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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 PACIFIC MARITIME ASSOCIATION'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 hereby opposes the Motion for Summary Judgment filed by DEFENDANT PACIFIC MARITIME ASSOCIATION. 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 Pacific Maritime Association'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

PMA would have this Court believe this is a story about a hapless longshore worker who could not figure out, over an eight year period, that discrimination in the workplace is prohibited and required fifteen separate arbitrations (thirteen more than any other Longshore worker – ever) until "deregistration" was the last remaining option to curb discriminatory conduct. Conspicuously absent from PMA's moving papers is a single mention of cartoons, flyers or opposition to Union conduct, the subject of every single arbitration.

PMA went to great lengths to bring attention to the misapplication of 13.2 in the case of Plaintiff to the Union. The efforts by PMA were insufficient and its failure to take further steps breached the contract. They do, however, act as admissions of the wrongful conduct by defendants and notice of the potential consequences of the continued prosecutions against Eric.

Eric is not guilty of repeated acts of civil rights violations but instead the preparation and publication of flyers and cartoons which satirized union and employer leadership for all manner of conduct including, graft, nepotism, corruption, unfair bargaining, and favoritism in work distribution, and for his frequent and unrestricted verbal criticism of these issues in meetings and other proceedings. The prosecution of Eric for the creation of political flyers under the guise of a civil rights arbitration procedure are ironic and egregious breaches of the CBA by PMA. [1]

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[1] This is one of three Motions for Summary Judgment filed simultaneously by the Defendants. Unfortunately, it is inevitable that the Court read and process what will in some degree be redundant arguments and evidence. We apologize in advance but are compelled to approach each motion on its own terms.

Plaintiff does not seek to vacate arbitration decisions. 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, and 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. (SUF 46)

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 47) 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 48) Eric has no way to replace what has been lost.

II. FACTS

A. Section 13.2

Section 13.2 is a clever mechanism to protect employers from liability and avoid the cost and expense of litigation.[2] Moreover, there is no remedy for the grievant. 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 49) The SGH sets forth the procedures and penalties provided in § 13. (SUF 50) 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,

[2] 13.2 is unique in that individual employers play no part in the process. PMA and ILWU have exclusive control of the process, arbitrations and the imposition of penalties.

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 51)

Section 13.2 is the exclusive remedy for discrimination complaints by longshore workers. Accordingly, the language of the agreement(s) provides: *"All grievances and complaints alleging incidents of discrimination or harassment* in connection with any action subject to the terms of this Agreement … *shall be processed solely* under the Special Grievance/Arbitration Procedures …" (emphasis added) (SUF 52) "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 53).

Nothing in the PCLCD or SGH suggests or advises workers that they are at liberty to pursue another remedy. (SUF 54) At least one employer failed at an attempt to compel arbitration under § 13.2. (SUF 55) Importantly, once a § 13.2 is filed against an "accused," the arbitration procedures are inescapable. (SUF 56) "Q. Did Mr. Aldape have the option of opting out of the grievance procedure? No. Q. It was mandatory for him? A. Yes." (SUF 57)

The PCLCD and SGH provide a draconian and unlawful arbitration procedure. Section 13 in the PCLCD purports to set forth a "no discrimination" policy, 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 58) 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 59) 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 60) Section 13.2 complaints are also sent to the CLRC. (SUF 61) Within fourteen days of filing a complaint, there is an arbitration. (SUF 62) The parties are notified of the hearing date and the accused has fourteen 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. (SUF63)

Defendants do not investigate § 13.2 complaints. (SUF 64) The arbitration(s) take place in the presence of PMA and Local 13 representatives. (SUF 65) Representatives are free to speak on behalf of either party. According to Arbitrator Miller, the "optics" involving Eric were that there was never anyone to support him other than his selected representative. (SUF 66)

Following the arbitration, which is transcribed by a reporter, a decision is issued. (SUF 67) 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 68) There is no liability or participation by the employer. The grievant may not recover monetary damages. A grievant's only redress is to *punish the accused*. (SUF 69) The penalties against the accused can include loss of seniority, a prohibition against working for discrete periods, and the ultimate penalty, deregistration. (SUF 70) The decision is issued within fourteen days of the hearing. (SUF 71) A party has fifteen days to appeal the decision relying on the written file. (SUF 72) A final and binding decision is issued in fourteen days. (SUF 73) The matter is subject to the Coast Appeals. (SUF 74) 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 75) If the local grievance machinery becomes stalled or fails to work, the Parties are at liberty to refer the matter to the CLRC for resolution. (SUF 76) Despite an obvious dispute between the Parties, this was never done. (SUF 77) Finally, the matter can be presented to the NLRB for decision by one of the parties which the NLRB appeared to invite. (SUF 78) Arbitrators are selected from the "industry" and incompetent to render decisions. (SUF 79)

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B. Eric's Deregistration

After eight 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 union office at the time. The flyer accused Viramontes of having a financial interest in Port Medical and using membership information for his personal gain.[3] (SUF 81) 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 82) 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 83)

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. (SUF84)

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[3] In January 2017, two ILWU members were sentenced to 41 months in federal prison for their 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 a complaint lodged against him for his role in Port Medical by PMA which was dropped during the pendency of this litigation. (SUF 80)

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 85)

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 86) 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 87) 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 88) 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 they failed to do so. (SUF 89).

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. PMA's complaint against Viramontes, alleged involvement in the Port Medical fraud scheme in 2016, was given to Eric by the then Labor Relations

Representative, Luke Hollingsworth. (SUF 90) Eric sent it to Jim Tessier to include in a request to open SP-0032-2012 as a means of vindication. (SUF 91) Tessier assisted Eric in preparing his appeals and flyers and, without Eric's permission, posted the complaint on *longshore-labor-relations.com.* (SUF 92) Arbitrator Mascola found Eric guilty and deregistered/terminated his employment. (SUF 93)

III. ARGUMENT

A. Defendants are not entitled to Summary Judgment.

There are disputes as to material facts and PMA 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. Plaintiff's Claims Against PMA Are Not Time Barred.

The statute of limitations for Plaintiff's Causes of Action is six months. NLRA § 10(b), 29 U.S. § 160(b); *DelCostello v.Teamsters*, 462 U.S. 151 (1983). The date of the final decision of the arbitration which resulted in Plaintiff's deregistration was July 31, 2017, and Plaintiff filed the original Complaint on January 24, 2018, within the statutory time limit. (SUF 94) Plaintiff's Court-ordered Third Amended Complaint, which names PMA as a defendant, is dated outside of that limit and relates back to the original filing date. Defendant PMA incorrectly asserts that amendments naming new defendants are not permitted and Plaintiff's claim is time barred against PMA.

Amended pleadings, including those that name a new party and filed outside of the statute of limitations, relate back to the date of the original pleading when they satisfy three elements. *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 545 (2010). Under *Fed. R. Civ. P.* 15(c)(1), (1) an amendment must assert a claim "that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading," (2) within ninety days of the filing of the

original complaint, the party to be joined must receive such notice of the action and will not be prejudiced in defending on the merits, and (3) within ninety days of the filing of the original complaint, the party to be joined 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), 4(m); *Krupski*, 560 U.S. at 545.

1. Plaintiff's Claims are Set Out in the Original Pleading.

PMA does not challenge the language, that claims "that arose out of the conduct, transaction, or occurrence set out" in the original Complaint, FRCP 15(c)(1)(B). The original Complaint provided numerous references to PMA and the part it played in Eric's travail. The following provisions are in Plaintiff's original complaint, please see: SUF 95-103. The same set of operative facts animates Plaintiff's claims against all defendants and describes the occurrences from which those claims arise. The original complaint clearly delineates PMA's involvement.

2. PMA Received Notice within Ninety Days and Was Not Prejudiced.

The party to be joined must "receive[] such notice of the action that it will not be prejudiced in defending on the merits." *Fed. R. Civ. P.* 15(c)(1)(C)(i). Where a proposed defendant has sufficient time and opportunity to prepare a defense, it is not prejudiced. *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400 (9th Cir. 1984). There is no evidence of prejudice 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).

Here, Defendants ILWU and Local 13 filed an unopposed motion to join PMA as a party on April 9, 2019, which is well within ninety days of the original complaint as contemplated by Rule 4(m). This formal notice satisfies the timeliness requirement of the second element described in *Krupski, supra*. The Court granted the motion on May 9, 2018. (SUF 104) Plaintiff filed the Third

Amended Complaint ("TAC") naming PMA as a defendant on May 16, 2018. (SUF 105) PMA received a hand-delivered copy of the TAC on May 22, 2018. (SUF 106) The pretrial scheduling conference date was not yet set. (SUF 107) Plaintiff granted PMA's requested extension, until June 12, 2018, to file its response. (SUF 108) PMA and all parties filed the Joint Rule 26 Statement on September 4, 2018. (SUF 109) Depositions began in October 2018 and PMA was present for all discovery matters. (SUF 110) PMA Counsel has taken the laboring oar in litigation. (SUF 111) On September 6, 2018, the Court set the trial date for July 16, 2019. (SUF 112) Thereafter, the parties stipulated to the filing of a Fourth Amended Complaint ("FAC") on December 19, 2018, which Plaintiff filed on January 3, 2019. (SUF 113)

Because PMA participated in all discovery and there was no pretrial conference or trial date scheduled at the time of joinder, PMA had sufficient time and opportunity to prepare a defense and was not prejudiced.

3. PMA Knew or Should Have Known of the Charges Against It.

Regarding the "mistake," mentioned in Rule 15(c)(1)(C)(ii), the Supreme Court held that "relation back under Rule 15(c)(1)(C) *depends on what the party to be added knew or should have known*, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." (emphasis added) *Krupski*, 560 U.S. at 541. 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, that deliberate but mistaken choice is the "mistake concerning the proper party's identity" mentioned in Rule 15(c)(1)(C)(ii). *Id.*, at 549. Allowing a prospective defendant who understood, or should have understood, that it escaped suit only because the plaintiff misunderstood a crucial fact about its role during the statute of limitations is a "windfall." *Id.*, at 550.

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Plaintiff knew of the existence of PMA. This is readily determined by the face of the complaint and evidenced in the examples cited above. It initially appeared that PMA, while a signatory to the CBA attempted to defend Plaintiff against ILWU and Local 13 and their weaponization of the grievance procedure against Plaintiff. During the course of investigation, however, witness interviews and careful document review revealed that PMA colluded with ILWU and Local 13 in their collective actions regarding Plaintiff. (SUF 114)

More importantly, PMA knew or should have known about its involvement with the occurrences set out in the original pleading. On January 20, 2017, labor consultant Jim Tessier, filed NLRB charges against PMA and ILWU on behalf of Plaintiff for the conduct set out in the original Complaint, but were later withdrawn. (SUF 115) On February 20, 2018, the day Plaintiff filed the First Amended Complaint which appeared on Mr. Tessier's Maritime Industry news blog and features PMA in virtually every monthly publication. (SUF 116) Plaintiff's deregistration, appeals process, and the ramifications to registrants are described on this news blog, which includes union letters carbon copied to PMA. (SUF 117) 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 forbids.

4. Defendant Misapplies Precedent to Support Its Motion.

PMA misapplies three cases to support its assertions. *Louisiana-Pacific Corp. v. ASARCO, INC.*, 5 F.3d 431 (9th Cir. 1993) involves a plaintiff attempting to apply a federal statute of limitations, where federal law did not preempt state law, in order to join a "dead" corporation which lacked the capacity to be sued. 5 F.3d at 434. Here, federal law preempts state law and PMA is a viable and liable entity. The court's ruling in *ASARCO* does not apply to these facts.

PMA also relies upon a 1966 case which states, "an amended pleading does not relate back insofar as it states claims against newly-joined defendants" and

cites to an action under 42 U.S.C.A. § 1983. *Lewis v. Lewis*, 358 F.2d 495, 502 (9th Cir. 1966). State law (and civil rights law in the year 1966) disallows the addition of a new defendant unless it is to correct a misnomer, but federal law is less restrictive. *Hawkins v. Pac. Coast Bldg. Prod., Inc.*, 124 Cal. App. 4th 1497, 1503 (2004); *Jackson v. Fischer*, 931 F.Supp. 1049, 1075 (N.D.Cal. 2013). The Court in *Krupski* noted that Rule 15(c) asks not what the *plaintiff* knew or should have known at the time of the original filing, but what the *prospective defendant* knew or should have known at that time. *Krupski*, 560 U.S. at 548 (emphasis added). And again, Plaintiff's mistaken understanding of a prospective defendant's role in the conduct that gave rise to his claims does not foreclose that Rule 15 (c)(1)(C)(ii) has been satisfied. *Id.*, at 549.

PMA further asserts that Rule 15(c)(1)(C) addresses only the issue of substituting a new defendant for an existing defendant based upon mistaken identity, citing *Telesaurus VPC, LLC v. Power, No*. CV 07-01311-PHX-NVW, 2011 WL 5024239, at *6 (D. Ariz. Oct. 21, 2011). However, newer appellate authority states that an amended complaint relates back to the original complaint and a plaintiff can add a new defendant, of which Plaintiff was aware at the time of the original complaint, if Defendant knew or should have known it would be named as a defendant but for Plaintiff's mistake as to the role the prospective defendant played. *In re LLS Am. LLC*, 701 F. App'x 565, 567–68 (9th Cir. 2017). Defendant's own authority supports Plaintiff's position here: "If the plaintiff did not timely discover the prospective defendant's role, then the court must resolve whether the plaintiff *should have* discovered it earlier, just as it would if the plaintiff had never before asserted that claim against anyone." *Telesaurus VPC*, 2011 WL 5024239, at *6. As stated above, Plaintiff knew of PMA's existence but was unaware of its role in the events underlying his claims until witness interviews and document review revealed PMA and ILWU's collusive activity. (SUF 115). As the facts of this case satisfy all three elements of the test for *Fed.*

R. Civ. P. 15(c)(1), Plaintiff respectfully requests this Court find the Third Amended Complaint, which added PMA as a defendant, relates back to the date of filing of the original Complaint and is therefore not time barred.

5. PMA's Conduct Equitably Estops the Limitations Period.

When parties have engaged in collusion, fraudulent concealment or other wrongdoing, the active conduct of the defendant halts the statute of limitations under the theory of equitable estoppel. *Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006). Plaintiff reasonably relied on the facially unlawful provision of 13.2 which governed his legal response. Not until the instant litigation was Plaintiff made aware that, notwithstanding the mandatory language of section 13, Defendants in fact assert that it is "voluntary." The repeated mis-application of 13.2 grievances ruled on by PMA employees on the basis of political fliers engenders the application of equitable estoppel. (SUF 118) Allowing an obviously biased arbitrator to decide the fate of Plaintiff's career is certainly "wrongdoing." (SUF 119) "Federal [labor] law does not grant the parties to [CBAs] the ability to contract for what is illegal under state law." *Freightliner, LLC v. Teamsters Local 305*, 336 F.Supp.2d 1118, 1125 (D. Or. 2004). PMA should not be permitted to apply these provisions to Plaintiff nor continue to enforce section 13 against thousands of workers.

6. Earlier Events Illustrate Conduct Within the Limitations Period.

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." *Local Lodge No. 1424, Int'l Assoc. of Machinists v. NLRB,* 362 U.S. 411, 416 (1960). While the deregistration was within the limitations period, and while the theory of equitable estoppel applies to PMA's earlier actions, Plaintiff may also reference those actions evidentiarily.

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C. PMA BREACHED THE PCLCD.

Defendant dismissively refers to Plaintiff's claims as nothing more than a collection of "fundamental misunderstandings" of the CBA and oversimplifies them as a cluster of time-delimited gripes about disciplinary hearings. As an overarching principle, PMA breached § 18.1 which promises every longshore worker to observe the Agreement (CBA) in good faith and to observe this commitment without resort to gimmicks or subterfuge. PMA has breached this provision as set forth below.

1. PMA's Violations of Section 18.1 of the PCLCD

Defendant PMA violated the CBA and effectively admitted the likelihood of 13.2's unlawfulness as applied to Plaintiff. (SUF 120) Breaches of Section 18.1 of the CBA include, *inter alia*: (1) Mascola, a PMA employee, breached §17.511 when he failed to recuse himself or when PMA became aware of the bias and retained him to preside over Eric's arbitration. *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 by failing to seek Mascola's recusal 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." (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 condoned and ratified the conduct. (SUF 121) (3) § 17.263, 17.27, 17.282: PMA violated the contract by failing to submit its dispute with ILWU regarding misapplication of Section 13. (SUF 122) "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 123). "PMA is confident that the Coast Appeals Officer is aware of the peril to labor contracts if they are applied unlawfully." PMA breached the contract for

the failure to correct (at minimum) the misapplication of 13.2 which caused Eric's deregistration. (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 124) PMA's employee, Mascola, breached the SGH by applying events spanning more than nine years in SCGM-0009-2017. (SUF 125) (5) § 13.1, 2, and 3, Pg. 9 of the PCLCD and SGH: Defendants espouse a workplace free from discrimination and a procedure to rectify any breach of the policy. 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). Here, the mandatory discrimination grievance procedure 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 intended to protect civil rights. (6) PMA breached Section 13.3 as it relates to 0032-2016 by holding an improper hearing under conditions which were dubious and at best perfunctory. (SUF 126)

2. PMA Argues Against a Plain-Meaning Interpretation of the CBA.

Whenever possible, courts first attempt to discern the parties' intent from the plain language of the contract. *See Flores v. American Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003); *Corbin Northridge LP v. HBC Solutions, Inc.*, No. CV1402714RGKJCX, 2015 WL 12712292, at *2 (C.D. Cal. Feb. 17, 2015); *Brandwein v. Butler*, 218 Cal. App. 4th 1485, 1505 (2013). Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent. *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015).

a. PMA Contradicts the Plain Meaning of the CBA.

PMA asserts that Plaintiff misunderstands the interrelation between §§ 13 and 17 of the PCLCD and that Plaintiff alleges an impossible breach. PMA

misses the point and also contradicts the plain language of the contract. Section 17.263 of the PCLCD states: "When either the Union or PMA claims there has been a violation of Section 13 by anyone bound by this Agreement, the grievance shall be submitted to the Joint Coast Labor Relations Committee and shall be resolved there or referred to the Coast Arbitrator for hearing and decision in accordance with the applicable contract provisions." (SUF 127) The interrelated nature of sections 13 and 17 could not be clearer. Further, § 13.3 describes how certain claims, including those under federal statutes like FLMA, USERRA, and ADA, are to be filed under § 17 procedures. (SUF 128)

b. PMA's Actions Contradict its Interpretation of the CBA.

PMA's assertion also contradicts its prior conduct. PMA refused to implement an arbitral award because it disagreed with the 13.2 finding. (SUF 129) Arbitrator/PMA employee, David Miller, referred parties to a 13.2 grievance to section 17 to resolve the issue. (SUF 130) McEllrath, ILWU President, testified that the JCLRC (half of which is made up of PMA appointees) has authority to invalidate arbitral decisions. (SUF131) He further stated that parties to the CBA are responsible for administering and enforcing the CBA and ensuring its terms are adhered to. (SUF 132) McEllrath testified that the CLRC "can do whatever it wants." (SUF 131) In 2008, parties agreed upon an MOU that stated their desire to replace local-level arbitrators with "professional qualified arbitrators," but never implemented this change. (SUF 133) In 2014, employers, still concerned about a lack of arbitral neutrality, attempted to replace arbitrators for sections 17 and 13.2 grievances with professional arbitrators from outside the maritime industry. (SUF 134) While parties agreed to this change in February 2015, they selected arbitrators from within the industry (including Mascola) six months later. (SUF 135) ILWU and PMA declined to honor employers' stated request for unbiased arbitrators, a condition which had been voted upon and accepted in 2008 and again in 2014, and instead installed their preferred agents.

PMA is incorrect that no portion of section 17 applies to 13.2 grievances. Section 17 provides additional procedures for when a section 13 grievance fails to bring about a resolution, and it delineates the policies and procedure which manage the infrastructure of grievances outside the scope of section 13. Plaintiff's past conduct and the CBA's plain language belie Defendants' reductionist approach.

D. The Union Has Breached the Duty of Fair Representation.

1. 13.2 is Unenforceable and Should be Deemed Void.

Plaintiff also seeks declaratory relief that section 13.2 of the CBA is unlawful. (FAC, Pg. 23, ln.5-6) The United State Supreme Court and California courts have determined that arbitration provisions such as § 13.2 are unenforceable. *See Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 78–79 (1998). 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. *Wright,* 525 U.S. 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 136)

Plaintiff is the analogue to the grievant in the § 13.2 process and is no less trapped, arguably, 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 137)

In *Kaplan v. Int'l All. of Theatrical & Stage Emp. & Motion Picture Mach. Operators of U.S. & Canada*, 525 F.2d 1354, 1360 (9th Cir. 1975) *abrogated on other grounds*, the court held: "The International cannot claim ignorance nor escape liability from the natural consequences …by making and enforcing, albeit tacitly, a collective bargaining agreement which perpetuates past discriminatory effects, appellant International has violated Title VII. Policies and practices…"

Here, ILWU bargained for the PCLCD (ILWU UF 12-17), has recently ratified its unenforceable provisions, and perpetuates its unlawful enforcement by consistently and intentionally applying a distorted version to Eric. (SUF 138) The Ninth Circuit 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.

2. Plaintiff has Adduced Substantial Evidence that the Union Breached the Duty of Fair Representation.

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, Intern. v. O'Neill*, 499 U.S. 65, 67. A union breaches its DFR where

its actions are arbitrary, discriminatory, or in bad faith. *Vaca*, 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. The Union Breach Its Duty of Fair Representation in Negotiating and Enforcing Section 13.2.

As set forth in Section 5, Plaintiff asserts that defendants are equitably estopped from asserting the six-month statute of limitations under § 10(b) of the NLRA, 29 U.S.C. § 160(b), as a defense to the Union's negotiation and enforcement of 13.2. *Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006). Equitable estoppel applies in the instant matter because while the ILWU *insists* 13.2 is "voluntary," the language of the contract provides otherwise. (SUF 52, 53, 136, 137) Defendants also testified that 13.2 is the exclusive remedy for discrimination claims (SUF 52, 56, 57) and admitted the CBA does not advise employees who have suffered discrimination of their rights to seek alternative remedies. (SUF 54) Defendants rely on the *absence* of notice to support their "voluntary theory" of 13.2, but silence is not a defense to equitable estopple when there is a duty to speak, *United States v. Georgia-Pacific Co*., 421 F.2d 92, 97 (9th Cir. 1970), and the DFR imposes 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). Eric's knowledge of the purported "voluntary" aspect of 13.2, which was purposefully concealed by the inclusion of mandatory language in the PCLCD and SGH (SUF 52, 53), was unknown to him until this litigation (SUF 139) and he reasonably relied upon the mandatory nature of 13.2 (SUF 140), just as PMA and the ILWU intended him to. To hold Plaintiff to a limitations period intended to promote swift resolutions of claims, in light of ILWU's fraudulent

concealment, allows ILWU to "take advantage of its own wrong." *Atkins v. Union Pacific R. Co.*, 685 F.2d 1146, 1149 (9th Cir. 1982) (citations and alterations omitted).

b. The Union Breached Its Duty of Fair Representation in Mishandling Eric's 13.3 Grievance Against Mascola.

Contrary to defendant's assertion that the Union did not owe Eric a DFR in processing his 13.3 grievances, the Supreme Court has made clear that a union's conduct is subject to review following a joint committee's decision. *See Hines v. Anchor Motor Freight, Inc*., 424 U.S. 554, 568 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964). Moreover, the cases cited by defendant on this point are not binding on this Court and are inapposite. For example, unlike the Union defendants in this case, in *Early v. Eastern Transfer*, 699 F.2d 552 (1st Cir. 1983), the defendants actually performed an investigation, and the plaintiffs were afforded a hearing at which they were represented and allowed to argue their case. *Id*. at 554. Moreover, the *Early* court left open the DFR question. *Id.* at 560. ("On the record before us, we cannot say that the union representatives' vote against the Earlys raises a triable issue as to some breach of the duty of fair representation.")

Here, Eric's 13.3 alleged discriminatory application of 13.2 against him by Mascola who Eric alleged had exceeded his authority in approving grievances which did not meet the criteria of 13.2 to carry out a personal vendetta against him. (SUF 141) On two separate occasions prior to becoming an arbitrator, Mascola threatened to kill Eric and called him a "fucking monkey" during LRC meetings while acting as an LRC representative for Local 13. (SUF 142, 143) The impunity with which Mascola and Defendants acted, effectively invited repeated and meritless complaints against Eric in which he was forced to defend himself in clear violation of the plain language of the CBA. (SUF 144) As the person to whom the ILWU and PMA had delegated their duties, (SUF 145) Mascola was an

"institutional party" for purposes of Eric's 13.3 grievance (SUF 146) Moreover, Eric's claims relating to the mishandling of his grievance against Mascola is not time barred. He was never advised nor notified of the outcome of the 13.3 complaint. (SUF 147) Eric reasonably relied upon the grievance procedure the Union had negotiated on his behalf (SUF 148) and was not made aware of any decision regarding the 13.3 until this litigation (SUF 147). Moreover, the dismissal of Eric's 13.3 complaint occurred under dubious conditions, including a "special" meeting with only two attendees, one Union member and a member of the administrative staff of PMA. (SUF 149) Defendants had an opportunity, even a contractual mandate to investigate; they failed to do so. (SUF 150, 151) Importantly, the issue of Mascola's bias was known to the parties in advance of the deregistration arbitration. (SUF 141, 142, 152) The Union processed Eric's 13.3 grievance in an arbitrary, discriminatory, bad faith and collusive manner with PMA, and the Union's breach of its DFR seriously undermined the integrity of the grievance process. *Hines*, 424 U.S. at 568.

c. The ILWU Breached Its Duty of Fair Representation by Repeatedly Failing to Represent Plaintiff Against the Apparent Misapplication and Misuse of Section 13.2.

It is ironic that PMA is now arguing that there is nothing the Union could have done to prevent the misuse of 13.2 to punish Eric for his political speech. PMA who wrote to the ILWU insisting that it agree to dismiss 13.2 SP-0032-2012 (filed by Christopher Viramontes) and vacate the arbitrator's decision in SCGM-0009-2012, the case that formed the basis of Eric's deregistration. According to PMA, SCGM-0009-2012 "*ignored the Accused's [Eric's] rights to criticize elected Union officials…*" (SUF 153) and "*The Employers find it disturbing and, certainly contrary to the Special Procedures for § 13.2 Complaints, that the Coast Appeals Officer has now increased the penalty for Mr. Aldape when no violation of § 13.2 even exists in this case.*" (SUF 154) The

ILWU failed to respond to PMA (SUF 155), and, in turn, PMA did (at least initially) exactly what it now asserts cannot be done—i.e. it refused to implement the award against Eric and sought to challenge its propriety under Section 17. (SUF 129) Section 17.263 expressly provides PMA and the ILWU a dispute resolution mechanism where one of them claims, as PMA did, that Section 13 has been violated. (SUF 75) As recently as November of 2016, PMA wrote a 19-page appeal penalizing Eric under 13.2 for a political cartoon alleging unfairness in job elevations in SCGM-0015-2016 and SPSC-0032-2016. (SUF 83). PMA wrote, "*Mr. Aldape did not engage in conduct prohibited by Section 13.2. Disciplining him for distributing the flyer would violate Section 13 and could jeopardize the integrity of the entire Section 13.2 process.*" (SUF 156) The ILWU opposed PMA's appeal. (SUF 88) "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).

The president of ILWU, Robert McEllrath, admitted under oath that the CLRC has the ability to vacate orders/decisions of an arbitrator. (SUF 131) McEllrath was a member of the Coast Committee. (SUF 157) Indeed, the CLRC vacated arbitrator David Miller's decisions modifying the award against Eric. (SUF 158). As PMA's former Director of Contract and Administration and Arbitration put it, "the CLRC could do anything it wanted." (SUF 159) The 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 132) The ILWU repeatedly breached the DFR over eight years as Union officials filed fifteen 13.2 grievances against Plaintiff. (SUF 160) The gravamen of these grievances was political flyers and/or cartoons, satirizing management or elected union members. (SUF 161) Section 13.2 was weaponized against Eric like no other longshore worker. (SUF 162) Not once did the ILWU or Local 13 defend

Eric or seek to correct the unlawful application and misapplication of 13.2. (SUF 163) ILWU's president harbored personal animus toward Eric because one of his flyers placed McEllrath in conflict with PMA's president during contract negotiations. (SUF 164) Instead of carrying out its duty to fairly represent Eric, the ILWU intervened in his deregistration to prevent his witness from testifying. (SUF 165)

The ILWU was on notice that the misapplication of 13.2 was improper and failed to remedy the situation. (SUF 83-89, 166) 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. A reasonable jury could find on the evidence present that the ILWU exercised its discretion in bad faith and with a discriminatory motive to punish Eric for his political speech against the Union.

3. ILWU Breached the DFR by Allowing Mascola to Hear Eric's Arbitrations.

Mascola had an actual conflict of interest in hearing cases involving Eric. ILWU and PMA were aware, before deregistering Eric, that Mascola had threatened to kill Eric (SUF 143), had publicly called him a "fucking monkey" (SUF 142), and had a known hatred for him (SUF 140). Eric objected to Mascola hearing 13.2 grievances against him, including his deregistration (SUF 167). Eric filed a 13.2 against Mascola for race discrimination (SUF 168) and filed a 13.3 alleging that Mascola was wrongfully using his position as arbitrator to carry out a personal vendetta against him using 13.2 (SUF 169). Mascola's predecessor, arbitrator David Miller, testified that Mascola repeatedly told him that he [Mascola] hated Eric "*And then his [Mascola's] reply, I distinctly remember, he says, 'I hate the man, I hate the man.*'" (SUF 170) "*… Mascola was a constant thing that Aldape was causing problems and that he hated him personally and didn't care what happened, …*" (SUF 140) "*Mr. Mascola, like I said, is very*

calm, but when the subject of Mr. Aldape would come up, he would become agitated …" (SUF 158)

ILWU and PMA as parties to the CLRC, hired, fired, trained, supervised, paid, and had the power and authority to vacate and overturn arbitrator's decisions. (SUF 171) As the employee of ILWU and PMA, Defendants are responsible for the "bad acts" of Mascola either directly or by a theory of *respondeat superior*, a subset of the theory of agency. *See Ruppe v. City of L.A.*, 186 Cal. 400, 402 (1921); Rest.2d, Agency §§ 231, 244 et seq. Mascola's bias is undisputed and of the most egregious sort. (SUF 140, 142, 158, 170, 172) At a minimum, Mascola's recusal in Eric's case was mandated by the plain language of the contract and the CLRC's own policy. (SUF 173, 174, 175) Defendant's decision to retain Mascola was irrational. Alternatively, and more plausibly, the ILWU breached its DFR through bad faith and discriminatory conduct by retaining Mascola and failing to seek his recusal or disciplinary action, including termination. (ILWU UF 52, 53, 54; SUF 173, 174, 175) Defendant's retention of Mascola as an arbitrator involving Aldape was discriminatory, an act of bad faith, or "so far outside a wide range of reasonableness" as to be "wholly irrational or arbitrary." *Air Line Pilots Ass'n. Int'l v. O'Neill*, 499 U.S. 65, 67 (1991).

4. LWU Breached the DFR by Ratifying and Condoning the Misapplication of 13.2 to Punish Eric for Exercising his Free Speech Rights.

Virtually all of the 13.2 grievances filed by Local 13 officials against Eric relate in some manner to his political flyers, which he distributed to the membership, often during election season and contract negotiations, concerning the very subject matter *specifically excluded* from Section 13.2, i.e. intra-union political disputes and union business that have nothing to do with PCL&CA covered employment. (SUF 176) The flyers were critical of Union officials and

policies. (SUF 161) Eric was the target of repeated 13.2 grievances by Union officials who were mentioned or depicted in his political flyers and cartoons to the membership. (SUF 160) As PMA stated: "Section 13 was not intended to protect Union or Employer representatives from scorn, even if unfair. (SUF 81) Eric's flyers and cartoons are precisely the type of speech Congress intended to protect to union members under the NLRA and the LMRDA. *See Reed v. United Transp. Union*, 488 U.S. 319 (1989); *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982); *Hall v. Cole*, 412 U.S. 1 (1973).

For example, Lawrence Toledo, a member of the Local 13 grievance committee, filed Grievance SPSC-0005-2016 on March 14, 2016 over a political flyer encouraging the membership to vote in an upcoming Local 13 election. Its headline read, "Vote JoJo – Bobby O gotta GO." The flyer accused Local 13 President Bobby Olvera of being a "rat" and divulging Union strategy to Los Angeles Mayor Eric Garcetti. On 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 race discrimination and postings on the internet. (SUF 177) John William Seixas, also a member of the Local 13 grievance committee, filed SPSC-0008-2016 on March 18, 2016 based on the same "rats" flyer. Mascola found both grievances met the requirements of 13.2.

Grievance SPSC-0006-2017 was filed on March 10, 2017 by Christopher Viramontes, a member of the Local 13 Executive Committee. This grievance resulted in Eric's deregistration. Viramontes alleged that Eric published Employer Complaint EC-0781-2016 to the internet in retaliation for Viramontes's filing another 13.2, SP-0032-2012, five years earlier—the case in which PMA came to Eric's defense and demanded that the ILWU set aside the award—involving a political flyer with a headline that read, "Vote!!! Don't Be Shy – Put In The Other Guy" and "Our Money Your Vote – Steady Men Are A Joke" and accused

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Viramontes of "running football cards" and being involved in a medical benefits scam called "Port Medical". (SUF 178)

David Miller testified that Defendants sought to influence his decisions, and neither party wanted to help Eric: "Q: … Did you ever feel that there was an effort being made by either ILWU or PMA to impact a decision, a pending decision, with respect to Mr. Aldape? … A: Oh, there's no question about it. Q: Okay. How many times did that occur? A: It was constant. Q: It was constant? A: Every time an Aldape issue came up. Q: Somebody tried to pressure you. A: Well, both parties tried to paint it that way. They were both – what can I say? Neither of them wanted to help Mr. Aldape. It was that simple. I could see it at every hearing. Mr. Aldape didn't get the best representation at any time…" (SUF 179) ILUW intervened in Eric's deregistration to prevent Mr. Miller from testifying as a witness (SUF 165) in violation of the CBA. Plaintiff has established that ILWU breached the Duty of Fair Representation.

IV. CONCLUSION

Defendant Pacific Maritime Association's Motion for Summary Judgment should be denied.

Dated: July 19, 2019

ANDREA COOK & ASSOCIATES

By: _____/s/_____
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