

No. _____

In The

SUPREME COURT OF THE UNITED STATES

Mary Steele-Klein, et al.

v.

International Brotherhood of Teamsters, et al.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTARY AUTHORITY

Mary Steele-Klein, Petitioner, Representing Herself
and Representing Others similarly situated (Putative Class Representative)

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY H. STEELE-KLEIN,

Plaintiff-Appellant,

v.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 117, doing
business in Washington, headquarters,
Washington, DC; et al.,

Defendants-Appellees.

No. 14-36083

D.C. No. 2:14-cv-00553-RSM

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, Chief Judge, Presiding

Submitted May 10, 2017**
Seattle, Washington

Before: McKEOWN, BEA, and N.R. SMITH, Circuit Judges.

Mary Steele-Klein appeals the district court's dismissal of her complaint for failure to state a claim without granting her leave to amend. We review a district

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

court's dismissal of a complaint for failure to state a claim de novo. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1034 (9th Cir. 2010). We review a district court's denial of leave to amend for abuse of discretion. *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008). We have jurisdiction to hear this appeal, 28 § U.S.C. 1291, and we affirm.

1. The district court properly dismissed Steele-Klein's first claim, asserting that Appellees violated her First and Fourteenth Amendment rights. Steele-Klein argues that Teamsters Local 117 ("the Union") and her employer¹ failed to meet the procedural requirements the Supreme Court outlined in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), with regard to the mandatory contributions she, as an employee of King County Elections, was required to make to the Western Conference Teamsters Pension Trust Fund ("WCTP Trust Fund"). The *Hudson* procedural requirements apply to mandatory union dues, not to mandatory pension contributions. *See id.* at 301–03. Steele-Klein has alleged no other manner in which the mandatory contributions to the WCTP Trust Fund implicate the First or Fourteenth Amendments. Accordingly, dismissal was proper,

¹ Steele-Klein asserts this claim, and other claims against her "employer." Because her actual employer—King County Elections—is not a named party in this case, we construe her references to "employer" to mean Dow Constantine, the King County Executive.

because there is no cognizable legal basis for Steele-Klein's claim. *See Woods v. U.S. Bank N.A.*, 831 F.3d 1159, 1162 (9th Cir. 2016) (holding that dismissal is proper where complaint lacks "a cognizable legal theory").

Steele-Klein's two proposed amendments would not cure these legal deficiencies. First, adding the WCTP Trust Fund as a party to this suit would not change our conclusion that the *Hudson* procedural requirements do not apply to mandatory pension contributions. Second, permitting Steele-Klein to assert an entirely new claim based on wrongful retaliation in violation of the First Amendment would be futile. Neither King County nor King County Elections (Steele-Klein's employer) are currently parties or proposed parties to this suit, and Steele-Klein has not identified how Constantine, individually, retaliated against her. *See Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012) ("[T]o establish individual liability under 42 U.S.C. § 1983, 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009))). The record shows that King County Elections rehired her to work another election cycle shortly after she complained about the mandatory pension contributions. We decline to grant her leave to amend, because she has failed to identify what specific additional facts she would plead to support her retaliation claim or what specific

parties retaliated against her. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008) (“Appellants fail to state what additional facts they would plead if given leave to amend, or what additional discovery they would conduct to discover such facts. Accordingly, amendment would be futile.”).

2. The district court properly dismissed Steele-Klein’s second claim, which asserted that the Union and Dow Constantine imposed an impermissible tax burden on her and other employees. Steele-Klein never explains this “impermissible tax burden” or cites a legal basis for her claim. Because Steele-Klein fails to identify a “cognizable legal theory” and fails to explain the facts supporting that legal theory, dismissal was proper. *See Woods*, 831 F.3d at 1162. Granting leave to amend would, again, be futile, because Steele-Klein has not identified how she would articulate a cognizable legal theory if given the opportunity. *See Kendall*, 518 F.3d at 1052.

3. The district court properly dismissed Steele-Klein’s third claim, asserting that the Union fraudulently misrepresented how it uses union dues. This claim fails to meet the heightened pleading standard found in Federal Rule of Civil Procedure 9(b). Steele-Klein has not identified the basic facts of the alleged fraudulent misrepresentation, such as what exact statements or omissions were fraudulent and when the allegedly fraudulent activity occurred. *Vess v. Ciba-Geigy*

Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (“Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.” (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997))). Steele-Klein also has not alleged facts to support each of the nine elements of a fraudulent misrepresentation claim under Washington law. *See Stiley v. Block*, 925 P.2d 194, 204 (Wash. 1996) (en banc). For example, the complaint does not assert how the Union intended to induce reliance on its allegedly fraudulent statements, or how Steele-Klein was injured when she relied on the statements. *See id.* Because Steele-Klein has made no attempt to clarify how she would overcome these deficiencies in her complaint, we find granting leave to amend would be futile. *See Kendall*, 518 F.3d at 1052.

4. The district court properly dismissed Steele-Klein’s fourth cause of action, asserting a claim for “theft.” The district court properly construed the claim as one for the tort of conversion, because Washington does not have a civil claim for “theft.” “Money may be the subject of conversion if the party charged with conversion wrongfully received the money” *Coto Settlement*, 593 F.3d at 1039. The complaint does not identify a cognizable legal basis for concluding that Appellees “wrongfully” received her wages when King County Elections deducted the mandatory contribution to the WCTP Trust Fund from her paycheck. *See*

Woods, 831 F.3d at 1162. Moreover, Steele-Klein acknowledges beginning work at King County Elections only after signing a notice of employment that explained the mandatory wage deduction for the WCTP Trust Fund, which suggests she in fact consented to such deductions. *Id.* Steele-Klein also omits any substantive discussion of this claim on appeal; therefore, any arguments for saving this claim from dismissal or amending this claim are waived. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996).

5. The district court properly dismissed Steele-Klein's fifth claim, because there is no civil action for embezzlement under Washington law.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY STEELE-KLEIN,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF

Defendants.

Case No. C14-553RSM

ORDER ON PENDING MOTIONS

I. INTRODUCTION

This matter comes before the Court on a number of pending motions, including: Defendant International Brotherhood of Teamsters, Local 117's ("Local Teamsters") Motion to Dismiss (Dkt. #9); Defendant International Brotherhood of Teamsters' ("International Teamsters") Motion to Dismiss (Dkt. #15); Plaintiff's Motion for Substitution of Signed Letter (Dkt. #18); Plaintiff's Motion to Appoint Counsel (Dkt. #19); Plaintiff's Motion for Joinder (Dkt. #20); Defendants' Motion for Protective Order to Stay Discovery (Dkt. #28); Plaintiff's Motion to Continue as Class Action (Dkt. #30); and Defendant Dow Constantine's Motion to Dismiss (Dkt. #31). The Court addresses each of these motions below.

BACKGROUND

Pro Se Plaintiff, Mary Steele-Klein, filed a Complaint on April 21, 2014. Dkt. #4. She brings claims against two Defendants – International Brotherhood of Teamsters, Local 117 and

King County Executive Dow Constantine. Plaintiff alleges that in 2011 she was hired by King County as one of a group of predominantly low-income seniors to work in the King County Elections division. *Id.* at 5. In that position, she was a nonmember of the Local Teamsters bargaining unit, and, as a condition of her employment, was required to pay dues. *Id.* These dues were automatically withheld from her paycheck by her employer, King County Elections division. *Id.* at 2. Plaintiff worked intermittently for several election cycles (approximately 2-4 per year) until 2013. *Id.* at 5. She worked less than 1/6 of full time equivalent hours, received

and received no retirement benefits. *Id.* She also was not entitled to notice or the right to vote on union matters. In addition, according to Plaintiff, Washington's Public Employment Relations Commission ("PERC") has ruled that she has no standing under Washington law to object to alleged union or employer abuses of dues. *Id.*

Plaintiff alleges that on July 19, 2013, King County informed her that she would be assessed an additional \$0.50 per hour in dues to support a new union pension trust fund. At the same time, Plaintiff was informed that she was excluded from ever benefitting from the fund. *Id.* at 6. Plaintiff verbally objected to the payments, and signed a "Notice" of the increase "under protest." *Id.* Plaintiff followed with written objections to the union and her employer on July 23, 2014. *Id.* She received no response to her objections. Instead, Plaintiff alleges, she was subjected to undue public criticism and King County refused to hire her for the next two

months. Plaintiff asserts that nonmember workers were discouraged from talking about the issue at lunch breaks, and were told that "the walls have ears" and anything they discussed would get back to the union. Dkt. #4 at 6. Plaintiff also complains that she had been previously unaware of the "ideological" uses of the dues by the union, which she did not

support, because of the union's misrepresentations that dues were for collective bargaining

and Fourteenth Amendment rights were infringed when the union and her employer failed to respond to her written objections to the payment of dues and to the use of the dues for "uses not germane to collective bargaining purposes." *Id.* Plaintiff alleges that despite her written objections, Defendants failed to provide her with information, process or procedure as to the apportionment of disputed dues to exclude nongermane uses, that they have not provided an escrow account for the disputed portion of her dues, and that they have failed to make any rebates. *Id.* at 2. Plaintiff apparently filed a complaint with PERC, and alleges that she suffered retaliation for such filing, as evidenced by King County's failure to rehire her for the 2014 January and April election periods despite her excellent work history. *Id.* Plaintiff asserts that such action or inaction violates the United States Supreme Court's rulings in *Chicago Teacher's Union No. 1, AFT, AFL-CIO v. Hudson*,

John Davenport v. Washington Education Assoc'n, 551 U.S. 177, 127 S. Ct. 2372 (2007), which she asserts requires the union to take specific affirmative action after receipt of written objections. *Id.* at 2-3. In addition to her constitutional claims, Plaintiff alleges a host of other federal state law claims against all defendants including: impermissible imposition of a tax burden, fraudulent misrepresentation, theft, and embezzlement. *Id.* at 9.

III. DISCUSSION

A. Plaintiff's Motion to Substitute Signed Letter

As an initial matter, the Court examines Plaintiff's pending Motion to Substitute, which requests that a signed version of Exhibit A to the Complaint replace the unsigned version

1 initially filed with the Court. Dkt. #18. Defendants have not objected. Accordingly, the Court
2 GRANTS Plaintiff's Motion to Substitute.

3 **B. Defendants' Motions to Dismiss**

4 All Defendants have moved to dismiss this case against them under Federal Rule of
5 Civil Procedure 12(b)(6). Dkts. #9, #15 and #31. The Court next addresses these motions, as
6 the Court's decisions on these motions will inform its decisions on the remaining motions.
7

9 On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure
10 12(b)(6), all allegations of material fact must be accepted as true and construed in the light
11 most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38
12 (9th Cir. 1996). However, the court is not required to accept as true a "legal conclusion
13 couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
14 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Complaint "must contain sufficient factual
15 matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. This
16 requirement is met when the plaintiff "pleads factual content that allows the court to draw the
17 reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Absent facial
18 plausibility, Plaintiffs' claims must be dismissed. *Twombly*, 550 U.S. at 570.
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23 Defendant Local Teamsters has moved to dismiss this action on the basis that Plaintiff
24 has improperly conflated pension contributions with dues and therefore has failed to state a
25 claim for relief. Dkt. #9. Plaintiff responds that she has pleaded sufficient facts to state a
26 plausible claim for relief, and therefore Defendant's motion should be denied. Dkt. #12. For
27 the following reasons the Court disagrees with Plaintiff and GRANTS Defendant's motion.
28

1 a. Pension Contributions Versus Union Dues 16

2 Plaintiff's First and Second Causes of Action are primarily premised on Plaintiff's
3 objections to mandatory contributions to a union pension fund. Dkt. #4 at 8-9. While Plaintiff
4 pleads here claims by characterizing the contributions as "dues," a review of the Complaint and
5 the Exhibits attached thereto demonstrate that Plaintiff has objected to assessments that are not
6 considered to be dues. Indeed, Plaintiff attached her letter of objection at Exhibit A to the
7 Complaint. That letter specifically raises objections to the newly-required pension trust
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See Dkt. #18, Appendix.

11 LIKEWISE, PLAINTIFF'S "FACTS" set forth in her Complaint focus on these mandatory pension
12 contributions. Dkt. #4 at 5-7 and Exs. A and G. In fact, she admits that she had been paying
13 union dues for several years. However, the gravamen of her complaint centers on her
14 objections to the pension contributions and the alleged failures of and retaliation by Defendants
15 thereafter. *Id.*

16 The contributions disputed by Plaintiff are made by King County to the Western
17 Conference of Teamsters Pension Trust ("WCTPT") for member pension benefits. The
18 WCTPT is a multi-employer, Taft-Hartley pension fund that is not an arm or branch of the
19 Local Teamsters. See Dkt. #9 at 3. The federal courts have long-differentiated pension trust
20 funds from union dues, finding that union dues are not pension assets. See, e.g., *Lauer v.*
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22 EXHIBIT 7799 (N.D. Ill. Jan. 23, 2012);

24 34, 41 (2d. Cir. 1997); see also 29 C.F.R. § 2510.3-102(a)
25 (stating that plan assets "include amounts (other than union dues) that a participant has
26 withheld from his wages by an employer. . ."). As a result, the Court agrees with Defendant
27 that *Hudson, supra*, and its progeny are not applicable to this situation. See Dkts. #9 at 3-4 and
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1 Causes of Action one and two against the Local Teamsters
2 are DISMISSED. 17

3 b. Fraudulent Misrepresentation

4 The Court next turns to Plaintiff's claim for fraudulent misrepresentation. Because the
5 claim depends on fraud, it is subject to the heightened pleading standard under Federal Rule of
6 Civil Procedure 9(b). Rule 9(b) requires that, when fraud or mistake is alleged, "a party must
7 state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b).
8 An allegation of fraud is sufficient if it "identifies the circumstances constituting fraud so that
9 the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken*, 6
10 F.3d 666, 672 (9th Cir. 1993) (internal citations and quotations omitted). Averments of fraud
11 must identify "the who, what, when, where, and how" of the misconduct charged.
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13 *Neubronner*, 6 F.3d at 672, 1106 (9th Cir. 2003).

14 Here, the Complaint does not sufficiently identify the circumstances that constitute
15 fraud, including such facts as the time, date, or other details of the alleged fraudulent activity.
16 *Neubronner*, 6 F.3d at 672. Rather, Plaintiff alleges in conclusory manner that she was injured
17 because she relied on a statement on the union's website that represented dues are not used for
18 partisan political activities, when she believes in fact they are used for substantial political
19 activity. Dkt. #4 at 7. She does not sufficiently explain why the statement is fraudulent, or
20 how her reliance on such representation resulted in damages. Further, Plaintiff's allegations do
21 not identify the circumstances constituting fraud as to each Defendant, do not specify how each
22 Defendant could have intended to induce reliance by people, including Plaintiff, or otherwise
23 permit Defendants to prepare an adequate answer from the allegations. Accordingly, this claim
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c. Theft

Plaintiff's claim for "theft" must also fail. The Court has construed Plaintiff's claims

at 9, ¶ 12. Through this claim,

Plaintiff alleges that Defendants took a portion of her wages as dues without her consent. *Id.*

Under Washington law, the tort of conversion is defined as "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Washington St. Bank v. Medalia Healthcare L.L.C.*, 96 Wn. App. 547, 554,

984 P.2d 1041 (1999), review denied 140 Wn.2d 1007, 999 P.2d 1261 (2000) (citing *Judkins v.*

Sadler-Mac Neil, 61 Wn.2d 1, 3, 376 P.2d 837 (1962)). However, the factual allegations set

forth by Plaintiff do not support such a claim. Indeed, as discussed above, Plaintiff alleges that

she objected to contributions to the pension fund, but nowhere does she allege that she failed to

consent to the payment of union dues. As a result, this claim must also fail.

d. Embezzlement

Embezzlement. Dkt. #4 at 9, ¶ 13.

There is no civil action for embezzlement under Washington common law. Accordingly, this claim is DISMISSED.

3. *Defendant International Teamsters' Motion to Dismiss*

Defendant International Teamsters has moved to dismiss out of an abundance of caution because it was served with a copy of the Summons and Complaint. Dkt. #15. While Plaintiff argues that International Teamsters has not demonstrated that it does not control the Local Teamsters, Plaintiff has not actually alleged such control. See Dkt. #4. Moreover, a review of the Complaint reveals that Plaintiff makes no allegations at all against the International Teamsters. See Dkt. #4. Accordingly, Plaintiff has failed to set forth facts sufficient to support

1 any plausible claim against the International Teamsters, and any claims against it must be
2 DISMISSED.

3 *4. Defendant Constantine's Motion to Dismiss*

4 The Court now turns to Defendant Constantine's Motion to Dismiss. Dkt. #31.
5 Defendant Constantine in part reiterates the arguments made by the Local Teamsters, as
6 addressed above, and in part argues that Plaintiff has failed to allege any claims of retaliation
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9 the Local Teamsters' motion. Dkt. #37.

10 For the reasons already set forth above, the Court rejects Plaintiff's arguments regarding
11 the withholding of pension contributions. To the extent her claims against Defendant
12 Constantine are based on those arguments, the claims are DISMISSED. Likewise, Plaintiff
13 wholly fails to set forth any facts supporting a claim for First Amendment retaliation,
14 fraudulent misrepresentation or theft with respect to Defendant Constantine. Accordingly,
15 those claims must also be DISMISSED against him. Finally, as the Court has already noted,
16 there is not common law claim for embezzlement, and therefore that claim must also be
17 DISMISSED.
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20 **C. Defendants' Motion for Protective Order**

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22 order to stay discovery. Dkt. #28.
23 Because Plaintiff's Complaint has been dismissed in its entirety, the motion is DENIED AS
24 MOOT.

25 **D. Plaintiff's Motion to Appoint Counsel**

26 Plaintiff has moved for the appointment of counsel in this matter. Dkt. #19. In civil
27 cases, the appointment of counsel to a *pro se* litigant "is a privilege and not a right." *United*
28

1 *States ex. Rel. Gardner v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965) (citation omitted).
2 "Appointment of counsel should be allowed only in exceptional cases." *Id.* (citing *Weller v.*
3 *Dickson*, 314 F.2d 598 (9th Cir. 1963)). A court must consider together "both the likelihood of
4 success on the merits and the ability of the petitioner to articulate his claims *pro se* in light of
5 the complexity of the legal issues involved." *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.
6 1983). Even where the claim is not frivolous, counsel is often unwarranted where the litigant's
7 chances of success are extremely slim. *See Mars v. Hanberry*, 752 F.2d 254, 256 (6th Cir.

10 *dismissed in its entirety*, the Court cannot find
11 that she is entitled to appointment of counsel. Accordingly, Plaintiff's Motion to Appoint
12 Counsel is DENIED.

13 **E. Plaintiff's Motion for Joinder and Motion to Continue as Class Action**

14 Plaintiff has also moved to join the pension trust fund as a Defendant to this action and
15 to continue this matter as a class action. Dkts. #20 and #30. Because Plaintiff's Complaint has
16 been dismissed in its entirety, these motions are DENIED AS MOOT.

17 **F. Leave to Amend**

18 Ordinarily, leave to amend a complaint should be freely given following an order of
19 dismissal, "unless it is absolutely clear that the deficiencies of the complaint could not be cured
20 by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987); *see also DeSoto v.*

21 *...* (1992) ("A district court does not err in
24 denying leave to amend where the amendment would be futile." (citing *Reddy v. Litton Indus.,*
25 *Inc.*, 912 F.2d 291, 296 (9th Cir. 1990)). Here, the Court concludes that granting leave to
26 amend would be futile. The Court can conceive of no possible cure for the deficiencies in
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Plaintiff's Complaint, particularly given the invalidity of Plaintiff's primary legal arguments as discussed above.

IV. CONCLUSION

Having reviewed the parties' motions, the responses in opposition thereto and replies in support thereof, along with the supporting declarations and exhibits and the remainder of the record, the Court hereby finds and ORDERS:

1) Plaintiff's Motion to Substitute (Dkt. #18) is GRANTED. The unsigned version of Exhibit A to Plaintiff's Complaint is replaced with the signed version submitted by Plaintiff.

2) Defendant's Motion to Dismiss (Dkt. #9) is GRANTED and the claims against it are DISMISSED in their entirety.

3) Defendant International Teamsters' Motion to Dismiss (Dkt. #15) is GRANTED and the claims against it are DISMISSED in their entirety.

4) Defendant Constantine's Motion to Dismiss (Dkt. #31) is GRANTED and the claims against him are DISMISSED in their entirety.

5) Defendants' Motion for Protective Order (Dkt. #28) is DENIED AS MOOT.

6) Plaintiff's Motion to Appoint Counsel (Dkt. #19) is DENIED.

7) Plaintiff's Motion for Joinder (Dkt. #20) is DENIED AS MOOT.

8) Plaintiff's Motion to Continue as Class Action (Dkt. #30) is DENIED AS MOOT.

9) This matter is now CLOSED.

DATED this 2 day of December, 2014



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

FILED

UNITED STATES COURT OF APPEALS

SEP 29 2017

FOR THE NINTH CIRCUIT

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

MARY H. STEELE-KLEIN,

Plaintiff-Appellant,

v.

INTERNATIONAL BROTHERHOOD
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business in Washington, headquarters,
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Defendants-Appellees.

No. 14-36083

D.C. No. 2:14-cv-00553-RSM
Western District of Washington,
Seattle

ORDER

Before: McKEOWN, BEA, and N.R. SMITH, Circuit Judges.

Appellant's motion for reconsideration (and corrected motion for reconsideration) is **DENIED**. The court will not entertain any further motions in this matter.