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ERIC ALDAPE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERIC ALDAPE, Plaintiff, v. INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, et al., Defendants	CASE NO. 2:18-cv-624 AB (SKx) Assigned to: Hon. Andre' Birotte Jr. **PLAINTIFF'S OPPOSITION TO DEFENDANT INTERNATIONAL LONGSHORE AND WAREHOUSE UNION'S MOTION FOR SUMMARY JUDGMENT** Date: August 16, 2019 Time: 10:00 a.m. Place: Courtroom 7B

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TO THIS HONORABLE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLAINTIFF ERIC ALDAPE (hereinafter "Eric" or "Plaintiff") hereby opposes the Motion for Summary Judgment filed by DEFENDANT INTERNATIONAL LONGSHORE AND WAREHOUSE UNION (hereinafter "ILWU"). Plaintiff's Opposition is based on the attached Memorandum of Points and Authorities, the Declaration of Andrea L. Cook with Exhibits, Plaintiff's Statement of Genuine Disputes and Additional Material Facts in Opposition to Defendant International Longshore and Warehouse Union's Motion to Summary Judgment, all the files and records in this case, and any such further evidence as may be adduced at the hearing on this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Eric Aldape's complaint and the evidence adduced in twelve depositions, approximately 17,000 pages of documents, interviews and expert opinions, is neither simple nor "imaginative" as described by one Defendant (LOCAL 13 MSJ, 1:3-5). Defendants have colluded to bring about the unlawful deregistration/ wrongful termination of Eric by bargaining for and implementing a provision of the collective bargaining agreement ("CBA") which is unlawful on its face and was weaponized against Eric over a period of nine years on fifteen occasions because he published and circulated political cartoons which lampooned union leaders for graft, nepotism, corruption, unfair bargaining, favoritism in work distribution; and, for his frequent and unrestricted verbal criticism of these issues in meetings and other proceedings.[1] [2]

Section 13.2, a provision of § 13 of the *Pacific Coast Longshore Contract Document* ("PCLCD") and its companion document, the *Pacific Coast Special Grievance Handbook* ("SGH"), purports to *protect* the rights of Longshore workers, but in fact robs them of their rights in a duplicitous manner. There is nothing "typical" about this case. This is a case of first impression[3] which asks this Court to declare a provision of a collective bargaining agreement, masquerading as a mechanism for addressing civil rights violations in the workplace, as unlawful and unenforceable. (SUF 114)

Plaintiff seeks redress for his wrongful termination at the hands of a biased

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[1] Defendants fail to identify that the "discrimination" complaints alleged against Eric arise from cartoons which are caricatures of elected union officials or are retaliation complaints by grievants for prior charges.

[2] All but one grievant was an elected official or running for office. (SUF 112)

[3] Former counsel for ILWU, Rob Remar advised that the provisions of 13.2 found in the PCLCD and SGH have never been challenged by an accused. (SUF 113)

arbitrator who threatened to kill Eric and called him a "fucking monkey" before becoming an arbitrator. Moreover, Plaintiff seeks vindication for his right to speak freely as it relates to union and employment matters. (SUF 115) Eric does not consider his "free speech" claims "thrown in" for "good measure" but rather, the freedom of speech claims are the gravamen of his lawsuit.

Plaintiff's case is intended to vindicate Eric's rights *and* the rights of 21,000 longshore men and women working and living on the Western Seaboard. (SUF 116) Longshore workers are an indispensable part of the supply chain for goods coming in and out of the U.S. They are the gatekeepers of twenty-nine ports that together unload and load $3 trillion worth of goods every year. The U.S. economy relies heavily on robust West Coast ports and, by extension, a vital longshore workforce. Cargo moving through West Coast ports comprises 12.5% of the U.S. GDP. (SUF 117) Section 13.2 of the PCLCD, iterated over many years, in multiple contracts, deprives workers of their civil rights and should not be tolerated by this Court.

Like the vast majority of longshore workers, Eric comes from a longshoring family. Eric followed in the footsteps of his grandfather. Two brothers, an uncle, two sisters-in-law, and four cousins are or were longshore workers. (SUF 118) With a severe learning disability, a propensity for hard work and a bright mind, longshore work offered Eric an opportunity to earn a six-figure income and enjoy uniquely generous benefits for himself and his family. (SUF 119) Eric has no way to replace what has been lost.

Plaintiff does not seek to vacate the arbitration decision. However, the remedies he seeks may have that effect. Vacatur could not provide the relief that Plaintiff seeks. Eric was forced to comply with § 13.2, reasonably believing the provisions were lawful, culminating in his termination, called a "fucking monkey" and assaulted in the presence of multiple witnesses by the arbitrator responsible for Eric's deregistration. Eric was "slugged" for opposing the

negotiations relative to § 13.2 in 2015,[4] punished by repeated periods of time off work for "discriminatory" acts he did not commit and subjected to a mandatory "kangaroo court" procedure in which the "accused" has few rights but is subject to various forms of punishment, including time off work and ultimately, deregistration and termination.

II. FACTS

A. Background

After nine years, Eric's coup de grace occurred as a result of three grievances filed by Chris Viramontes, Secretary/Treasurer of Local 13 ("Viramontes"). In 2012, Eric circulated a political flyer and cartoon in which Eric accused Viramontes of "splitting his time between running football cards and port medical." Viramontes was running for caucus delegate at the time. The flyer accused Viramontes of having a financial interest in Port Medical and using membership information for his personal gain.[5] (SUF 121) Eric was sentenced to six months off work following an arbitration pursuant to § 13.2. There was no finding that the cartoon was discriminatory and fell into one of the eight protected classes, a pre-requisite to a finding of guilt and imposition of penalties under § 13.2. (SUF 123) PMA made initial, but ineffective efforts to assist Plaintiff as late as 2016 and warned ILWU of the potential liability for the misapplication of § 13.2. (SUF 124)

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[4] Eric was physically assaulted as a caucus delegate and wrote to Local President, Olivera, seeking redress. The assault on Eric was ignored with impunity by union officials who had the obligation to file charges against Eric's attacker. (SUF 120)

[5] In January 2017, an ILWU member was sentenced to 41 months in federal prison for his role in a scheme in which two medical clinics (Port Medical) submitted more than a quarter-million dollars in bills to the union's health care plan for chiropractic services that were not provided or were not medically necessary. Mr. Viramontes was the subject of an FBI investigation and PMA lodged a complaint against him for his role in Port Medical. PMA dropped the complaint during the pendency of this litigation. (SUF 122)

Following the guilty verdict in 2012 for the Viramontes complaint, PMA wrote a letter to ILWU, Coast Committee, stating,

> [T]he Employers propose that the Coast Labor Relations Committee vacate Southern California Area Arbitration Opinion and Decision No. SCGM-0009-2012… dismiss the grievance…The award conflicts with both the letter and the spirit of Section 13 and the Employers wish to have no part in implementing this decision. (SUF125)

In a subsequent letter, dated November 27, 2012, PMA challenged the arbitration decision, SCGM-0009-2012, and the appeal decision, CA-10-2012. "The employers are not aware of any evidence, let alone evidence introduced through a proper hearing…Mr. Aldape's initial action did not in any way violate Section 13.2." (SUF 126)

On November 11, 2016, PMA filed a nineteen-page appeal on behalf of the employers regarding a grievance against Eric for a political cartoon. (SUF 127) PMA argued, "Mr. Aldape's flyer, including the cartoon, would be considered protected concerted activity by the NLRB and Union activity covered by §13. In a previous appeal filed by PMA to the NLRB, in dicta, the ALJ stated, "The NLRB held the section 13.2 process's legality is suspect should it be used to discipline a worker for protected concerted activities…a grievance-arbitration system that effectively permitted employees to be prosecuted for engaging in Sec. 7 activity would raise serious questions under Sec. 8(a)(1) or 8(b)(1)(A), regardless of the lack of direct involvement in the proceedings by the parties responsible for creating and maintaining the system. The parties' tolerance for such a system could conceivably give rise to a duty to fix it or be held responsible for the resulting infringement on Sec. 7 activity." (SUF 128) Local 13 opposed PMA's appeal which sought to vacate the Area Arbitrator's findings and penalties and to dismiss the grievance against Plaintiff. (SUF 129) Richard Marzano, Director of

Contract Administration and Arbitration for PMA from 2012 to 2015, testified that the misapplication of § 13.2 could have been brought before the Coast Arbitrator by PMA, but it failed to do so. (SUF 130,131,132).

Eric was found guilty of a third Viramontes grievance, SPSC-0006-2017, retaliation for grievances filed by Viramontes nearly five years earlier and for a subsequent "posting" of a PMA complaint against Viramontes on a website.[6] PMA's complaint against Viramontes, alleged involvement in the Port Medical Fraud scheme in 2017, was given to Eric by the then Labor Relations Representative, Luke Hollingsworth. (SUF 135) Eric sent it to Jim Tessier to include in a request to open SP-0032-2012 as a means of vindication. (SUF 136, 121) Tessier assisted Eric in preparing his appeals and flyers and, without Eric's permission, posted the complaint on *longshore-labor-relations.com.* (SUF 137) Arbitrator Mascola found Eric guilty and deregistered/terminated his employment. (SUF 138)

B. Section 13.2 Procedure

Section 13 of the PCLCD, while not new to defendants' CBA was included in the 2015 version and ratified again 2019. (ILWU UF 15, 16; SUF 139) The SGH sets forth the procedures and penalties provided for in § 13. (SUF 140) The language in both the PCLCD and the SGH mirrors in some regards the language of Title VII and FEHA. "There shall be no discrimination in connection with . . . race, creed, color, sex…, age…, national origin, religious or political beliefs, disability, protected family care or medical leave status, veteran status, political affiliation, or marital status." Also prohibited: "retaliation of any kind for filing or supporting a complaint of discrimination or harassment." (SUF 141)

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[6] On July 9, 2013, Viramontes filed a 13.2 Complaint against Eric for an assault which occurred off the union premises and which Viramontes alleged was retaliatory. Eric was found guilty and sentenced to a year off work. (SUF 133). Assault charges are properly heard by the JPLRC pursuant to §17.82. (SUF 134)

Section 13.2 is the exclusive remedy for discrimination complaints by longshore workers. (SUF 133) Accordingly, the language of the agreement(s) provides: *"All grievances and complaints alleging incidents of discrimination or harassment* connection with any action subject to the terms of this Agreement… *shall be processed solely* under the Special Grievance/Arbitration Procedures …" (emphasis added) (SUF 142) "To correct *any incidents of discrimination*,…which violate this Policy, the longshore worker…must promptly file, within fifteen (15) calendar days…a grievance…" (emphasis added) (SUF 143).

Despite Defendant's assertions, nothing in the PCLCD or SGH suggests or advises workers that they are at liberty to pursue another remedy. (SUF 144) At least one employer unsuccessfully attempted to compel arbitration under § 13.2. (SUF 145) Importantly, once a § 13.2 is filed against an "accused," the arbitration procedures are mandatory. (SUF 146) "Q. Did Mr. Aldape have the option of opting out of the grievance procedure?... A. No. Q. It was mandatory for him? A. Yes." (SUF 147)

The PCLCD and SGH provide a draconian and unlawful arbitration procedure. Section 13 in the PCLCD purports to set forth a "no discrimination" policy and was used against Plaintiff for his active dissidence as a vocal critic of Defendants' policies and procedures and their impact on the working conditions of Longshore workers. (SUF 148) The SGH provides that aggrieved workers must file their complaints within fifteen days of the incident, arguably, the world's shortest statute of limitations. (SUF 149) Complaints are sent to one of two arbitrators who are appointed by PMA and ILWU, and to the JPLRC c/o the local PMA office. (SUF 150) Section 13.2 complaints are also sent to the CLRC. (SUF 151) Within 14 days of filing a complaint, there is an arbitration. (SUF 152) The parties are notified of the hearing date and the accused has 14 days (at most), to organize a defense, i.e., identify witnesses, obtain a representative (lawyers are not permitted), and notify the arbitrator of witnesses he intends to call. (UF153)

Defendants do not investigate § 13.2 complaints. (SUF 154) The arbitration(s) take place in the presence of PMA and Local 13 representatives. (SUF 155) Representatives are free to speak on behalf of either party. According to Arbitrator Miller, the "optics" involving Eric were that there was no one to support him other than his selected representative. (SUF 156)

Following the arbitration, which is transcribed by a reporter, a decision is issued. (SUF 157) Where there is a finding of "guilty," the Arbitrator is at liberty to levy an endless list of penalties. Penalties are the only remedy available under § 13.2. (SUF 158) There is no liability against the employer. The grievant may not recover monetary damages. A grievant's only redress is to *punish the accused*. There is no consequence to an employer. (SUF 149) The penalties against the accused can include loss of seniority, a prohibition against working for discrete periods, and the ultimate penalty, deregistration. (SUF 150) The decision is issued within fourteen days of the hearing. (SUF 151) Following the receipt of the decision, a party has fifteen days to appeal the matter using the documents and transcripts on file. (SUF 162) A decision is issued within fourteen days of receipt of the appeal. (SUF 163) The decision is final and binding on the parties. (SUF 164). The matter is subject to the Coast Appeals. (SUF 165) If the parties to the contract disagree as to whether the decision violates § 13, the PCLCD requires the grievance to be submitted to the CLRC or to the Coast Arbitrator. (SUF 166) If the local grievance machinery stalls or fails to work, the Parties are at liberty to refer the matter to the CLRC for resolution. (SUF 168) Despite an obvious dispute between the Parties, this was never done. Finally, the matter can be presented to the NLRB for decision by one of the parties which the NLRB appeared to invite. (SUF 128) Arbitrators are selected from the "industry" and incompetent to render decisions. (SUF 169)

C. Arbitrator Mascola was Biased and Incompetent.

ILWU and PMA jointly selected Mark Mascola as an arbitrator in

September 2015.[7] PMA and ILWU jointly employ him through the Joint Coast Labor Relations Committee (JCLRC), which has the responsibility to "investigate and adjudicate" grievances. (SUF 170) Members of the JCLRC include the President, Vice President, and other officers of ILWU. (SUF 171) Mascola's qualifications as an arbitrator are a high school diploma, several semesters in junior college with a focus on woodworking, and two "seminars" provided by the "joint parties." (SUF 172) Mascola was given a "Code of Conduct" by his employers when he became an arbitrator. (SUF 173)

Mascola had two altercations with Eric before 2015. In 2012, Mascola *physically* attacked Eric and threatened to kill him. Mascola was an elected official at the time.[8] (SUF 176) A few weeks later, frustrated by what he considered Eric's disruptive behavior during an LRC hearing, he called Eric a "fucking monkey." (SUF 174) Mascola's "hatred" of Eric never abated. David Miller, an arbitrator hearing § 13.2 complaints, including those against Aldape, was contacted repeatedly by Mascola while an LRC representative. (SUF 177) Mascola continually expressed his hatred toward Eric. "Mascola was a constant thing that Aldape was causing problems and that he hated him personally and he didn't care what happened, and he basically stayed away from any kind of defense for Aldape when he would appear as a labor relations person at the hearings. It was obvious." (SUF 178)

D. Defendants Colluded in Maintaining Mascola as the Arbitrator to Hear Eric's Deregistration Arbitration.

Eric filed a 13.3 complaint with the Joint Port Labor Relations Committee (JPLRC) on March 24, 2016, alleging Mascola was biased and exceeded his

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[7] From 2008 to 2015, Mascola was a Labor Relations Representative and held office on the Executive Board and Grievance Committee.

[8] Eric filed a 13.2 complaint against Mascola. Fearful of retaliation and facing multiple 13.2 charges, he withdrew the complaint against Mascola. (SUF 175)

authority. (SUF 179) The JPLRC has no deadline by which to respond to 13.3 complaints. (SUF 180) Eric never received notice of the outcome of the bias complaint. (SUF 181) As of January 29, 2019, Plaintiff still believed the 13.3 complaint accusing Mascola of bias was never processed. (SUF 182) Defendants produced purported minutes by the JPLRC regarding the "decision" on Eric's 13.3 amidst a turnover of some 8,500 documents as part of a document request on March 14, 2019. (SUF 183)

Disturbingly, the "decision" by the JPLRC, dismissing the 13.3 complaint against Mascola, appears to be rigged by defendants. The "hearing" took place during a "special" meeting with only two attendees, Eric Kalnes, not an employee representative but part of the administrative staff of PMA, and Mike Dimon, an LRC representative. (SUF 184) Section 17.11 of the PCLCD details membership in the JPLRC: "…comprised of 3 or more representatives designated by the Union and 3 or more *representatives* designated by the Employers. Each side of the committee shall have equal vote." (SUF 185) A careful review of the "decision" provides a unique number, inconsistent with the usual numbering system used in 13.3 complaints, including an "A." (SUF 186) While Defendants had a contractual mandate to investigate and to meet and confer with the grievant, they failed to do so. (SUF 188)

Mascola's bias was known to the parties at the deregistration arbitration. In a prior § 13.2 complaint against Eric, SPSC-0008-2016, Mascola considered the issue and determined that he was not biased. (ILWU UF 99; SUF 189) Mascola rendered his decision July 10, 2017, finding Eric guilty and imposing the penalty of deregistration. Eric timely appealed. The issue of bias was "considered" and rejected. (SUF 190) PMA, the employer (in conjunction with ILWU), were aware of the alleged bias as early as March 2016. (SUF 191)

E. The Deregistration Arbitration Ran Afoul of Ordinary Fairness.

While Defendant ILWU eschews its participation or even knowledge of the

events surrounding Plaintiff's deregistration, the President of ILWU, Robert McEllrath, wrote a sternly worded letter intervening in the arbitration regarding the appearance of David Miller. (SUF 192) Miller was no longer an arbitrator and, given his observations regarding Mascola's bias, his testimony might have genuinely helped Plaintiff. Eric was sick on the day of the arbitration, and his representative provided a doctor's note indicating Eric's unavailability and requesting a continuance. The arbitration moved forward in Eric's absence. (SUF 193) No one from Local 13 or PMA advocated for Eric in any § 13.2 proceeding, including in an appeal of the deregistration. (SUF 194)

III. ARGUMENT

A. Defendants are not Entitled to Summary Judgment.

There are disputes as to material facts and ILWU is not entitled to Summary Judgment as a matter of law. *Fed.R.Civ. P.* 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Plaintiff demonstrates significant evidence in support of his opposition as set forth herein. *Celotex*, 477 U.S. at 325.

B. 13.2 is Unenforceable and Should be Deemed Void.

The United State Supreme Court and California courts have determined that arbitration provisions such as § 13.2 are unenforceable. *See Wright v. Universal Mar. Serv. Corp.* (1998) 525 U.S. 70, 78–79 (*Wright*). In *Wright, supra*, the Court found that an arbitration clause is unenforceable in a collective bargaining agreement that does not contain "a clear and unmistakable waiver of the covered employees' rights to a judicial forum" for discrimination claims. *Id.*, at 82. Neither the PCLCD nor the SGH contains a waiver. *Wright*, a longshoreman, suffered an injury. The lower court held that the longshoreman was required to pursue arbitration under the terms of the collective bargaining agreement. *Id.*, at 75. The lack of a clear and unmistakable waiver of union-represented employees' rights deemed the arbitration clause unenforceable. *Id.*, at 82. Defendants would have the Court (and Longshore workers) believe that § 13

is "voluntary" despite the explicit language of the agreement and therefore, no waiver is required. The ruse perpetrated on workers is that while § 13.2 "quacks," Defendants insist that it is not *really* a duck, except as applied to the accused, which they are forced to admit. (SUF 195)

We ask this Court to consider Plaintiff, the analogue to the grievant in the § 13.2 process, is no less trapped. Arguably, he is more so by a system which is empowered to punish him by taking away his livelihood in fewer than ninety days in a kangaroo court, overseen by an unqualified (and in this instance, biased) arbitrator under the guise of civil rights protections. Eric was hounded for years by the weaponization of an unlawful, unenforceable, and compulsory arbitration provision from which he could not escape. In every instance of a § 13.2 being filed against him, Eric's appearance and compliance were mandatory. (SUF 196)

In *Kaplan v. Int'l All. of Theatrical & Stage Emp. & Motion Picture Machine Operators of U.S. & Canada*, 525 F.2d 1354, 1360 (9th Cir. 1975) *abrogated on other grounds*, the court held,

> . . . [T]he International cannot claim ignorance nor escape liability from the natural consequences of (the Roster) provisions. By making and enforcing, albeit tacitly, a collective bargaining agreement which perpetuates past discriminatory effects, appellant International has violated Title VII. Policies and practices, however neutral on their face, are unlawful if they tend to perpetuate the effects of past discrimination.

Here, ILWU bargained for the PCLCD (ILWU UF 12-17), recently ratified its unenforceable provisions, and perpetuates its unlawful enforcement by consistently and intentionally applying a distorted version to Eric. (SUF 197)

The Ninth Circuit has made it clear that CBA provisions should not be applied if they are illegal under state law. *See Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695 (9th Cir. 2001) (federal labor law "does not

grant the parties to collective-bargaining agreements the ability to contract for what is *illegal* under state law" (emphasis added)); *Freightliner, LLC v. Teamsters Local 305*, 336 F.Supp.2d 1118, 1125 (D. Or. 2004). Defendants should not be permitted to enforce and weaponize an unlawful provision of the collective bargaining agreement against Plaintiff and some 21,000 workers

1. Plaintiff is Not Required to Exhaust an Administrative Remedy.

Plaintiff addresses this issue out of an abundance of caution as it may relate to issues independently raised by the Plaintiff. Federal labor policy may require an employee to exhaust arbitration procedures provided in the collective bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). Where collusion between the union and the employer may render the filing of a grievance futile, parties can't rely upon the employee's failure to exhaust as a defense. *Williams v. Pac. Mar. Ass'n*, 617 F.2d 1321, 1329 (9th Cir. 1980) (dicta), *cert. denied*, 449 U.S. 1101 (1981). Where Defendants participated in deregistering appellants or had voiced opinions on their cases, the Ninth Circuit found it unlikely that such persons could be entirely fair and impartial. *Id*. Here, the parties agreed upon and maintained a "discrimination" policy and arbitration procedure which ordinarily keeps employers out of court, avoids damages for meritorious claims, and is used arbitrarily and punitively to quickly and effectively punish or terminate undesirable employees. (ILWU UF 23-24) (SUF 141, 142, 144, 146, 147, 158, 159, 160)

2. The Six-Month Statute of Limitations Should Not Apply to Plaintiff's Claims.

In most cases, DFR claims are subject to a six-month statute of limitations under § 10(b) of the NLRA, 29 U.S.C. § 160(b); *DelCostello v. Teamsters*, 462 U.S. 151, 169-70 (1983). Accrual begins when Plaintiff knew or should have known of his claim. Equitable estoppel is an exception that applies in this matter.

The Ninth Circuit equates equitable estoppel with fraudulent concealment

which "halts the statute of limitations when there is active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006). "The plaintiff must demonstrate that he relied on the defendant's misconduct in failing to file in a timely manner and 'must plead with particularity the facts which give rise to the claim of fraudulent concealment." *Id.*; *Naton v. Bank of Cal.*, 649 F.2d 691, 696 (9th Cir. 1981). "Conduct or representations" by the defendant that tend to "lull the plaintiff into a false sense of security, can estop the defendant from raising the statute of limitations based upon the principle that no man may take advantage of his own wrong." *Atkins v. Union Pac. R.R. Co.*, 685 F.2d 1146, 1149 (9th Cir. 1982) (citations and alterations omitted); *McCray v. Unite Here! Local 19*, No. 16-CV-01233-BLF, 2017 WL 567319, at *4 (N.D. Cal. Feb. 13, 2017,). A finding of equitable estoppel rests on the consideration of four elements to establish estoppel: (1) the party to be estopped must know the facts, (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended, (3) the latter must be ignorant of the true facts, and (4) he must rely on the former's conduct to his injury. *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir.), *cert. denied*, 364 U.S 882 (1960). There must be a showing that the party acted in a manner calculated to mislead. Here, while ILWU *insists* § 13.2 is "voluntary," they repeatedly provide contract language stating otherwise. (SUF 142, 144, 196, 213) The parties to the contract testify that § 13.2 is the exclusive remedy for discrimination claims. (SUF 142, 144) Silence is not a defense to equitable estoppel when there is a duty to speak. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 97 (9th Cir. 1970). Here, Defendants rely on the *absence* of notice to support their "voluntary theory" of § 13.2. Courts may assume the duty of fair representation imposed on unions the same duty to disclose owed by a fiduciary. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S.

65, 74 (1991). *Thibodeaux v. Teamsters Local 853*, 263 F.Supp.3d 772, 778 (N.D. Cal. 2017).

Plaintiff's knowledge of the purported "voluntary" aspect of § 13.2 was unknown to him until this litigation. (SUF 198) Plaintiff reasonably relied upon the mandatory nature of § 13.2, an important issue in seeking a legal remedy and as a practical matter. (SUF 199) Any "voluntary" aspect of § 13.2 was purposefully concealed by the inclusion of mandatory language in the PCLCD and SGH. (SUF 142, 144, 200) "The grievance procedure of this Agreement shall be the exclusive remedy…" (SUF 201) Eric and ILWU workers reasonably believed that § 13.2 was the sole avenue by which they could prosecute discrimination claims. To hold Plaintiff to a limitations period intended to promote swift resolutions of claims, in spite of ILWU's fraudulent concealment, allows ILWU to "take advantage of its own wrong."

Moreover, where instances within the six-month period may constitute unfair labor practices, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose, § 10(b) ordinarily does not bar such evidentiary use of anterior events." *Local Lodge No. 1424, Int'l Assoc. of Machinists v. N.L.R.B.*, 362 U.S. 411, 416 (1960). *See Int'l Union, United Auto., Aerospace and Agricultural Implement Workers v. N.L.R.B.*, 363 F.2d 702, 706-07 (1966). ILWU has improperly relied on § 10(b) to attempt to exclude evidence of current unfair labor practices in the past. *N.L.R.B. v. I.L.W.U., Local No. 13*, 549 F.2d 1346, 1351 (9th Cir. 1977). Historical events should be considered for current violations of the DFR but also to evaluate whether ILWU should be equitably estopped from asserting the statute of limitations period.

3. ILWU is Liable for the Acts of Local 13 Under an Agency Theory.

ILWU takes the untenable position that it cannot be held liable because it did not file the grievances against Eric. (ILWU MSJ, 23:26-24:4) A specious

argument, ILWU implemented and administered the § 13.2 grievance process with full knowledge that it was being abused by Local 13, arbitrated by their employee, a biased arbitrator, to silence Eric's political speech and activities and, failed to take action to remedy the abuse despite repeated PMA warnings. (SUF 125, 126, 127) ILWU had both a statutory and a contractual duty to remedy the abuse once it became aware of it and its failure to do so breached both its duty of fair representation and violated his free speech rights. *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980).

ILWU is liable on an agency theory because it "instigated, supported, ratified or encouraged" the wrongful activities of Local 13 and its officials as its agent. *Hills v. Serv. Employees Int'l Union*, No. 09CV1919 WQH WVG, 2011 WL 3667643, at *11 (S.D. Cal. Aug. 19, 2011), *aff'd*, 520 F. App'x 555 (9th Cir. 2013), *quoting Moore v. Local Union 569 of Intern. Broth. of Elec. Workers*, 989 F.2d 1534, 1543 (9th Cir.1993). ILWU intentionally refused to act to correct the abuse of § 13.2 with full knowledge of all the facts. Specifically: (1) the ILWU as a party to the CLRC controlled the § 13.2 grievance process and received all § 13.2 complaints (SUF 221); (2) the CLRC has independent knowledge of § 13.2 proceedings (SUF 222); (3) PMA repeatedly warned ILWU that Eric was being wrongfully prosecuted and penalized under § 13.2 (SUF 124, 125, 126, 127); (4) ILWU President McEllrath unabashedly testified that he (CLRC) could overturn arbitrations (SUF 208); (5) Eric begged McEllrath to protect him from the misuse of § 13.2 and was ignored by ILWU (SUF 132); (6) McEllrath harbored animus toward Eric as a flyer placed McEllrath in conflict with PMA's president during contract negotiations (SUF 223); (7) ILWU allowed Mascola to continue hearing § 13.2 grievances, despite his bias; and, (8) ILWU intervened in Eric's deregistration to prevent him from calling Mr. Miller as a witness, thereby thwarting his defense (SUF 224).

Moreover, ILWU is vicariously liable under a *respondeat superior* theory

of liability for the actions of Mascola. As a party to the CLRC, the ILWU selects Area and Coast Arbitrators who hear § 13.2 grievances and appeals, agrees on the eligibility requirements for Arbitrators, employs and pays arbitrators, exercises oversight and control over arbitrators, and has the authority to terminate arbitrators and to overturn and vacate the arbitrations. (SUF 170, 207, 227)

Federal Courts look to state law to determine agency principles. In California, liability under the doctrine of *respondeat superior* extends to malicious acts and other intentional torts an employee committed within the scope of his employment. *See Ruppe v. City of Los Angeles*, 186 Cal. 400, 402 (1921); Witkin, *Rest.2d, Agency* §§ 231, 244 *et seq*. *Respondeat superior* is sometimes used for analysis of agency issues. Witkin, *supra*, § 192. "Under the doctrine of *respondeat superior*…the employer is liable for the torts of the agent or employee. It is immaterial that the employee acts in excess of authority or contrary to instructions." *Id.* § 165. ILWU is responsible for the "bad acts" of Mascola. (SUF 174, 177, 178)

C. Defendant ILWU Breached the Duty of Fair Representation.[9]

As the exclusive bargaining representative, a union owes its members a duty of fair representation (DFR). *Vaca v. Sipes*, 386 U.S. 171, 176 (1967). The duty applies to all union activities, including, contract negotiation, administration and enforcement. *Id.; Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991). A union breaches its DFR where its actions are arbitrary, discriminatory, or in bad faith. 386 U.S. at 190. A union's exercise of its judgment is discriminatory if there is "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301 (1971). A union exercises its judgment in bad faith if there is "substantial evidence of fraud, deceitful action or dishonest conduct." *Id.*, at 299.

[9] See Section III.A.3.

A union's exercise of its judgment may be deemed arbitrary where it is "so far outside a wide range of reasonableness that [it is] wholly irrational or arbitrary" *O'Neill*, 499 U.S. at 67. Courts allow an attack on a final arbitration award on the grounds of fraud, deceit or breach of the DFR or when the grievance procedure was a "sham, substantially inadequate or substantially unavailable." *Harris v. Chem. Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971).

1. The ILWU and Local 13 Have a History of Failing to Represent Plaintiff.

Eric suffered repeated instances of breach of the DFR over nine years as Union officials filed fifteen § 13.2 grievances against him. (SUF 202) The gravamen of the grievances were political flyers and/or cartoons satirizing management or elected union members. (SUF 203) Section 13.2 was weaponized against Eric like no other longshore worker. (SUF 204) Neither ILWU nor Local 13 defended Eric nor corrected the unlawful application and misapplication of § 13.2 to Eric. (SUF 205)

The misuse of § 13.2 against Eric in the cases leading up to his deregistration were so egregious that PMA, fearful of litigation, came to Plaintiff's defense when the Union failed to do so. (SUF 124, 125, 126, 130) PMA stopped short of taking the necessary steps to create real change, including filing their own complaint against ILWU. (SUF 206)

2. Defendants Colluded in Maintaining Mascola as the Arbitrator to Hear Eric's Deregistration Arbitration.

Eric filed a §13.3 complaint against the Joint Port Labor Relations Committee on March 24, 2016, alleging Mark Mascola was biased and exceeded his authority and discriminatory application of § 13.2 against him. (SUF 179) Eric was never advised nor given notice of the outcome of the bias complaint or given notice of the outcome. (SUF 181) The dismissal of the 13.3 complaint occurred under dubious conditions, including a "special" meeting with only two attendees,

one of whom was a member of the administrative staff of PMA. (SUF 184) Defendants had an opportunity, even a contractual mandate to investigate; they failed to do so. (SUF 187, 188) Importantly, the issue of Mascola's bias was known to the parties in advance of the deregistration/arbitration. (ILWU UF 52, 53, 54; SUF 174, 175, 179) Arbitrator Mascola rendered his decision July 10, 2017, and Eric timely appealed. The appeal to the Area Arbitrator, Larry Schwerin, also employed by ILWU and PMA, considered the issue of bias. (SUF 189, 190, 210) Mascola retains his position as an arbitrator.

3. ILWU Breached Its Duty of Fair Representation to Plaintiff, Independent of Local 13.

ILWU owed Plaintiff a duty of fair representation. *Vaca,* 386 U.S. at 177. The duty applies to all activities, including contract negotiation, administration and enforcement, conducted by the union on behalf of members. *O'Neill*, 499 U.S. at 67. ILWU is a party to the PCLCD with PMA and was responsible for administering and enforcing the contract and ensuring its terms were adhered to. (SUF 211)

PMA repeatedly warned of the misapplication of § 13.2 to the Plaintiff. (SUF 125, 126) ILWU failed to respond to PMA. (SUF 212) ILWU refused to take action. (SUF 213)

Mascola, in breach of the contract, considered sixty-seven cartoons and flyers created over a nine-year period and all other decisions in his decision to decertify the plaintiff in violation of the SGH. (SUF 214) (SUF 215) The arbitration was sham, substantially inadequate or substantially unavailable.

"A union's interpretation of its collective bargaining agreement that is patently lacking in merit may constitute bad faith and may itself be evidence that its representation was unfair." *Local 13, Int'l Longshoremen's & Warehousemen's Union v. Pac. Mar. Ass'n*, 441 F.2d 1061, 1069 (9th Cir. 1971). *ILWU was on notice* that the misapplication of § 13.2 was improper and failed to remedy the

situation. (SUF 124, 125, 126, 130, 127, 128, 129) The prosecution of Eric for the creation of political flyers under the guise of a civil rights arbitration procedure is an ironic and egregious act of bad faith by ILWU.

4. That Grievants Could Choose Their Representative Does Not Absolve the Union of Its DFR Obligation.

Plaintiff's choice of a representative in the grievance process does not absolve ILWU of liability. Eric testified that he did not trust officers or LRC Representatives. (SUF 216) Defendants are not at liberty to hide behind the rights of workers to choose their representatives as a means of relieving themselves of their duty. Such a defense makes a mockery of the public policy supporting worker's rights and the concomitant Duty of Fair Representation.

D. ILWU and Local 13 Violated Plaintiff's Rights Under the LMRDA.

Section 411(a)(2) states that, "Every member of any labor organization shall have the right to meet and assemble freely with other members … to express any views, arguments, or opinions ... to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting …" 29 U.S.C. § 411(a)(2). The Supreme Court has concluded that congress intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one's mind without fear of reprisal. *Reed v. United Transp. Union*, 488 U.S. 319, 325 (1989). It "adopted the freedom of speech and assembly provision in order to promote union democracy ... [and] recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Id.* Thus, the core purpose of § 101(a)(2) is to protect free speech and assembly rights because these are considered "vital to the independence of the membership and the effective and fair operation of the union as the representative." *Id.*

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1. Plaintiff's LMRDA Claims Are Not Time-Barred.

Claims under § 101(a)(2) of the LMRDA are governed by California's two-year personal injury statute of limitations. *G.P. Reed v. United Transp. Union*, 488 U.S. 319, 323 (1989). Assuming, arguendo, that the Court does not consider Plaintiff's equitable estopple argument,[10] actionable LMRDA claims accrued on or after January 24, 2016. [Plaintiff's 1/3/19 FAC.] In addition, the court can look to events outside the statute of limitations to shed light on the true character of claims within the statutory period. See: p. 14:17-25.

2. Plaintiff Exercised His Right to Oppose Union Policies and Officials.

To state a cause of action for a violation of § 101(a)(2), a union member must allege facts showing that: "(1) he or she exercised the right to oppose union policies; (2) he or she was subjected to retaliatory action; and, (3) the retaliatory action was a direct result of his [or her] decision to express disagreement' with the union's leadership." *Casumpang v. Int'l Longshoremen's & Warehousemen's Union*, 269 F.3d 1042, 1058 (9th Cir. 2001). A causal link between protected activities and an adverse action may be inferred from circumstantial evidence such as union officials' knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected activity and the retaliatory conduct. *See id.* at 1059.

Conspicuously absent from ILWU's MSJ is that all grievances filed by Local 13 officials against Eric (inside and outside the limitations period), relate to political flyers. (SUF 202, 203) Plaintiff also exercised his rights under the

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[10] See: Section III.A.2. Equitable Estoppel i.e.; ILWU repeatedly and knowingly misused and tolerated the exploitation of Section 13.2 in an ongoing pattern and practice of continuing harassment of Eric in deprivation of his LMRDA free speech rights. *Masters v. Screen Actors Guild*, No. 04-2102 SVW (VBKX), 2004 WL 3203950, at *10 (C.D. Cal. Dec. 8, 2004).

LMRDA by filing § 13.3 charges of bias against the arbitrators. See: Section B.3. Plaintiff has established the first element of a § 101(a)(2) claim.

Eric was subject to retaliatory actions. In the instance of every grievance, it was filed immediately by a union official.[11] Union officers were essentially "invited" to file repeated grievances by the failure of the parties to correct the misapplication in a definitive manner. (SUF 129, 202, 206, 212, 218) Seven § 13.2 complaints were filed within the two-year statute, January 24, 2016 to July 31, 2017. (SUF 202) Five of the arbitrations were heard by Mascola. Long-time ILWU lawyer, Coast Appeals Officer, Larry Schwerin, heard appeals. (SUF 202) Mascola was biased against Eric and had a known hatred of him (SUF 174, 176, 179). The § 13.3 grievances against Mascola and Schwerin alleged bias and discriminatory application of § 13.2, and Eric repeatedly objected to Mr. Mascola hearing § 13.2 grievances. Such objections were dismissed by the CLRC, overruled by Mr. Mascola, and confirmed by Schwerin. (SUF 189, 190)

All of the grievances filed within the two-year limitations period related to political speech. The grievance filed by Lawrence Toledo, a member of the grievance committee, arose out of a political flyer encouraging the membership to vote in an upcoming election. The headline head line read, "Vote JoJo – Bobby O gotta GO," accusing Local 13 President Bobby Olvera of being a "rat" and giving Union strategy to Los Angeles Mayor Eric Garcetti. The back of the flyer was a cartoon depicting several ILWU officials as "rats." Mr. Toledo complained, "Eric Aldape handed out flyers at the dispatch hall" and alleged discrimination on the basis of his (Toledo's) "race" as a Native American. (SUF 225) Toledo failed to appear and the matter was dismissed. (SUF 226) Schwerin reversed the dismissal (without notice to Eric) and the matter was set for another hearing. (SUF 227)

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[11] In the case of Ms. Droege, her father (who was accused of nepotism), was Mark Jurisic and a union official.

William Seixas, a member of the Grievance Committee, based on the same "rats" flyer, filed a grievance. Mascola heard the matter on April 11, 2016. (SUF 228) Seixas filed a second grievance because Eric "assaulted" Sexias as he was removing political flyers. (SUF 229) PMA filed an appeal and advised Schwerin that, "*Mr. Aldape did not engage in conduct prohibited by Section 13.2" and "Disciplining him for distributing the flyers would violate Section 13 and could jeopardize the integrity of the entire Section 13.2 process*." (SUF 127) Eric was found guilty and given a year off work. (SUF 230) The proper provision in the PCLCD for assault is § 17.821 which are heard by the JPLRC.[12] (SUF 134) Seixas filed a second grievance, alleging Eric "continues to work in violation of the arbitrator's ruling and Aldape is breaking confidentiality by allegedly posting about the proceedings on the internet."[13] Seixas filed a "retaliation" complaint related to the "rats" flyer and other union political matters. (SUF 231) Eric was found not guilty. (SUF 232)

Christopher Viramontes, a Union official, alleged that Eric "published" a PMA complaint regarding involvement in the Port Medical fraud in retaliation for a flyer making the same allegations *nearly five years earlier*. See: Section II.A. (SUF 233) Mascola relied upon on all prior § 13.2 decisions. "*Past 13.2* ***hearings*** *involving Aldape provide unmistakable precedent that Aldape has knowledge and awareness of the guidelines, penalties, and wording within the Pacific Coast Special Grievance.*" (SUF 220) Mascola also took into consideration sixty-seven flyers, published over a nine-year period. (SUF 203)

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[12] Eric was punched in the face by a member in a caucus meeting in 2015 and the union did nothing about it. (SUF 120) However, when Viramontes accused Aldape of assaulting him, Local 13 filed an action and obtained a restraining order against Aldape. (SUF 234)

[13] Eric has produced evidence that Local 13 attempted to thwart his efforts to work at a non-PMA worksite in Tacoma, Washington, while serving the time off penalty entered in SCGM-0015-2016.

Eric's suffered retaliatory actions as a result of political speech regarding union matters. Elected officials targeted Eric for his political speech by filing repeated, unfounded § 13.2 grievances against him which were arbitrated in most instances by Mascola, an admittedly biased arbitrator. (SUF 202, 203) See Section II.B, 2.

E. PMA Breached the Collective Bargaining Agreement.

1. Plaintiff's Breach of Contract Claims are NOT Time-Barred.

Amended pleadings, including those naming a new party, relate back to the date of the original pleading when: (1) they arose out of the same conduct, (2) the new party received notice within ninety days and will not prejudiced, and (3) the new party knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. *Fed. R. Civ. P.* 15(c)(1)(C), 4(m); *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 545 (2010).

Defendants ILWU and Local 13 filed an unopposed Motion for Joinder of PMA on April 9, 2019, well within the ninety-day limit defined by Rule 4(m). A party is not prejudiced where an action is still in the discovery stage with no trial date pending, and no pretrial conference scheduled. *DCD Programs, Ltd. V. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987). PMA participated in all discovery and there was no pretrial conference or trial date scheduled at the time of joinder, so PMA was not prejudiced. If a plaintiff knows that a prospective defendant exists but misunderstands its role in the events giving rise to the claim and mistakenly chooses to sue a different defendant, Plaintiff's actions still satisfy Rule 15(c)(1)(C)(ii). *Krupski*, 560 U.S. at 549. Discovery revealed that PMA colluded with ILWU and Local 13 in their collective actions regarding Plaintiff. (SUF 217) To allow PMA to escape liability merely because Plaintiff misunderstood PMA's role in the occurrences that gave rise to this suit would be to award it the windfall the Supreme Court specifically forbade.

Where instances within six months may constitute unfair labor practices,

section 10(b) allows the evidentiary use of earlier events to shed light on matters occurring within the limitations period. *Local Lodge No. 1424, Int'l Assoc. of Machinists v. N.L.R.B.*, 362 U.S. 411, 416 (1960). See: section C, 2.

2. PMA Breached the CBA.

Defendant PMA violated the contract and effectively admitted the likelihood of § 13.2's unlawfulness as applied to Plaintiff. (SUF 125, 126, 127, 191, 206) Breaches of § 18.1 (good faith guarantee) of the CBA include, *inter alia*: (1) Mascola, an agent of PMA, breached PCLCD § 17.511 when he failed to recuse himself from presiding over Plaintiff's arbitration in the face of a clear conflict of interest. *See Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31 (D.C. Cir. 2015) (stating apparent authority exists when principal permits agent to do something which reasonably leads another to believe agent had authority). PMA breached § 18.1, 17.511 and their obligations under the agreement by failing to terminate or otherwise prevent Mascola from presiding over an arbitration in spite of known conflict. "[T]he sole legal basis for any authority exercised by the arbitrator in this case is … the consent of the parties to the PCL&CA." *EEOC v. Waffle House, Inc*., 534 U.S. 279, 294 (2002) (quoting, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989)) ("'[a]rbitration . . . is a matter of consent, not coercion.'"). **(**2) SGH LOU "B" § III.6: PMA President, Jim McKenna, received a letter from ILWU thwarting Eric's defense in a breach of § III.6 by preventing the appearance of his requested witness. PMA effectively assented to this conduct. (SUF 218) **(**3) § 17.263, 17.27, 17.282: PMA violated the contract by failing to submit its dispute with ILWU regarding misapplication of § 13. (SUF 219) "Mr. Aldape's speech involved criticism of Union officials and candidates for Union office, and he did not in any way violate Section 13.2" (SUF 125, 126, 127) "PMA is confident that the Coast Appeals Officer is aware of the peril to labor contracts if they are applied unlawfully." (4) SGH LOU "C"; "In determining penalties [for 13.2

violations], a prior offense that predates by five years or more the dates of the current offense shall not be considered." (SUF 215) PMA's agent, Mascola, breached the SGH by applying events spanning more than nine years in SCGM-0009-2017. (SUF 220) (5) § 13.1, 2, and 3, p. 9 of the PCLCD and SGH: In interpreting a CBA to determine an employer's contractual defense, the NLRB gives controlling weight to the parties' actual intent underlying the language. *Mining Specialists, Inc.*, 314 N.L.R.B. 268, 268-269 (1994). Section 13.2 binds workers to a result that has no meaningful remedy for the grievant, a draconian result for the accused, and freedom from prosecution for the employer. By its very essence, PMA breached an agreement with the stated objective to protect civil rights. (6) PMA breached § 13.3 by holding an improper hearing under conditions which were dubious and at best perfunctory. (SUF 183, 184, 186)

IV. CONCLUSION

Defendant INTERNATIONAL LONGSHORE AND WAREHOUSE UNION's Motion for Summary Judgment should be denied.

Dated: July 19, 2019

ANDREA COOK & ASSOCIATES

By: _____/s/_____
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