No. 18-___

IN THE

Supreme Court of the United States

NU IMAGE, INC., A CALIFORNIA CORPORATION,

Petitioner,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 2, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), federal courts have subject matter jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." In *Textron Lycoming Reciprocating Engine Div. v. United Auto., Aerospace and Agriculture Implement Workers of America*, 523 U.S. 653, 118 S.Ct. 1626, 140 L.Ed. 2d 863 (1998), this Court held that, where neither the employer nor the labor organization asserts that there has been a breach of a labor agreement, federal courts do not have jurisdiction over a suit seeking to invalidate the agreement. In so holding, however, the Court noted that "a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a [federal] court to declare the agreement invalid." *Id.* at 658.

Petitioner Nu Image and Respondent IATSE entered into a collective bargaining agreement, which Nu Image claims was fraudulently induced based on IATSE's representations that Nu Image would not have to make any residual contributions to IATSE's health and pension plans. The plans, third-party beneficiaries of the collective bargaining agreement, sued Nu Image in federal district court, claiming that Nu Image breached the agreement by failing to make residual contributions. Under established authority, Nu Image was unable to raise IATSE's fraud as a defense and it settled with the plans. Thereafter, IATSE filed an arbitration against Nu Image, also claiming that Nu Image breached the collective bargaining agreement by failing to make residual contributions to the plans. In that arbitration, the arbitrator may be without power to consider Nu Image's fraud defense.

Accordingly, Nu Image filed suit in federal district court against IATSE for fraud and declaratory relief. In a decision that misinterprets this Court's decision in *Textron* and conflicts with decisions from the Fifth and Seventh Circuits, the Ninth Circuit held that Section 301(a) permits the exercise of jurisdiction only when a *plaintiff* asserts that a *defendant* breached a labor agreement. As a result, the Ninth Circuit affirmed the district court's dismissal of Nu Image's lawsuit for lack of subject matter jurisdiction, effectively precluding Nu Image from seeking any relief for the millions of dollars of damages it has suffered as a result of IATSE's fraud.

Against this factual backdrop, the question presented by this Petition is:

Do federal courts have subject matter jurisdiction pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) over a complaint for intentional and negligent misrepresentation and declaratory relief, where the lawsuit seeks relief from claims that the plaintiff violated the parties' collective bargaining agreement?

CORPORATE DISCLOSURE STATEMENT AND PARTIES TO THE PROCEEDINGS

Pursuant to United States Supreme Court Rule 14(1)(b), Petitioner Nu Image, Inc. advises the Court that all parties to this proceeding are identified on the cover page, and that Nu Image Holdings, Inc. is the parent company of Nu Image, Inc.

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PETITION FOR WRIT OF CERTIORARI

Nu Image, Inc. ("Nu Image") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States District Court for the Central District of California (Appendix ("App.") 26a) can be located at *Nu Image, Inc. v. Int'l Alliance of Theatrical Stage Employees*, 2016 WL 917887 (C.D. Cal. Mar. 7, 2016). The published opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a) can be located at *Nu Image, Inc. v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of United States, Its Territories and Canada, AFL–CIO, CLC*, 893 F.3d 636 (9th Cir. 2018).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion on June 20, 2018. On August 7, 2018, the Ninth Circuit denied Nu Image's Petition for Rehearing *En Banc*. (App. 45a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (Section 301(a)) 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 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).

STATEMENT OF THE CASE

I. Factual Background[1]

Petitioner Nu Image is an independent film production company that employs, among others, motion picture production crew members in the United States. Those crew members are unionized and represented by Respondent IATSE,[2] a labor organization. (App. 53a, Complaint ¶ 9.) IATSE's standard collective bargaining agreement ("CBA"), titled the "Basic Agreement," requires that employers make residual contributions to the union's health and pension plans – the Motion Picture Industry Pension & Health Plans (the "Plans"). (App. 53a, Complaint ¶ 11.)

Between 1995 and 2006, Nu Image and IATSE had not agreed to an overall CBA governing all of Nu Image's motion picture productions ("Overall CBA"). (App. 54a, Complaint ¶ 13.) Instead, during that time, Nu Image and IATSE entered into single-production CBAs that governed their relationship on a motion-picture-by-motion-picture basis. (App. 54a, Complaint ¶ 14.) Under these single-production CBAs, Nu Image never paid, and neither the Plans nor IATSE ever

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[1] Because the district court dismissed the Complaint for lack of subject matter jurisdiction following a motion to dismiss, the Statement of the Case treats the facts alleged in the Complaint as true. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104, 118 S. Ct. 1003, 1017, 140 L. Ed. 2d 210 (1998).

[2] "IATSE" refers to Defendant and Appellee International Alliance of Theatrical Stage Employees Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC.

asked Nu Image to pay, residual contributions to the Plans. (App. 54a, 55a, Complaint ¶ 16.) This was consistent with IATSE's and the Plan's common practice of not seeking residual contributions on independent films. (App. 54a, 55a, Complaint ¶ 16.)

In 2006, Nu Image and IATSE entered into negotiations for an Overall CBA that would govern all further Nu Image motion pictures produced in the territory governed by the Overall CBA. (App. 55a, Complaint ¶ 17.) During the negotiations, Nu Image made clear to IATSE that it would not enter into an Overall CBA if it were required to make residual contribution payments to the Plans, and it sought confirmation from IATSE that it would not have to make such payments. (App. 55a, 56a, Complaint ¶¶ 18, 20.) Certain IATSE executives, including one who also was a Director of the Plans, represented to Nu Image that neither IATSE nor the Plans would seek residual contributions under any future CBA, such as the Overall CBA. (App. 55a, 56a, 57a, Complaint ¶¶ 19, 21–24.)

Relying on IATSE's representations that no residual contributions would be required, which were consistent with both IATSE's treatment of Nu Image's pictures in the past and IATSE's treatment of independent films generally, Nu Image entered into an Overall CBA with IATSE in May 2006, which incorporated the terms of the Basic Agreement (which required residual contributions). (App. 57a, Complaint ¶ 26.) Based on these same representations, Nu Image neither paid, nor believed it was obligated to pay, the residual contributions. (App. 57a, 58a, Complaint ¶¶ 26-27.)

Seven years later, in May 2013, the Plans sued Nu Image for breach of the Overall CBA, alleging that Nu Image failed to pay residual contributions called for

by the Overall CBA for the period May 1, 2006 to December 31, 2010. (App. 50a, Complaint ¶ 29.) Nu Image's defense to that claimed breach is a simple one – the agreement to make residual contributions to the Plans was procured by fraud (*i.e.,* IATSE's representations that the Plans would not seek residual contributions from Nu Image). (App. 56a, 57a, Complaint ¶¶ 21–24.) But, Nu Image could not assert a fraud defense to the Plans' lawsuit for breach of contract because, for policy reasons, contract law does not apply with full force in ERISA suits brought by trust funds, such as the Plans. *See Southern Cal. Retail Clerks Union & Food Emp'rs Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1265–66 (9th Cir. 1984) (holding that a fraudulent inducement defense "is not a legitimate defense to the Trust Funds' suit for delinquent contributions"); *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 775 (9th Cir. 1986) (same).

As a result, Nu Image was stuck between a rock and a hard place and, in February 2015, Nu Image settled the Plans' first lawsuit. (App. 59a, Complaint ¶ 31.)

In December 2014, the Plans filed a second lawsuit, asserting nearly identical claims as those asserted in the Plans' first lawsuit, but for the period January 1, 2011 through December 31, 2014. (App. 59a, Complaint ¶ 33.) Nu Image again could not assert a defense of fraud in the inducement, so it settled that lawsuit, as well, in November 2016.

Meanwhile, on March 9, 2015, IATSE filed its own arbitration grievance against Nu Image, claiming that Nu Image breached the Overall CBA by failing to pay residual contributions. In its grievance, IATSE seeks to collect the difference between "all residual contributions" that Nu Image allegedly owed under the Overall

CBA and the amount Nu Image paid to settle the Plans' first lawsuit. IATSE also claims that Nu Image's failure to pay residual contributions is "a continuing breach of the parties (*sic*) collective bargaining agreement."

Having been sued twice by the Plans and once by IATSE for an alleged breach of the Overall CBA, and having been accused of continuing to violate the Overall CBA by IATSE, on July 28, 2015, Nu Image filed its Complaint in district court against IATSE for intentional misrepresentation, negligent misrepresentation and declaratory relief. (App. 50a, Complaint.)

On September 8, 2015, IATSE moved to dismiss Nu Image's Complaint on the ground that the district court lacked subject matter jurisdiction under Section 301(a). On March 7, 2016, the district court granted IATSE's motion to dismiss, and Nu Image appealed.

II. Misinterpreting This Court's Decision In *Textron*, The Ninth Circuit Affirmed The Dismissal Of Nu Image's Complaint

The primary issue before the Ninth Circuit was whether this Court's decision in *Textron Lycoming Reciprocating Engine Div. v. United Auto., Aerospace and Agriculture Implement Workers of America*, 523 U.S. 653, 118 S.Ct. 1626, 140 L.Ed. 2d 863 (1998) forecloses jurisdiction pursuant to Section 301(a) over Nu Image's claims for misrepresentation and declaratory relief. (App. 8a.)

Nu Image argued that federal courts have Section 301(a) jurisdiction over claims for fraud in the inducement and declaratory relief when those claims are asserted to seek relief from accusations of breach of a labor agreement, whether those accusations were asserted by a party or a third-party beneficiary to the

labor agreement. (App. 10a.) In support of its position, Nu Image cited (among other cases) *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321 (9th Cir. 1988). Both sides and the Ninth Circuit acknowledged that *Rozay's Transfer* is on all fours with this case and, if still good law following this Court's decision in *Textron*, Nu Image would prevail.[3] In that case, the Ninth Circuit held that federal courts have subject matter jurisdiction pursuant to Section 301(a) over a plaintiff's claim for fraud in the inducement of a CBA where the plaintiff asserted its fraud claim to seek relief from accusations that it violated the CBA. *Id.* at 1325-26.[4]

IATSE argued, on the other hand, that this Court's decision in *Textron* "abrogated" *Rozay's Transfer* and foreclosed federal court jurisdiction over Nu Image's lawsuit. IATSE claimed that *Textron* limits Section 301(a) jurisdiction to allow federal courts to hear only

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[3] The Ninth Circuit expressly noted that Nu Image and IATSE "agree[d] that if *Rozay's Transfer* remains good law, then the district court had subject matter jurisdiction over this case." (App. 8a.)

[4] In *Rozay's Transfer*, Rozay's and a union entered into negotiations for a new CBA. *See Rozay's Transfer*, 850 F.2d at 1323. During negotiations, the union misrepresented that Rozay's would not have to make past contribution payments to the union's trust fund that were due under the new CBA. Incorrectly believing that its obligation to pay those contributions had been waived, Rozay's entered into the new CBA with the union. *Id.* at 1324. Southwest, the trust fund's assignee, subsequently sued Rozay's for failure to make payments under the new CBA, leading to a judgment against Rozay's. *Id.* at 1324. Rozay's then filed suit against the union for fraud in the inducement of the new CBA. *Id.* at 1324-25. The Ninth Circuit held that the district court had jurisdiction over Rozay's lawsuit because Section 301(a) jurisdiction includes an "action alleging fraudulent inducement in the formation of the agreement." *Id.* at 1326.

those cases in which the *plaintiff* alleges that a *defendant* violated a labor agreement.

The majority decision of the Ninth Circuit agreed with IATSE, concluding that the Court's reasoning in *Textron* suggests that Section 301(a) jurisdiction exists only if a *plaintiff* asserts "as an element of its claim a 'violation of the collective-bargaining agreement,' which Nu Image has not done." (App. 10a-12a.) The majority's decision misreads the decision in *Textron*. *Textron* held only that federal courts lack jurisdiction over an action attacking the validity of a labor agreement where *no party* has alleged a *prior* violation of a CBA. *Textron*, 523 U.S. at 658 (emphasis added). This Court explained in *Textron*, however, that, under Section 301(a), a "declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid." *Id.* at 658. That is precisely what Nu Image did here. Nu Image was accused of (and, indeed, was sued for) violating the Overall CBA by both IATSE and the Plans, and Nu Image seeks relief from those accusations of breach (which have already caused Nu Image to suffer millions of dollars of damages). The Ninth Circuit should have ruled in Nu Image's favor and this Court is Nu Image's last resort.[5]

[5] In his dissent, Judge Carlos T. Bea agreed with Nu Image's interpretation of *Textron*, stating that "the majority errs when it ignores *Textron's* clear guidance that [S]ection 301(a) extends subject matter jurisdiction to actions seeking declaratory relief from alleged violations of a CBA." (App. 19a.) Judge Bea also voted to grant Nu Image's Petition for Rehearing En Banc to review the Ninth Circuit's interpretation of *Textron*.

III. The Basis For Subject Matter Jurisdiction In The District Court

The basis for subject matter jurisdiction in the district court is the very issue presented in this Petition. Nu Image contends that because IATSE and the Plans asserted claims against Nu Image for breach of the Overall CBA, and Nu Image's misrepresentation and declaratory relief claims are brought in defense to those claims, the district court has jurisdiction under Section 301(a). Accordingly, in its Complaint, Nu Image alleged that jurisdiction was proper under Section 301(a) because:

> This action arises from IATSE's representations to Nu Image that if Nu Image entered into a [CBA] with IATSE, Nu Image would not be obligated to pay Residual Contributions as provided in the [Basic Agreement]. IATSE made these representations with the intention of inducing Nu Image into a CBA, and Nu Image reasonably relied on those representations. Nevertheless, [the Plans] *have claimed, and IATSE now claims, that Nu Image breached the CBA that it entered into in 2006 by failing to pay Residual Contributions*….

(App. 51a, Complaint ¶ 3 (emphasis added).)

REASONS FOR GRANTING THIS PETITION

I. Summary Of Argument Supporting Grant Of Review

Nu Image's Petition satisfies two grounds for review, as established by this Court's rules. First, the Ninth Circuit Court of Appeals "decided an important question of federal law that has not been, but should

be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* United States Supreme Court Rule 10(c). Second, the Ninth Circuit decision is "in conflict with the decision of another United States court of appeals on the same important matter." *See* United States Supreme Court Rule 10(a).

The Ninth Circuit erroneously interpreted *Textron* as suggesting that federal courts have jurisdiction under Section 301(a) *only if* a plaintiff alleges, as an element of its claim, that a defendant violated a labor agreement. This Court's holding in *Textron* did not directly address that issue. Instead, it addressed a situation where no party claimed that there had been a breach of a labor agreement, but one party was nevertheless attempting to invalidate the agreement prospectively. In that context, the Court held that Section 301(a) jurisdiction does not exist if there is no antecedent claim that a party breached a labor agreement. In the context of this case, the Court's reasoning fully supports Nu Image's position. Thus, the Ninth Circuit's decision both conflicts with this Court's reasoning in *Textron* and raises an important question of federal law that has not been, but should be, decided by this Court.

In addition, the Court should grant Nu Image's Petition because there is a Circuit split that should be resolved. The Ninth Circuit's decision is directly contrary to decisions in the Fifth and Seventh Circuits, which have held that Section 301(a) jurisdiction exists over a plaintiff's complaint seeking relief from prior accusations that the plaintiff violated a labor agreement – the precise issue here. The Court of Appeals for the Eighth Circuit is the only circuit to interpret *Textron* in a manner consistent with the

Ninth Circuit (but, as discussed below, the decision by the Eight Circuit Court of Appeals may be limited). This split in authority should be resolved.

The issue is also of considerable importance. The Ninth Circuit's decision essentially gives the perpetrator of a fraud – whether it be the union or the employer – a free pass, leaving the victim of the fraud with no recourse. Clearly, that is not what Congress intended when it enacted Section 301(a).

II. The Ninth Circuit Misinterpreted *Textron* As Requiring That A Plaintiff Allege, As An Element Of Its Claim, A Breach Of Contract

The Ninth Circuit misinterpreted *Textron* when it concluded that this Court suggested there is jurisdiction under Section 301(a) only if a *plaintiff* alleges that the *defendant* violated a labor agreement (*i.e.,* as an element of its claim). (App. 11a.) In *Textron,* this Court held that a federal court lacks jurisdiction to adjudicate the validity of a labor agreement when *neither* the plaintiff nor the defendant (or any non-party) alleges that a party to the CBA had previously breached the agreement. *Textron*, 523 U.S. at 658. But in reaching that decision, the Court suggested that a federal court has the ability to adjudicate the validity of a labor agreement where, as here, there is an antecedent claim that a party violated the labor agreement.[6]

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[6] Although the Ninth Circuit disregarded this Court's statements as *dicta*, "Supreme Court *dicta* 'have weight that is greater than ordinary judicial *dicta* as prophecy of what that Court might hold'; accordingly, [courts should] 'not blandly shrug them off because they were not a holding.'" *United States v. Montero-Camargo*, 208 F.3d 112, 1132 n. 17 (9th Cir. 2000) (Noonan, J., concurring and dissenting).

In *Textron*, the CBA between the employer (Textron) and the union prohibited the union from striking against Textron for any reason. Through the adoption of a separate memorandum agreement, the parties agreed that Textron would notify the union before it subcontracted out any work typically performed by union members. During negotiations of the CBA, the union repeatedly asked Textron whether it had any plans to subcontract out work typically performed by union members. Textron represented that it had no such plans. In June 1994, however, Textron announced that it would subcontract out work, thereby eliminating the jobs of about one-half of the union members. The union sued Textron, alleging that Textron fraudulently induced the union to sign the CBA by concealing its plan to subcontract work to non-union workers. As a result, the union sought a declaratory judgment that the agreement was voidable. The Supreme Court noted that the union had not alleged that "[the union] or Textron had ever violated the terms" of the CBA. *Id.* at 654-55. Nor did the union allege that it had threatened to strike or that Textron claimed a strike by the union would violate the CBA. *Id.* at 661. The union simply sought to invalidate the CBA *to allow* it to strike against Textron *in the future* without risking being in breach. *Id*. at 654–55.

This Court held that the district court lacked jurisdiction over the union's fraud in the inducement claim because there was no claimed "violation" of a labor agreement. *Id.* at 658. The union's lawsuit to declare a contract invalid so that it could take part in an activity in the future without risking a claimed violation of the CBA did not fall within Section 301(a) jurisdiction. *Id.*

Importantly, *Textron* did not foreclose (or even purport to foreclose) a federal court's ability to adjudicate the validity of a labor agreement under Section 301(a), stating its holding "does not mean that a federal court can never adjudicate the validity of a contract under [section] 301(a)." *Id.* at 658. The Court in *Textron* provided the following guidance:

> [Section 301(a)] simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense. [Citation omitted.] *Similarly, a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid.* But in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate "suits for violation of contracts."

Id. at 658 (emphasis added). The Court continued:

> This would seem to be the end of the matter. Here, the Union neither alleges that Textron has violated the contract, *nor seeks declaratory relief from its own alleged violation*.[7]

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[7] In Judge Carlos T. Bea's dissenting opinion below, he wrote that it is this highlighted "statement from the *Textron* court that causes me to diverge from the majority's opinion. In short …, my view is that the majority errs when it ignores *Textron's* clear

> Indeed, as far as the Union's complaint discloses, *both* parties are in absolute compliance with the terms of the [CBA]. Section 301(a) jurisdiction does not lie over such a case.

Id. (emphasis added). When the two statements above are read together, it is clear that if the union sought "declaratory relief from its own alleged violation," as Nu Image does here, the district court would have had jurisdiction under Section 301(a). The Ninth Circuit's decision to the contrary was erroneous.

III. The Ninth Circuit Decision Conflicts With Decisions Of The Fifth And Seventh Circuits

The Ninth Circuit decision below directly conflicts with decisions of the Fifth and Seventh Circuits. Both the Ninth Circuit and the district court recognized this conflict. (*See* App. 11a-12a ("We are mindful that this point has divided the circuits…., but in our judgment, absent some affirmative claim by the plaintiff of a violation of a contract, a district court does not have jurisdiction under section 301(a)."); App. 39a-40a ("While these cases arguably evidence a split of authority regarding the scope of the Supreme Court's holding in *Textron*, they do not require a different result here.").

The decision below squarely conflicts with several decisions of the Seventh Circuit. In *J.W. Peters, Inc. v. Bridge, Structural and Reinforcing Iron Worker, Local Union 1, AFL-CIO*, 398 F.3d 967, 973 (7th Cir. 2005), the employer and the union disputed whether

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guidance that section 301(a) extends subject matter jurisdiction to actions seeking declaratory relief from alleged violations of a CBA." (App. 19a.)

the employer had properly terminated a pre-hire agreement. The union sent a letter to the employer, insisting that the employer had not properly terminated the agreement and filed a grievance and request for arbitration. The employer, in turn, filed a complaint in federal court seeking declaratory judgment that the CBA between the parties had been repudiated and was no longer in effect with respect to the employer. *Id.* at 970-71.

The Seventh Circuit noted that it had previously held that a federal court has Section 301(a) jurisdiction over a dispute concerning the validity of the CBA in *International Bdh. of Electrical Workers, Local 481 v. Sign-Craft, Inc.,* 864 F.2d 499, 502 (7th Cir. 1988). The Seventh Circuit also noted that *Textron* subsequently held that "'suits for violation of contracts' under § 301 are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *J.W. Peters, Inc.*, 398 F.3d at 972. The Seventh Circuit concluded, however, that *Textron* did not "foreclose jurisdiction in this case." *Id.* at 972 (citing *Textron*, 523 U.S. at 655, 658).

> The Supreme Court [in *Textron*] specifically stated [] that "a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid" and emphasized that, in the case before it, "the Union neither alleges that Textron has violated the contract, nor seeks declaratory relief from its own violation." In this case, by contrast, [the employer] was accused of violating the terms of the collective bargaining agreement by attempting to terminate the collective bargaining relationship without providing proper notice.

> [The employer] sought declaratory relief from this alleged violation. Thus, this is a suit "for violation of contracts" within the meaning of § 301.

Id. at 973. *See also Newell Operating Co. v. Int'l Union of United Auto., Aerospace, and Agricultural Implement Workers of America,* 532 F.3d 583, 590 (7th Cir. 2008) (overruled on other grounds by *NewPage Wis. Sys. v. United Steel, Paper & Forestry*, 651 F.3d 775, 778 (7th Cir. 2011) ("This suit involves the alleged violation of the collective-bargaining agreement, and therefore falls within the plain terms of [Section 301(a)]."); *Stevens Constr. Corp. v. Chi. Reg'l Council of Carpenters*, 464 F.3d 682, 684 (7th Cir. 2006) (federal court has jurisdiction over employer's lawsuit that was filed "[i]n response to the grievance" filed by the union claiming the employer breached the parties' CBA).

These decisions in the Seventh Circuit directly support Nu Image's position and they are directly contrary to the Ninth Circuit's decision below.

More recently, the Fifth Circuit reached a similar conclusion. In *Houston Refining, L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 406, n. 16 (5th Cir. 2014), an employer brought an action against a union seeking to vacate an arbitration award that found the employer's suspension of matching contributions to its employees' 401(k) plans violated the parties' collective bargaining agreement. The employer, Houston Refining, argued that the existence of a CBA is necessary for subject-matter jurisdiction under Section 301(a). *Id.* at 400. The court first addressed "whether, under section 301(a), the existence of a labor contract is a requirement for federal subject-matter jurisdiction," as the employer argued.

Id. at 401. The court found that the existence of a contract is not a requirement because, in *Textron*, this Court found that "[a]n *allegation* of a labor contract violation is sufficient to support subject-matter jurisdiction under Section 301(a)." *Id.* at 402 (emphasis added). The Fifth Circuit's analysis of *Textron* is consistent with Nu Image's position and, again, directly contrary to the Ninth Circuit's decision below:

> *Textron* thus teaches that an "*alleged* violation" satisfies section 301(a)'s jurisdictional requirement.
>
> …
>
> This suit involves at least two alleged violations of a labor contract. *First, Houston Refining's complaint claimed that the Union alleged the company had violated a CBA*. Second, in requesting vacatur of the arbitral award, Houston Refining alleged that the award violated the terms of the 2006 CBA – assuming *arguendo* its existence. Accordingly, the district court properly exercised subject matter jurisdiction over this suit for "violation of contracts between an employer and a labor organization."

Id. at 406 (emphasis added).[8]

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[8] In addition to these two Courts of Appeals, numerous United States district courts have interpreted *Textron* and Section 301(a) consistent with Nu Image's position and contrary to the Ninth Circuit's decision below. *See, e.g., Needham Excavating, Inc. v. Int'l Union of Operating Engs., Local 150*, 2016 WL 9450447, at *2-3 (S.D. Iowa Jan. 5, 2016); *J.F. New & Assoc., Inc. v. Int'l Union of Operating Engineers, Local 150, ALF-CIO*, 2015 WL 1455258, at *4 (N.D. Ind. Mar. 30, 2015); *Stanker & Galetto, Inc.*

The Eight Circuit Court of Appeals is the only Court of Appeals to interpret *Textron* in a manner consistent with the Ninth Circuit. *See Gerhardson v. Gopher News Co.*, 698 F.3d 1052, 1058 (8th Cir. 2012) (finding that "*Textron* only permits a litigant to raise the validity of a contract as an affirmative defense, it does not allow such claims to be asserted offensively…. Under *Textron* …, the invalidity of a contract may be raised defensively in a contract enforcement action, but federal courts are not authorized to provide other relief on the same invalidity"). However, one subsequent district court distinguished *Gerhardson* where there was a prior accusation of breach made by the union, as IATSE has asserted against Nu Image in the pending arbitration. *See Needham Excavating, Inc. v. Int'l Union of Operating Engineers, Local 150*, 2016 WL 9450447 (S.D. Iowa Jan. 5, 2016) at *3 n.2 ("The Court finds NEI's allegations regarding the Quad Cities Heavy and Highway Agreement place its Complaint under the exception recognized by *Textron*: NEI asserts Local 150 has accused it of violating the Quad Cities Heavy and Highway Agreement and NEI thus responsively raises the invalidity of the CBA in its action for a declaratory judgment.").

The decision of the Ninth Circuit Court of Appeals is irreconcilable with decisions from the Fifth and

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v. The New Jersey Regional Council of Carpenters of the United Bhd. of Carpenters and Joiners of America, 2013 WL 4596947, at *2 (D.N.J. Aug. 28, 2013); *Vulcan Constr. Materials, L.P. v. Int'l Union of Operating Engineers, Local Union No. 150*, 2009 WL 5251889, at *4 (N.D. Ill. Nov. 25, 2009); *Joseph W. Davis, Inc. v. Int'l Union of Operating Engineers, Local 542*, 636 F. Supp. 2d 403, 410-11 (E.D. Penn 2008); *The Painting Co. v. District Council No. 9*, 2008 WL 4449262, at *4, *12 (S.D. Ohio Sept. 30, 2008).

Seventh Circuits. Review should be granted to resolve this conflict.

IV. This Petition Presents An Issue Of Considerable Importance

This Petition does not present a mere technical error or an innocuous split in authority. The Ninth Circuit's decision has the effect of precluding Nu Image, and other parties like it, from seeking relief in federal court and likely in *any* forum.

Nu Image has become liable to the Plans for millions of dollars arising out of claims that Nu Image violated terms of the Overall CBA, even though Nu Image *was fraudulently induced to enter into that agreement*. Nu Image was unable to raise its affirmative defense of fraud in the inducement to the Plans' lawsuits because of limitations in ERISA law. *See Southwest Administrators, Inc.*, 791 F.2d at 775. Nu Image also could not seek relief against IATSE in state court because claims for misrepresentation in connection with a labor agreement are preempted by Section 301(a). *See Bale v. General Telephone Co.*, 795 F.2d 775, 779-80 (9th Cir. 1986); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1012 (9th Cir. 2000). Nor could Nu Image obtain adequate relief from the National Labor Relations Board because the Board "is not authorized to award full compensatory or punitive damages to individuals affected by the unfair labor practice." *Gurley v. Hunt*, 287 F.3d 728, 731-32 (8th Cir. 2002). And, finally, Nu Image likely cannot obtain relief in an arbitration proceeding because such disputes are typically limited to disputes over "wage scales, hours of employment or working conditions." *See N.C. Mail Haulers & Postal Labor Local 8001 v. East Coast Leasing, Inc.*, No. 1:06-cv-00840, 2006 WL 3068497, at *6 (M.D.N.C. Oct. 27, 2006) (claim for fraudulent

inducement did not fall under the definition of grievance because it was "not related to 'wages, hours, and conditions of employment'"); *Mesquite Lake Assoc. v. Lurgi Corp.*, 754 F. Supp. 161, 163 (N.D. Cal. 1991) (denying motion to compel arbitration because "the [arbitration] clauses are clear in their definition of the three discrete areas of dispute subject to arbitration, and the complaint does not fall within those three areas").[9]

The Court should not let such an injustice stand. The Ninth Circuit's decision gives parties to a labor agreement (whether the employer or the union) an unfettered license to commit fraud. And this same injustice is likely to repeat itself, as demonstrated by *Rozay's Transfer* and the numerous decisions by the district courts and the Courts of Appeals in the Fifth, Seventh and Eighth Circuits cited above.

CONCLUSION

The Ninth Circuit misinterpreted *Textron* in a manner that unduly limits the scope of federal court jurisdiction granted by Section 301(a). When read properly, *Textron* holds only that a federal court lacks jurisdiction under Section 301(a) to hear disputes when neither party alleges that a labor agreement has been violated. The corollary inquiry presented in this Petition – whether the district court has jurisdiction when there is an antecedent claim of breach of a labor agreement – has not been directly decided by this

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[9] The Ninth Circuit incorrectly concluded that "Nu Image cannot complain about inequity, having intentionally withdrawn from arbitration…." (App. 13a.) Nu Image has not withdrawn from any arbitration; its arbitration against IATSE is still pending. Nu Image is simply attempting to pursue its fraud and declaratory relief claims in the correct forum – *i.e.*, in federal court – as IATSE will surely assert that Nu Image's fraud claim and defense (and its declaratory relief claim) are not arbitrable.

Court, but the Court's reasoning of *Textron* fully supports Nu Image's position that jurisdiction exists. The Court should grant review to extend its reasoning in *Textron* to the facts here. Review is also necessary to resolve the irreconcilable conflict in the Circuits. The issue at hand is important. The Ninth Circuit's decision not only closes the federal court doors to Nu Image, it effectively precludes all similarly situated fraud victims from pursuing their claims and obtaining relief in any forum.

Accordingly, Nu Image respectfully requests that the Court grant its Petition and reverse the judgment, allowing Nu Image's claims to proceed in the district court.

Respectfully submitted,

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November 2, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-55451
2:15-cv-05704-CAS-AFM

NU IMAGE, INC., a California corporation,

Plaintiff-Appellant,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC,

Defendant-Appellee.

OPINION

Appeal from the United States District Court for the Central District of California Christina A. Snyder, District Judge, Presiding

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Argued and Submitted December 7, 2017
Pasadena, California

Filed June 20, 2018

Before: Paul J. Kelly, Jr.,[*] Consuelo M. Callahan, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Kelly;
Dissent by Judge Bea

SUMMARY[**]

Labor Law

The panel affirmed the district court's dismissal for lack of subject matter jurisdiction of an action brought under the Labor Management Relations Act.

An employer alleged that a union engaged in intentional and negligent misrepresentation to induce it to enter into a collective bargaining agreement. The employer sought a declaratory judgment that part of the CBA was invalid.

The panel held that § 301(a) of the LMRA grants jurisdiction only for suits that claim a violation of a CBA, which the employer did not do. The panel rejected the argument that the LMRA grants a district court jurisdiction to hear any case in which a party, or third party, has alleged a violation of a CBA. The panel concluded that the court's holding in *Rozay's Transfer v. Local Freight Drivers, Local 208, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 850 F.2d 1321 (9th Cir. 1988), that an employer

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[*] The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

can sue under § 301(a) for declaratory relief to void a provision of a CBA without alleging a contract violation, could not stand following *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, & Agric. Implement Workers of Am.,* 523 U.S. 653 (1998). The panel further held that jurisdiction was not authorized under *Textron*'s holding that, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, a court may, consistent with § 301, adjudicate an affirmative defense that the contract was invalid.

Dissenting, Judge Bea wrote that he agreed with the majority that *Textron* abrogated the reasoning underlying *Rozay's Transfer*. Diverging from the majority, however, Judge Bea wrote that, under *Textron*, § 301(a) extends subject matter jurisdiction to actions seeking declaratory relief from alleged violations of a CBA. Because the employer sought relief from its accused violation of the parties' CBA, its claims should be allowed to proceed in federal court.

COUNSEL

Martin D. Katz (argued), Richard W. Kopenhefer, and Matthew G. Ardoin, Sheppard Mullin Richter & Hampton LLP, Los Angeles, California, for Plaintiff-Appellant.

David A. Rosenfeld (argued), William A. Sokol, and Michael D. Burstein, Weinberg Roger & Rosenfeld, Alameda, California, for Defendant-Appellee.

OPINION

KELLY, Circuit Judge:

This case concerns the scope of federal subject matter jurisdiction under section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.

§ 185(a). Plaintiff-Appellant Nu Image, Inc., brought suit in federal district court under section 301(a) against Defendant-Appellee International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO ("IATSE"). Nu Image claimed that IATSE engaged in intentional and negligent misrepresentation to induce Nu Image to enter into a collective bargaining agreement ("CBA") and sought a declaratory judgment that part of the CBA was invalid. The district court dismissed the action for lack of subject matter jurisdiction, holding that section 301(a) grants jurisdiction only for suits that claim a violation of a CBA, which Nu Image did not do. *Nu Image, Inc. v. Int'l All. of Theatrical Stage Emps.*, No. 2:15-CV-05704-CAS(AFMx), 2016 WL 917887, *4, *7 (C.D. Cal. Mar. 7, 2016). Having jurisdiction under 28 U.S.C. § 1291, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Prior to 2006, Nu Image, an independent movie production and marketing company, and IATSE, a labor organization that represents motion picture production crew members, entered into single production CBAs. These CBAs governed their relationship on a per-motion-picture basis. After 2006, Nu Image and IATSE entered into negotiations for an "Overall CBA" that would govern all motion picture productions. The Overall CBA required Nu Image to make residual contributions to the Motion Picture Industry Health and Pension Plans (the "Plans").

During negotiations for the Overall CBA, Nu Image alleges that it told IATSE "it would not agree to an Overall CBA if it were required to remit Residual Contribution payments to the Plans." 3 ER 318. Nu Image claims that IATSE orally represented that

neither IATSE nor the Plans would seek contribution. Between 2006 and 2009, Nu Image did not pay into the Plans and neither the Plans nor IATSE took the position that Nu Image was required to pay.

On May 13, 2013, however, the Plans sued Nu Image for breach of the Overall CBA for failure to pay residual contributions to the Plans from 2006 to 2010.[1] Nu Image informed the Plans of the prior oral agreement between Nu Image and IATSE; however, IATSE denied that any oral agreement occurred. On March 9, 2015, IATSE filed a grievance under the Overall CBA against Nu Image for its failure to pay into the Plans, which IATSE maintained was a "continuing breach of the parties' [CBA]." 3 ER 224. Nu Image and IATSE thereafter entered in arbitration. Nu Image soon hired new counsel, put the arbitration on hold, and filed the present suit. Asserting jurisdiction under section 301(a), Nu Image claimed that as a result of IATSE's intentional and negligent misrepresentation, Nu Image incurred and will continue to incur significant costs. Nu Image also claimed that IATSE claimed "that Nu Image breached the CBA . . . by failing to pay Residual Contributions." 3 ER 314. Nu Image finally sought declaratory relief requesting "a judicial determination that the Residual Contribution provisions in the [Overall CBA] do not apply to Nu Image." 3 ER 324. IATSE filed a motion to dismiss the complaint for lack of subject matter jurisdiction arguing that Nu Image's complaint was not a suit for violation of a contract. *See* Fed. R. Civ. P. 12(b)(1). The district court

[1] The Plans later filed a second suit on December 30, 2014, claiming a failure to pay from 2011 through 2014. That lawsuit was dismissed pending a further audit of Nu Image. On February 4, 2015, Nu Image settled the Plans' first lawsuit.

agreed and dismissed the action. This timely appeal followed.

DISCUSSION

A district court's dismissal for lack of subject matter jurisdiction is reviewed de novo. *Young v. United States*, 769 F.3d 1047, 1052 (9th Cir. 2014).

This case presents a difficult question regarding the scope of the jurisdiction granted by section 301(a). Nu Image argues that the LMRA grants a district court jurisdiction to hear any case in which a party, or third party, has alleged a violation of a CBA. According to Nu Image, it does not matter whether the plaintiff in a given case specifically alleges a violation of a CBA as an element of its claims. As a result, Nu Image contends that the district court has jurisdiction to hear this case because it arises out of the fact that IATSE accused Nu Image of violating the Overall CBA.

IATSE, on the other hand, argues that section 301(a) grants jurisdiction to hear only those cases in which the plaintiff alleges a claim based on a violation of a CBA. Because Nu Image does not allege that there has been a violation of the Overall CBA as an element of any of its claims contained in its complaint, IATSE argues that section 301(a) does not provide the district court with subject matter jurisdiction to resolve Nu Image's claims. We agree.

Section 301(a) grants federal courts jurisdiction to hear "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). This statute is an "exception to the primary jurisdiction doctrine [of the NLRB] . . . designed to afford the courts jurisdiction to resolve labor disputes that focused on the interpretation of the terms of the collective bargaining agreement." *Pace v. Honolulu*

Disposal Serv., 227 F.3d 1150, 1156 (9th Cir. 2000) (quoting *United Ass'n of Journeymen v. Valley Eng'rs*, 975 F.2d 611, 614 (9th Cir. 1992)). Section 301(a) is designed to allow federal courts the limited role of "enforc[ing] . . . collective bargaining agreements." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960).

This seemingly simple statute is complicated by precedent. We previously have allowed an employer to sue under section 301(a) for declaratory relief and misrepresentation to void a provision of a CBA. *See Rozay's Transfer v. Local Freight Drivers, Local 208, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 850 F.2d 1321 (9th Cir. 1988). In *Rozay's Transfer*, Rozay's Transfer, an employer, sued Teamster's Local 208 ("Teamster's") under section 301(a) for fraudulent inducement into executing a new CBA. *Id.* at 1323. During the negotiations for the new CBA, Rozay's had expressed concern that it might not be able to pay trust fund contributions that would be owed under the new CBA. *Id*. at 1324. Teamster's told Rozay's that it would ask the Trust Fund to waive them. *Id*. When asked, however, the Trust Fund refused to waive the contribution requirements. *Id.* Teamster's did not inform Rozay's of the denial and it entered into the new CBA. *Id.* Southwest Administrators, the Trust Fund's assignee, subsequently sued Rozay's for failure to pay into the fund. *Id.* Because Rozay's could not assert a fraudulent inducement claim against the fund under the law, Rozay's instead filed a separate suit against Teamster's for fraudulent inducement to recover its damages. *Id.* at 1324–25. The district court resolved the action in favor of Rozay's. *Id.* at 1325. On appeal, union amicus contested jurisdiction, arguing that this court did not have jurisdiction over the claim because the NLRB had exclusive jurisdiction. This court disagreed and

held that the district court had jurisdiction under section 301(a) to "entertain this action alleging fraudulent inducement in the formation of the agreement." *Id.* at 1325–26.

The parties agree that if *Rozay's Transfer* remains good law, then the district court had subject matter jurisdiction over this case. Since *Rozay's Transfer*, however, the Supreme Court decided *Textron Lycoming Reciprocating Engine Division, Avco Corp. v. United Automobile, Aerospace, and Agriculture Implement Workers of America,* 523 U.S. 653 (1998), which calls into doubt *Rozay's* holding. Thus, the question before us is whether *Rozay's Transfer* remains good law and, if not, whether *Textron* now forecloses section 301 jurisdiction over Nu Image's claims. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003).

In *Textron*, the United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") and Textron Lycoming Reciprocating Engine Division ("Textron") were parties to a CBA that "required Textron to give the Union seven days' notice before entering into any agreement to 'subcontract out' work." 523 U.S. at 654–55. Textron later announced that it would subcontract out its work, causing many Union members to lose jobs. *Id*. at 655. UAW sued under section 301(a) claiming that it was fraudulently induced into signing a CBA and seeking a declaratory judgment that the CBA was void. *Id*. Of importance, UAW did not allege that either it or Textron had violated the CBA. *Id*. Applying a textual analysis of section 301(a), the Court held that because "'[s]uits for violation of contracts' under [section] 301(a) *are not suits that claim a contract is invalid*, but suits that claim a contract has been violated," the district court lacked jurisdiction. *Id*. at 657 (emphasis added).

After careful consideration of both opinions, we conclude that *Textron* has abrogated the reasoning underlying *Rozay's Transfer*. In *Rozay's Transfer*, citing previously established circuit precedent, this court held that the declaratory relief and misrepresentation claims could move forward because "[s]ection 301 . . . applies not only to suits for breach of a collective bargaining agreement once it is duly formed, but also to suits impugning the existence and validity of a labor agreement." 850 F.2d at 1326. *Textron* clearly states that section 301(a)'s grant of jurisdiction does not sweep so broadly. 523 U.S. at 656. Thus, our holding in *Rozay's*, that an employer can sue under section 301(a) for declaratory relief to void a provision of a CBA all without alleging a contract violation, cannot stand after *Textron*.

This does not end the case though. *Textron* made clear that its holding "does not mean that a federal court can never adjudicate the validity of a contract under [section] 301(a)." 523 U.S. at 657. Instead,

> [Section 301(a)] simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with [section] 301(a), adjudicate that defense. *Similarly, a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid*. But in these cases, the federal court's power to adjudicate

> the contract's validity is ancillary to, and not independent of, its power to adjudicate '[s]uits for violation of contracts.'"

Id. at 657–58 (emphasis added) (citation omitted). Nu Image argues this language completely supports its position—Nu Image is "a declaratory judgment plaintiff" that has been "accused of violating a collective-bargaining agreement" and is now asking the court to "declare the agreement invalid." While Nu Image may admit that its suit is one claiming the contract is invalid (which *Textron* does not allow), it argues that in this context "ancillary" refers to "a federal court's power to entertain a declaratory judgment action as part and parcel of its jurisdiction over 'suits for violation of contracts' under Section 301(a)." Aplt. Reply Br. at 13. Therefore, its suit passes through the jurisdictional gateway and the court has jurisdiction.

Nu Image's reading of *Textron* ignores what *Textron* commands: a party must *first* pass through the jurisdictional "gateway" (by alleging a violation of contract) before asking if any of its additional claims (such as its declaratory judgment action to void the Overall CBA) are ancillary or independent. *Textron*, 523 U.S. at 658.

We hold that Nu Image has not crossed this initial threshold. Its claim is that part of the Overall CBA is invalid because IATSE misled Nu Image during the contract negotiations. Complaint at 2, *Nu Image, Inc v. Int'l All. of Theatrical Stage Emps.*, No. 2:15-CV-05704 (C.D. Cal. Mar. 7, 2016), ECF No. 1. Clearly, Nu Image seeks not the enforcement of a contract, but rather the *voiding of it*. Nu Image forthrightly asks "[f]or a judicial determination that the Residual Contribution provisions in the Basic Agreement do not

apply to Nu Image." *Id.* at 11. While its motivation for seeking this relief may be an *accusation* of a contract violation by IATSE, Nu Image did not bring suit "*because a contract has been violated*." *Textron*, 523 U.S. at 657. *Textron* bars suits claiming a contract is void unless a plaintiff also alleges as an element of its claim[2] a "violation of the collective-bargaining agreement," which Nu Image has not done. *Id.* at 661. To the contrary, Nu Image does not claim that either it or IATSE violated the Overall CBA. To restate: Nu Image filed suit seeking to void the CBA (which *Textron* clearly bars) based on an alleged state law misrepresentation claim (a theory the NLRB arguably has primary jurisdiction over, *see id.* at 662 (Stevens, J., concurring)), all under a statute that grants jurisdiction for only "[s]uits for violation of contracts." 29 U.S.C. § 185(a). This is a bridge too far.

Considering both the plain language of the statute, *Textron*'s holding, and the limited role of federal courts in labor disputes, we hold that Nu Image's claim is too far removed and too independent to pass through section 301(a)'s jurisdictional gateway. We are mindful that this point has divided the circuits, *compare Gerhardson*, 698 F.3d at 1058 ("*Textron* only permits a litigant to raise the validity of a contract as an affirmative defense; it does not allow such claims to be asserted offensively"), *with Hous. Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 406 n.16 (5th Cir. 2014) ("A plaintiff's claim that it

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[2] The dissent contends that section 301(a) does not require a violation of the CBA as an element of the claim. However, if section 301(a) grants federal courts jurisdiction to hear only "suits that claim a contract has been violated," *Textron*, 523 U.S. at 657, it is unclear how a suit could be filed in which a contract violation is *not* an element of that claim.

(and not the defendant) allegedly violated a labor contract is sufficient to support section 301 jurisdiction."), *and J.W. Peters, Inc. v. Bridge, Structural & Reinforcing Iron Workers, Local Union 1*, 398 F.3d 967, 973 (7th Cir. 2005), *as amended on denial of reh'g and reh'g en banc*, No. 04-2797, 2005 WL 957272 (7th Cir. Mar. 28, 2005) (holding that district court had jurisdiction over declaratory judgment plaintiff "accused of violating the terms of the collective bargaining agreement"), but in our judgment, absent some affirmative claim by the plaintiff[3] of a violation of the contract, a district court does not have jurisdiction under section 301(a).

The dissent advances two principal reasons against our reading of *Textron*. First, in its view, the examples provided in *Textron* (after invocation of the "gateway" metaphor) are all examples of the types of cases that automatically pass through the gateway and by holding otherwise, we are ignoring "clear guidance" in the form of Supreme Court dicta. Second, the dissent suggests that Nu Image is without recourse and our result favors IATSE. Neither reason is persuasive. Under the dissent's view, section 301(a) as a jurisdictional grant is limitless.

We reject the first reason because the dissent's broad reading of *Textron*'s gateway language does not make sense in context. Supreme Court dicta should be given "due deference," but it is the Court's holding that is ultimately binding. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000).

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[3] Of course, once a plaintiff makes a claim of violation of contract, the federal court obtains jurisdiction and section 301(a) "does not restrict the legal landscape [the federal court] may traverse." *Textron*, 523 U.S. at 658.

Textron's very next sentence—"the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate '[s]uits for violation of contracts'"—belies any notion that a party may pursue non-contract violation claims without first alleging a violation of contract. Concerning the second reason, Nu Image cannot complain about inequity, having intentionally withdrawn from arbitration to pursue a federal forum. The dissent also gives no reason, and we see none, why Congress cannot create a jurisdictional statute that at times allows one party into federal court but not another. It is not strange at all that Nu Image cannot file in federal court because IATSE *could* file a claim. *Cf. Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1 (1983).

In the end, the dissent's reading of the statute would expand section 301(a) beyond recognition. Any party seeking to invalidate a contract would have a federal forum merely by alleging that another party claimed, *in any context*, a contract violation. Section 301(a), a limited jurisdictional grant, cannot sweep so broadly.

IATSE also argues that *Rozay's Transfer* was implicitly overruled by the Supreme Court's opinion in *Granite Rock Co. v. Int'Z Bhd. of Teamsters*, 561 U.S. 287 (2010). Because we resolve the case on the reasoning above, we decline to rule on the applicability of *Granite Rock*.

AFFIRMED.

BEA, Circuit Judge, dissenting:

The majority opinion ignores clear guidance from the Supreme Court regarding the meaning of section 301(a) of the Labor Management Relations Act (the "LMRA"), *see* 29 U.S.C. § 185(a), and, in doing so, reaches a formalistic and impractical result which gives to a game-playing party, who is perhaps in violation of a collective bargaining contract ("CBA"), the option to avoid the federal court jurisdiction provided by section 301(a) of the National Labor Relations Act. Because I think this court is bound to give the Supreme Court's guidance deference, I respectfully dissent.

I

Plaintiff-Appellant Nu Image, Inc. ("Nu Image") is an independent movie production and marketing company. Defendant-Appellee International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada ("IATSE") is a labor union that represents motion picture production crew members.

In 2006, Nu Image and IATSE negotiated a universal CBA to govern their future dealings (the "Overall CBA"). The Overall CBA incorporated by reference a form CBA used by IATSE to govern its relationship with a variety of production companies. The form CBA included a provision that required production companies to make "residual contribution" payments to certain defined benefit plans (the "Plans"). During negotiations, Nu Image claims that it made it clear that it would not enter into the Overall CBA if it were required to make residual contribution payments to the Plans. Nu Image claims that, in response, IATSE

represented to Nu Image that neither IATSE nor the Plans would seek residual contribution payments from Nu Image. The parties then entered into the Overall CBA.

For seven years, Nu Image and IATSE operated and worked under the Overall CBA. Nu Image did not make residual contribution payments to the Plans. Neither the Plans nor IATSE requested residual contribution payments. In May 2013, however, the Plans, as beneficiaries to the Overall CBA, sued Nu Image for failure to make the residual contribution payments from 2006 through 2010 (the "First Plans-Nu Image Lawsuit"). Nu Image asked IATSE to inform the Plans that Nu Image was not required to make those payments, and to execute a side letter to that effect, but IATSE declined to do so.

When IATSE refused to execute the requested side letter, Nu Image filed a grievance against IATSE under the Overall CBA alleging that IATSE had fraudulently induced Nu Image to enter into the Overall CBA (the "Nu Image Grievance"). Importantly, Nu Image could not raise these arguments in the First Plans-Nu Image Lawsuit because fraud in the inducement of the underlying contract is not a defense in certain ERISA actions, such as the First Plans Nu-Image Lawsuit. *See Sw. Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 775 (9th Cir. 1986). As a result, Nu Image's only remedy was to seek indemnification from IATSE against the claims brought by the Plans in the First Plans-Nu Image Lawsuit.

In 2015, while the Nu Image Grievance was pending, Nu Image settled the First Plans-Nu Image Lawsuit with the Plans. But, in the meantime, the Plans sued Nu Image again, this time alleging that Nu Image had failed to make the required residual contribution

payments from 2011 through 2014 (the "Second Plans-Nu Image Lawsuit"). The Second Plans-Nu Image Lawsuit was dismissed without prejudice to allow the Plans to conduct a further audit of Nu Image.

In March 2015, IATSE submitted a grievance against Nu Image, pursuant to the overall CBA. It claimed that Nu Image breached the overall CBA by failing to make the required residual contribution payments and that Nu Image's failure to make those payments was a "continuing breach" of the Overall CBA (the "IATSE Grievance"). IATSE sought to recover the difference between the residual contribution payments Nu Image should have made under the Overall CBA and the amount Nu Image had paid to the Plans to settle the First Plans-Nu Image Lawsuit.

Nu Image and IATSE moved toward arbitration on both the Nu Image Grievance and the IATSE Grievance. However, Nu Image then retained new counsel, who put the grievance proceedings on hold. Subsequently, Nu Image filed a complaint against IATSE in the District Court for the Central District of California (the "Complaint"). The Complaint alleges claims for Intentional Misrepresentation, Negligent Misrepresentation, and Declaratory Relief. In the Complaint, Nu Image seeks a judicial determination that residual contribution provisions of the Overall CBA do not apply to Nu Image and a finding that IATSE must indemnify Nu Image for any damages Nu Image incurs as a result of the Plans' lawsuits.

The Complaint asserted that the district court had subject matter jurisdiction pursuant to section 301(a) of the LMRA, which allows district courts to hear "Suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185. IATSE filed a motion to dismiss the Complaint for lack of subject

matter jurisdiction, arguing that the Complaint was not a suit "for violation of" a contract. *See* Fed. R. Civ. P. 12(b)(1). The district court agreed with IATSE and dismissed the Complaint. In response, Nu Image filed the instant appeal.

II

This case presents a difficult question, made more difficult by complicated precedent, regarding the scope of the federal court jurisdiction granted by section 301(a) that is complicated by precedent. Nu Image argues that the LMRA grants district courts jurisdiction to hear any case in which a party, or third party, has alleged a violation of a CBA, regardless whether the plaintiff in a given case specifically alleges a violation of a CBA as an element of its claims. IATSE, on the other hand, argues that section 301(a) grants jurisdiction to hear only those cases in which the plaintiff alleges a claim based on a violation of a CBA. Because Nu Image does not allege that there has been a violation by IATSE of the Overall CBA as an element of any of the claims in its Complaint, IATSE argues that section 301(a) does not provide the district court with subject matter jurisdiction in this case.

As the majority recognized, we have previously allowed claims substantively identical to Nu Image's to proceed under section 301(a). *See Rozay's Transfer v. Local Freight Drivers, Local 208, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 850 F.2d 1321 (9th Cir. 1988). In *Rozay's Transfer*, we held that that the district court had jurisdiction under section 301(a) to "entertain this action alleging fraudulent inducement in the formation of the agreement." *Id.* at 1325–26. If *Rozay's Transfer* remains good law, the parties agree that the district court had subject matter jurisdiction over Nu Image's claims.

The majority correctly notes that the subsequent Supreme Court precedent has called our decision in Rozay's Transfer into doubt. *See Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653 (1998). Thus, the first question we must answer in this case is whether Textron impliedly abrogated our decision in Rozay's Transfer.[1]

I agree with the majority that *Textron* clearly abrogated the reasoning underlying *Rozay's Transfer*.[2] In *Textron*, the Supreme Court held that "'Suits for violation of contracts' under [section] 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *Id.* at 656–58. The *Textron* explained that that a "Suit for violation of" a contract "is one filed *because a contract has been violated*." *Id.* (emphasis in the original). The Court concluded that because "the [plaintiff] Union neither allege[d] that [the employer] has violated the contract,

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[1] *Textron* did not directly address our opinion in *Rozay's Transfer*. Thus, any abrogation of our precedent would be implied, not direct.

[2] In *Textron*, an employer and labor union negotiated a CBA. 523 U.S. at 654–55. During negotiations, the labor union repeatedly asked the employer if it had any plans to shift its production to non-union channels; the employer stated that it had no such plans. *Id.* After the CBA had been signed, the employer announced plans to shift its production to non-union channels. *Id.* The union filed suit in federal court, seeking a declaration that the CBA was invalid due to the employer's misrepresentation. *Id.* The union claimed the district court had jurisdiction under section 301(a), but the district court dismissed the suit because it did not view it as a "suit for violation" of the CBA. *Id.* The third circuit reversed, holding that there was jurisdiction because the suit sought to invalidate the CBA. *Id.* The Supreme Court reversed the Third Circuit, finding that there was no jurisdiction under section 301. *Id.*

nor [sought] declaratory relief from its own alleged violation," the suit was not one "for violation of" a CBA and, as a result, there was no jurisdiction under section 301(a). *Id.* (emphasis added).

It is this last, underlined statement from the *Textron* court that causes me to diverge from the majority's opinion. In short, although the majority is correct that *Textron* abrogates the reasoning of *Rozay's Transfer*, my view is that the majority errs when it ignores *Textron*'s clear guidance that section 301(a) extends subject matter jurisdiction to actions seeking declaratory relief from alleged violations of a CBA.

There are two relevant statements from *Textron* that lead me to conclude that the district court had subject matter jurisdiction over Nu Image's claims. First, *Textron* states that its holding "does not mean that a federal court can never adjudicate the validity of a contract under § 301(a)." Instead:

> [Section 301(a)] simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense. *Similarly, a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid.* But in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not

> independent of, its power to adjudicate "[s]uits for violation of contracts."

Id. (citations omitted) (emphasis added).

The *Textron* Court went on to note that:

> [T]he Union neither allege[d] that Textron has violated the contract, *nor [sought] declaratory relief from its own alleged violation*. Indeed, as far as the Union's complaint disclose[d], both parties [were] in absolute compliance with the terms of the collective-bargaining agreement. Section 301(a) jurisdiction does not lie over such a case.

Id. (emphasis added).

When read in conjunction, these two statements imply that had the union in *Textron* sought "declaratory relief from its own alleged violation" of the CBA, the district court would have had jurisdiction under section 301(a). Because Nu Image seeks precisely that sort of relief in this case, these statements from *Textron* support the conclusion that the district court had jurisdiction over Nu Image's claims.[3]

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[3] IATSE argues that these statements are mere dicta and should not overshadow *Textron*'s core holding. But IATSE's position is untenable in light of our repeated holding that we do "not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference." *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000). Indeed, "Supreme Court dicta 'have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold'; accordingly, we do 'not blandly shrug them off because they were not a holding.'" *Id.* (quoting *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir.1992) (Noonan, J., concurring and dissenting)). This deference is particularly persuasive in light of our rule that well-

The majority makes much of the *Textron* court's statement regarding the "gateway" through which parties must pass into federal court. But the majority's reading of that passage is both strained and inconsistent with other portions of *Textron*. It is true that section 301(a) creates a "gateway" through which parties must pass before a district court may exercise jurisdiction over a claim that a CBA is invalid. But the *Textron* court provides two examples of cases that have passed through the jurisdictional gateway other than by alleging a violation of a contract as an element of a claim. First, a *defendant* in a section 301(a) suit who raises the invalidity of the CBA *as a defense* in a breach of contract action. Second, a *plaintiff* who brings a declaratory judgment action seeking relief from the *plaintiff's* alleged violation[4] of a CBA.

The *Textron* court clearly meant both examples it gave to serve as illustrations of cases *where the parties had passed through the gateway* erected by section 301(a). That understanding is further confirmed by the *Textron* court's later statement that the district court lacked jurisdiction, in part, because the union did not seek "declaratory relief from its own alleged violation" of the CBA, implying that the district court would have had jurisdiction had the union sought declaratory relief from its alleged violation of the CBA. Seeking declaratory relief from an alleged violation of a CBA is sufficient to pass through section 301(a)'s gateway. If these two examples given by the *Textron*

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reasoned dicta in panel opinions is the binding law of the circuit. *See United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001).

[4] Notably, the *Textron* court does not require a declaratory judgment plaintiff to state in the complaint that it *actually* violated the CBA, merely that it has been "accused" of violating the CBA, as Nu Image has done here. 523 U.S. at 656.

Court do not provide an illustration of situations in which federal courts have jurisdiction to hear disputes regarding CBAs, in addition to cases in which a plaintiff asserts a breach of contract action, what *do* the *Textron* Court's words mean? The majority opinion elides an answer.

In this case, because Nu Image seeks relief from its accused violation of the Overall CBA, it has passed through section 301(a)'s "gateway," and its claims should be allowed to proceed in federal court. This result makes sense. After all, a breach of contract claim and a claim seeking declaratory relief from an alleged violation of a contract are flip sides of the same coin. It would be strange indeed if a district court could exercise subject matter jurisdiction over one, but not the other. Instead, the Supreme Court correctly recognized that the power to hear declaratory judgment actions seeking relief from an accused violation of a contract is "ancillary"[5] to, or part and parcel with, a

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[5] The parties vehemently disagree over what Justice Scalia expressed when he used the word "ancillary." IATSE argues that Justice Scalia was referring to the court's "ancillary jurisdiction," thereby implying that there had to be an independent basis for jurisdiction to allow the court to reach a declaratory judgment action. That interpretation is unpersuasive for a number of reasons. First, Justice Scalia did not specifically invoke the doctrine of "ancillary jurisdiction," which allowed federal courts to exercise jurisdiction over certain claims because they were closely related to claims over which the court had subject matter jurisdiction and was ultimately replaced by statute by the doctrine of supplemental jurisdiction. More importantly, by the time *Textron* was decided, the concept of "ancillary jurisdiction" had been replaced with "supplemental jurisdiction," which would make a reference to a legal doctrine that was defunct at the time odd at best. *See* 28 U.S.C. § 1367(a) (1990). It would be uncharacteristic of a punctilious wordsmith such as Justice Scalia to use a superseded term, without adding at least an "obs." (for obsolete)

court's power to hear the underlying breach of contract action.

Aside from its reference to the *Textron* court's "gateway," the majority provides no support for its decision to discard clear guidance from the Supreme Court. Ignoring the Supreme Court's direction, the majority insists that a violation of the CBA must be "an element of [Nu Image's] claim," a requirement found in neither the statute nor *Textron*. Such a formalistic approach defies the *Textron* court's reading of section 301(a) as providing jurisdiction over suits "filed because a contract has been violated." Simply put, a suit seeking declaratory relief from an alleged violation of a contract is a suit filed "because" of an accused violation of the contract.[6]

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after "ancillary." Finally, Justice Scalia's statement regarding declaratory judgment plaintiffs came in the context of his examples of when a court could "adjudicate the validity of a contract under § 301(a)." 523 U.S. 657–58. This context indicates that these examples, including that of a declaratory judgment plaintiff, are examples where the court has jurisdiction under section 301(a). *See* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180–82 (2012) (noting that the Harmonious-Reading Canon requires that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory").

[6] The majority contends that my reading of *Textron* would "expand section 301(a) beyond recognition" and grant any party access to federal court "merely by alleging that another party claimed, *in any context*, a contract violation." This characterization ignores *Textron*'s limiting guidance: a suit for violation of a contract is a suit "filed because a contract has been violated." This language demonstrates that there must be some causal link between the alleged contractual violation and the lawsuit. Thus, a plaintiff's mere allegation that another party had alleged a contract violation in a wholly unrelated context would be insufficient to invoke Section 301(a)'s jurisdictional grant. Here,

Additionally, the majority's opinion means that parties in Nu Image's position cannot independently choose to present their arguments in a judicial forum. As discussed above, Nu Image could not raise its arguments regarding the validity of the CBA's residual contribution payment provision in the First or Second Plans-Nu Image Lawsuits because our precedent bars such arguments in certain ERISA cases. *See* discussion *supra* at 15–16. Thus, Nu Image was left to pay the Plans and seek compensation from IATSE after the fact. But while the majority's decision means that section 301(a) empowers IATSE to sue Nu Image in federal court for failure to make the residual contribution payments—a right the Plans also have under ERISA—it deprives Nu Image of the opportunity to press its claims or defenses in that same court unless IATSE chooses a judicial forum. This result is not only inefficient, it also gives one party—IATSE, in this case—the power to dictate whether another party—here, Nu Image—can raise its arguments in a judicial forum, or only in the grievance forum, which IATSE now prefers. The majority's opinion fails to justify this strange outcome.

To summarize, an examination of *Textron* in the context of this case would lead me to two holdings. First, I would hold that *Textron* has abrogated the reasoning of *Rozay's Transfer*. Not all suits asserting that a CBA is void invoke the district court's jurisdiction pursuant to section 301(a). Second, following *Textron*'s guidance, I would hold that a district court has jurisdiction to hear a declaratory judgment action

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however, Nu Image seeks declaratory relief *from the very violation* IATSE has alleged. There is a clear, definitive link between the alleged violation and Nu Image's claim, rendering this a suit "filed because a contract has been violated."

brought by a plaintiff seeking relief from what a counterparty to the CBA has alleged is a violation of a CBA. Because Nu Image's Complaint seeks just this sort of relief, I would hold the district court had jurisdiction under section 301(a) to hear Nu Image's claims and erred in dismissing those claims for want of subject matter jurisdiction.[7]

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[7] Finally, because I would hold that *Textron* did not here remove jurisdiction from the district court, it would be necessary to reach IATSE's alternative argument that Nu Image's claims are barred by the Supreme Court's opinion in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010). I would hold that *Granite Rock* does not bar jurisdiction in this case. IATSE argues that *Granite Rock* stands for the proposition that no tort claim is cognizable under section 301(a) and, as a result, Nu Image's Complaint, which is based on tort-misrepresentation does not fall within section 301(a)'s grant of jurisdiction. There are at least two problems with this argument.

First, Nu Image's claims sound, at least partially, in contract. A suit for a declaratory judgment that a contract is unenforceable as a result of a fraudulent misrepresentation can be maintained as an action in contract. *Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015) ("A claim for declaratory judgment as to the existence of a contract is an action sounding in contract."); *see generally* 1A C.J.S. Actions § 126. Thus, at a minimum, Nu Image's request for a declaration that the residual contribution provisions of the CBA are unenforceable survives *Granite Rock*.

Second, *Granite Rock*'s holding is not as broad as IATSE contends. The *Granite Rock* court itself "emphasize[s]" that its holding is a narrow one. 561 U.S. at 312. The *Granite Rock* court simply declined to recognize a new federal common law tort for tortious interference with a CBA. *Id.* at 312–13. *Granite Rock* did not speak to the availability of misrepresentation actions under section 301(a). Because Nu Image does not bring a claim for tortious interference with a CBA, *Granite Rock* does not bar Nu Image's claims.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL
'O' JS-6

Case No. 2:15-cv-05704-CAS(AFMx)

Date March 7, 2016

Title NU IMAGE, INC V. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC

Present: The Honorable CHRISTINA A. SNYDER

Catherine Jeang
Deputy Clerk

Not Present
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) - DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION (Dkt. 19, filed September 8, 2015)

I. INTRODUCTION

On July 28, 2015, plaintiff Nu Image, Inc. ("Nu Image") filed the operative complaint in this action

against defendant International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories, and Canada, AFL-CIO, CLC ("IATSE"). Plaintiff's complaint is based on Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("LMRA"), and asserts claims for (1) intentional misrepresentation, (2) negligent misrepresentation, and (3) declaratory relief. In brief, this action seeks damages that have resulted from defendant IATSE's alleged misrepresentations regarding plaintiff's residual payment obligations under a collective bargaining agreement.

On September 8, 2015 defendant filed the instant 12(b)(1) motion to dismiss for lack of subject matter jurisdiction or, in the alternative, compel arbitration. Dkt. 19. On October 5, 2015, plaintiff filed an opposition, dkt. 23, and on October 9, 2015, defendant replied, dkt. 24. Having carefully considered the parties' arguments, the Court finds and concludes as follows.

II. BACKGROUND

Nu Image is a full-service, independent production company that produces and markets motion pictures in the United States and abroad. Compl. at ¶ 6. Defendant IATSE is a labor organization that represents motion picture production crew members in the United States. *Id.* at ¶ 9. The complaint alleges that prior to 2006, Nu Image and IATSE entered into single-production collective bargaining agreements ("CBAs") that governed their relationship on a per-motion picture basis. *Id.* at ¶ 14. Nu Image states that under these single-production agreements, it never paid, and was never asked to pay, residual contributions to the Motion Picture Industry Health and Pension Plans (the "Plans"). Such payments are typically

required under the producer-IATSE and MPTAAC Basic Agreement ("Basic Agreement"). *Id.* at ¶¶ 16, 18.[1]

However, in 2006 Nu Image and IATSE entered into negotiations for an "Overall CBA" that would govern every Nu Image motion picture produced in the territory governed by the CBA. Id. at ¶ 17. Nu Image alleges that during these negotiations it made "abundantly clear" to IATSE "that it would not agree to an Overall CBA if it were required to remit Residual Contribution payments" to the Plans, as provided in the Basic Agreement. *Id.* at ¶¶ 3, 18. Nu Image further alleges that IATSE executives represented to Nu Image on multiple occasions that neither IATSE nor the Plans would seek residual contributions under any future CBA, including the Overall CBA. *Id.* at ¶¶ 18, 21.

Nu Image further avers that in reliance upon IATSE's representations that Nu Image would not have to pay residual contributions in the future, Nu Image agreed to enter into the Overall CBA, which purports to incorporate the terms of the Basic Agreement. *Id.* at ¶ 26. On its face, the Basic Agreement, as incorporated into the Overall CBA, *does* require the payment of Residual Contributions to the Plans; however, Nu Image alleges that in reliance upon IATSE's representations, Nu Image neither paid nor believed it was obligated under the Overall CBA to pay residual contributions between 2006 and 2009. Id. at ¶¶ 3, 27. Nu Image

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[1] The Basic Agreement is the standard agreement negotiated by IATSE and major motion picture production studios, and typically governs the relationship between an employer and IATSE. Compl. at ¶ 9. Nu Image alleges that independent producers like Nu Image were not involved in the negotiations giving rise to the Basic Agreement, and as such the Basic Agreement was not drafted with the business model of independent producers in mind. Id. at ¶ 9.

further asserts that during that same time period, neither IATSE nor the Plans took the position that Nu Image was obligated to remit residual contributions to the Plans. *Id.* at ¶ 27.

However, on May 13, 2013, the Plans sued Nu Image for breach of the Overall CBA (the "Plans' First Lawsuit"), based upon Nu Image's failure to pay residual contributions for the period of May 1, 2006 through December 31, 2010.[2] *Id.* at ¶ 30. Following the filing of the Plans' First Lawsuit, Nu Image asked IATSE to inform the Plans that Nu Image was not required to make residual contributions under the Overall CBA and that the Plans' demand for such payments was erroneous. *Id.* Nu Image alleges that IATSE denied that any oral representations regarding the residual payments had ever been made, and accordingly refused to corroborate Nu Image's contentions regarding the lack of any duty to make the payments under the Overall CBA. *Id.*

The Plans' First Lawsuit ultimately settled on or around February 4, 2015. *Id.* at ¶ 31. However, the Plans also filed a second lawsuit alleging the same claims for the period from 2011 through 2014.[3] *Id.* at ¶ 33. Accordingly, Nu Image alleges that "as a direct result of IATSE's misrepresentations," Nu Image "incurred significant amounts of money to defend against and settle the [Plans' First Lawsuit]" and

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[2] According to the complaint in the instant suit, the Directors of the Plans ("Directors") oversee the management and administration of the Plans. Compl. at ¶ 12. If the Directors believe that an employer has failed to make proper contributions, the Directors have the authority to file a lawsuit to recover unpaid contributions. *Id.*

[3] The complaint alleges that this lawsuit was dismissed pending the Plans' further audit of Nu Image. *Id.* at ¶ 33.

continues to face the possibility of additional suits for allegedly delinquent residual contributions for later time periods. *Id.* at ¶¶ 32-33. In the instant complaint, Nu Image thus brings claims for intentional misrepresentation, *id.* at ¶¶35-42, negligent misrepresentation, *id.* at ¶¶ 43-47, and declaratory relief, *id.* at ¶¶ 48-50. In connection with its claim for declaratory relief, Nu Image "requests a judicial determination that Nu Image's contentions . . . are correct, and that IATSE is obligated to indemnify or otherwise compensate Nu Image for any liability it incurs in the future to the Plans arising from the non-payment of Residual Contributions and for the cost of defending against any further lawsuit brought by the Plans seeking Residual Contributions." *Id.* at ¶ 50.

III. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss an action pursuant to Federal Rule of Civil Procedure 12(b)(1) raises the objection that the federal court has no subject matter jurisdiction over the action. This defect may exist despite the formal sufficiency of the allegations in the complaint. *T.B. Harms Co. v. Eliscu*, 226 F. Supp. 337, 338 (S.D.N.Y. 1964), *aff'd* 339 F.2d 823 (2d Cir. 1964). When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

Once a Rule 12(b)(1) motion has been raised, the burden is on the party asserting jurisdiction. *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th

Cir. 1995); *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000). If jurisdiction is based on a federal question, the pleader must show that he has alleged a claim under federal law and that the claim is not frivolous. *See* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1350, pp. 211, 231 (3d ed. 2004). If jurisdiction is based on diversity of citizenship, the pleader must show real and complete diversity, and also that his asserted claim exceeds the requisite jurisdictional amount of $75,000. *See id.*

IV. DISCUSSION

A. Subject Matter Jurisdiction under LMRA § 301(a)

Defendant IATSE argues that the Court lacks subject matter jurisdiction under section 301 of the Labor Management Relations Act ("Section 301"). Section 301(a) of the Labor Management Relations Act 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 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). Accordingly, defendant contends that because plaintiff's complaint fails to allege a breach of contract, and Section 301 confers jurisdiction only to adjudicate breach of contract claims (i.e., "suits for violation of contracts"), the Court accordingly lacks subject matter jurisdiction to

adjudicate this action. Motion at 1. In advancing its argument regarding lack of subject matter jurisdiction, defendant primarily relies upon the Supreme Court's decision in *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653 (1998). The parties' chief dispute in the instant motion is whether, in light of *Textron*, this Court retains subject matter jurisdiction under Section 301 to adjudicate plaintiff's misrepresentation and declaratory relief claims.

1. The Supreme Court's Decision in *Textron*

The plaintiff-union in *Textron* had alleged that the defendant-employer fraudulently induced the union to sign a collective-bargaining agreement. *Id.* at 655. As in the instant case, the plaintiff in *Textron* claimed that both before and during CBA negotiations, the defendant made material misrepresentations that influenced plaintiff's decision to enter the CBA—in that case, misrepresentations regarding the employer's plans to subcontract out work that would otherwise be performed by union members. *Id.* As redress, the union sought "a declaratory judgment that the existing collective bargaining agreement between the parties is voidable," and "compensatory and punitive damages . . . to compensate [the Union and its members] for the harm caused by [Textron's] misrepresentations and concealments." *Id.* (alterations in original). Furthermore, as in the instant suit, the plaintiff in *Textron* "[did] not allege that either it or [the defendant] ever violated the terms of the collective-bargaining agreement." *Id.*

The Court in *Textron* concluded that "[b]ecause the Union's *complaint* alleges no violation of the collective-bargaining agreement, neither [the Supreme Court]

nor the federal courts below have subject matter jurisdiction over th[e] case under § 301(a) of the Labor-Management Relations Act." *Id.* at 661-662 (emphasis added). "By its terms," the Court explained, Section 301 "confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts.'" *Id.* at 656. Accordingly, the Court rejected the contention that Section 301 was "broad enough to encompass not only a suit that 'alleges' a violation of contract, but also one that concerns a violation of contract, or is intended to establish a legal right to engage in what otherwise would be a contract violation." *Id.* Simply put, "a suit 'for violation of a contract' is not one filed with a view to' a future contract violation . . . It is one filed *because a contract has been violated*." *Id.* at 657. Similarly, and more relevant to the instant action, "'[s]uits for violation of contracts' under § 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *Id.*

In the instant action, it is undisputed that plaintiff's complaint does not allege a breach of the CBA. However, the parties dispute whether, in light of *Textron*, the lack of any such allegation deprives the court of subject matter jurisdiction under Section 301. Plaintiff argues that *Textron* does not require that the complaint in the instant suit include a claim for breach of contract in order to maintain subject matter jurisdiction under Section 301. Opp'n at 11. In *Textron*, as plaintiff notes,

> [The plaintiff-union] neither allege[d] that Textron ha[d] violated the contract, nor [sought] declaratory relief from its own alleged violation. Indeed, as far as the Union's complaint disclose[d], both parties [were] in absolute compliance with the terms of the collective-

> bargaining agreement. Section 301(a) jurisdiction does not lie over such a case.

Textron, 523 U.S. at 658. Thus, according to plaintiff, *Textron* "merely requires that a party – *i.e.*, any party, including the union or a trust fund – has asserted a violation of a labor contract before a federal court has jurisdiction under section 301." Opp'n at 11 (citing *Textron*, 525 U.S. at 657-58). Plaintiff further asserts, citing to various cases outside of the Ninth Circuit, that the essential allegation regarding a contractual violation "*need not be asserted in the same lawsuit*, in federal court, or, for that matter, in any adversarial proceeding." *Id.* (emphasis added). In other words, plaintiff argues that so long as an allegation of a contractual breach has been brought by anyone—even a non-signatory to the agreement (e.g., the Plans in the instant suit), and even outside the context of a lawsuit—then Section 301 grants this Court subject matter jurisdiction to adjudicate an action like the instant case.

The Court disagrees and finds that plaintiff relies upon a misreading of *Textron*. It is true, as plaintiff notes, that the plaintiff-union in *Textron* "d[id] not allege that either it or [defendant-employer] ever violated the terms of the collective-bargaining agreement." *Textron*, 525 U.S. at 655. Here, in contrast to the plaintiff-union in *Textron*, Nu Image asserts that it has been accused of violating the Overall CBA (outside the context of this lawsuit) and has filed this action "because of" the alleged violation. Opp'n at 13. However, this distinction is insufficient to confer jurisdiction in the instant action, which "obviously does not have as its 'purpose or object' violation of any contract." *Textron*, 525 U.S. at 657. The holding in *Textron* was that "neither [the Supreme Court] nor the federal courts below have

subject matter jurisdiction over th[e] case under" Section 301 "[b]ecause the [plaintiff's] *complaint alleges no violation* of the collective-bargaining agreement." *Id.* at 661-62 (emphasis added).

Of course, "[i]f [Nu Image's] allegations are true, it seems clear that [IATSE] violated its statutory duty to bargain in good faith." *Id.* at 662 (Stevens, J., concurring). However, *Textron's* holding that the federal courts do not have Section 301 jurisdiction over a suit like the instant action "comports with the important goal of protecting the primary jurisdiction of the National Labor Relations Board in resolving disputes arising from the collective-bargaining process." *Id.* (Stevens, J., concurring).

> As the [Supreme] Court has long recognized, "[i]t is implicit in the entire structure of the [National Labor Relations] Act that the Board acts to oversee and referee the process of collective bargaining." [Citation.] "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules." [Citation.] The rules governing disputes that arise out of the collective-bargaining process are within the special competence of the National Labor Relations Board. [Citation.] The fact that the Board undoubtedly has more expertise in the collective-bargaining area than federal judges provides an additional reason for concluding that Congress meant what it said in § 301(a) and for rejecting the Union's and the Government's broad reading of the "[s]uits for violation of contracts" language.

Id. (Stevens, J., concurring) (citations omitted).

It is true, as plaintiff contends, that the Court in *Textron* noted that its holding "does not mean that a federal court can never adjudicate the validity of a contract under § 301(a)." *Id.* at 657. Plaintiff accordingly relies upon dicta in *Textron* explaining that "a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid."[4] *Id.* at 658. Crucially, however, plaintiff fails to cite the sentence of the Court's opinion that immediately follows, in which the Court clarified that "in these cases [i.e., declaratory relief actions seeking contract invalidity], the federal court's power to adjudicate the contract's validity *is ancillary to, and not independent of, its power to adjudicate '[s]uits for violation of contracts*.'" *Id.* at 658

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[4] The entire relevant passage in *Textron* reads as follows:

> "Suits for violation of contracts" under § 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated. This does not mean that a federal court can never adjudicate the validity of a contract under § 301(a). That provision simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85-86 (1982). Similarly, a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid. *But in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate "[s]uits for violation of contracts.*"

Textron, 523 U.S. at 657-58 (emphasis added).

(second alteration in original). Section 301 "erects a gateway through which parties may pass into federal court"—however, *"once they have entered*, it does not restrict the legal landscape they may traverse." *Id.* (emphasis added). Thus, plaintiff's declaratory relief claim does not, by itself, permit plaintiff to "pass into federal court" through the Section 301 "gateway"; rather, it simply presents an additional claim that a court could adjudicate "in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract." *Id.*

Accordingly, when presented with similar facts as those alleged here, various district courts—including some in the Ninth Circuit—have dismissed for lack of subject matter jurisdiction.[5] *See*, *e.g.*, *Trustees of Operating Engineers Pension Trust v. Tab Contractors, Inc.*, 224 F. Supp. 2d 1272, 1278 (D. Nev. 2002) ("[Plaintiff] asserts only three causes of action in its Third-Party Complaint—declaratory relief, indemnification, and unjust enrichment. Noticeably absent from [plaintiff's] Third-Party Complaint is a *cause of action alleging that any of the Third-Party Defendants breached the collective-bargaining agreement* . . . unless this Court grants [plaintiff] leave to amend its Complaint to clarify its claim for contract breach, this Court will not have subject matter jurisdiction over [plaintiff's] claims . . . under the LMRA."); *Lopresti v.*

[5] The Court is aware of only three decisions of the Ninth Circuit Court of Appeals, one unpublished, that cite to *Textron* at all. *See Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978 (9th Cir. 1999); *John v. United States*, 247 F.3d 1032, 1033 (9th Cir. 2001); *Rugemer v. Am. Nat. Can Co.*, 217 F.3d 846 (9th Cir. 2000) (unpublished disposition). However, none of these cases substantively discusses the holding in *Textron* or its effect on the scope of subject matter jurisdiction under Section 301.

Merson, No. 00 CIV. 4255 (JGK), 2001 WL 1132051, at *6 (S.D.N.Y. Sept. 21, 2001) (Koetl, J.) (citing *Textron*, 523 U.S. at 657) (finding— *despite complaint's inclusion of a CBA breach claim*—that a cause of action alleging an agreement was "procured through fraud" was "precisely the sort of challenge to the validity of a labor contract that does not state a claim under section 301 of the LMRA").

The decision of the Eighth Circuit Court of Appeals in *Gerhardson v. Gopher News* Co.,698 F.3d 1052 (8th Cir. 2012) is particularly instructive. The plaintiffs in *Gerhardson* were unionized delivery drivers covered by a CBA who sued, for various breaches of duty, (1) their employer, (2) their union, and (3) the pension management firm operating the unionized employees' pension plan.[6] *Id.* at 1054. The employer "filed a cross-claim against the union, alleging fraud and conspiracy and seeking declaratory judgment, indemnification, and contribution from the union for damages and costs incurred by [the employer] arising out of the union's alleged misconduct" during negotiation of the CBA. *Id.* at 1055. The district court dismissed the employer's crossclaims against the union on the grounds that the court lacked subject matter jurisdiction under Section 301. *Id.* at 1057.

The Eighth Circuit affirmed, first noting that "the National Labor Relations Board (NLRB) has exclusive jurisdiction over claims that 'arguably' constitute unfair labor practices under §§ 7 or 8 of the NLRA." *Id.* (citing *San Diego Building Trades Council Millmen's*

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[6] Notably, the pension management firm in *Gerhardson*—*much* like the Plans in the instant suit—had previously sued their employer in a separate civil action in an effort to recover unpaid contributions. *Gerhardson*, 698 F.3d at 1055 (citing *Central States v. Gopher News*, 542 F. Supp. 2d 823, 829 (N.D. Ill. 2008)).

Union, Local 2020 v. Garmon, 359 U.S. 236, 245 (1959) ("Garmon")). Citing to a decision of the Ninth Circuit, the court then explained that the employer's "claims of bad faith and misrepresentation against the union involve conduct [during CBA negotiations] arguably prohibited by the NLRA and therefore are subject to *Garmon's* preemption doctrine." *Id.* (citing *Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008) ("Because bargaining in bad faith is an unfair labor practice prohibited by NLRA §§ 7 and 8," the NLRB has exclusive jurisdiction.)). The employer in *Gerhardson*, much like Nu Image here, challenged this conclusion, arguing that its claims "enter[ed] court through *Textron's* 'gateway' "because it had "asserted [these] claims against the union in connection with the drivers' § 301(a) claim to enforce the CBA." *Id.* at 1058. The Eighth Circuit rejected this argument (as the Court does here), noting that *"Textron* only permits a litigant to raise the validity of a contract as an *affirmative defense*; it does not allow such claims to be asserted offensively." *Id.* (emphasis added). The court further explained that under *Textron*, while "the invalidity of a contract may be raised defensively in a contract enforcement action, [] federal courts are not authorized to provide other relief based on the same invalidity." *Id.* Ultimately, therefore, the employer's claims, including its claims of bad faith and misrepresentation, were "subject to exclusive NLRB jurisdiction." *Id.*

Again, Nu Image resists such a reading of *Textron*, citing to various cases outside of the Ninth Circuit that have, when presented with similar facts, found subject matter jurisdiction to exist under Section 301. *See*, *e.g.*, *Joseph W. Davis, Inc. v. Int'l Union of Operating Engineers, Local 542*, 636 F. Supp. 2d 403, 411 (E.D. Pa. 2008); *J.W. Peters, Inc. v. Bridge, Structural and*

Reinforcing Iron Workers, Local Union 1, 398 F.3d 967, 973 (7th Cir. 2005); *The Painting Co. v. Dist. Council No. 9, Int'l Union of Painters & Allied Trades, A.F.L.*, No. 2:07-CV-550, 2008 WL 4449262 (S.D. Ohio Sept. 30, 2008); *J.F. New & Associates, Inc. v. Int'l Union of Operating Engineers, Local 150, ALF-CIO*, No. 3:14-CV-1418 RLM, 2015 WL 1455258, at *2 (N.D. Ind. Mar. 30, 2015). While these cases arguably evidence a split of authority regarding the scope of the Supreme Court's holding in *Textron*, they do not require a different result here.

Accordingly, the Court finds that under *Textron*, this Court lacks subject matter jurisdiction pursuant to Section 301.[7]

2. The Effect of *Textron* on the Ninth Circuit's Decision in *Rozay's Transfer v. Local Freight Drivers*

Plaintiff further argues that the Ninth Circuit's decision in *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321, 1324 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1768 (1989)—which predates *Textron* by ten years but whose facts closely resemble those in the instant case—establishes that this court has subject matter jurisdiction under Section 301 over claims for fraud in the inducement in connection with a CBA (so long as a party is claiming that the CBA was breached). *See* Opp'n at 7-8. In *Rozay's*, plaintiff-

[7] The Court notes that Nu Image "did not allege federal question jurisdiction under 28 U.S.C. § 1331, but only under LMRA § 301. Specific jurisdictional provisions such as § 301 are grants of jurisdiction over cases in which the claimant is pressing a particular federal cause of action-in the case of § 301, it is a suit for violation of a contract between an employer and a labor organization." *Mitchell v. Mirant California, LLC*, No. C 07-05847 PJH, 2008 WL 501392, at *7 (N.D. Cal. Feb. 21, 2008) (Hamilton, J.).

employer "Rozay's" brought an action pursuant to Section 301 against defendant-union for fraudulently inducing it to execute a collective bargaining agreement. *Id.* at 1323. Defendant IATSE in the instant action argues that *Textron* effectively overruled or at least undermined the reasoning in *Rozay's*, while plaintiff Nu Image contends that *Rozay's* remains good law. As explained below, the Court concludes that the reasoning in *Rozay's* regarding the scope of subject matter jurisdiction under Section 301 was at least abrogated by *Textron* and, accordingly, does not require that this Court find that it has subject matter jurisdiction under Section 301 to adjudicate the misrepresentation claims in the instant suit.

As in the instant case, the action in *Rozay's* arose from the defendant-unions's alleged misrepresentations during negotiations regarding a renewed CBA with the employer (Rozay's). *Id.* During the negotiations, Rozay's stopped making trust fund contributions that had been required under the previous expired CBA. *Id.* Later, as the union and Rozay's were negotiating the new CBA, Rozay's expressed concern about its ability to make retroactive trust fund contributions, as would have been required by the new CBA. *Id.* at 1324. Union representatives "agreed to contact the trust fund and request a waiver of the obligation to make contributions . . . [and] assured Rozay['s] that the delinquent payments would be forgiven" by the trust fund. *Id.* Unbeknownst to Rozay's, when the union representatives later asked the trust fund to forgive Rozay's delinquent contribution payments, the trust fund denied the request. *Id.* However, when the new collective bargaining agreement was executed a few weeks later, the union representative did not advise Rozay's of the trust fund's decision to deny the request to waive the delinquent contribution, despite

the union's knowledge of the trust fund's decision. *Id.* Rozay's, assuming that unpaid contributions would be forgiven, signed the new CBA. *Id.* The assignee of the trust fund subsequently sued Rozay's for its failure to pay contributions under the new CBA. *Id.* Rozay's later brought a separate lawsuit pursuant to Section 301 of the LMRA against the union for fraud in the inducement. *Id.*

Following a bench trial, the district court entered judgment in favor of Rozay's on the fraudulent misrepresentation claim. *Id.* at 1325. On appeal, amicus for the defendant-union challenged the court's jurisdiction to hear the fraudulent inducement claim under Section 301. *Id.* at 1326. The Ninth Circuit ultimately concluded that Section 301 "applies not only to suits for breach of a collective bargaining agreement once it is duly formed, *but also to suits impugning the existence and validity of a labor agreement*." *Id.* at 1326 (citing *International Brotherhood of Electrical Workers, Local 532 v. Brink Construction Co.*, 825 F.2d 207, 212 (9th Cir. 1987); and *John S. Griffith Construction Co. v. United Brotherhood of Carpenters and Joiners*, 785 F.2d 706, 712 (9th Cir. 1986). Accordingly, the court held "that the district court had jurisdiction under LMRA § 301 to entertain th[e] action alleging fraudulent inducement in the formation of the agreement." *Id.* at 326.

However, this holding appears inconsistent with that of Textron—specifically, the Supreme Court's holding that "neither [it] nor the federal courts below have subject matter jurisdiction over th[e] case under" Section 301 "*[b]ecause the [plaintiff's] complaint allege[d] no violation* of the collective-bargaining agreement." *Textron*, 523 U.S. 661-62. Nu Image resists this conclusion, arguing that in *Textron*, the Supreme

Court held that federal courts lack jurisdiction over a plaintiff's action attacking the validity of a labor agreement where no party had, *"in any legal forum or other less formal context*," alleged a prior violation of a CBA.[8] Opp'n at 15. Again, the Court rejects plaintiff's reading of *Textron* as conferring subject matter jurisdiction over the instant suit so long as an alleged violation of the CBA has occurred "in any legal forum or other less formal context."

Accordingly, the Court concludes that the Ninth Circuit's abrogated holding in *Rozay's Transfer* does not require a different result in the instant case.[9] *See also Gerhardson*, 698 F.3d at 1059 (explaining that despite Eighth Circuit precedent that "would seem to support" appellant's argument regarding subject matter jurisdiction under Section 301, the court "will not interpret [its] precedent in a way that is inconsistent with binding Supreme Court authority," including *Textron* and *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982)); *United Food & Commercial Workers Union, Local 1564 of New Mexico v. Albertson's, Inc.*, 207 F.3d 1193, 1194-95 (10th Cir. 2000) ("At the time this

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[8] Specifically, Nu Image argues that the "plaintiff in *Textron* only sought relief from a prospective breach of the CBA. But, in *Rozay's Transfer*, the trust funds had alleged a prior breach of the CBA, just as the Plans and IATSE have done here. This distinction is critical; *Textron* only required that there be a claimed prior violation of a CBA." Opp'n at 15 (citing *Textron*, 523 U.S. at 657-58).

[9] Defendant also argues that Rozay's was further abrogated by the Supreme Court's holding in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010). *See* Motion at 7-10; Reply at 3-6. Plaintiff contests this conclusion. *See* Opp'n at 16-17. However, the Court need not rely upon the holding in *Granite Rock* to reach its conclusion with respect to the instant motion, and accordingly does not address the effect, if any, of *Granite Rock* on *Rozay's Transfer*.

litigation was filed, federal jurisdiction was soundly based on § 301(a) . . . [but] [i]n the interim . . . the [Supreme] Court has handed down its decision in *[Textron]*, holding that jurisdiction does not lie under § 301(a) for a declaratory judgment suit alleging the invalidity, but not a party's violation, of a collective bargaining agreement—*clearly rejecting our prior interpretation of § 301(a) and eliminating that jurisdictional basis*.") (emphasis added).

V. CONCLUSION

In accordance with the foregoing, the Court GRANTS defendant's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Plaintiff's complaint is accordingly dismissed without prejudice.

IT IS SO ORDERED.

Initials of Preparer 00 : 00
CMJ

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: August 7, 2018]

No. 16-55451
D.C. No. 2:15-cv-05704-CAS-AFM

NU IMAGE, INC., a California corporation,

Plaintiff-Appellant,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC,

Defendant-Appellee.

Central District of California, Los Angeles

ORDER

Before: KELLY,[*] CALLAHAN, and BEA, Circuit Judges.

Judge Callahan votes to deny the petition for rehearing en banc and Judge Kelly so recommends. Judge Bea votes to grant the petition for rehearing en banc.

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[*] The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

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

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: August 15, 2018]

No. 16-55451
D.C. No. 2:15-cv-05704-CAS-AFM

NU IMAGE, INC., a California corporation,
Plaintiff-Appellant,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC,
Defendant-Appellee.

U.S. District Court for
Central District of California, Los Angeles

MANDATE

The judgment of this Court, entered June 20, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Jessica F. Flores Poblano
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX E

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations
(Refs & Annos)
Subchapter IV. Liabilities of and Restrictions on Labor and Management

Currentness

<Notes of Decisions for 29 USCA § 185 are displayed in two separate documents.>

29 U.S.C.A. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

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

(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 chapter and any employer whose activities affect commerce as defined in this chapter 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, subpena, 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.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: 2:15-CV-05704

NU IMAGE, INC., a California corporation,
Plaintiff,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC,
Defendant.

NU IMAGE, INC.'S COMPLAINT FOR:
(1) INTENTIONAL MISREPRESENTATION;
(2) NEGLIGENT MISREPRESENTATION; AND
(3) DECLARATORY RELIEF

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Attorneys for Plaintiff NU IMAGE, INC.

PARTIES

1. Plaintiff Nu Image, Inc. ("Nu Image") is a California corporation with its principal place of business in Los Angeles, California.

2. Based on information and belief, Defendant International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC ("IATSE") is an unincorporated labor organization with its principal place of business in New York, New York.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to Section 301(a) of the Labor Management Relations Act ("LMRA") [29 U.S.C. § 185(a)]. This action arises from IATSE's representations to Nu Image that if Nu Image entered into a collective bargaining agreement ("CBA") with IATSE, Nu Image would not be obligated to pay Residual Contributions as provided in the Producer-IATSE and MPTAAC Basic Agreement ("Basic Agreement"). IATSE made these representations with the intention of inducing Nu Image into entering into a CBA, and Nu Image reasonably relied on those representations. Nevertheless, the Motion Picture Industry Health and Pension Plans ("Plans") have claimed, and IATSE now claims, that Nu Image breached the CBA that it entered into in 2006 by failing to pay Residual Contributions, which has caused substantial damage to Nu Image.

4. This Court has jurisdiction over IATSE, without regard to the amount in controversy or the citizenship of the parties, pursuant to Section 301(a) of the LMRA [29 U.S.C. § 185(a)].

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims asserted herein – and, in particular, the misrepresentations committed by IATSE – occurred in this district.

SUMMARY

6. Nu Image is a full-service independent production company that produces and markets motion pictures domestically and internationally. Nu Image, together with its subsidiary Millennium Films, develops, finances, produces and sells between ten and fifteen motion pictures each year. Nu Image, like most other independent producers, earns revenues on its motion pictures by licensing distribution rights to third parties.

7. Nu Image operated as a "non-union" independent production company for years. In April 2006, Nu Image and IATSE entered into negotiations for a CBA that would apply to all Nu Image productions. During these negotiations, top IATSE officials made representations to Nu Image that it would not be obligated to pay Residual Contributions to the Plans. Without these representations, Nu Image would not have entered into the CBA with IATSE. However, these representations were false and they were made to induce Nu Image to enter into the CBA.

8. Relying on IATSE's representations, Nu Image did not pay Residual Contributions to the Plans. Then, in May 2013, the Plans sued Nu Image to collect "delinquent" Residual Contributions under the CBA. Due to federal labor law, which prohibits an employer from asserting fraud in the inducement as a defense in actions brought by employee welfare or pension benefit plans, Nu Image had limited defenses to the

claims brought by the Plans. Accordingly, Nu Image settled with the Plans and is now suing IATSE in this action to recover the amounts it paid to the Plans, as well as for other damages resulting from their misrepresentations, and for declaratory relief.

GENERAL ALLEGATIONS

Background On IATSE

9. IATSE is a labor organization that represents a large portion of motion picture production crew members in the United States. Generally, when an employer agrees to enter into a CBA with IATSE, the employer agrees to be bound by the terms of the Basic Agreement, which is the standard agreement negotiated by IATSE and major motion picture production studios. However, independent producers, such as Nu Image, were not involved in these negotiations. As a result, the Basic Agreement was not drafted with the business model of independent producers in mind.

10. When an employer agrees to a CBA with IATSE, the employer also signs the Trust Acceptance Agreement and Agreement of Consent ("Trust Agreements"), which purport to bind the employer to the terms of the Declarations of Trust governing the Plans.

11. Certain of the provisions of the Basic Agreement purport to require that an employer remit contributions to the Plans. Included in these contributions are "Residual Contributions," which derive from revenues that a producer earns from the exploitation of its motion pictures in secondary markets, such as "free television," "cassettes," "DVDs" or "pay television."[1]

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[1] The Residual Contribution provisions in the 2006 Basic Agreement are set forth in Article XIX (Post '60 Theatrical Motion Pictures) and Article XXVIII (Supplemental Markets).

12. The Directors of the Plans ("Directors") oversee the management and administration of the Plans. If the Directors believe that an employer has failed to make proper contributions, the Directors have authority to file a lawsuit to recover unpaid contributions.

Nu Image And IATSE's Relationship Between 1995 And 2006

13. Prior to 2006, Nu Image and IATSE had not agreed to an overall CBA that would govern Nu Image's productions (an "Overall CBA"). As a result, between 1995 and 2006, IATSE organized "campaigns" designed to "persuade" Nu Image into signing a CBA with IATSE. These campaigns involved picketing Nu Image productions, harassing Nu Image employees and threatening Nu Image executives with violence if Nu Image did not sign a CBA with IATSE.

14. Although Nu Image refused to enter into an Overall CBA, IATSE's "campaigns" sometimes forced Nu Image to modify its productions and agree to a CBA on a per-motion picture basis ("Single-Production CBAs"). IATSE and Nu Image entered into these Single-Production CBAs for various productions over the course of a decade.

15. The Single-Production CBAs purported to incorporate the terms of the Basic Agreement and related Trust Agreements, and accordingly, the Basic Agreement's Residual Contribution provisions.

16. However, Nu Image never paid Residual Contributions in connection with the Single-Production CBAs. It was Nu Image's understanding when it entered into Single-Production CBAs that independent producers were not required to and did not typically pay Residual Contributions to the Plans. Accordingly, Nu Image did not pay Residual Contributions in

connection with Single-Production CBAs and IATSE and the Plans did not request the payment of Residual Contributions in connection therewith.

The 2006 CBA Negotiations And Nu Image's Reliance On The Representations By IATSE

17. In 2006, Nu Image grew tired of IATSE's "campaigns" interfering with its motion picture productions. Accordingly, Nu Image decided that it would be prudent to enter into negotiations with IATSE for an Overall CBA.

18. Even though Nu Image was willing to enter negotiations with IATSE, Nu Image made it abundantly clear that it would not agree to an Overall CBA if it were required to remit Residual Contribution payments to the Plans. On at least two occasions, IATSE assured Nu Image that it would not have to make such contributions. The events surrounding the representations made by IATSE are described in more detail below.

19. On April 19, 2006, Nu Image executives Avi Lerner (CEO), Trevor Short (CFO) and John Thompson (Head of Production) met with IATSE's Matthew Loeb and Michael Miller, Jr., at Solley's Deli in Sherman Oaks, California. At that time, Loeb was an IATSE Vice President and soon-to-be Director of the Plans, and Miller was an IATSE Vice President and Director of the Plans. Loeb later became IATSE's International President.

20. At the April 19, 2006 meeting, Short (Trevor) and Lerner explained that Nu Image's business model made it virtually impossible to pay Residual Contributions and, at the same time, operate profitably. Short (Trevor) and Lerner sought confirmation from Loeb and Miller that the Residual Contribution

provisions of the Basic Agreement would not apply to Nu Image. Short (Trevor) and Lerner also made it clear that without this confirmation, Nu Image would not agree to an Overall CBA.

21. Loeb stated at the April 19, 2006 meeting that: (a) the Residual Contribution provisions of the Basic Agreement were not applied to independent producers; and (b) as a result, IATSE and the Plans had not previously sought residual contributions from Nu Image in connection with the Single-Production CBAs. Loeb then represented that neither IATSE nor the Plans would seek Residual Contributions in the future under the Overall CBA, just as they had not sought those contributions in the past from Nu Image in connection with the Single-Production CBAs or from other independent producers.

22. At the April 19, 2006 meeting, Miller also stated that Nu Image would not be liable for Residual Contributions under the Overall CBA. Nor did Miller object to or contradict Loeb's representations at this meeting.

23. Neither Loeb nor Miller stated that they lacked authority to make these representations on behalf of IATSE and the Plans. Indeed, to the contrary, their presence at the meeting led Nu Image to reasonably believe that Loeb and Miller had authority to make the representations described above.

24. Shortly after the Solley's meeting, IATSE and Nu Image met again to discuss the Overall CBA, again in Sherman Oaks, California. At this meeting, Lerner and Short (Trevor) met with IATSE's International President and Director of the Plans, Thomas Short. Short (Thomas) confirmed to Short (Trevor) and Lerner that Nu Image would not be asked to pay Residual

Contributions under the Overall CBA. As Loeb had stated at the Solley's Deli meeting, Short (Thomas) referenced the Single-Production CBAs with Nu Image and noted that Nu Image had not paid and did not have to pay Residual Contributions. Short (Thomas) further represented that, like other independent producers, Nu Image would not have to pay Residual Contributions in the future in connection with the Overall CBA.

25. IATSE made the representations described above knowing they were false or in reckless disregard for the truth.

26. In May 2006, in reliance on IATSE's representations that it would not have to pay Residual Contributions in the future, Nu Image agreed to enter into an Overall CBA, which purports to incorporate the Basic Agreement's Residual Contribution provisions.[2] In addition, Nu Image subsequently made significant business decisions based on the representations made by IATSE, including making motion pictures that were governed by the Overall CBA. Nu Image's reliance on IATSE's representations was entirely reasonable, especially given: (1) Nu Image was told the Residual Contribution provisions did not apply to independent producers; (2) the parties had worked together for over a decade – during which Nu Image *never* paid a Residual Contribution, and neither IATSE nor the Plans asked it to do so; and (3) the

[2] Nu Image also entered into a written "guarantee agreement" with IATSE pursuant to which Nu Image agreed that if it made a motion picture using one of its controlled, single-purpose entities (which Nu Image almost always used), then Nu Image would cause the controlled entity to sign the then current Basic Agreement.

representations concerning Residual Contributions described above were made by top IATSE officials.

27. Consistent with the foregoing and in reliance thereon, between 2006 and 2009, Nu Image did not pay any Residual Contributions. Further, during that time frame, neither IATSE nor the Plans took the position that Nu Image was obligated to remit Residual Contributions to the Plans.

Nu Image Is Damaged By The Misrepresentations Made By IATSE

28. As described more fully below, as a direct result of IATSE's misrepresentations, Nu Image has suffered massive damages.

29. On or about May 13, 2013, the Directors sued Nu Image on behalf of the Plans for breach of the Overall CBA, asserting that, among other things, Nu Image violated ERISA Section 515, 29 U.S.C. § 1145, by failing to make Residual Contributions to the Plans. In the lawsuit, the Directors claimed that Nu Image owed the Plans Residual Contributions for the period May 1, 2006 through December 31, 2010.

30. On September 26, 2013, Nu Image asked IATSE to inform the Directors that Nu Image was not required to pay Residual Contributions under the Overall CBA and that the Plans' demand for such payments was erroneous. On October 2, 2013, IATSE denied that any oral representations had been made and refused to correct the Plans' misunderstanding of the basis on which Nu Image signed the Overall CBA. Accordingly, the Plans continued with the lawsuit described above.

31. On or around February 4, 2015, the Directors and Nu Image entered into a confidential settlement agreement regarding the May 13, 2013 lawsuit.

32. Nu Image incurred significant amounts of money to defend against and settle the lawsuit brought by the Directors on behalf of the Plans.

33. The Directors also filed a second lawsuit against Nu Image, alleging essentially the same claims as those asserted in the first lawsuit but for the time period January 1, 2011 through December 31, 2014. The second lawsuit was dismissed pending the Plans' further audit of Nu Image. Accordingly, as a direct result of IATSE's misrepresentations, Nu Image also faces claims by the Directors for allegedly delinquent Residual Contributions for later time periods.

34. The amount of damages suffered by Nu Image will be proven at the time of trial, but Nu Image estimates that its damages will total in excess of five million dollars.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
(Intentional Misrepresentation)

35. Nu Image expressly incorporates the allegations set forth above in Paragraphs 1-34.

36. As more fully described above in Paragraphs 3 and 19–24, IATSE represented to Nu Image that: (a) the Residual Contribution provisions of the Basic Agreement are not applied to independent producers; and (b) the Residual Contribution provisions of the Basic Agreement would not apply to Nu Image if Nu Image entered into an Overall CBA with IATSE.

37. IATSE's representations were false when they were made.

38. IATSE either knew its representations were false when they were made or it made them in reckless disregard for the truth.

39. IATSE intended that Nu Image rely on its misrepresentations.

40. Nu Image reasonably relied on IATSE's misrepresentations by, among other things, agreeing to the Overall CBA and producing motion pictures under the Overall CBA. If Nu Image had known it would have to pay Residual Contributions, it would not have agreed to the Overall CBA or it would have produced these motion pictures in locations outside the reach of the Overall CBA.

41. As a direct and proximate result of IATSE's misrepresentations and Nu Image's reasonable reliance thereon, Nu Image has been damaged as alleged in Paragraphs 28–34. The precise amount of such damages will be proven at the time of trial.

42. IATSE's conduct, as alleged herein, was done intentionally, willfully, maliciously, unconscionably and with wanton disregard for the rights of Nu Image, and was engaged in for the purpose of benefitting IATSE and injuring Nu Image, which has subjected Nu Image to cruel and unjust hardship, and was performed with such malice so as to justify an award of exemplary or punitive damages in an amount according to proof at trial.

SECOND CLAIM FOR RELIEF
(Negligent Misrepresentation)

43. Nu Image expressly incorporates the allegations set forth above in Paragraphs 1-34.

44. To the extent that IATSE's representations as alleged in this Complaint, and specifically above in

Paragraphs 3 and 19–24, were not made intentionally to deceive Nu Image, then IATSE had no reasonable grounds for believing that its representations were true when made.

45. IATSE intended that Nu Image would rely on its misrepresentations.

46. Nu Image reasonably relied on IATSE's misrepresentations by, among other things, agreeing to the Overall CBA and producing motion pictures under the Overall CBA. If Nu Image had known it would have to pay Residual Contributions, it would not have agreed to the Overall CBA or it would have produced these motion pictures in locations outside the reach of the Overall CBA.

47. As a direct and proximate result of IATSE's misrepresentations and Nu Image's reasonable reliance thereon, Nu Image has been damaged as alleged in Paragraphs 28–34. The precise amount of such damages will be proven at the time of trial.

THIRD CLAIM FOR RELIEF
(Declaratory Relief)

48. Nu Image expressly incorporates the allegations set forth above in Paragraphs 1-34.

49. There exists an actual controversy between Nu Image, on the one hand, and IATSE, on the other hand, relating to the intended application of the Residual Contribution provisions of the Basic Agreement and IATSE's obligation to indemnify or otherwise compensate Nu Image for any exposure it has to the Plans arising from the non-payment of Residual Contributions. Specifically, Nu Image contends that the Residual Contribution provisions in the Basic Agreement do not apply to Nu Image and that IATSE

is obligated to indemnify or otherwise compensate Nu Image for any liability it incurs in the future to the Plans arising from the non-payment of Residual Contributions and for the cost of defending against any further lawsuit brought by the Plans seeking Residual Contributions. IATSE contends that the Residual Contributions apply to Nu Image and that it has no such obligation.

50. Accordingly, Nu Image requests a judicial determination that Nu Image's contentions, as set forth above, are correct, and that IATSE is obligated to indemnify or otherwise compensate Nu Image for any liability it incurs in the future to the Plans arising from the non-payment of Residual Contributions and for the cost of defending against any further lawsuit brought by the Plans seeking Residual Contributions.

WHEREFORE, Nu Image prays for judgment against IATSE as follows:

On The First Claim For Relief:

(a) For compensatory damages according to proof at trial;

(b) For exemplary or punitive damages according to proof at trial;

(c) For reformation of the Overall CBA to expressly provide that the Residual Contribution provisions of the Basic Agreement do not apply to Nu Image.

On The Second Claim For Relief:

(a) For compensatory damages according to proof at trial;

(b) For reformation of the Overall CBA to expressly provide that the Residual Contribution provisions of the Basic Agreement do not apply to Nu Image.

On The Third Claim For Relief:

(a) For a judicial determination that the Residual Contribution provisions in the Basic Agreement do not apply to Nu Image and that IATSE is obligated to indemnify or otherwise compensate Nu Image for any liability it incurs in the future to the Plans arising from the non-payment of Residual Contributions and for the cost of defending against any further lawsuit brought by the Plans seeking Residual Contributions.

On All Claims For Relief:

(a) For the costs incurred in this lawsuit;

(b) For such other and further relief as this Court deems just and proper.

Dated: July 28, 2015

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Martin D. Katz
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