (ECF No. 31) be, and the same hereby is, GRANTED. With regard to the MKA defendants, plaintiffs' ninth cause of action is DISMISSED with prejudice, and plaintiffs' tenth, thirteenth, nineteenth, twenty-third, twenty-fourth, and twenty-fifth causes of action are DISMISSED without prejudice.

IT IS FURTHER ORDERED that the ATU defendants' motion to dismiss (ECF No. 33) be, and the same hereby is, GRANTED. Plaintiffs' first through twenty-fourth, as well as twenty-sixth and twenty-seventh, causes of action against the ATU defendants are DISMISSED with prejudice.

IT IS FURTHER ORDERED that the ATU defendants' motion for leave to file excess pages (ECF No. 28) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that the KTA defendants' motion to dismiss (ECF No. 51) be, and the same hereby is, GRANTED in part and DENIED in part, consistent with the foregoing. With regard to the KTA defendants, plaintiffs' sixth and ninth causes of action are DISMISSED with prejudice, and plaintiffs' eighth cause of action is DISMISSED without prejudice. Therefore, plaintiffs may proceed against the KTA defendants as to their tenth, thirteenth, and nineteenth causes of action.

/s/ James C. Mahan
United States District Judge

Dated September 5, 2019.

ORDER DENYING MOTION TO REMAND OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (NOVEMBER 2, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE MENDOZA, JR., INDIVIDUALLY AND AS A MEMBER ON BEHALF OF THE AMALGAMATED TRANSIT UNION LOCAL 1637,

Plaintiff(s),

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL, ET AL.

Defendant(s).

Case No. 2:17-CV-2485 JCM (CWH)

Before: James C. MAHAN,
United States District Judge.

Presently before the court is plaintiff Jose Mendoza Jr.'s motion to remand to state court. (ECF No. 4). Defendants Amalgamated Transit Union International, Antonette Bryant, Lawrence Hanley, Carolyn Higgins, Tyler Home, James Lindsay, Keira McNett, Terry

Richards, and Daniel Smith filed a response (ECF No. 19), to which plaintiff replied (ECF No. 20).

Also before the court is plaintiff's motion for a preliminary injunction. (ECF No. 14). Defendants filed a response (ECF No. 22), to which plaintiff replied (ECF No. 27).

Also before the court is plaintiff's second motion for temporary restraining order. (ECF No. 16). Defendants filed a response (ECF No. 23), to which plaintiff replied (ECF No. 27).

I. Facts

The factual background of this case spans seven years. The court briefly summarizes plaintiff's allegations as relevant to the instant motions.

Plaintiff Mendoza was the president of Amalgamated Transit Union Local 1637 ("Local 1637"), which is a local union that is affiliated with Amalgamated Transit Union International ("International").

Between 2010 and 2016, plaintiff had multiple disputes with International, many of which revolved around the appropriate way to read Local 1637's bylaws. Two primary disagreements between plaintiff and International concern the appropriate rate of pay for the president of Local 1637 and whether the president could designate the secretary-treasurer position as less than full-time.

Article 4 of Local 1637's bylaws governs the president's rate of pay. (ECF No. 7-11). Plaintiff asserts that the version of the 2012 local bylaws sent to him by International president Lawrence Hanley reads "The

President/Business Agent shall be paid at a daily rate of 8 hours times the highest hourly rate paid to an employee in their respective job classification for 40 hours per week to perform duties of the office." (ECF No. 7-11). Plaintiff contends that International has the wrong version of Article 4 on file. (ECF No. 7). Plaintiff believes that the correct version of Article 4 omits the term "respective." (ECF No. 7). Plaintiff thus reads the bylaw language as entitling plaintiff to the highest rate of pay of any employee in the union (which is a mechanic's rate). (ECF No. 7). Plaintiff alleges that defendant International attempted to limit plaintiff's pay to the highest hourly rate paid to an employee in plaintiff's job classification of driver. (ECF No. 7).

The dispute over whether president could designate the secretary-treasurer position as less than full time turns on whether Local 1637 ever adopted amendments to its bylaws. (ECF No. 7). Plaintiff contends that Local 1637's executive board's adopted bylaws that would allow the president to designate the secretary-treasurer as less than full time. (ECF No. 7). Plaintiff alleges that defendant International would not approve of the adopted bylaws. (ECF No. 7).

Plaintiff alleges that he took proactive measures to resolve the outstanding issues with International. On December 31, 2016, plaintiff agreed to repay Local 1637 for the alleged overpayments he received as president. (ECF No. 7). Plaintiff asserts that he continues to make these payments without delay. (ECF No. 7).

On January 14, 2017, plaintiff sent a correspondence to Hanley requesting information on the proper way to amend the bylaws to avoid future conflicts with International. (ECF No. 7). Plaintiff alleges that

multiple emails were exchanged, during which plaintiff explained that quorum was often not met at Local 1637's meetings and the executive board was overwhelmingly in favor of amending the bylaws and planned on doing so pursuant to Section 13.2 of the ATU Constitution.[1] (ECF No. 7). Hanley expressed concern regarding the potentially anti-democratic nature of plaintiff's proposed method of amending the bylaws and suggested that Section 13.2 did not allow for amendment in the manner that plaintiff had described. (ECF No. 7).

On January 30, 2017, Hanley notified plaintiff that International would request an audit of Local 1637 by an internal auditor (Tyler Home) with the

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[1] Section 13.2 of the ATU Constitution reads, in relevant part,

> The bylaws and rules of LUs and amendments thereto, to be legal and effective, shall be read at two (2) regular meetings of the LU and posted at appropriate locations with notice of the meeting at which the second reading shall occur before adoption and it shall require a two-thirds vote of the membership in attendance and voting at the second union meeting to adopt. After posting the proposed bylaws, rules or amendments for adoption and failing to obtain a quorum at two (2) consecutive meetings of the LU, the local executive board shall have the power, unless otherwise restricted by law, by a two-thirds vote of the total membership of the executive board to adopt such proposals on behalf of the LU. Such a vote, if taken, shall dispose of the question and stand as the vote of the LU membership. <u>After adoption by the LU the bylaws, rules or amendments so adopted shall be forwarded to the IP for approval and must have the approval of the IP before going into effect</u>.

(ECF No. 7-28 at 58) (emphasis added).

assistance of International Vice President James Lindsay.

In February and March of 2017, plaintiff and Hanley sent multiple emails to each other related to the proposed amendments (amongst other things). (ECF No. 7). Plaintiff took the position that Local 1637's executive board had validly adopted the amendments. (ECF No. 7). Hanley took the position that the amendments were not validly adopted. (ECF No. 7).

On March 10, 2017, Home and Lindsay produced their internal audit report. (ECF No. 7). The report found that Mendoza committed financial malfeasance.[2] (ECF No. 7). On April 10, 2017, Hanley removed plaintiff from his position as president and imposed a trusteeship over Local 1637. Hanley's trusteeship order states, in part:

> It has come to the attention of this office that there are several issues severely impacting the effective administration and functioning of Local 1637. These problems include, but are not necessarily limited to, the following: 1) overpayment to the president/business agent in the form of salary' and vacation pay; 2) multiple instances or financial malpractice and/or malfeasance including failure to complete required audits, failure to authenticate expenses for purposes or reimburse-

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[2] Plaintiff's motion cites an independent audit report, prepared by Miller Kaplan and Arase, which states that management corrected all non-trivial misstatements in their 2015 financial reports and that none of the misstatements were material to the 2015 financial statements when considered holistically.

> ment, and an unauthorized withdrawal of cash to pay officers' salaries; 3) impediments to democratic functioning, resulting in chronic failure to achieve quorums at membership meetings; 4) failure to timely process grievances; and 5) failure to comply with the directive of the International President with respect to the role and responsibilities of the financial secretary-treasurer.

(ECF No. 7-39).

The trusteeship order appointed Lindsay as trustee over Local 1637. (ECF No. 7-39). Hanley appointed International representative Antonette Bryant as hearing officer for the trusteeship hearing. (ECF No. 7).

On April 26, 2017, Hanley sent a notice of trusteeship hearing to Local 1637 and to plaintiff. (ECF No. 7-42). On May 9th and 10th, 2017, Lindsay held the trusteeship hearing. Plaintiff alleges that two members of International's general counsel, Keira McNett and Daniel Smith, were present at the meeting. Plaintiff alleges that these attorneys,

> [A]ssist[ed] Bryant during this Trusteeship hearing in denying Plaintiff Mendoza due process in the following ways, which include but are not limited to: (1) refusing to allow Mendoza to ask relevant questions during cross-examination; (2) denying Mendoza his right to cross-examine some of ATU's witnesses; (3) presenting biased interested witnesses; (4) failing to object to Bryant's status as hearing officer despite being an employee of Hanley; (5) presenting false

> evidence and testimony; and (6) failing to review the evidence and identify clearly exculpatory evidence at the hearing, which was their job based on their own representations at the hearing.

(ECF No. 7). Bryant subsequently ratified the trusteeship. (ECF No. 7).

Plaintiff alleges that Lindsay has requested that criminal charges be brought against plaintiff for the alleged misappropriation of union funds. (ECF No. 7).

On September 26, 2017, plaintiff filed his first motion for temporary restraining order. (ECF No. 7). The court denied the motion on September 28, 2017. (ECF No. 13).

II. Legal Standard

i. Motion to Remand

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Pursuant to 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

Procedurally, a defendant has thirty (30) days upon notice of removability to remove a case to federal court. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446

(b)(2)). Defendants are not charged with notice of removability "until they've received a paper that gives them enough information to remove." *Id.* at 1251.

Specifically, "the 'thirty day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face' the facts necessary for federal court jurisdiction." *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty Co.*, 425 F.3d 689, 690-91 (9th Cir. 2005) (alterations in original)). "Otherwise, the thirty-day clock doesn't begin ticking until a defendant receives 'a copy of an amended pleading, motion, order or other paper' from which it can determine that the case is removable. *Id.* (quoting 28 U.S.C. § 1446(b)(3)).

A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. § 1447(c). Remand to state court is proper if the district court lacks jurisdiction. *Id.* "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, federal subject matter jurisdiction must exist at the time an action is commenced. *Mallard Auto. Grp., Ltd. v. United States*, 343 F. Supp. 2d 949, 952 (D. Nev. 2004) (citing *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir.1988)).

On a motion to remand, the removing defendant faces a strong presumption against removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental Life Ins. Co.*, 102

F.3d 398, 403-04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992).

ii. Preliminary Injunctive Relief

"Injunctive relief is an extraordinary remedy and it will not be granted absent a showing of probable success on the merits and the possibility of irreparable injury should it not be granted." *Shelton v. Nat'l Collegiate Athletic Assoc.*, 539 F.2d 1197, 1199 (9th Cir. 1976).

Courts must consider the following elements in determining whether to issue a temporary restraining order and preliminary injunction: (1) a likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; and (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008). The test is conjunctive, meaning the party seeking the injunction must satisfy each element. However, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the [movant] can support issuance of a preliminary injunction, so long as the [movant] also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Winter*, 129 S. Ct. at 392).

Under Federal Rule of Civil Procedure 65, a court may issue a temporary restraining order only when the moving party provides specific facts showing that immediate and irreparable injury, loss, or damage will result before the adverse party's opposition to a

motion for preliminary injunction can be heard. Fed. R. Civ. P. 65.

III. Discussion

i. Motion to Remand

Plaintiff argues that the court should remand the case to state court as plaintiff's claims arise under state law. Defendant asserts that because all of plaintiff's claims are completely pre-empted by Section 301(a) of the Labor Management Relations Act ("LMRA"), the claims present federal questions. Defendant asserts in the alternative that if the court finds that plaintiff's claims sounding in tort are not pre-empted by Section 301(a), that the court should nonetheless exercise supplemental jurisdiction over the claims as they arise out of the same transaction or occurrence as plaintiff's breach of contract claims.

Section 301(a) of the LMRA grants federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce" and for suits "between any such labor organizations." 29 U.S.C. § 185(a). In *United Association of Journeymen v. Local 334*, 452 U.S. 615 (1981), the Court held that union constitutions are "'contracts between labor organizations' within the meaning of § 301(a)" and that "[n]othing in the language and legislative history of § 301(a) suggests any special qualification or limitation on its reach." *Id.* at 620, 624-25. The Court has since held that suits by a union member alleging breach of the union constitution is within the scope of § 301. *Wooddell v. Int'l Bhd. Of Elec.*

Workers, Local 71, 502 U.S. 93, 101-02 (1991). Further, § 301(a) completely preempts state law tort claims if "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

Here, plaintiff's first and second causes of action allege that defendants' conduct ("Unilaterally Amending Article 4 of the Local 1637 Constitution," "failure to follow procedure in charging Plaintiff Mendoza," and imposing a trusteeship over Local 1637) breached the union constitution. (ECF No. 1). Section 301(a) grants federal jurisdiction over such claims. *See Wooddell*, 502 U.S. at 101-02; *Journeymen*, 452 U.S. at 620. Further, defendant's state-law tort claims relate to the process by which International imposed a trusteeship over Local 1637 and removed Mendoza from his position as president of Local 1637. "Resolution of [these claims] is substantially dependent upon analysis of the terms of [the relevant] labor contract[s]." *See Lueck*, 471 U.S. at 220. Therefore, Section 301(a) grants federal jurisdiction over the claims.[3] *See id.*

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[3] As defendants note in their response to plaintiff's motion to remand, an alternative ground for exercising jurisdiction over plaintiff's tort-based claims would be that supplemental jurisdiction exists over the claims. (ECF No. 19 at 9). Supplemental jurisdiction exists under 28 U.S.C. § 1367(a) when claims are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* "Nonfederal claims are part of the same case as federal claims when they derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them in one

Defendants have demonstrated that federal question jurisdiction exists over all of plaintiff's causes of action. Further, plaintiff does not allege any procedural defects in removal procedure.[4] Therefore, defendants have carried their burden of establishing that removal was proper. *See Sanchez*, 102 F.3d at 403-04.

ii. Motion for preliminary injunction

Plaintiff requests a preliminary injunction that would dissolve the current trusteeship over Local 1637 and reinstate the prior executive board. Defendants argue that plaintiff has not demonstrated a likelihood of success on the merits or shown irreparable harm. Defendants further state that injunctive relief would impose greater harm on defendants than any harm that would be imposed by maintaining the status quo, and that public policy favors denial of plaintiff's requested injunctive relief.

Plaintiff's motion does not demonstrate a likelihood of success on the merits of plaintiff's claims. As defendants note, plaintiff's motion for preliminary injunction is essentially the same as plaintiff's first motion for

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judicial proceeding." *Trs. of Constr. Indus. and Laborers Health and Welfare Tr. v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 925 (9th Cir. 2003) (quotations omitted). Here, plaintiff's claims sounding in tort arise from the same nucleus of operative facts as plaintiff's contract-based claims. Further, the claims are such that plaintiff would be expected to try them in one proceeding. Therefore, supplemental jurisdiction would be appropriate on these facts even absent original jurisdiction. *Id.*

[4] Upon independent examination, the court does not see any defects in defendant's removal procedure.

temporary restraining order. The court finds that the instant motion suffers from the same deficiencies the court articulated in its order denying plaintiff's first motion for a temporary restraining order. *See* (ECF No. 13).

Plaintiff's motion does not discuss any relevant cause of action or why plaintiff is likely to succeed on that particular cause of action. *See* (ECF No. 14). Plaintiff's section discussing his likelihood of success on the merits is dedicated to describing and debunking the defendants' five listed reasons for removing plaintiff from his union office and for imposing a trusteeship over Local 1637. *See* (ECF No. 14). This is not enough to demonstrate probable success on the merits of plaintiff's claims. As plaintiff's motion fails to show a likelihood of success on the merits, the court will deny plaintiff's request for injunctive relief. *See Winter*, 129 S. Ct. at 392.

Further, plaintiff has not demonstrated immediate and irreparable harm that will accrue in the absence of an injunction. Defendants accurately note that the trusteeship was imposed over Local 1637 in May and plaintiff waited until September to file a lawsuit. (ECF No. 22). Plaintiff's explanation for the delay is that he needed time to obtain adequate legal services to investigate his claims and initiate legal action. Assuming this is true, plaintiff's filings with the court do not demonstrate that any additional harm will accrue to plaintiff if the court declines to dissolve a trusteeship that has been in place since May.

Furthermore, plaintiff has not shown that the balance of harms favors an injunction. As defendants' response articulates, defendants imposed a trusteeship

over Local 1637 due to concerns regarding plaintiff's self-dealing and the highly anti-democratic nature of Local 1637. (ECF No. 22). If the court grants plaintiff's request for injunctive relief, and defendants' assertions regarding plaintiff's illegal conduct are true, then reinstating the prior executive board and dissolving the trust could cause defendants significant harm that far outweighs any harm that denial of a preliminary injunction imposes on plaintiff.

Finally, the public interest counsels against granting injunctive relief in this case. Here, an injunction would greatly upset the status quo by re-instating a suspended executive board and president and dissolving a union trusteeship. Plaintiff has not made a strong enough showing in his motion to merit his requested relief. *See Shelton*, 539 F.2d at 1199.

iii. Motion for Temporary Restraining Order

This is plaintiff's second motion for temporary restraining order. *See* (ECF No. 7). As defendants' response notes, plaintiff's second motion is for all intents and purposes the same as plaintiff's first motion for temporary restraining order. (ECF No. 23); *compare* (ECF No. 7), *with* (ECF No. 16). As plaintiff presents the court with no compelling reason to reconsider its prior order, plaintiff's second motion for a temporary restraining order will be denied.

IV. Conclusion

Plaintiff's claims are pre-empted by Section 301(a) of the LMRA. Therefore, this court has subject matter jurisdiction over the action and defendants have carried their burden of establishing that removal

was proper. Further, plaintiff has not shown this court that injunctive relief is warranted on these facts.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiffs' motion to remand to state court (ECF No. 4) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for a preliminary injunction (ECF No. 14) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for a temporary restraining order (ECF No. 16) be, and the same hereby is, DENIED.

/s/ James C. Mahan
United States District Judge

Dated November 2, 2017.

ORDER ON MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (SEPTEMBER 19, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE MENDOZA, JR., ET AL,

Plaintiff(s),

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL, ET AL.

Defendant(s).

Case No. 2:17-CV-2485 JCM (CWH)

Before: James C. MAHAN,
United States District Judge.

Presently before the court is defendants' motion to dismiss. (ECF No. 38). Plaintiff Jose Mendoza, Jr. ("plaintiff") filed a response (ECF No. 44), to which defendants replied (ECF No. 52).

I. Facts

The factual background of this case spans seven years. The court briefly summarizes plaintiff's allegations as relevant to the instant motion.

Plaintiff Mendoza was the president of Amalgamated Transit Union Local 1637 ("Local 1637"), which is a local union that is affiliated with Amalgamated Transit Union International ("International").

Between 2010 and 2016, plaintiff had multiple disputes with International, many of which revolved around the appropriate way to read Local 1637's bylaws. Two primary disagreements between plaintiff and International concern the appropriate rate of pay for the president of Local 1637 and whether the president could designate the secretary-treasurer position as less than full-time.

Article 4 of Local 1637's bylaws governs the president's rate of pay. (ECF No. 7-11). Plaintiff asserts that the version of the 2012 local bylaws sent to him by International president Lawrence Hanley reads "The President/Business Agent shall be paid at a daily rate of 8 hours times the highest hourly rate paid to an employee in their respective job classification for 40 hours per week to perform duties of the office." (ECF No. 7-11). Plaintiff contends that International has the wrong version of Article 4 on file. (ECF No. 7). Plaintiff believes that the correct version of Article 4 omits the term "respective." (ECF No. 7). Plaintiff thus reads the bylaw language as entitling plaintiff to the highest rate of pay of any employee in the union (which is a mechanic's rate). (ECF No. 7). Plaintiff alleges that defendant International attempted

to limit plaintiff's pay to the highest hourly rate paid to an employee in plaintiff's job classification of driver. (ECF No. 7).

The dispute over whether the president could designate the secretary-treasurer position as less than full time turns on whether Local 1637 ever adopted amendments to its bylaws. (ECF No. 7). Plaintiff contends that Local 1637's executive board's adopted bylaws that would allow the president to designate the secretary-treasurer as less than full time. (ECF No. 7). Plaintiff alleges that defendant International would not approve of the adopted bylaws. (ECF No. 7).

Plaintiff alleges that he took proactive measures to resolve the outstanding issues with International. On December 31, 2016, plaintiff agreed to repay Local 1637 for the alleged overpayments he received as president. (ECF No. 7). Plaintiff asserts that he continues to make these payments without delay. (ECF No. 7).

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[1] Section 13.2 of the ATU International Constitution reads, in relevant part,

expressed concern regarding the potentially anti-democratic nature of plaintiff's proposed method of amending the bylaws and suggested that Section 13.2 did not allow for amendment in the manner that plaintiff had described. (ECF No. 7).

On January 30, 2017, Hanley notified plaintiff that International would request an audit of Local 1637 by an internal auditor (Tyler Home) with the assistance of International Vice President James Lindsay.

In February and March of 2017, plaintiff and Hanley sent multiple emails to each other related to the proposed amendments (amongst other things). (ECF No. 7). Plaintiff took the position that Local 1637's executive board had validly adopted the

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> The bylaws and rules of LUs and amendments thereto, to be legal and effective, shall be read at two (2) regular meetings of the LU and posted at appropriate locations with notice of the meeting at which the second reading shall occur before adoption and it shall require a two-thirds vote of the membership in attendance and voting at the second union meeting to adopt. After posting the proposed bylaws, rules or amendments for adoption and failing to obtain a quorum at two (2) consecutive meetings of the LU, the local executive board shall have the power, unless otherwise restricted by law, by a two-thirds vote of the total membership of the executive board to adopt such proposals on behalf of the LU. Such a vote, if taken, shall dispose of the question and stand as the vote of the LU membership. <u>After adoption by the LU the bylaws, rules or amendments so adopted shall be forwarded to the IP for approval and must have the approval of the IP before going into effect</u>.

(ECF No. 7-28 at 58) (emphasis added).

amendments. (ECF No. 7). Hanley took the position that the amendments were not validly adopted. (ECF No. 7).

On March 10, 2017, Home and Lindsay produced their internal audit report. (ECF No. 7). The report found that Mendoza committed financial malfeasance.[2] (ECF No. 7). On April 10, 2017, Hanley removed plaintiff from his position as president and imposed a trusteeship over Local 1637. Hanley's trusteeship order states, in part:

> It has come to the attention of this office that there are several issues severely impacting the effective administration and functioning of Local 1637. These problems include, but are not necessarily limited to, the following: 1) overpayment to the president /business agent in the form of salary' and vacation pay; 2) multiple instances of financial malpractice and/or malfeasance including failure to complete required audits, failure to authenticate expenses for purposes or reimbursement, and an unauthorized withdrawal of cash to pay officers' salaries; 3) impediments to democratic functioning, resulting in chronic failure to achieve quorums at membership meetings; 4) failure to timely process grievances; and 5) failure to

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[2] Plaintiff's motion cites an independent audit report, prepared by Miller Kaplan and Arase, which states that management corrected all non-trivial misstatements in their 2015 financial reports and that none of the misstatements were material to the 2015 financial statements when considered holistically.

> comply with the directive of the International President with respect to the role and responsibilities of the financial secretary-treasurer.

(ECF No. 7-39).

The trusteeship order appointed Lindsay as trustee over Local 1637. (ECF No. 7-39). Hanley appointed International representative Antonette Bryant as hearing officer for the trusteeship hearing. (ECF No. 7).

On April 26, 2017, Hanley sent a notice of trusteeship hearing to Local 1637 and to plaintiff. (ECF No. 7-42). On May 9th and 10th, 2017, Lindsay held the trusteeship hearing. Plaintiff alleges that two members of International's general counsel, Keira McNett and Daniel Smith, were present at the meeting. Plaintiff alleges that these attorneys,

> [A]ssist[ed] Bryant during this Trusteeship hearing in denying Plaintiff Mendoza due process in the following ways, which include but are not limited to: (1) refusing to allow Mendoza to ask relevant questions during cross-examination; (2) denying Mendoza his right to cross-examine some of ATU's witnesses; (3) presenting biased interested witnesses; (4) failing to object to Bryant's status as hearing officer despite being an employee of Hanley; (5) presenting false evidence and testimony; and (6) failing to review the evidence and identify clearly exculpatory evidence at the hearing, which

> was their job based on their own representations at the hearing.

(ECF No. 7). Bryant subsequently ratified the trusteeship. (ECF No. 7).

Plaintiff alleges that Lindsay has requested that criminal charges be brought against plaintiff for the alleged misappropriation of union funds. (ECF No. 7).

Plaintiff brings the instant suit on behalf of himself and on behalf of Local 1637. (ECF No. 1).

II. Legal Standard

a. Motion to dismiss

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.*

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged – but it has not shown – that the pleader is entitled to relief." *Id.* at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court held,

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.

> Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

b. FRCP 9(b) – Claims Alleging Fraud

Allegations of fraud are subject to a heightened pleading standard. *See* Fed. R. Civ. P. 9(b) ("[A] party must state with particularity the circumstances constituting fraud . . . ."). Rule 9(b) operates "to give defendants notice of the particular misconduct which is alleged," requiring plaintiffs to identify "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (citations omitted).

"The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Id*. (citations omitted). Rule 9(b) provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id*.

III. Discussion

Plaintiff Mendoza's complaint sets forth ten separate causes of action on behalf of himself as an individual, and on behalf of Local 1637: (1) breach of contract regarding defendants' alleged amending of Article 4 of the Local 1637 Constitution and failure to follow procedure in charging plaintiff Mendoza; (2) breach

of contract regarding defendants' alleged fraudulent contravention of the ATU International Constitution and Bylaws in implementing the trusteeship; (3) breach of implied covenant of good faith and fair dealing; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) legal malpractice as to defendants Keira McNett and Daniel Smith; (7) breach of fiduciary duty; (8) constructive fraud; (9) malicious prosecution; and (10) civil conspiracy.[3]

As a preliminary matter, the parties disagree about which federal labor statute governs plaintiff's claims, and under what circumstances. *See* (ECF Nos. 38, 44). Defendants argue in their motion to dismiss that the "presumption of validity" standard set forth in Title III of the Labor-Management Reporting and Disclosure Act ("LMRDA") should be applied to International's imposition of a trusteeship. (ECF No. 38 at 9). Plaintiff disagrees. (ECF No. 44).

The court has already found that plaintiff's claims are preempted by the Labor Management Relations Act ("LMRA"), not the LMRDA. (ECF No. 30). The court's previous order denying plaintiff's motion to remand, motion for a preliminary injunction, and motion for a temporary restraining order (ECF No. 30) provides:

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[3] With respect to some of plaintiff's claims, plaintiff fails to specify the individual defendants to which the claims apply. (ECF No. 1). Only claims six (6) and ten (10) specify the defendants to which those claims apply. *Id.* Therefore, the court will assume that the remaining claims are asserted against all defendants, and proceed accordingly.

Section 301(a) of the LMRA grants federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce" and for suits "between any such labor organizations." 29 U.S.C. § 185(a). In *United Association of Journeymen v. Local 334*, 452 U.S. 615 (1981), the Court held that union constitutions are "'contracts between labor organizations' within the meaning of § 301(a)" and that "[n]othing in the language and legislative history of § 301(a) suggests any special qualification or limitation on its reach." *Id.* at 620, 624-25. The Court has since held that suits by a union member alleging breach of the union constitution is within the scope of § 301. *Wooddell v. Int'l Bhd. Of Elec. Workers, Local 71*, 502 U.S. 93, 101-02 (1991). Further, § 301(a) completely pre-empts state law tort claims if "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

Here, plaintiff's first and second causes of action allege that defendants' conduct ("Unilaterally Amending Article 4 of the Local 1637 Constitution," "failure to follow procedure in charging Plaintiff Mendoza," and imposing a trusteeship over Local 1637) breached the union constitution. (ECF No. 1). Section 301(a) grants federal jurisdiction

> over such claims. *See Wooddell*, 502 U.S. at 101-02; *Journeymen*, 452 U.S. at 620. Further, defendant's state-law tort claims relate to the process by which International imposed a trusteeship over Local 1637 and removed Mendoza from his position as president of Local 1637. "Resolution of [these claims] is substantially dependent upon analysis of the terms of [the relevant] labor contract[s]." *See Lueck*, 471 U.S. at 220. Therefore, Section 301(a) grants federal jurisdiction over the claims. *See id.*

(ECF No. 30 at 7) (footnote omitted).

Furthermore, the Ninth Circuit has held that the LMRDA requires as a "condition precedent to the filing of a § 501(b) suit [by an individual union member]. . . proof that the union refuses or fails to sue upon a demand made by the union member." *Building Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 506 (9th Cir. 1989). Plaintiff has not alleged that he has made such demand upon Local 1637, nor has he alleged that it has refused to bring suit in response thereto. Accordingly, the court finds that plaintiff's claims have not been pleaded pursuant to the LMRDA.

Defendant cites *Argentine v. USW* for the proposition that an LMRDA standard can and should be applied to an LMRA claim regarding the imposition of a trusteeship. However, in *Argentine*, the plaintiff had brought valid LMRDA claims in addition to his LMRA claims, premised on similar facts. *Argentine v. USW*, 287 F.3d 476, 481-82 (6th Cir. 2002). Thus, the court's application of the LMRDA's "presumption of

validity" standard to plaintiff's claims in that case was appropriate.

Here, however, as plaintiff disavows that he brought his claims pursuant to the LMRDA and has not alleged that he made the requisite demand as required by the LMRDA prior to filing the instant suit, the court finds that these claims are not appropriate for review under the LMRDA. Accordingly, the court will review the sufficiency of plaintiff's claims under standards set forth in the LMRA only.

a. Plaintiff's tort claims

Defendants argue in their motion to dismiss, and plaintiff does not dispute, that plaintiff's tort claims should be dismissed as fully precluded by plaintiff's Section 301(a) contract claim. (ECF No. 38 at 16). *See also* (ECF No. 44 at 8-9). The United States Supreme Court has held that, where a plaintiff brings a contract claim under Section 301 of the LMRA, any state-law tort claims that are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

Indeed, where a plaintiff's contract and tort claims stem from the same facts, the duties and rights at issue in a state-law tort claim "derive from the rights and obligations established by the contract." *Id.* at 216-217. Therefore, a contract claim brought under the Section 301 of the LMRA precludes the need for duplicative state-law tort claims.

Here, the court has already found that plaintiff Mendoza's state-law tort claims "relate to the process by which [ATU] International imposed a trusteeship over Local 1637 and removed Mendoza from his position as president of Local 1637. (ECF No. 30 at 7). Accordingly, the court found that resolution of these claims is "substantially dependent upon analysis of the terms of [the relevant] labor contract[s]." *Id.* It is on this basis that the court initially assumed subject-matter jurisdiction over plaintiff's state-law claims. *Id.*

Accordingly, the court will dismiss plaintiff's third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth claims as preempted by Section 301(a) of the LMRA, without prejudice.[4] As a result, only plaintiff's first and second claims for breach of contract remain.

b. Plaintiff's Claims as to Individual Union Members

Defendants argue in their motion to dismiss (ECF No. 38), and plaintiff does not dispute, that individual union members cannot be sued for damages under Section 301(a) of the LMRA. *See* (ECF No. 44 at 29); s*ee also SEIU v. Nat'l Union of Healthcare*

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[4] Plaintiff has expressed to the court his desire to amend his complaint to plead these claims as LMRDA claims if the court continues to construe his claims as LMRA claims. (ECF No. 44 at 9). Indeed, plaintiff has opposed the court's jurisdiction over these claims pursuant to the LMRA from the outset of this case. (ECF No. 4) (plaintiff's motion to remand to state court). Because the court recognizes that the plaintiff is the master of the complaint, the court will dismiss plaintiff's claims without prejudice so that plaintiff may file a motion for leave to amend.

Workers, 598 F.3d 1061 (9th Cir. 2010). Rather, plaintiff contends that while the LMRA does not permit plaintiffs to bring suit against individual union members, the LMRDA does. (ECF No. 44 at 29). *See* 29 U.S.C. § 501(a)-(b). Plaintiff therefore argues that because the LMRDA, which was enacted after the LMRA, permits plaintiffs to sue individual union members for damages, the court should find that Congress intended to impose individual liability on union officers "in both state and federal court." (ECF No. 44 at 29-30).

Plaintiff cannot have it both ways. The court will not apply a theory of liability under the LMRDA at plaintiff's request while simultaneously refusing to apply the "presumption of validity" standard set forth by the LMRDA to plaintiff's claims regarding the imposition of the trusteeship. As the court has found that plaintiff's claims are not appropriate for review under the LMRDA, the court declines to impose liability upon individual union members or officers to plaintiff's claims as currently plead.

Therefore, the court will dismiss plaintiff's first and second claims as they pertain to individual defendants James Lindsay III, Lawrence J. Hanley, Antonette Bryant, Terry Richards, Carolyn Higgins, Keira McNett, Daniel Smith, and Tyler Home, insofar as these claims are brought against defendants in their individual capacities.

c. Plaintiff's Remaining Claims

In accordance with the foregoing, the court will now address the sufficiency of plaintiff's first and second claims for breach of contract as they pertain to:

ATU International; James Lindsay III, in his official capacity as ATU International Vice President and Trustee; Lawrence J. Hanley, in his official capacity as International Union President; and Antonette Bryant, in her official capacity as International Representative and Hearing Officer.

i. Claims One and Two: (1) Breach of Contract, Amending Article 4 of the Local 1637 Constitution, Failure to Follow Procedure in Charging Plaintiff Mendoza; (2) Fraudulent Breach of ATU International Constitution and Bylaws Regarding Trusteeship

In defendants' motion to dismiss, defendants argue that plaintiff's first and second claims should be dismissed for failure to overcome the "presumption of validity" test set forth under the LMRDA, which the court has already dispelled. (ECF No. 38 at 10-12). Defendants further argue, summarily and without providing convincing points and authorities, that plaintiff has failed to plead enough "non-conclusory facts" to withstand the standards set forth under FRCP 12(b)(6) and 9(b). *Id.* at 12-15, 17-18. The court disagrees.

Plaintiff's complaint sets forth ten pages of facts common to all claims, as well as another seven pages of allegations to support his first and second claims for breach of contract. (ECF No. 1). These facts and allegations, when read together, sufficiently indicate to the court and the parties the circumstances that give rise to plaintiff's causes of action. The allega-

tions set forth more than just a "formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678.

Furthermore, to the extent plaintiff's second claim alleges fraudulent behavior by defendants in implementing the trusteeship, plaintiff meets his burden under Rule 9(b) to allege facts regarding the persons, places, times, dates, and other details of the alleged fraudulent activity. *Neubronner,* 6 F.3d at 671. Accordingly, the court will deny defendants' motion to dismiss claims one and two of plaintiff's complaint.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion to dismiss (ECF No. 38) be, and the same hereby is, GRANTED in part and DENIED in part, consistent with the foregoing.

/s/ James C. Mahan
United States District Judge

Dated September 19, 2018.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APRIL 5, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOR PUBLICATION

RAYMOND GARCIA, AS A MEMBER, AND ON BEHALF OF CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION,

Plaintiff-Appellee,

and

CHERIE MANCINI; FREDERICK GUSTAFSON,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; NEVADA SERVICE EMPLOYEES UNION; MARY KAY HENRY, IN HER OFFICIAL CAPACITY AS UNION PRESIDENT; LUISA BLUE, IN HER OFFICIAL CAPACITY AS TRUSTEE,

Defendants-Appellants.

No. 19-16863

D.C. Nos.
2:17-cv-01340-APG-NJK
2:17-cv-02137-APG-NJK

RAYMOND GARCIA, AS A MEMBER, AND ON BEHALF OF CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION,

Plaintiff-Appellant,

and

CHERIE MANCINI; FREDERICK GUSTAFSON,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; NEVADA SERVICE EMPLOYEES UNION; MARY KAY HENRY, IN HER OFFICIAL CAPACITY AS UNION PRESIDENT; LUISA BLUE, IN HER OFFICIAL CAPACITY AS TRUSTEE,

Defendants-Appellees.

No. 19-16933

D.C. Nos.
2:17-cv-01340-APG-NJK
2:17-cv-02137-APG-NJK

CHERIE MANCINI,

Plaintiff-Appellant,

and

RAYMOND GARCIA, AS A MEMBER, AND ON BEHALF OF CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION; FREDERICK GUSTAFSON,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; NEVADA SERVICE EMPLOYEES UNION; MARY KAY HENRY, IN HER OFFICIAL CAPACITY AS UNION PRESIDENT; LUISA BLUE, IN HER OFFICIAL CAPACITY AS TRUSTEE,

Defendants-Appellees.

No. 19-16934

D.C. Nos.
2:17-cv-01340-APG-NJK
2:17-cv-02137-APG-NJK

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Before: M. Margaret MCKEOWN and Jacqueline H. NGUYEN, Circuit Judges, and Eric N. Vitaliano,** District Judge.

NGUYEN, Circuit Judge:

** The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

This dispute between union members and their union arises out of a trusteeship imposed on Nevada Service Employees Union ("the Local") by the Service Employees International Union (the "International"). Following a period of internal strife and two hearings investigating member complaints, a majority of the Local's executive board voted to request the trusteeship. Local member Raymond Garcia filed suit in state court against the International, International officials, and the Local's board (collectively, "the Union") challenging the trusteeship as violating the Local's constitution, the International's constitution, and an affiliation agreement between the two organizations. The case was removed to federal court, and the district court granted the Union's motion dismiss in part, holding that five claims were preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and were therefore "converted" into § 301 claims. The consolidated plaintiffs (the "Union Members") appeal. We affirm the district court's preemption determination and its exercise of jurisdiction over the preempted claims.[1]

I. Background

The Local is an affiliate of the International and is governed by the Local Constitution, which is generally subordinate to the International Constitution. The Local and the International are also parties to an Affiliation Agreement. The Affiliation Agreement con-

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[1] Garcia's suit was consolidated with *Mancini v. SEIU*, No. 19-16934, but we deal here only with issues relevant to Garcia's claims. The parties' remaining issues on appeal are addressed in a concurrently issued memorandum disposition.

tains a waiver provision purporting to, in some circumstances, waive portions of the International Constitution concerning trusteeships.

After the International received numerous complaints from Local members regarding the breakdown of the Local's basic governance and democratic processes, the International ordered a hearing concerning the state of the Local. The hearing officer issued findings of fact and recommendations including a recommendation that the International place the Local into trusteeship. The Local Board met with two representatives of the International and the International's associate general counsel, and voted to request that the International place the Local into trusteeship. The International subsequently did so.

Garcia filed suit in state court against the Union. He brought seven state law claims: (1) breach of contract by the Local Board, (2) breach of contract by the International, (3) breach of the implied covenant of good faith and fair dealing by the International, (4) fraudulent misrepresentation by the International, (5) negligent misrepresentation by the International, (6) legal malpractice by the International's associate general counsel, and (7) breach of fiduciary duty by the International. After removing the case to federal court, the Union moved to dismiss Garcia's claims. The district court granted the motion in part, holding that five of the claims (Claims 2, 3, 5, 6, and 7) were preempted by § 301 of the LMRA and thus "converted" into—that is, treated as—§ 301 claims. The Union Members appeal.

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291, and we review the existence of subject matter jurisdiction de novo. *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160, 1165 (9th Cir. 2006). We review a district court's ruling on a motion to dismiss de novo. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011).

III. Discussion

The Union Members argue that the district court erred in exercising federal question jurisdiction over Garcia's state law claims, because § 301 of the LMRA does not preempt claims based on a union constitution. They are mistaken. Section § 301 completely preempts state law claims based on contracts between labor unions, which may include union constitutions. The district court correctly held that Garcia's claims required analysis of at least one § 301 labor contract and were therefore preempted.

A. Section 301 Completely Preempts Claims That Require Interpretation of a Union Constitution, to the Extent the Constitution Is a Contract Between Unions

State law claims that are completely preempted are removable to federal court under the complete preemption corollary to the well-pleaded complaint rule. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987). This doctrine allows state law claims to be removed to federal court, even where a federal question does not appear on the face of the complaint, because "[o]nce an area of state law has been completely pre-

empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* at 392; *see* 28 U.S.C. § 1331. Section 301 is one of just three federal statutes that the Supreme Court has held to "so preempt their respective fields as to authorize removal of actions seeking relief exclusively under state law. . . . "[2] *In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005). State law claims that fall within the area of § 301 are considered federal law claims and are preempted and removable. *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 560-61 (1968); *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 23-24 (1983).

Section 301(a) of the LMRA provides:

> 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

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[2] The Union Members rely extensively on *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958), arguing that it creates an exception to § 301 preemption for suits filed by union members against unions in state court, particularly when the suit alleges violation of a union constitution. This argument is unavailing because *Gonzales* concerns the scope of preemption under the National Labor Relations Act ("NLRA"), not under § 301. *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 301 n.10 (1977) (explaining that *Gonzales* "established another exception to the general rule of [NLRA] preemption for state-law actions alleging expulsion from union membership in violation of the applicable union constitution and bylaws and seeking restoration to membership and damages").

> 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.

29 U.S.C. § 185(a) (emphasis added). "[U]nion constitutions are an important form of contract between labor organizations," *Wooddell v. Int'l Bhd. of Elec. Workers*, *Local 71*, 502 U.S. 93, 101 (1991), and therefore "a union constitution is a 'contract' within the plain meaning of § 301(a)," *United Ass'n of Journeymen & Apprentices v. Local 334*, 452 U.S. 615, 622 (1981).

We have previously held that a union member may bring suit directly under § 301 for violation of a union constitution. *Kinney v. Int'l Bhd. of Elec. Workers*, 669 F.2d 1222, 1229 (9th Cir. 1981) (citing *Stelling v. Int'l Bhd. of Elec. Workers Local Union No. 1547*, 587 F.2d 1379, 1382-83 (9th Cir. 1978)). *Kinney* and *Stelling* did not decide whether state law claims based on a union constitution are subject to § 301 preemption and removable. They are. As the text of the statute and Supreme Court authority make clear, § 301 preempts state law claims based on a union constitution to the extent the constitution is a contract between labor unions. Every court of appeals to have addressed the question agrees. *See Kitzmann v. Local 619-M Graphic Commc'ns Conference of Int'l Bhd. of Teamsters*, 415 F. App'x 714, 719 (6th Cir. 2011) (holding that state law claims based on an international constitution, district-level constitution, and affiliation agreement are preempted as those documents are labor contracts under § 301); *Wall v. Constr. & Gen. Laborers' Union, Local 230*, 224 F.3d 168, 178 (2d Cir. 2000) (finding that "for preemption purposes, the term 'labor contract'

includes union constitutions" and holding claims preempted by § 301); *DeSantiago v. Laborers Int'l Union of N. Am., Local No. 1140*, 914 F.2d 125, 128 (8th Cir. 1990) (holding that because union members had "alleged claims against the Local based upon the local and international constitutions, . . . those claims were preempted by section 301(a)"); *Pruitt v. Carpenters' Local Union No. 225 of United Bhd. of Carpenters & Joiners*, 893 F.2d 1216, 1219 (11th Cir. 1990) (finding that § 301 completely preempted state law claim alleging violation of union constitution).

The Union Members argue that even if § 301 once preempted state law claims alleging breach of a union constitution, Congress repealed § 301's preemptive force by including in the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 *et seq.*, six savings clauses that operate to preserve state claims and remedies brought by union members against their unions to enforce union constitutions. But three of the clauses cited by the Union Members are entirely inapplicable,[3] and none reinvigorate state rights or remedies preempted by other federal statutes.[4] The latter point is key. The LMRDA

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[3] Section 524 "saves only state criminal laws and thus cannot directly save" Garcia's state law claims. *Bloom v. Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356, 1360 (9th Cir. 1986). Section 483 applies only to state law challenges to union elections and only saves claims regarding pre-election conduct, which are not at issue here. And § 501 is not a savings clause; it provides a private right of action.

[4] Section 413 preserves state law causes of action by union members seeking to vindicate the basic rights provided in the LMRDA's Bill of Rights or broader rights provided by states, which Garcia is not seeking here. *See, e.g.*, *Int'l Bhd. of Boiler-*

contains no words repealing § 301 or its preemptive effect. "The cardinal rule is that repeals by implication are not favored." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). And although "[w]here there are two acts upon the same subject, effect should be given to both if possible," *id.*, none of the LMRDA's savings clauses concern the subject of uniform interpretation of labor contracts. Even if there is topical overlap between the statutes, "[i]t is not sufficient . . . to establish, that subsequent laws cover some or even all of the cases provided for by the prior act; for they may be merely affirmative, or cumulative or auxiliary." *Id.* at 504 (quotation omitted). That is the case with the LMRA and the LMRDA: "Congress was aware that the rights conferred by the [LMRDA] overlapped

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makers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO v. Hardeman, 401 U.S. 233, 244 n.11 (1971). Section 523 specifically preserves state law remedies for breach of fiduciary duty and related issues—*i.e.*, issues concerning the "responsibilities" of the union and its officers. *See Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 506 (1984) (finding that § 523 "indicates that Congress necessarily intended to preserve some room for state action concerning the responsibilities and qualifications of union officials") (emphasis added); *Hotel Employees & Rest. Employees Int'l Union v. Nevada Gaming Comm'n*, 984 F.2d 1507, 1514 (9th Cir. 1993) (observing that "[t]he LMRDA . . . imposes qualification requirements on union officials and expressly disclaims any intent to preempt state regulation of union officials") (citing 29 U.S.C. § 523(a)). The clause allows Garcia to bring a state law breach of fiduciary duty claim, which he did, but as explained below, his claim requires interpretation of a § 301 labor contract, triggering § 301 preemption. Finally, § 466 provides that the LMRDA's "rights and remedies" concerning trusteeships "shall be in addition to any and all other rights and remedies at law or in equity." 29 U.S.C. § 466 (emphasis added).

those available under state law and other federal legislation, and expressly provided that these rights were to be cumulative[,]" *Grand Lodge of Int'l Ass'n of Machinists v. King*, 335 F.2d 340, 347 (9th Cir. 1964), with the new protections contained in the LMRDA overlapping and supplementing existing state and federal protections, *Brock v. Writers Guild of Am., W., Inc.*, 762 F.2d 1349, 1358 n.8 (9th Cir. 1985). The LMRDA savings clauses do not operate to repeal § 301's preemptive effect.

B. Garcia's Claims Were Preempted and Removable

All that remains is to determine whether Garcia's claims were preempted. We hold that the district court was correct: Garcia's five claims were preempted by § 301 and the district court had subject matter jurisdiction over those claims.[5]

To determine whether any state law claim is preempted and removable, "we need only inquire whether [the] claim arose under section 301. . . . " *Newberry v. Pac. Racing Ass'n*, 854 F.2d 1142, 1146 (9th Cir. 1988). We employ a two-step analysis: First, we determine whether the cause of action involves a right conferred by state law, as opposed to by a labor contract. *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1032 (9th Cir. 2016). If the labor contract alone creates the right, the claim is preempted and the analysis ends. *Id. See also Livadas v. Bradshaw*, 512 U.S. 107, 123-24 (1994) ("[I]t is the legal character of a

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[5] The district court also had supplemental jurisdiction over the non-preempted pendant state law claims under 28 U.S.C. § 1367.

claim, as independent of rights under the [labor contract] . . . that decides whether a state cause of action may go forward.") (internal citation omitted).

Second, if the right underlying the state law claim "exists independently" of the labor contract, we determine whether the right is "'nevertheless substantially dependent on analysis'" of a labor contract. *Kobold*, 832 F.3d at 1032 (quoting *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007)). Said differently, "in order for complete preemption to apply, the need to interpret the [labor contract] must inhere in the nature of the plaintiff's claim." *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005) (quotation omitted). "[T]he term 'interpret' is defined narrowly—it means something more than 'consider,' 'refer to,' or 'apply.'" *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000). While this may be a "hazy" line, "the totality of the policies underlying § 301," including "securing the uniform interpretation of labor contracts . . . guides our understanding of what constitutes 'interpretation.'" *Id.* at 1108-09 (citation omitted). There is not substantial dependence "when the meaning of contract terms is not the subject of dispute," *Livadas*, 512 U.S. at 124, and "the bare fact that a [labor contract] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.* If there is not substantial dependence, "the claim can proceed under state law." *Kobold*, 832 F.3d at 1033. But "[w]here there is such substantial dependence, the state law claim is preempted by § 301," *id.*, and "that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract

law," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) (citing *Avco*, 390 U.S. at 557).

Garcia's claims are based chiefly on two contracts between labor organizations: the International Constitution and the Affiliation Agreement between the Local and International. *See Lathers Local 42-L v. United Bhd. of Carpenters & Joiners of Am.*, 73 F.3d 958, 961 (9th Cir. 1996) ("An agreement of affiliation between unions is a contract between labor organizations."). Interpretation of the Affiliation Agreement's waiver provision is central to all of Garcia's claims, because Garcia alleges that the Affiliation Agreement operates to (1) preserve those portions of the Local Constitution that require the Local Board to hold a special election and bar it from voting for a trusteeship, and (2) waive those portions of the International Constitution that would allow the International to impose a trusteeship.

Garcia's breach of contract claim against the International alleges that the International breached the Affiliation Agreement's waiver provision and violated the Local's right to be free from trusteeship pursuant to the terms of the Affiliation Agreement. His breach of implied covenant of good faith and fair dealing claim alleges that the International made misrepresentations about the content of the Affiliation Agreement and the International Constitution that caused the Local Board to vote in favor of the trusteeship, breaching the covenant—a guarantee that "'derives from the contract [and] is defined by the contractual obligation of good faith,' and therefore [is] preempted to the same extent the breach of contract claim is." *Audette v. Int'l Longshoremen's & Ware-*

housemen's Union, 195 F.3d 1107, 1112 (9th Cir. 1999) (quoting *Allis-Chalmers*, 471 U.S. at 218) (first insertion in original). Under the first step of the two-step analysis, these claims seek to vindicate rights created solely by § 301 labor contracts and are thus preempted. *Kobold*, 832 F.3d at 1032.

Garcia's negligent misrepresentation and legal malpractice claims allege that International officials misled the Local Board regarding its rights under the Affiliation Agreement and the Local Constitution. Under the second step of the analysis, these claims are substantively, if not entirely, dependent on the interpretation of a § 301 labor contract and thus preempted. *Id.* The fact that the legal malpractice claim includes a variety of non-contract-related legal malpractice allegations, does not save the claim from preemption, although those aspects of the claim are not subsumed by § 301. *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1153 (9th Cir. 2019) ("[C]laims are only preempted to the extent there is an active dispute over the meaning of the contract terms.") (quotation omitted).

Finally, Garcia's breach of fiduciary duty claim alleges that the International had a duty to members of the Local, which it breached by making the above-mentioned misrepresentations to the Local Board. Determining the nature of the relationship between the International and Local requires interpreting the Affiliation Agreement and the International and Local Constitutions, and determining whether there was misrepresentation of contract-based rights requires the same core interpretation of § 301 labor contracts as the other claims. This claim is thus also preempted.

* * *

The district court correctly determined that five of Garcia's claims required interpretation of a § 301 labor contract, treated those claims as § 301 claims, and exercised jurisdiction over those claims.

AFFIRMED.

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APRIL 5, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND GARCIA, AS A MEMBER, AND ON BEHALF OF CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION,

Plaintiff-Appellee,

and

CHERIE MANCINI; FREDERICK GUSTAFSON,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; NEVADA SERVICE EMPLOYEES UNION; ET AL.,

Defendants-Appellants.

No. 19-16863

D.C. Nos.
2:17-cv-01340-APG-NJK

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

2:17-cv-02137-APG-NJK
District of Nevada, Las Vegas

RAYMOND GARCIA, AS A MEMBER, AND ON BEHALF OF CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION,

Plaintiff-Appellant,

and

CHERIE MANCINI; FREDERICK GUSTAFSON,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; NEVADA SERVICE EMPLOYEES UNION; ET AL.,

Defendants-Appellees.

No. 19-16933

D.C. Nos.
2:17-cv-01340-APG-NJK
2:17-cv-02137-APG-NJK

CHERIE MANCINI,

Plaintiff-Appellant,

and

RAYMOND GARCIA, AS A MEMBER, AND ON BEHALF OF CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION; FREDERICK GUSTAFSON,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; NEVADA SERVICE EMPLOYEES UNION; ET AL.,

Defendants-Appellees.

No. 19-16934

D.C. Nos.
2:17-cv-01340-APG-NJK
2:17-cv-02137-APG-NJK

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Before: MCKEOWN and NGUYEN, Circuit Judges, and Vitaliano,** District Judge.

Defendants the Nevada Service Employees Union (the "Local"), the Service Employees International Union (the "International"), and others (collectively, "the Union") appeal the district court's holding, at the motion to dismiss stage in *Garcia v. SEIU*, that a

** The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

breach of contract claim was not preempted by 29 U.S.C. § 301. Local member Raymond Garcia and former Local president Cheri Mancini (collectively, the "Union Members") cross-appeal the district court's denial of leave to amend the complaint and motion for reconsideration in the consolidated litigation, and its grant of summary judgment in *Garcia*. The Union Members also appeal two orders stemming from a discovery dispute: an order granting attorney's fees to the Union, and an order denying a motion for reconsideration of that decision. We dismiss in part and affirm in part.[1]

1. The Union argues that the district court erred in denying its motion to dismiss one of Garcia's breach of contract claims on the ground that it was not preempted by 29 U.S.C. § 301. The district court subsequently remanded this claim to state court for lack of subject jurisdiction. With limited exception for certain civil rights cases, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . . " 28 U.S.C. § 1447(d). The breach of contract claim was subject to non-discretionary remand under 28 U.S.C. § 1447(c), and that remand order is not reviewable. *See Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 948-49 (9th Cir. 2004) (explaining that only non-jurisdictional, discretionary orders of remand are reviewable on

[1] We address the Union Members' challenge to the district court's exercise of jurisdiction over the *Garcia* claims in a concurrently filed opinion.

appeal).[2] We may not review the order of dismissal because doing so "cannot affect the rights of litigants in the case before [us]." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quotation omitted). Therefore, the Union's appeal is dismissed.

2. In the cross-appeal, the Union Members challenge the district Court's denial of their motion to amend the complaint to consolidate the two operative complaints and add new allegations and claims, and the district court's denial of a motion for reconsideration as to the proposed amendments to the *Mancini v. SEIU* claims. We review for abuse of discretion, *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013), and affirm.

The Union Members offered evidence supporting the allegations in the operative *Mancini* complaint and the new proposed allegations. The district court carefully considered the proffered evidence—much of which was inadmissible—and concluded that amendment would be futile. None of the newly proposed claims would change the fact that Mancini failed to allege a single claim that survived summary judgment. The district court's findings are supported by the record, and we affirm its denial of the motion to amend and motion for reconsideration.[3]

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[2] The Union's request that we take judicial notice of the fact that the state court has stayed proceedings on remand is denied as moot.

[3] The Union's motion to strike excerpts of the Union Members' supplemental excerpts of the record as well as references to those excerpts in the Union Members' reply brief is denied.

3. Contrary to the Union Members' argument, the district court did not impose the wrong standing requirement in granting summary judgment in favor of the Union in *Garcia v. SEIU*. The district court held that Garcia failed to demonstrate traceability because he failed to present evidence that the Union's alleged conduct caused the Local's executive board to vote to request a trusteeship, the imposition of which allegedly injured Garcia. The Union Members argue that Garcia did not need to show that the Union's conduct *caused* the vote that allowed the trusteeship, only that the Union breached the relevant union governing documents to which Garcia (as a union member) is a party. The Union Members conflate their cause(s) of action with Article III standing, the requirements of which all plaintiffs must meet. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). *Wooddell v. Int'l Bhd. of Elec. Workers*, *Local 71*, 502 U.S. 93 (1991), and related union cases do not suggest otherwise: "Of course, for petitioner to bring suit, he must have personal standing." *Id.* at 99 n.4. The district court did not abuse its discretion in concluding that Garcia lacked personal standing.

4. Finally, the Union Members appeal the district court's imposition of attorney's fees as a sanction for discovery violations and denial of their motion for reconsideration. We review for abuse of discretion. *Lew v. Kona Hosp.*, 754 F.2d 1420, 1425-26 (9th Cir. 1985). Contrary to the Union Members' argument, the award of fees was not imposed due to the number of documents withheld, but because the Union Members failed to show withholding the documents at all was substantially justified. The magistrate judge did not

ignore the Union Members' arguments about the relevancy of the contested documents, but in fact discussed and rejected those arguments.

We therefore affirm the district court's denial of amendment to the complaint and grant of summary judgment in favor of the Union, and its award of sanctions for discovery violations.

DISMISSED IN PART AND AFFIRMED IN PART.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

29 U.S.C. § 160

(a)Powers of Board Generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 USCS § 158]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 USCS §§ 151–158, 159–169] or has received a construction inconsistent therewith.

29 U.S.C. § 185

(a)Supervisors as Union Members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but

no employer subject to this Act [29 USCS §§ 151-158, 159-169] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b)Agreements Requiring Union Membership in Violation of State Law

Nothing in this Act [29 USCS §§ 151-158, 159-169] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) Power of Board to Decline Jurisdiction of Labor Disputes; Assertion of Jurisdiction by State and Territorial Courts

(1)The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act [5 USCS §§ 551 et seq.], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this Act [29 USCS §§ 151-158, 159-169] shall be deemed to prevent or bar any agency or the courts of any State or Territo-

ry (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

29 U.S.C. § 164

(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 Act, 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.

(b)Responsibility for Acts of Agent; Entity for Purposes of Suit; Enforcement of Money Judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and

against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of Process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of Question of Agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 401

(a) Standards for Labor-Management Relations

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal

Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) Protection of Rights of Employees and the Public

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) Necessity to Eliminate or Prevent Improper Practices

The Congress, therefore, further finds and declares that the enactment of this Act is necessary to

eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

29 U.S.C. § 411

(a)

(1) Equal Rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation Fees, and Assessments

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act [enacted Sept. 14, 1959] shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting,

after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the Right to Sue

No labor organization shall limit the right of any member thereof to institute an action

in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards Against Improper Disciplinary Action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of Constitution and Bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

29 U.S.C. § 413

Nothing contained in this title [29 USCS §§ 411 et seq.] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

29 U.S.C. § 431

(a) Adoption and Filing of Constitution and Bylaws; Contents of Report

Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information—

(1) the name of the labor organization, its mailing address, and any other address at which it maintains its principal office or at which it keeps the records referred to in this title [29 USCS §§ 431 et seq.];

(2) the name and title of each of its officers;

(3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;

(4) the regular dues or fees or other periodic payments required to remain a member of the reporting labor organization; and

(5) detailed statements, or references to specific provisions of documents filed under this subsection which contain such statements, showing the provision made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other benefit plans, (D) authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the

reporting labor organization files with the Secretary the annual financial report required by subsection (b).

(b) Annual Financial Report; Filing; Contents

Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the

purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof; all in such categories as the Secretary may prescribe.

(c) Availability of Information to Members; Examination of Books, Records, and Accounts

Every labor organization required to submit a report under this title [29 USCS §§ 431 et seq.] shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 462

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial

malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

29 U.S.C. § 464

(a) Complaint; Investigation; Commencement of Action by Secretary, Member or Subordinate Body of Labor Organization; Jurisdiction

Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this title (except section 301) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.

(b) Venue

For the purpose of actions under this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization (1) in

the district in which the principal office of such labor organization is located, or (2) in any district in which its duly authorized officers or agents are engaged in conducting the affairs of the trusteeship.

(c) Presumptions of Validity or Invalidity of Trusteeship

In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 302 [29 USCS § 462]. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302 [29 U.S.C. § 462]. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

29 U.S.C. § 466

The rights and remedies provided by this title [29 USCS §§ 461 et seq.] shall be in addition to any and all other rights and remedies at law or in equity: *Provided,* That upon the filing of a complaint by the Secretary the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be res judicata.

29 U.S.C. § 481

(a) Officers of National or International Labor Organizations; Manner of Election

Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Officers of Local Labor Organizations; Manner of Election

Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Requests for Distribution of Campaign Literature; Civil Action for Enforcement; Jurisdiction; Inspection of Membership Lists; Adequate Safeguards to Insure Fair Election

Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof.

Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of Intermediate Bodies; Manner of Election

Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) Nomination of Candidates; Eligibility; Notice of Election; Voting Rights; Counting and Publication of Results; Preservation of Ballots and Records

In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 [29 USCS § 504] and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good

standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title [29 USCS §§ 481 et seq.].

(f) Election of Officers By Convention of Delegates; Manner of Conducting Convention; Preservation of Records

When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title [29 USCS §§ 481 et seq.]. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) Use of Dues, Assessments or Similar Levies, and Funds of Employer for Promotion of Candidacy of Person

No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title [29 USCS §§ 481 et seq.]. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) Removal of Officers Guilty of Serious Misconduct

If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act [5 USCS §§ 551 et seq.] that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title [29 USCS §§ 481 et seq.].

(i) Rules and Regulations for Determining Adequacy of Removal Procedures

The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h).

29 U.S.C. § 483

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title [29 USCS §§ 481 et seq.]. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title [29 USCS §§ 481 et seq.]. The remedy provided by this title [29 USCS §§ 481 et seq.] for challenging an election already conducted shall be exclusive.

29 U.S.C. § 501

(a) Duties of Officers; Exculpatory Provisions and Resolutions Void

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the

same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of Duties; Action By Member After Refusal or Failure By Labor Organization to Commence Proceedings; Jurisdiction; Leave of Court; Counsel Fees and Expenses

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any

State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Embezzlement of Assets; Penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

29 U.S.C. § 523

(a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and except as explicitly provided to the contrary,

nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

(b) Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505 [29 USCS § 186]) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended [29 USCS §§ 151 et seq.].

29 U.S.C. § 524

Nothing in this Act [29 USCS §§ 401 et seq.] shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes.

29 U.S.C. § 524a

Notwithstanding this or any other Act regulating labor-management relations, each State shall

have the authority to enact and enforce, as part of a comprehensive statutory system to eliminate the threat of pervasive racketeering activity in an industry that is, or over time has been, affected by such activity, a provision of law that applies equally to employers, employees, and collective bargaining representatives, which provision of law governs service in any position in a local labor organization which acts or seeks to act in that State as a collective bargaining representative pursuant to the National Labor Relations Act [29 USCS §§ 151 et seq.], in the industry that is subject to that program.

U.S. DEPARTMENT OF LABOR REPORT OF INVESTIGATION OF JOSE MENDOZA (SEPTEMBER 28, 2018)

U.S. DEPARTMENT OF LABOR
OFFICE OF LABOR-MANAGEMENT STANDARDS

Subject(s):

Jose Mendoza, former President/Business Agent
Transit Union, AFL-CIO
Local 1637
Las Vegas, NV 89146

Program:-Criminal Investigation

Case Number: 520-6010084

Office: LVRIO

Status: Closed

LM: 540-258

PREDICATION

[redacted] former President/Business Agent Jose Mendoza paid himself at a higher rate than he was entitled, improperly changed the bylaws to increase his salary while decreasing the financial secretary and treasurer's (FST) salary, withdrew cash without authorization, claimed mileage reimbursements for personal travel, and obtained a debit card, which is prohibited by the constitution.

SYNOPSIS

Preliminary OLMS investigation disclosed the following irregularities which initially appeared to be instances of Local 1637 fund embezzlement:

> From July 1, 2010 to April 11, 2017 Jose Mendoza Jr. was on a union leave of absence from his employer to serve as president/business agent of Local 1637. During the period in question, Mendoza received approximately $351,586.81 in salary payments (including one cash withdrawal payment) and approximately $43,897.40 in reimbursed expenses. Mendoza also received a debit card from the union's bank but destroyed it without use.

Conclusive OLMS investigation determined that the bank-issued debit card was never activated and that the aforementioned payments issued to Mendoza were not paid at the higher questionable rate until after international representatives provided interpretational guidance on various occasions. Although the investigation found evidence to support mileage claims for personal commuting, Mendoza was unaware of the policy and immediately corrected the practice upon notification.

[redacted]

Prepared By: [redacted]
Senior Investigator

[redacted]
Signature

9/28/2018
Date

Approved By: Pearl Moenahele, Supervisory Inv.

[redacted]
Signature

9/28/2018
Date

BACKGROUND

Between approximately 2012 and 2016, several complaints were filed by Local 1637 members with the international about various concerns including allegations that Mendoza's salary payments were based on a higher wage rate than he was entitled to receive under Article 4 of the bylaws. On August 15, 2016, International President (IP) Lawrence Hanley asked Mendoza why he was receiving the top rate paid to a mechanic when his respective job classification was a driver. According to Mendoza, both International Representative (IR) Steven MacDougall and International Vice President (IVP) William McLean agreed with Mendoza that Article 4 could be interpreted to allow the president/business agent to be paid the top rate of the highest paid job classification of an employee in the union. [redacted]

[redacted] Although Mendoza was not disciplined, he was instructed to recalculate his salary based on IP Hanley's interpretation and ordered to repay $5,865.60 to the local. Mendoza agreed to a repayment plan but appealed Hanley's decision. (b) (6). (n) (7)(t)

The aforementioned along with additional complaints from Local 1637 members triggered a review of the local's financial records by ATU Auditor [redacted] in March 2017. The auditor's finding included but were not limited to salary and vacation overpayments to President Mendoza, failure to authenticate expense reimbursements, and an unauthorized cash withdrawal to pay officers' salaries. Thereafter, the local was placed under emergency trusteeship on April 11, 2017 and the Local 1637 officers were suspended. A trusteeship hearing was held on May 9 and 10, 2017 followed by the ATU general executive board's June 24, 2017 determination that the trusteeship was justified and should continue. On May 30, 2018, an officer election was held and the trusteeship was subsequently lifted effective July 1, 2018. [redacted]

INVESTIGATIVE FINDINGS

During the period in question, Local 1637 was governed by the ATU Constitution and General Laws, the Local 1637 Bylaws and the effective collective bargaining agreements. The investigation, however, revealed a considerable amount of confusion concerning which version of the Local 1637 Bylaws were actually in effect or approved other than the bylaws dated October 1, 2008. For example, the records examination noted various email exchanges where the IP, ATU representatives, Local 1637 officers and members requested confirmation as to which local bylaws were in effect. Further evidence shows that [redacted] improperly submitted an amended version of the bylaws (a collaboration of unchanged October 1, 2008 provisions and February 2012 executive board approved amendments) to the ATU for final approval. Accordingly,

these altered February 2012 bylaws were subsequently approved by the ATU, without prior executive board or membership approval. Inevitably, IP Hanley made all of his determinations as to Mendoza's alleged wrongdoing based on inapplicable versions of the local's bylaws including an unapproved Article 4. [redacted]

Improper Bylaws Changes

The investigation found no evidence to support the allegation that Mendoza improperly changed the local bylaws to increase his salary while decreasing the FST's salary. To the contrary, changes to Article 4 related to the president's salary were properly approved by the executive board and submitted to the ATU for approval, but denied. [redacted]

Salary Payments

[redacted] and Mendoza interpreted the Local 1637 Bylaws as entitling the president to receive the highest pay rate of any employee in the union at large for his salary but they both felt the language of Article 4 was open to interpretation and consulted international officials for guidance. [redacted] talked to someone at the international in late 2010 while Mendoza stated he discussed his interpretation with various international officials, including International Vice President William McLean and International Representative Steven MacDougall, over a span of several years. According to Mendoza [redacted], McLean and MacDougall told Mendoza that they agreed with his interpretation [redacted]

According to and Mendoza, he did initially receive compensation at the highest rate of his job [redacted] classification of a driver until their interpretation

that Mendoza could receive the highest rate of pay of any employee was confirmed. The records examination disclosed that in July 2011 Mendoza's hourly rate for salary increased to the higher rate of Mechanic A, and continued at this rate until November 2016, when IP Hanley requested the salary be recalculated. Mendoza appealed IP Hanley's decision and did agree to a monthly repayment plan only because he was required to make repayment. [redacted]

Although the investigation failed to uncover evidence of formal approval to amend Mendoza's salary to the higher rate of Mechanic A, [redacted] confirmed that the membership approved the budget which incorporated the higher rate. In addition, the meeting minutes and witnesses support passing a budget and instances of transparency related to Mendoza's compensation. Overall, the investigation revealed too much contradiction concerning Mendoza's authorized salary rate and not enough evidence to make a determination that Mendoza was willfully overpaid. [redacted]

Unauthorized Cash Withdrawal & Debit Card

The investigation revealed conflicting testimony related to the cash withdrawal of $740.00 and the debit card. According to Mendoza, weekly payroll was to be run on Thursday, January 12, 2017. However, FST Higgins [redacted] that day and was unable to process payments, [redacted] Mendoza claimed he could not afford to wait until the FST returned and decided to withdraw his regular weekly net salary amount, which was later approved by the executive board. The investigation disclosed no evidence that the cash withdrawal was an extra salary payment.

[redacted]

Review of the meeting minutes found evidence indicating that Mendoza introduced a motion to the executive board that would have authorized him to use a debit card drawn on the local's bank account; however, the motion was not approved. As a result, the debit card was never used and shredded it.

[redacted]

Personal Mileage Reimbursement

OLMS records examination and witness testimony revealed that Local 1637 was reimbursing officers for gasoline instead of claiming the IRS business mileage rate. After IVP James Lindsay advised the officers that non-commuting mileage claims with logs should be used instead of gas reimbursements, Mendoza stopped including commuting mileage between his home and the union office. However, Mendoza also started claiming mileage to post offices for union mailings that were near his house. According to Mendoza, he did not know it was wrong to request reimbursement for gas [redacted]

[redacted] Once Lindsay explained the policy, Mendoza corrected the process and claimed mileage and reimbursed the local $115.84 for unauthorized commuting claims. [redacted]

CONCLUSION

OLMS investigation failed to substantiate a misappropriation of funds attributable to Mendoza. The local's most recent financial disclosure report Form LM-2 on file with the DOL meets the standards of acceptability. No improper loans to officers or employ-

ees were disclosed during this investigation. The local is adequately bonded. [redacted]

This case is closed. All records including additional reports of interview, memoranda, and supporting documents are maintained with the case file.

BY LAWS FOR THE AMALGAMATED TRANSIT UNION LOCAL 1637 LAS VEGAS, NEVADA (IN EFFECT 2008)

ARTICLE 1
PREAMBLE

This organization shall be known as Amalgamated Transit Union, Local 1637, [L.U.] Las Vegas, Nevada which holds a legal charter duly granted by the Amalgamated Transit Union, AFL-CIO, CLC. it is the objective of this L.U. to function in accordance with the rules and regulations of the Amalgamated Transit Union as affiliated with the American Federation of Labor-Congress of Industrial Organizations.

This document shall be the Bylaws of this Local, and they shall be supplemental to the Constitution and General Laws of the Amalgamated Transit Union, as amended. All prior Bylaws of this L.U. are hereby revoked, and these current Bylaws become effective October 1, 2008.

ARTICLE 2
OBJECTIVES OF THE L.U.

The objectives of this L.U. shall be to promote the cause of trade union principles, to advance wages, to improve the working conditions for all members, and to specifically represent the best interests of all of its members when dealing with the employer and other outside agencies.

ARTICLE 3
OFFICERS OF THE L.U.

The officers of this L.U., which shall constitute the L.U. Executive Board, shall be a President-Business Agent, Vice President, Financial-Recording Secretary Treasurer, Assistant Business Agent for Operations and Assistant Business Agent for Maintenance and two Executive Board Officers from each of the following: Fixed Route [CAT] Tompkins, Fixed Route [CAT] Simmons, and Maintenance [CAT] Tompkins and Maintenance [CAT] Simmons.

ARTICLE 4
WAGES OF OFFICERS/EXPENSES

The President-Business Agent shall be paid at a daily rate of 8 hours times the highest hourly rate paid to an employee in their job classification for 40 hours per week to perform duties of the office.

All officers or representatives of the L.U. shall receive lost wages and when assigned work by the President. Lost wages and necessary Union work assignments shall be paid for actual time at the member's straight hourly rate.

The President-Business Agent shall be the only person authorized to approve book off/lost work time and necessary Union work assignments.

Delegates to the International Convention, Legislative Conference, and ATU education events shall receive lost wages, transportation, and a daily per diem of $50.00.

The Financial-Recording Secretary Treasurer shall prepare an annual budget for membership approval.

The annual budget shall be presented to the membership in June of each year covering July 1 through June 30. Annual budget line items include officer/staff compensation, book-off, office rental, office utilities and international Union per capita taxes.

Any single expenditure in excess of $250.00 except budgeted expenditures that have not exceeded the budgeted line amount shall require prior approval at the regular monthly meetings.

Benefits; any Union officer who is booked off or on leave from the employer shall not stiffer a loss in health benefits. The L.U. will reimburse the employer for the costs of such contractual benefits on a monthly basis. In the alternative, if the Union officer has a legitimate substitute for these contractual health benefits at a lower cost, the L.U. can approve such payment for these alternative health benefits.

Other lost contractual benefits; the L.U. shall reimburse any officer for the loss of any contractual benefits which would have been normally earned such as vacation and PTO time which was lost as a direct result of book off or leave for Union business.

ARTICLE 5
OFFICER OF PRESIDENT-BUSINESS AGENT

The President-Business Agent shall be the chief executive officer of the L.U. and shall have general supervision over all its affairs between the Executive Board and membership meetings. It shall be the duty of the chief executive officer to preside at all meetings of the L.U. to preserve order and enforce the Constitution and the L.U. Bylaws, to see that all officers perform their respective duties, to authorize lost

time for Executive Board and other members to carry out their L.U. duties, and to appoint all committees not otherwise provided for. The chief executive officer shall decide all questions of order subject to an appeal to the L.U., shall have a right to vote in secret ballot votes at the same time and along with other members who cast their ballots, and shall have a right to vote only in case of a tie where there is a standing or hand vote when she/he shall give the deciding vote.

The chief executive officer shall announce the result of alt votes, shall enforce all fines and penalties, shall have the power to call special meetings or when requested by one-third or more of the members in writing, shall sign all orders on the treasury for such money as shall by the Constitution *and the* L.U. Bylaws or by vote of the L.U. be ordered paid, sign all checks and drafts on bank, and perform such other duties as the Constitution and the L.U. Bylaws may require. The chief executive officer shall be ex officio chairman of all committees and shall be bonded for such amount, as the L.U. shall from time to time decide upon according to the law. The premium for such bond shall be paid for by the L.U.

ARTICLE 6
OFFICE OF VICE PRESIDENT

It shall be the duty of the Vice President in the absence of the chief executive officer to preside and perform all duties pertaining to the office of President-Business Agent, and in case of a vacancy in the office of President-Business Agent. The Vice President shall preside until the next General Election or Special

Election, as specified in the Constitution and General Laws.

It shall be the duty of the Vice President to render such assistance as may be required and directed of him or her by the President, to carry on all correspondence, to perform such other duties as pertain to this office, and to deliver to the L.U. at the expiration of his or her term of office all property entrusted to his or her care.

The Vice President *shall be* bonded for such amounts as the L.U. may from time to time decide upon according to the law. The bond premium shall be paid for by the L.U.

ARTICLE 7
OFFICE OF FINANCIAL-RECORDING SECRETARY TREASURE

The Financial Recording Secretary Treasurer (FinSec) shall work at an office designated as the headquarters of the L. U. The FinSec position is a full time position and shall be paid at a daily rate or 8 hours times 75% of the payrate of the President for a maximum of 40 hours per week to perform the duties of the office and shall receive an increase of 5% each July 1st until equal to the President.

The President-Business Agent shall book off the FinSec full time in accordance with Article 4, as a "necessary Union work assignment." If there is insufficient funds to support a full time FinSec, the position may be booked off on a part time basis.

The FinSec shall receive all monies due the L.U. and deposit it to the credit of the L.U. at a bank designated by the Executive Board, shall attend all

meeting and shall keep the L.U. in good standing with the International Union and affiliate bodies.

The FinSec shall render a report to the members at each monthly meeting of the receipts and expenditures of the preceding month, shall pay all bills by check jointly signed by the FinSec and the President/ Business Agent or designee and shall file au canceled checks. The L.U. accounts shall be audited as the International Constitution and General Laws require, and more often if the L.U. so decides. The FinSec shall keep a correct account of all proceedings of the L.U.; shall can the roll of officers, and shall preserve and maintain the records of the L.U. The FinSec shell perform other related and required duties.

At the expiration of the term of office, the FinSec shall turn over all books, correspondence, records and property of the L.U. to the duly elected and qualified successor. The FinSec shall also be bonded.

It shall be the duty of the FinSec to adhere to Section 13.11. 13.12 and 13.13 of the ATU Constitution and General Laws as amended 2007.

ARTICLE 8
ASSISTANT BUSINESS AGENTS

There shall be two Assistant Business Agents one from Operations and one from Maintenance. These Executive Board Officers shall originate their respective departments. They shall assist as directed by the President-Business Agent.

ARTICLE 9
EXECUTIVE BOARD

It shall be the duty of the Executive Board Officer to look after their respective worksites/properties, handling all grievances, complaints, and other matters in their respective workplace.

The Executive Board Officer shall have full knowledge of all grievances and complaints and shall participate, if needed, in all steps of the grievance procedure as directed by the President-Business Agent.

The Executive Board shall constitute the Grievance Committee, consider all grievances and complaints, and vote on the merit of moving the cases to the third level of the grievance procedure-joint resolution.

The Executive Board meetings shall be held monthly one week before the regular membership meeting. The President, with the approval of the Executive Board, shall set the meeting times, dates and location. The minutes shall be made a matter of record at the first meeting of the L.U.

The majority of members of the Executive Board shall constitute a quorum for the transaction of business.

Shop Stewards are not members of the Executive Board, nor do they constitute an Executive Board that could overturn any action thereof.

ARTICLE 10
SHOP STEWARDS

Shop Stewards are appointive positions. These positions shall be tilled only by appointment of the

President. Shop stewards shall report directly to the President or designee.

Shop Stewards shall be knowledgeable of the collective bargaining agreement, the grievance procedure, International Convention, the L.U. bylaws, work rules and regulations. The shop steward shall be prepared to advise members.

Shop Stewards shall promote the cause of trade unionism, and encourage fellow employees to become L.U. members.

Shop Stewards shall represent the best interests of L.U. members when dealing with employer representatives.

Shop Stewards shall file grievances on behalf of members, only after being assigned to do so by the President or appropriate garage Executive Board officer, as directed by the President.

ARTICLE 11
NOMINATION AND ELECTION OF OFFICERS

Election of officers and executive board members shall take place every three [3] years.

The L.U. election system shall be the plurality system as outlined in the International Constitution and General Laws, Section 14.5.

All eligibility requirements, nomination and election procedures shall be as outlined in the International Constitution and General Laws, Section 14, inclusive. The Labor Management Reporting and Disclosure Act of 1959 covers the L.U.

The nomination meeting shall be held at the regularly scheduled membership meetings during

the month of April. Notice of these meetings shall be posted on Union bulletin boards no later than ten [10] days prior to the meetings.

The President-Business Agent shall appoint an election committee of members in good standing who are not themselves candidates for L.U. office. The distribution, collection and counting of ballots shall be under the direct supervision of this committee.

The election shall be held no later than the 25th of May. Members will be notified by mail of the date, time and location of the election, no later than 15 days prior to the elect ion date.

Votes shall be cast by members in good standing at the specified location, during the specified hours. Elections will normally occur at the specific location of the monthly Membership Meeting. The Executive Board may approve an alternate location. No absentee or proxy votes will be permitted. Voting shall be secret ballot.

Names of members nominated shall be placed on ballots in alphabetical order under headings of the position [office] sought. Nominees may have an observer present during the voting and counting of ballots, provided that the observer is a member in good standing of the L.U.

All members of the L.U. shall vote for the offices of President-Business Agent, Vice President[s], Financial-Recording Secretary Treasurer and Executive Board Officers.

Only those members of a particular department may vote for Executive Board officers and *Assistant* Business Agents for Operations and Maintenance for

that department, example: fixed route mechanics vote for the fixed route mechanic/utilities positions. Tompkins based operators vote for Tompkins board position and Simmons based operators vote for Simmons board position.

Members to be eligible to vote must be in good standing according to the Constitution and General Laws signed a membership application and a dues deduction card.

ARTICLE 12
UN-EXPIRED TERM OF OFFICE

Should any elected office become permanently vacant with twelve months or less before the next regular election for any reason, the President shall appoint a member to the office, with the approval of the Executive Board.

Should any elected office become permanently vacant with more than twelve months before the next regular election for any reason, regulation governing nominations and election procedures in the International Constitution and General laws, Section 14, and specifically Section 14.10 shall apply.

ARTICLE 13
MEMBERSHIP ELIGIBILITY IN THE L.U.

Application for membership must be made on forms provided and authorized by the International Union.

Prospective members must also sign a dues deduction card to be submitted to the employer payroll department.

ARTICLE 14
DUES/INITIATION FEE/
SPECIAL ASSESSMENTS

Local Union monthly dues are paid in 26 per pay periods and shall be determined by the annual notice issued by the International.

Dues will increase as required pursuant to the International Constitution and General Laws.

Members while on medical leave or whose termination grievance is pending shall have the payment of their dues governed by Section 21, Membership, of our Constitution and General Laws.

Promotions: As per Section 21.2 of the International Constitution, "Where members of this Union are appointed to such official management and supervisory positions which are outside the bargaining unit, they may retain their active membership status at the discretion of the L.U. If the L.U. declines to permit such personnel appointed to outside management and supervisory positions to retain their L.U. membership, those members promoted out of the bargaining unit into such official positions may, by taking out a withdrawal card for the L.U. and filling it with the International office, continue their membership with the L.U. as M.A.L.s."

Withdrawal: Members in good standing, who are leaving their current employer, may request a withdrawal card from the L.U. Requests for a withdrawal card must be made to the L.U. Financial-Recording Secretary Treasurer no sooner than two [2] weeks prior to departure. The withdrawal shall be good for one [1] year and if presented to another L.U. of the

Amalgamated Transit Union, it will be accepted in lieu of an initiation fee.

Initiation Fees: There is a $125.00 initiation fee to become a member of this L.U., in addition to a one-time administration fee charge of $25.00. However, the administrative and initiation fee will be waived for new hires.

Special assessments may be levied only after proper notice of the special assessment proposal has been given, and the special assessment is approved by a majority vote of the total membership present at the regular scheduled monthly meeting.

ARTICLE 15
ARBITRATION

Prior to any grievance being taken to arbitration, the Executive Board must vote to recommend or to advise against.

The Executive Board will then present its recommendation to the membership for vote by secret ballot. Approval must be by majority vote of those casting votes, in person, at the regular monthly meetings of the L.U., which shall constitute the decision of the entire L.U. The cost of such arbitration shall be automatically assessed among all members of the L.U.

It shall be the duty of the President to ensure that notice of the pending vote is posted on the Union bulletin boards at least ten [10] days prior to the pending meeting.

It shall be the duty of the President to inform the grievant by certified mail of the pending meeting vote, at least seven [7] days prior to the meeting.

ARTICLE 16
COMPLIANCE WITH ROBERT'S RULES OF ORDER

Robert's Rules of Order shall govern at all times in matters of this L.U. in as much they are consistent with its needs and are not in conflict with the International Constitution and General Laws and/or the Bylaws of this L.U.

ARTICLE 17
COMPLIANCE WITH CONSTITUTION AND GENERAL LAWS, AS AMENDED

These Bylaws are subject to amendment, change, or modification as set forth in the Constitution and General Laws, as amended. Proposed amendments shall be presented in writing to the Executive Board of the L.U. at least five [5] days prior to the regular membership meetings.

ARTICLE 18
DISCLAIMER OF AUTHORITY

No member, agent, representative or officer of this L.U. or any other entity shall have the power or authority to represent, act for, accept legal service for, commit or bind this L.U. in any matter or proceeding except upon express written authority having been granted therefore by the L.U. President, the L.U. Executive Board or by authority granted by the International Constitution and General Bylaws.

ARTICLE 19
MEMBERSHIP MEETINGS/QUORUM

The monthly meetings of the L.U. shall be held at a location designated by the President. Notice of the day, time and location of the regular meetings shall be posted on the L.U. bulletin boards at company worksites. The order of business at all regular monthly meetings shall be in accordance with Section 13.16 of the International Constitution and General Laws.

A cumulative total of five percent of membership in good standing shall constitute a quorum. If no quorum is reached by the final session of the regular monthly meetings, all of the actions of the Executive Board, which would have been reported to the membership at those meetings, shall become final and binding on the L.U. without further action by the membership. Only members in good standing shall be allowed to vote.

ARTICLE 20
FORMULATION AND MAINTENANCE OF LEGAL FUNDS

It shall become the duty and obligation of this local to accumulate and provide funds necessary to cover legal expenses that derive from the attorneys we retain for legal *counsel.*

Only be absence of any assessment, in the event that the balance of our "Legal Fund" savings account reported by the Financial Secretary Treasurer to have been reduced below $10,000.00 [Ten Thousand Dollars] the dues commencing with the month following the month which such decrease was reported shall be increased by $5.00 [Five Dollars] per paid period

and remains until the "Legal Fund" is restored to $15,000.00 [Fifteen Thousand Dollars].

ARTICLE 21
NEGOTIATIONS OF CONTRACTS AND SETTLEMENTS

Proposals affecting seniority, wages, hours or working conditions of the members of this Local shall be negotiated in the manner hereinafter set forth.

Not less than three [3] members of the Executive Board shall be appointed to serve with the President on the negotiating committee. A steward or spokesperson in a job classification covered under the present Collective Bargaining Agreement may be appointed to serve on the negotiating committee in place of one [1] of the Executive Board.

DECLARATION OF LOCAL 1637 EXECUTIVE BOARD MEMBER DENNIS HENNESSEY (MAY 18, 2017)

STATE OF NEVADA
COUNTY OF CLARK

I, DENNIS HENNESSEY do hereby swear, under penalty of perjury, that the following assertions are true to the best of my knowledge and belief:

1. I am former member of the Local 1637 Executive Board that was removed from my position on the Local 1637 Executive Board upon imposition of the trusteeship over Local 1637 by ATU International on April 10, 2017.

2. I believe that this trusteeship was not imposed for a proper purpose, or accordance with the ATU International Constitution and General Laws ("CGL").

3. ATU International Vice President ("IVP") James Lindsay came to Local 1637 in 2016, prior to the imposition of this trusteeship to conduct an investigation into whether our President/Business Agent ("PBA"), Jose Mendoza, had been overpaid, and to investigate amendments to the Local 1637 Bylaws.

4. I believe that Jose Mendoza informed ATU International on multiple occasions in 2011 and 2012 that he had interpreted the Local 1637 Bylaw Article 4 as authorizing the Local 1637 PBA the highest rate of pay of any employee in Local 1637 based on the accounts of numerous Local 1637 Executive Board members who were board members at that time.

5. At no time did the Local 1637 Executive Board seek to overturn PBA Mendoza's decision regarding

the PBA's pay, and there were never enough members who wanted to challenge the decision to appeal this decision either.

6. The investigation into our local union was conducted based on the complaints of a single member of Local 1637, Terry Richards, and a single Local 1637 Executive Board member, Carolyn Higgins.

7. At no time did the Local 1637 Executive Board believe that the complaints of the two individuals warranted any consideration or investigation because we did not believe the actions of our PBA were not done in accordance with the ATU CGLs or the Local 1637 Bylaws.

8. I believe that the ATU International President Lawrence Hanley circumvented the procedure in Section 22 of the ATU CGLs regarding bring charges against members and officers, because these individuals never had the support or additional signatures of any other members of the Local 1637 Executive Board, or the membership, to substantiate these false charges.

9. The Local 1637 Executive Board believed that, given the ambiguity of the provision, the interpretation was acceptable, and supported by ATU International.

10. While IVP Lindsay was present at Local 1637 conducting his investigation, the Local 1637 Executive Board came to a consensus that the Local 1637 Bylaw Article 7 had been improperly amended by former Local 1637 Financial Secretary Treasurer Jeffrey Raske based on significant evidence that ATU International has sent PBA Mendoza multiple conflicting copies of the Local 1637 Bylaws to PBA Mendoza in 2013.

11. There was no evidence presented by ATU International or PBA Mendoza that the version of the 2012 Local 1637 Bylaws that ATU International used to support charges against Mr. Mendoza were voted on by the Local 1637 Executive Board.

12. Rather, in an email from ATU International employee, Kristi Adams, there were copies of the proposed amendments that the Local 1637 Executive Board had voted on back in 2012, and a copy of the 2012 Local 1637 Bylaws used by ATU International to support this trusteeship, which had completely different language.

13. Based on this evidence, the Local 1637 Executive Board came to a consensus that there were numerous versions of the Local 1637 Bylaws that ATU International and Local 1637 had on file, and we believed that something improper had occurred when the bylaws were amended in 2012.

14. Despite this, ATU IVP Lindsay ignored the findings of the Local 1637 Executive Board, and disregarded the clear evidence that there were multiple versions of the bylaws sent to Local 1637, and recommended removing Mendoza and the Local 1637 Executive Board from office and imposition of this trusteeship anyway.

15. To try and remedy this problem, the Local 1637 Executive Board proposed amendments to the Local 1637 Bylaws in 2017, posted copies of the proposed bylaws at the union hall, read the proposed bylaws at two meetings, and because there was no quorum, we voted to approve the bylaws in accordance with the ATU CGLs.

16. Despite following proper procedure for amending the bylaws, ATU International President Hanley refused to approve the bylaws that we properly amended, and used the bylaws that we believed were not properly approved by the Local 1637 Executive Board to impose this trusteeship over Local 1637.

17. I attended the trusteeship hearing on May 9-10, 2017, and personally witnessed ATU Associate General Counsel Kiera McNett and Hearing Officer Antonette Bryant refuse to permit Jose Mendoza, who represented the Local 1637 Executive Board at the hearing, to cross-examine any of the witnesses from Local 1637 at the hearing.

18. I believe this trusteeship was imposed solely to remove Jose from office because of charges he brought against ATU International Representative Richie Murphy for his conduct in negotiations with a Local 1637 employer.

19. I believe that what was done to Jose, and the Local 1637 Executive Board was improper, and fully support a Court order ending this trusteeship.

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

DATED this 18th day of May, 2017.

/s/ Dennis Hennessey
Local 1637 Executive Board Member

DECLARATION OF LOCAL 1637 EXECUTIVE BOARD MEMBER ROBBIE HARRIS (MAY 18, 2017)

STATE OF NEVADA
COUNTY OF CLARK

I, ROBBIE HARRIS do hereby swear, under penalty of perjury, that the following assertions are true to the best of my knowledge and belief:

1. I am former member of the Local 1637 Executive Board that was removed from my position on the Local 1637 Executive Board upon imposition of the trusteeship over Local 1637 by ATU International on April 10, 2017.

2. I believe that this trusteeship was not imposed for a proper purpose, or in accordance with the ATU International Constitution and General Laws ("CGL").

3. ATU International Vice President ("IVP") James Lindsay came to Local 1637 in 2016, prior to the imposition of this trusteeship to conduct an investigation into whether our President/Business Agent ("PBA"), Jose Mendoza, had been overpaid, and to investigate amendments to the Local 1637 Bylaws.

4. With regards to whether our PBA was overpaid salary, in 2012 I personally witnessed Jose Mendoza inform ATU IVP William McLean of his interpretation of the Local 1637 Bylaws Article 4 as authorizing the Local 1637 PBA the highest rate of pay of any employee/member of Local 1637.

5. IVP McLean agreed with Jose Mendoza's interpretation of the Local 1637 Bylaw Article 4 as granting

the Local 1637 PBA the highest rate of pay of any employee in the union.

6. At no time did the Local 1637 Executive Board seek to overturn PBA Mendoza's decision regarding the PBXs pay, and there were never enough members who wanted to challenge the decision to appeal this decision either.

7. The Local 1637 Executive Board believed that, given the ambiguity of the provision, the interpretation was acceptable, and supported by ATU International.

8. The investigation into our local union was conducted based on the complaints of a single member of Local 1637, Terry Richards, and a single Local 1637 Executive Board member, Carolyn Higgins.

9. At no time did the Local 1637 Executive Board believe that the complaints of these two individuals warranted any consideration or investigation because we did not believe the actions of our PBA were not done in accordance with the ATU CGLs or the Local 1637 Bylaws.

10. I believe that the ATU International President Lawrence Hanley circumvented the procedure in Section 22 of the ATU CGLs regarding bring charges against members and officers because these individuals never had the support or additional signatures of any other members of the Local 1637 Executive Board, or the membership, to substantiate these false charges.

11. While IVP Lindsay was present at Local 1637 conducting his investigation, the Local 1637 Executive Board came to a consensus that the Local 1637 Bylaw Article 7 had been improperly amended by former Local 1637 Financial Secretary Treasurer

Jeffrey Raske based on significant evidence that ATU International has sent to PBA Mendoza multiple conflicting copies of the Local 1637 Bylaws to PBA Mendoza in 2013.

12. There was no evidence presented by ATU International or PBA Mendoza that the version of the 2012 Local 1637 Bylaws that ATU International used to support charges against Mr. Mendoza were voted on by the Local 1637 Executive Board.

13. Rather, in an email from ATU International employee, Kristi Adams, there were copies of the proposed amendments that the Local 1637 Executive Board had voted on back in 2012, and a copy of the 2012 Local 1637 Bylaws used by ATU International to support this trusteeship, which were completely different language.

14. Based on this evidence, the Local 1637 Executive Board came to a consensus that there were numerous versions of the Local 1637 Bylaws that ATU International and Local 1637 had on file, and we believed that something improper had occurred when the bylaws were amended in 2012.

15. Despite this, ATU IVP Lindsay ignored the findings of the Local 1637 Executive Board, and disregarded the clear evidence that there were multiple versions of the bylaws sent to Local 1637, and recommended removing Mendoza and the Local 1637 Executive Board from office and imposition of this trusteeship anyway.

16. To try and remedy this problem, the Local 1637 Executive Board proposed amendments to the Local 1637 Bylaws in 2017, posted copies of the proposed bylaws at the union hall, read the proposed

bylaws at two meetings, and because there was no quorum, we voted to approve the bylaws in accordance with the ATU CGLs.

17. Despite following proper procedure for amending the bylaws, ATU International President Hanley refused to approve the bylaws that we properly amended, and used the bylaws that we believed were not properly approved by the Local 1637 Executive Board to impose this trusteeship over Local 1637.

18. I attended the trusteeship hearing on May 9-10, 2017, and personally witnessed ATU Associate General Counsel Kiera McNett and Hearing Officer Antonette Bryant refuse to permit Jose Mendoza, who represented the Local 1637 Executive Board at the hearing, to cross-examine any of the witnesses from Local 1637 at the hearing.

19. I believe this trusteeship was imposed solely to remove Jose from office because of charges he brought against ATU International Representative Richie Murphy for his conduct in negotiations with a Local 1637 employer.

20. I believe that what was done to Jose, and the Local 1637 Executive Board was improper, and fully support a Court order ending this trusteeship.

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

DATED this 18th day of May, 2017.

/s/ Robbie Harris
Local 1637 Executive Board Member

DECLARATION OF LOCAL 1637 EXECUTIVE BOARD MEMBER LINDA JOHNSON-SANDERS (MAY 18, 2017)

STATE OF NEVADA
COUNTY OF CLARK

I, LINDA JOHNSON-SANDERS do hereby swear, under penalty of perjury, that the following assertions are true to the best of my knowledge and belief:

1. I am former member of the Local 1637 Executive Board that was removed from my position on the Local 1637 Executive Board upon imposition of the trusteeship over Local 1637 by ATU International on April 10, 2017.

2. I believe that this trusteeship was not imposed for a proper purpose, or in accordance with the ATU International Constitution and General Laws ("CGL").

3. ATU International Vice President ("IVP") James Lindsay came to Local 1637 in 2016, prior to the imposition of this trusteeship to conduct an investigation into whether our President/Business Agent ("PBA"), Jose Mendoza, had been overpaid, and to investigate amendments to the Local 1637 Bylaws.

4. I believe that Jose Mendoza informed ATU International on multiple occasions in 2011 and 2012 that he had interpreted the Local 1637 Bylaw Article 4 as authorizing the Local 1637 PBA the highest rate of pay of any employee in Local 1637 based on the accounts of numerous Local 1637 Executive Board members who were board members at that time.

5. At no time did the Local 1637 Executive Board seek to overturn PBA Mendoza's decision regarding the PBA's pay. and there were never enough members who wanted to challenge the decision to appeal this decision either.

6. The investigation into our local union was conducted based on the complaints of a single member of Local 1637, Terry Richards, and a single Local 1637 Executive Board member, Carolyn Higgins.

7. At no time did the Local 1637 Executive Board believe that the complaints of these two individuals warranted any consideration or investigation because we did not believe the actions of our PBA were not done in accordance with the ATU CGLs or the Local 1637 Bylaws.

8. I believe that the ATU International President Lawrence Hanley circumvented the procedure in Section 22 of the ATU CGLs regarding bring charges against members and officers because these individuals never had the support or additional signatures of any other members of the Local 1637 Executive Board, or the membership, to substantiate these false charges.

9. The Local 1637 Executive Board believed that, given the ambiguity of the provision, the interpretation was acceptable, and supported by ATU International.

10. While IVP Lindsay was present at Local 1637 conducting his investigation, the Local 1637 Executive Board came to a consensus that the Local 1637 Bylaw Article 7 had been improperly amended by former Local 1637 Financial Secretary Treasurer Jeffrey Raske based on significant evidence that ATU International has sent PBA Mendoza multiple conflicting copies of the Local 1637 Bylaws to PBA Mendoza in 2013.

11. There was no evidence presented by ATU International or PBA Mendoza that the version of the 2012 Local 1637 Bylaws that ATU International used to support charges against Mr. Mendoza were voted on by the Local 1637 Executive Board.

12. Rather, in an email from ATU International employee, Kristi Adams, there were copies of the proposed amendments that the Local 1637 Executive Board had voted on back in 2012, and a copy of the 2012 Local 1637 Bylaws used by ATU International to support this trusteeship, which had completely different language.

13. Based on this evidence, the Local 1637 Executive Board came to a consensus that there were numerous versions of the Local 1637 Bylaws that ATU International and Local 1637 had on file, and we believed that something improper had occurred when the bylaws were amended in 2012.

14. Despite this, ATU IVP Lindsay ignored the findings of the Local 1637 Executive Board, and disregarded the clear evidence that there were multiple versions of the bylaws sent to Local 1637, and recommended removing Mendoza and the Local 1637 Executive Board from office and imposition of this trusteeship anyway.

15. To try and remedy this problem, the Local 1637 Executive Board proposed amendments to the Local 1637 Bylaws in 2017, posted copies of the proposed bylaws at the union hall, read the proposed bylaws at two meetings, and because there was no quorum, we voted to approve the bylaws in accordance with the ATU CGLs.

16. Despite following proper procedure for amending the bylaws, ATU International President Hanley refused to approve the bylaws that we properly amended, and used the bylaws that we believed were not properly approved by the Local 1637 Executive Board to impose this trusteeship over Local 1637.

17. I attended the trusteeship hearing on May 9, 2017, and personally witnessed ATU Associate General Counsel Kiera McNett and Hearing Officer Antonette Bryant refuse to permit Jose Mendoza, who represented the Local 1637 Executive Board at the hearing, to cross-examine any of the witnesses from Local 1637 at the hearing.

18. I believe this trusteeship was imposed solely to remove Jose from office because of charges he brought against ATU International Representative Richie Murphy for his conduct in negotiations with a Local 1637 employer.

19. I believe that what was done to Jose, and the Local 1637 Executive Board was improper, and fully support a Court order ending this trusteeship.

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

DATED this 18th day of May, 2017.

/s/ Linda Johnson-Sanders
Local 1637 Executive Board Member

DECLARATION OF LOCAL 1637 EXECUTIVE BOARD MEMBER GARY SANDERS (MAY 18, 2017)

STATE OF NEVADA
COUNTY OF CLARK

I, GARY SANDERS do hereby swear, under penalty of perjury, that the following assertions are true to the best of my knowledge and belief:

1. I am former member of the Local 1637 Executive Board that was removed from my position on the Local 1637 Executive Board upon imposition of the trusteeship over Local 1637 by ATU International on April 10, 2017.

2. I believe that this trusteeship was not imposed for a proper purpose, or in accordance with the ATU International Constitution and General Laws ("CGL").

3. ATU International Vice President ("IVP") James Lindsay came to Local 1637 in 2016, prior to the imposition of this trusteeship to conduct an investigation into whether our President/Business Agent ("PBA"), Jose Mendoza, had been overpaid, and to investigate amendments to the Local 1637 Bylaws.

4. I believe that Jose Mendoza informed ATU International on multiple occasions in 2011 and 2012 that he had interpreted the Local 1637 Bylaw Article 4 as authorizing the Local 1637 PBA the highest rate of pay of any employee in Local 1637 based on the accounts of numerous Local 1637 Executive Board members who were board members at that time.

5. At no time did the Local 1637 Executive Board seek to overturn PBA Mendoza's decision regarding

the PBA's pay, and there were never enough members who wanted to challenge the decision to appeal this decision either.

6. The investigation into our local union was conducted based on the complaints of a single member of Local 1637, Terry Richards, and a single Local 1637 Executive Board member, Carolyn Higgins.

7. At no time did the Local 1637 Executive Board believe that the complaints of these two individuals warranted any consideration or investigation because we did not believe the actions of our PBA were not done in accordance with the ATU CGLs or the Local 1637 Bylaws.

8. I believe that the ATU International President Lawrence Hanley circumvented the procedure in Section 22 of the ATU CGLs regarding bring charges against members and officers because these individuals never had the support or additional signatures of any other members of the Local 1637 Executive Board, or the membership, to substantiate these false charges.

9. The Local 1637 Executive Board believed that, given the ambiguity of the provision, the interpretation was acceptable, and supported by ATU International.

10. While IVP Lindsay was present at Local 1637 conducting his investigation, the Local 1637 Executive Board came to a consensus that the Local 1637 Bylaw Article 7 had been improperly amended by former Local 1637 Financial Secretary Treasurer Jeffrey Raske based on significant evidence that ATU International has sent PBA Mendoza multiple conflicting copies of the Local 1637 Bylaws to PBA Mendoza in 2013.

11. There was no evidence presented by ATU International or PBA Mendoza that the version of the 2012 Local 1637 Bylaws that ATU International used to support charges against Mr. Mendoza were voted on by the Local 1637 Executive Board.

12. Rather, in an email from ATU International employee, Kristi Adams, there were copies of the proposed amendments that the Local 1637 Executive Board had voted on back in 2012, and a copy of the 2012 Local 1637 Bylaws used by ATU International to support this trusteeship, which had completely different language.

13. Based on this evidence, the Local 1637 Executive Board came to a consensus that there were numerous versions of the Local 1637 Bylaws that ATU International and Local 1637 had on file, and we believed that something improper had occurred when the bylaws were amended in 2012.

14. Despite this, ATU IVP Lindsay ignored the findings of the Local 1637 Executive Board, and disregarded the clear evidence that there were multiple versions of the bylaws sent to Local 1637, and recommended removing Mendoza and the Local 1637 Executive Board from office and imposition of this trusteeship anyway.

15. To try and remedy this problem, the Local 1637 Executive Board proposed amendments to the Local 1637 Bylaws in 2017, posted copies of the proposed bylaws at the union hall, read the proposed bylaws at two meetings, and because there was no quorum, we voted to approve the bylaws in accordance with the ATU CGLs.

16. Despite following proper procedure for amending the bylaws, ATU International President Hanley refused to approve the bylaws that we properly amended, and used the bylaws that we believed were not properly approved by the Local 1637 Executive Board to impose this trusteeship over Local 1637.

17. I attended the trusteeship hearing on May 9-10, 2017, and personally witnessed ATU Associate General Counsel Kiera McNett and Hearing Officer Antonette Bryant refuse to permit Jose Mendoza, who represented the Local 1637 Executive Board at the hearing, to cross-examine any of the witnesses from Local 1637 at the hearing.

18. I believe this trusteeship was imposed solely to remove Jose from office because of charges he brought against ATU International Representative Richie Murphy for his conduct in negotiations with a Local 1637 employer.

19. I believe that what was done to Jose, and the Local 1637 Executive Board was improper, and fully support a Court order ending this trusteeship.

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

DATED this 18th day of May, 2017.

/s/ Gary Sanders
Local 1637 Executive Board Member

DECLARATION OF LOCAL 1637 EXECUTIVE BOARD MEMBER MYEKO EASLEY (MAY 18, 2017)

STATE OF NEVADA
COUNTY OF CLARK

I, MYEKO EASLEY, do hereby swear, under penalty of perjury, that the following assertions are true to the best of my knowledge and belief:

1. I am former member of the Local 1637 Executive Board that was removed from my position on the Local 1637 Executive Board upon imposition of the trusteeship over Local 1637 by ATU International on April 10, 2017.

2. I believe that this trusteeship was not imposed for a proper purpose, or in accordance with the ATU International Constitution and General Laws ("CGL").

3. ATU International Vice President ("IVP") James Lindsay came to Local 1637 in 2016, prior to the imposition of this trusteeship to conduct an investigation into whether our President/Business Agent ("PBA"), Jose Mendoza, had been overpaid, and to investigate amendments to the Local 1637 Bylaws.

4. At no time did the Local 1637 Executive Board seek to overturn PBA Mendoza's decision regarding the PBA's pay, and there were never enough members who wanted to challenge the decision to appeal this decision either.

5. The Local 1637 Executive Board believed that, given the ambiguity of the provision, the interpretation was acceptable, and supported by ATU International.

6. The investigation into our local union was conducted based on the complaints of a single member of Local 1637, Terry Richards, and a single Local 1637 Executive Board member, Carolyn Higgins.

7. At no time did the Local 1637 Executive Board believe that the complaints of these two individuals warranted any consideration or investigation because we did not believe the actions of our PBA were not done in accordance with the ATU CGLs or the Local 1637 Bylaws.

8. I believe that the ATU International President Lawrence Hanley circumvented the procedure in Section 22 of the ATU CGLs regarding bring charges against members and officers because these individuals never had the support or additional signatures of any other members of the Local 1637 Executive Board, or the membership, to substantiate these false charges.

9. While IVP Lindsay was present at Local 1637 conducting his investigation, the Local 1637 Executive Board came to a consensus that the Local 1637 Bylaw Article 7 had been improperly amended by former Local 1637 Financial Secretary Treasurer Jeffrey Raske based on significant evidence that ATU International has sent to PBA Mendoza, including multiple conflicting copies of the Local 1637 Bylaws to PBA Mendoza in 2013.

10. There was no evidence presented by ATU International or PBA Mendoza that the version of the 2012 Local 1637 Bylaws that ATU International used to support charges against Mr. Mendoza were voted on by the Local 1637 Executive Board.

11. Rather, in an email from ATU International employee, Kristi Adams, there were copies of the pro-

posed amendments that the Local 1637 Executive Board had voted on back in 2012, and a copy of the 2012 Local 1637 Bylaws used by ATU International to support this trusteeship, which were completely different language.

12. Based on this evidence, the Local 1637 Executive Board came to a consensus that there were numerous versions of the Local 1637 Bylaws that ATU International and Local 1637 had on file, and we believed that something improper had occurred when the bylaws were amended in 2012.

13. Despite this, ATU IVP Lindsay ignored the findings of the Local 1637 Executive Board, and disregarded the clear evidence that there were multiple versions of the bylaws sent to Local 1637, and recommended removing Mendoza and the Local 1637 Executive Board from office and imposition of this trusteeship anyway.

14. To try and remedy this problem, the Local 1637 Executive Board proposed amendments to the Local 1637 Bylaws in 2017, posted copies of the proposed bylaws at the union hall, read the proposed bylaws at two meetings, and because there was no quorum, we voted to approve the bylaws in accordance with the ATU CGLs.

15. Despite following proper procedure for amending the bylaws, ATU International President Hanley refused to approve the bylaws that we properly amended, and used the bylaws that we believed were not properly approved by the Local 1637 Executive Board to impose this trusteeship over Local 1637.

16. I attended the trusteeship hearing on May 9, 2017, and personally witnessed ATU Associate General

Counsel Kiera McNett and Hearing Officer Antonette Bryant refuse to permit Jose Mendoza, who represented the Local 1637 Executive Board at the hearing, to cross-examine any of the witnesses from Local 1637 at the hearing.

17. After imposition of the trusteeship, IVP Lindsay appointed all the former Local 1637 Executive Board officers as assistant trustees.

18. After the decision to ratify the trusteeship was issued, I was charged with representing Jose Mendoza in a grievance with Keolis regarding his return to work.

19. I received an email regarding Jose Mendoza's driving under the influence charge from Keolis in May of 2017. The date the record was purchased was March of 2017, before imposition of the trusteeship.

20. Prior to the step #1 grievance meeting Jose called me, and informed me he was not going to make the meeting due to his babysitter could not make it. So I called senior Supervisor Kelvin Manzanares to ask if we could postpone the grievance until the next day so that Jose could be there. He told me okay we can discuss it when I got there. When we showed up to negotiate the grievance, it appeared to me that Keolis and ATU IVP Lindsay had already agreed not to give the extension for some odd reason. So I asked Kelvin why the change because over the phone not more than five minutes ago you were going to give me the extension. His reply was that the company wanted to move forward with this grievance, and offer a settlement that Jose would be terminated if he did not return to work with a commercial driver's license ("CDL") within seven (7) days of the grievance

hearing, and myself and the other negotiator Niel Silver were just there to make the process appear fair.

21. I did not agree to this settlement, nor would I have if I were the one deciding on it because Jose could not possibly meet the terms of the settlement.

22. After the Step 1 hearing, ATU IVP Lindsay agreed to the settlement without consulting with us.

23. I believe that ATU IVP James Lindsay and Keolis worked together to terminate Jose's employment in order to expel him from union membership.

24. I believe this trusteeship was imposed solely to remove Jose from office because of charges he brought against ATU International Representative Richie Murphy for his conduct in negotiations with a Local 1637 employer.

25. I believe that what was done to Jose, and the Local 1637 Executive Board was improper and fully support a Court order ending this trusteeship.

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

DATED this 18th day of May, 2017.

/s/ Myeko Easley
Local 1637 Executive Board Member

DECLARATION OF LOCAL 1637 EXECUTIVE BOARD MEMBER ROBERT NAYLOR (MAY 18, 2017)

STATE OF NEVADA
COUNTY OF CLARK

I, ROBERT NAYLOR do hereby swear, under penalty of perjury, that the following assertions are true to the best of my knowledge and belief:

1. I am former member of the Local 1637 Executive Board that was removed from my position on the Local 1637 Executive Board upon imposition of the trusteeship over Local 1637 by ATU International on April 10, 2017.

2. I believe that this trusteeship was not imposed for a proper purpose, or in accordance with the ATU International Constitution and General Laws ("CGL").

3. ATU International Vice President ("IVP") James Lindsay came to Local 1637 in 2016, prior to the imposition of this trusteeship to conduct an investigation into whether our President/Business Agent ("PBA"), Jose Mendoza, had been overpaid, and to investigate amendments to the Local 1637 Bylaws.

4. With regards to whether our PBA was overpaid salary, in 2012 I personally witnessed Jose Mendoza inform ATU IVP William McLean of his interpretation of the Local 1637 Bylaws Article 4 as authorizing the Local 1637 PBA the highest rate of pay of any employee/member of Local 1637.

5. IVP McLean agreed with Jose Mendoza's interpretation of the Local 1637 Bylaw Article 4 as granting

the Local 1637 PBA the highest rate of pay of any employee in the union.

6. At no time did the Local 1637 Executive Board seek to overturn PBA Mendoza's decision regarding the PBA's pay, and there were never enough members who wanted to challenge the decision to appeal this decision either.

7. The Local 1637 Executive Board believed that, given the ambiguity of the provision, the interpretation was acceptable, and supported by ATU International.

8. The investigation into our local union was conducted based on the complaints of a single member of Local 1637, Terry Richards, and a single Local 1637 Executive Board member, Carolyn Higgins.

9. At no time did the Local 1637 Executive Board believe that the complaints of these two individuals warranted any consideration or investigation because we did not believe the actions of our PBA were not done in accordance with the ATU CGLs or the Local 1637 Bylaws.

10. I believe that the ATU International President Lawrence Hanley circumvented the procedure in Section 22 of the ATU CGLs regarding bring charges against members and officers because these individuals never had the support or additional signatures of any other members of the Local 1637 Executive Board, or the membership, to substantiate these false charges.

11. While IVP Lindsay was present at Local 1637 conducting his investigation, the Local 1637 Executive Board came to a consensus that the Local 1637 Bylaw Article 7 had been improperly amended by former Local 1637 Financial Secretary Treasurer Jeffrey

Raske based on significant evidence that ATU International has sent PBA Mendoza, including multiple conflicting copies of the Local 1637 Bylaws to PBA Mendoza in 2013.

12. There was no evidence presented by ATU International or PBA Mendoza that the version of the 2012 Local 1637 Bylaws that ATU International used to support charges against Mr. Mendoza were voted on by the Local 1637 Executive Board.

13. Rather, in an email from ATU International employee, Kristi Adams, there were copies of the proposed amendments that the Local 1637 Executive Board had voted on back in 2012, and a copy of the 2012 Local 1637 Bylaws used by ATU International to support this trusteeship, which had completely different language.

14. Based on this evidence, the Local 1637 Executive Board came to a consensus that there were numerous versions of the Local 1637 Bylaws that ATU International and Local 1637 had on file, and we believed that something improper had occurred when the bylaws were amended in 2012.

15. Despite this, ATU IVP Lindsay ignored the findings of the Local 1637 Executive Board, and disregarded the clear evidence that there were multiple versions of the bylaws sent to Local 1637, and recommended removing Mendoza and the Local 1637 Executive Board from office and imposition of this trusteeship anyway.

16. To try and remedy this problem, the Local Executive Board proposed amendments to the Local 1637 Bylaws in 2017, posted copies of the proposed bylaws at the union hall, read the proposed bylaws

at two meetings, and because there was no quorum, we voted to approve the bylaws in accordance with the ATU CGLs.

17. Despite following proper procedure for amending the bylaws, ATU International President Hanley refused to approve the bylaws that we properly amended, and used the bylaws that we believed were not properly approved by the Local 1637 Executive Board to impose this trusteeship over Local 1637.

18. I attended the trusteeship hearing on May 9, 10, 2017, and personally witnessed ATU Associate General Counsel Kiera McNett and Hearing Officer Antonette Bryant refuse to permit Jose Mendoza, who represented the Local 1637 Executive Board at the hearing, to cross-examine any of the witnesses from Local 1637 at the hearing.

19. I believe this trusteeship was imposed solely to remove Jose from Office because of charges he bought against ATU International Representative Richie Murphy for his conduct in negotiations with a Local 1637 employer.

20. I believe that what was done to Jose, and the Local 1637 Executive Board was improper, and fully support a Court order ending this trusteeship.

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

Dated this 18th day of May, 2017.

/s/ Robert Naylory
Local 1637 Executive Board Member

DECLARATION OF LOCAL 1637 EXECUTIVE BOARD MEMBER CESAR JIMENEZ (MAY 18, 2017)

STATE OF NEVADA
COUNTY OF CLARK

I, CESAR JIMENEZ do hereby swear, under penalty of perjury, that the following assertions are true to the best of my knowledge and belief:

1. I am former member of the Local 1637 Executive Board that was removed from my position on the Local 1637 Executive Board upon imposition of the trusteeship over Local 1637 by ATU International on April 10, 2017.

2. I believe that this trusteeship was not imposed for a proper purpose, or in accordance with the ATU International Constitution and General Laws ("CGL").

3. ATU International Vice President ("IVP") James Lindsay came to Local 1637 in 2016, prior to the imposition of this trusteeship to conduct an investigation into whether our President/Business Agent ("PBA"), Jose Mendoza, had been overpaid, and to investigate amendments to the Local 1637 Bylaws.

4. I believe that Jose Mendoza informed ATU International on multiple occasions in 2011 and 2012 that he had interpreted the Local 1637 Bylaw Article 4 as authorizing the Local 1637 PBA the highest rate of pay of any employee in Local 1637 based on the accounts of numerous Local 1637 Executive Board members who were board members at that time.

5. At no time did the Local 1637 Executive Board seek to overturn PBA Mendoza's decision regarding

the PBA's pay, and there were never enough members who wanted to challenge the decision to appeal this decision either.

6. The investigation into our local union was conducted based on the complaints of a single member of Local 1637, Terry Richards, and a single Local 1637 Executive Board member. Carolyn Higgins.

7. At no time did the Local 1637 Executive Board believe that the complaints of these two individuals warranted any consideration or investigation because we did not believe the actions of our PBA were not done in accordance with the ATU CGLs or the Local 1637 Bylaws.

8. I believe that the ATU International President Lawrence Hanley circumvented the procedure in Section 22 of the ATU CGLs regarding bring charges against members and officer because these individuals never had the support or additional signatures of any other members of the Local 1637 Executive Board, or the membership, to substantiate these false charges.

9. The Local 1637 Executive Board believed that, given the ambiguity of the provision, the interpretation was acceptable, and supported by ATU International.

10. While IVP Lindsay was present at Local 1637 conducting his investigation, the Local 1637 Executive Board came to a consensus that the Local 1637 Bylaw Article 7 had been improperly amended by former Local 1637 Financial Secretary Treasurer Jeffrey Raske based on significant evidence that ATU International has sent PBA Mendoza multiple conflicting copies of the Local 1637 Bylaws to PBA Mendoza in 2013.

11. There was no evidence presented by ATU International or PBA Mendoza that the version of the 2012 Local 1637 Bylaws that ATU International used to support charges against Mr. Mendoza were voted on by the Local 1637 Executive Board.

12. Rather, in an email from ATU International employee, Kristi Adams, there were copies of the proposed amendments that the Local 1637 Executive Board had voted on back in 2012, and a copy of the 2012 Local 1637 Bylaws used by ATU International to support this trusteeship, which had completely different language.

13. Based on this evidence, the Local 1637 Executive Board came to a consensus that there were numerous versions of the Local 1637 Bylaws that ATU International and Local 1637 had on file, and we believed that something improper had occurred when the bylaws were amended in 2012.

14. Despite this, ATU IVP Lindsay ignored the findings of the Local 1637 Executive Board, and disregarded the clear evidence that there were multiple versions of the bylaws sent to Local 1637, and recommended removing Mendoza and the Local 1637 Executive Board from office and imposition of this trusteeship anyway.

15. To try and remedy this problem, the Local 1637 Executive Board proposed amendments to the Local 1637 Bylaws in 2017, posted copies of the proposed bylaws at the union hall, read the proposed bylaws at two meetings, and because there was no quorum, we voted to approve the bylaws in accordance with the ATU CGLs.

16. Despite following proper procedure for amending the bylaws, ATU International President Hanley refused to approve the bylaws that we properly amended, and used the bylaw that we believed were not properly approved by the Local 1637 Executive Board to impose this trusteeship over Local 1637.

17. I attended the trusteeship hearing on May 9-10, 2017, and personally witnessed ATU Associate General Counsel Kiera McNett and Hearing Officer Antonette Bryant refuse to permit Jose Mendoza, who represented the Local 1637 Executive Board at the hearing, to cross-examine any of the witnesses from Local 1637 at the hearing.

18. I believe this trusteeship was imposed solely to remove Jose from office because of charges he brought against ATU International Representative Richie Murphy for his conduct in negotiations with a Local 1637 employer.

19. I believe that what was done to Jose, and the Local 1637 Executive Board was improper, and fully support a Court order ending this trusteeship.

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

DATED this 18th day of May, 2017.

/s/ Cesar Jimenez
Local 1637 Executive Board Member

COMPLAINT
(SEPTEMBER 22, 2017)

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JOSE MENDOZA, JR., INDIVIDUALLY AND AS A MEMBER AND REPRESENTATIVE OF THE AMALGAMATED TRANSIT UNION LOCAL 1637, A NON-PROFIT COOPERATIVE CORPORATION,

Plaintiff,

v.

AMALGAMATED TRANSIT UNION INTERNATIONAL ("ATU"), A NONPROFIT CORPORATION; JAMES LINDSAY III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ATU INTERNATIONAL VICE PRESIDENT AND TRUSTEE; LAWRENCE J. HANLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS INTERNATIONAL UNION PRESIDENT; ANTONETTE BRYANT, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS INTERNATIONAL REPRESENTATIVE AND HEARING OFFICER; TERRY RICHARDS, INDIVIDUALLY; CAROLYN HIGGINS, INDIVIDUALLY; KEIRA MCNETT, INDIVIDUALLY; DANIEL SMITH, INDIVIDUALLY; TYLER HOME, INDIVIDUALLY; DOES; and ROE CORPORATIONS 1-20, INCLUSIVE,

Defendants.

Case No.: A-17-761963-C
Department 23

COMES NOW, Plaintiff, JOSE MENDOZA JR., individually and as a member and representative of the ATU Local 1637, by and through his attorney of record, MICHAEL MCAVOYAMAYA, ESQ., and hereby complains and alleges as follows:

I. Jurisdiction and Venue

This Complaint is alleged under state law. This Court has personal jurisdiction over the Defendants and claims, as set forth herein pursuant to NRS 14.065, and such jurisdiction is not inconsistent with the Nevada Constitution or the United States Constitution. Venue is proper in this Court pursuant to NRS 13.010 et seq. because, among other reasons, Local 1637 operates its principal place of business in Clark County, Nevada.

While this Complaint is alleged only under state law, and jurisdiction in this Court is clearly proper, the causes of action alleged herein relate to conduct that is also in violation of rights guaranteed by the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411, 462, and 464. As such, Plaintiff will take this time to apprise this Court of the relevant jurisdictional statutes in the LMRDA, and why this action cannot be removed to the federal district court.

A. Jurisdiction Under The Labor Management Reporting And Disclosure Act

Plaintiff is alleging numerous causes of action, which could be construed as alleging violations of the LMRDA. "The LMRDA 'was the product of congressional concern with widespread abuses of power by union leadership.'" *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 352 (1989). While the federal district courts have exclusive jurisdiction to hear claims alleged under the LMRDA (29 U.S.C. § 401, 412, 464, et al.), the LMRDA does not preempt any other remedies provided for under state or federal law:

> Nothing contained in this title [29 USCS §§ 411 et seq.] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

29 U.S.C. § 413.

The Courts are consistent in holding that claims falling under the LMRDA enjoy concurrent jurisdiction between state and federal courts. *Teamsters Agricultural Workers Union v. International Brotherhood of Teamsters*, 140 Cal. App. 3d 547, 550 (Cal. App. 5th Dist. Mar. 4, 1983) ("federal-state jurisdiction is concurrent with respect to suits brought under the Labor-Management Reporting and Disclosure Act of 1959"); Berg v. Watson, 417 F. Supp. 806, 808 (S.D.N.Y. July 9, 1976) ("[t]his Court is of the opinion that a state court has concurrent jurisdiction over claims brought pursuant to Section 102 of the Landrum-Griffin Act,

29 U.S.C. § 412"). As such, Plaintiff can and intends to file simultaneous legal actions in both state and federal court for the conduct alleged herein.

In addition to concurrent jurisdiction, it is unanimously held by the federal courts that "rights guaranteed under the LMRDA are not subject to preemption." *Fulton Lodge No. 2 of International Asso. of Machinists & Aerospace Workers v. Nix*, 415 F.2d 212, 216 (5th Cir. 1969) *citing International Bhd. of Boilermakers, etc. v. Braswell*, 388 F.2d 193, 195-196 (5th Cir. 1968). The LMRDA "does not supplant remedies available under the law." *Green v. Hotel & Restaurant Employees' & Bartenders' International Union*, 220 F. Supp. 505, 507 (E.D. Mich. July 18, 1963). "Absent an express basis for federal jurisdiction, power to decide whether a union has abided by its own by-laws and rules, remains with the state courts." *Carroll v. Associated Musicians of Greater New York*, 235 F. Supp. 161, 174 (S.D.N.Y. Jan. 15, 1963) *citing International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923 (1958). "[T]he possibility of partial relief from the [National Labor Relations] Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered." *International Ass'n Of Machinists v. Gonzales*, 356 U.S. 617, 621, 78 S. Ct. 923, 925 (1958).

Because the LMRDA contains an anti-preemption provision, this matter is proper in this Court, is properly alleged under state law, and cannot be removed on the basis of federal preemption. As such, any attempt to remove this action to federal court should be stricken.

II. Parties

1. Plaintiff Jose Mendoza is, and was at all times relevant hereto, a resident of the County of Clark, State of Nevada, a member of ATU Local 1637 (hereinafter "Local 1637"), and the duly elected President of Local 1637.

2. Defendant Amalgamated Transit Union (hereinafter "ATU") is and was at all times relevant herein a nonprofit corporation with headquarters in Silver Spring, Maryland, with

[. . .]

FIRST CAUSE OF ACTION

(Breach of Contract, Local 1637 And ATU Constitutions – Unilaterally Amending Article 4 Of The Local 1637 Constitution, Failure to Follow Procedure in Charging Plaintiff Mendoza)

66. Plaintiff restates all the preceding and subsequent allegations as though fully set forth herein.

67. That Local 1637's By Laws prescribe the proper procedure for amending the By Laws, to wit: "These By Laws are subject to amendment, change or modification as set forth in the International Constitution and General Laws, as amended. Proposed amendments shall be presented in writing to the Executive Board of the L.U. at least 5 days prior to the regularly scheduled membership meeting. Amendments shall be governed by Section 13.2 of the International Constitution and General Laws."

68. That the Constitution and Bylaws of the Local Union are a contract enforceable by the Local Union's members. *See Johnson v. International of*

United Bhd., C. J., 52 Nev. 400, 412, 288 P. 170, 173 (Nev. 1930).

69. That the ATU Constitution Section 12.5 provides the proper procedure for bring charges against members of the Union. Section 12.5 directs that charges against members for refusals to carry out Union policies, or attempts to thwart or interfere with Union policies, may be filed with the GEB "upon the signature of at least two officers of the IU." A copy of the charges must be served on the accused. At that point, the GEB may refer to the charges to the LU, or may investigate and process the charges themselves, serving the accused with a complaint including specific charges. The accused member must be given ten days notice of the hearing on the . . .