Andrea L. Cook, SBN 164915
**ANDREA COOK & ASSOCIATES**
555 East Ocean Boulevard, Suite 430
Long Beach, California 90802
Telephone: (562) 951-9135
Facsimile: (562) 951-9126
E-mail: alcook@alcooklaw.com

David P. Farrell, SBN 246110
**LAW OFFICE OF DAVID P. FARRELL**
555 E. Ocean Blvd., Ste. 430
Long Beach, California 90802
Telephone: (562) 479-0939
Facsimile: (562) 479-0935
E-mail: david@dpflegal.com

Attorneys for PLAINTIFF
ERIC ALDAPE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| ERIC ALDAPE,<br><br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, et al.,<br><br>Defendants | CASE NO. 2:18-cv-624 AB (SKx)<br><br>Assigned to: Hon. Andre' Birotte Jr.<br><br>**PLAINTIFF'S OPPOSITION TO DEFENDANT LOCAL 13'S MOTION FOR SUMMARY JUDGMENT**<br><br>Date: August 30, 2019<br>Time: 10:00 a.m.<br>Place: Courtroom 7B |

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

PLAINTIFF ERIC ALDAPE (hereinafter "Plaintiff" or "Eric") hereby opposes the Motion for Summary Judgment filed by DEFENDANT LOCAL 13. 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

Setting aside the sarcastic and dismissive rhetoric, Defendant Local 13 mischaracterizes Plaintiff Eric Aldape's case. As set forth in Eric's Opposition(s) to Defendants Pacific Maritime Association's (PMA)[1] and International Longshore and Warehouse Union's (ILWU) respective Motion(s) for Summary Judgment, this case regards the gross misconduct of certain elected union officials, a specific arbitrator and the condonation and ratification of such conduct by Defendants. Moreover, this case reflects the repeated ratification and application of a provision of the Pacific Coast Longshore Contract Document ("PCLCD" or "CBA"), unlawful as written and as applied, repeatedly to Plaintiff.

The pretense of grievance procedure § 13.2 is that it embodies civil rights protections for Longshore workers. In fact, it is a mechanism to violate the rights of workers. In the case of Eric, weaponized so as to remove the protections provided by the *Labor Management Relations Act*, 29 USC § 185, and *Labor Management Reporting and Disclosure Act*, 29 USC § 401 (a)(2). Eric has the right to free speech in the workplace and to be free from arbitrary and discriminatory conduct by Defendants ILWU and Local 13. Defendants are required to honor the terms and conditions of the CBA, negotiated Defendants and contractually "committed to observe the agreement in good faith." (SUF 29)

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[1] PMA currently represents 78 companies, responsible for half of all US imports and nearly all Asian imports. West Coast shipping traffic is responsible for 12.5 percent of the US GDP. (SUF 27) PMA negotiates and is the bargaining representative for these companies, as well as the joint operator of the dispatch halls which provide longshore workers to 78 companies along the West Coast. The dispatch hall is run by the JOINT Port Labor Relations Committee (JPLRC) in each of four ports on the West Coast. (SUF 28)

## II. FACTS

For purposes of this motion, the identification of the parties, the relative relationships and other facts not otherwise in dispute contained in section II, A, pp. 2:10-3:9 of ILWU, Local 13's Motion for Summary Judgment, Plaintiff does not repeat them here. Simply put, Eric was a registered longshore worker subject to a CBA bargained for, by, and between ILWU and PMA. Local 13 is the chartered, affiliated local for ILWU for longshore workers in the Los Angeles area.

Plaintiff disputes nearly all other factual assertions. Particularly noteworthy is a statement found on p. 4:5-9. "In essence, the accuser and the accused have the complete responsibility over a complaint. Should a worker feel inclined to file a Section 13.2 complaint against another worker, then he or she (not Local 13 and not PMA) decide whether to file the Section 13.2 complaint." This suggests a sort of worker-dictated, free for all without Defendant's strict, contractual control.

In Eric's case, he was subject to fifteen complaints over a period of nine years. With one exception, all were filed by elected officials of the Union or (in one instance), an individual running for office. Seven of the 15 were filed in the two years before Eric was terminated. (SUF 30) This was thirteen complaints more than any other longshore worker. (SUF 31) Eric is the ***only*** longshore worker since the inception of 13.2 in 2003 to be deregistered. (SUF 32)

### A. Section 13.2 Procedure

Section 13 of the PCLCD, not new to Defendants' CBA, was included in the 2014 version (ratified in 2015) and ratified again in 2019. (SUF 33) The Special Grievance Handbook ("SGH") sets forth the procedures and penalties provided for in § 13.2 (SUF 34) 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 35)

The SGH provides that workers suffering discrimination must file their complaints within fifteen days of the incident. (SUF 36) 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 37) Arbitrators are selected from the "industry" by Defendants. (SUF 38)

Section 13.2 complaints are also sent to the CLRC. (SUF 39) The selected arbitrator is the "gateway" to whether the grievance proceeds to arbitration in that they are required to make a determination if the Complaint falls into one of the eight protected classes identified in § 13. (SUF 40) Within fourteen days of filing a complaint, there is an arbitration. (SUF 41) 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. (SUF 42)

Defendants do not investigate § 13.2 complaints. (SUF 43) The arbitration(s) take place in the presence of PMA and Local 13 representatives. (SUF 44) Representatives are free to speak on behalf of either party. According to Arbitrator Miller, the "optics" involving Eric were that no one supported him other than his selected representative. This is not the normal course of a § 13.2 arbitration in which representatives of PMA[2] and Local 13 are present to supervise and are at liberty to argue for the grievant or the "accused." (SUF 45)

Following the arbitration, which is transcribed by a reporter, a decision is issued. (SUF 46) Where there is a finding of "guilty," the Arbitrator is at liberty

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[2] As detailed below, there were a number of instances when PMA opposed the application of 13.2 to the Plaintiff, but its agents seldom spoke during actual proceedings.

to levy penalties. (SUF 47) Penalties are purportedly determined by the number of prior offenses, the SGH, and the discretion of the arbitrator. (SUF 34) There is no liability for the employer. No consideration is given to making the grievant whole. A grievant's only redress is to punish the accused. (SUF 48)

A party has fifteen days to appeal the matter using the documents and transcripts on file. (SUF 49) A decision is issued within fourteen days of receipt of the appeal. (SUF 50) The decision is final and binding on the parties. (SUF 51) The matter is subject to the Coast Appeals. (SUF 52) If the parties to the CBA disagree as to whether a decision violates section 13, the matter may be submitted to the CLRC or to the Coast Arbitrator. (SUF 53) If the local grievance machinery stalls or fails to work, the Parties may refer the matter to the CLRC. (SUF 54) PMA repeatedly opposed the application of 13.2 to Eric. (SUF 55) Despite an obvious dispute between Defendants regarding the proper application of § 13.2, particularly with regard to Eric, these procedures were never followed. PMA advised Plaintiff that the dispute regarding the application of § 13.2 was referred to the CLRC. This was never done. (SUF 56) Finally, the matter can be presented to the NLRB for decision by one of the parties, which the NLRB appeared to invite in one instance. Specifically, the Board noted the potential for mischief wrought to freedom of speech by the misapplication of § 13.2. (SUF 57)

Section 13.2 is the exclusive remedy for discrimination complaints by longshore workers. (SUF 58) 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 58) "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 59)

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Despite Defendant's assertions, nothing in the PCLCD or SGH suggests or advises workers that they are at liberty to pursue another remedy. (SUF 60) At least one employer unsuccessfully attempted to compel arbitration under § 13.2. (SUF 61) Importantly, once a § 13.2 is filed against an "accused," the arbitration procedures are mandatory. (SUF 62) "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 63)

**B. Disciplinary Actions Against Eric Aldape**

All fifteen arbitrations, arose out of Eric's right to freedom of speech in the workplace. Eric's accusations were *not* against rank and file members, but against those holding union office (or running for office) with allegations of fraud and corruption, among others. Union officers began to weaponize § 13.2 against Eric in 2008 when he (Eric) circulated a political flyer accusing Frank Ponce de Leon, while he was running for Secretary/Treasurer, of conflicts of interest in violation of the contract. (SUF 64) Ponce de Leon wrote a threatening letter to Eric and filed a grievance according to the ILWU Constitution based on prohibited intra-union activities. (SUF 65) Following a "guilty" decision by the Grievance committee, the matter went to the general membership for a vote and the decision was reversed by rank and file members. (SUF 66) Unsuccessful in curbing Eric's political speech, Section 13.2 was used on fifteen subsequent occasions until Eric's deregistration in 2017. (SUF 30)

1. Complaint # SP-0005-2009 was the result of three flyers accusing Mark Jurisic, a member of the Executive Board and Registration Committee (responsible for admitting applicants into the Union) of nepotism. Jurisic's daughter filed a 13.2 complaint regarding the innuendo that a failed drug test "smeared" her reputation. (SUF 67) Unaware of the requirement that any § 13.2 Complaint must arise out of an enumerated protected class, Eric apologized for the flyers and was found guilty on that basis and without any other finding. (SUF

68) Mark Mascola, the arbitrator later responsible for Eric's deregistration, represented the grievant in this and a subsequent arbitrations. (SUF 69)

2. Complaint # SP-0010-2009 was the result of flyers and cartoons criticizing Steven Bebich as a candidate for the position of Secretary Treasurer. (SUF 70) Prior to publishing the flyers, Eric called Bebich and told him of his intention to publish flyers which included a reference to prior criminal acts. "Are you eligible?" (SUF 70, 71) Following the publication of the flyers, Bebich took exception. Eric then left a voice mail, referring to Bebich's response that Eric was "stupid" and Eric's intention to be specific about the criminal allegations. This is a voice mail littered with obscenities and harsh allegations against a political candidate. (SUF 72) It does not have the patina of twitter remarks, but it has nothing to do with discrimination, nor do the opinions of the arbitrators in the original decision and the appeal pretend that it does.[3]

3-5. Complaints numbered SP-0032-2012, SP-0017-2013, and SPSC-0006-2017 lie at the heart of Plaintiff's wrongful termination and those arbitrations directly tied to Plaintiff's termination. Christopher Viramontes filed a complaint in 2012, while holding the position of Secretary/Treasurer for Local 13, a powerful position. Eric created a flyer and cartoon alleging that Viramontes controlled a football-betting business and was a principal in the Port Medical scandal.[4] (SUF 74) Mr. Viramontes was the subject of an FBI investigation and PMA lodged a complaint against him for his role in Port Medical in 2017, but dropped it during the pendency of this litigation. (SUF 76) During his deposition,

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[3] Neither decision in Complaints SP-0005-2009 and SP-0009-2009 make any reference to discrimination. (SUF 73)

[4] In January 2017, two ILWU members were sentenced to 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. (SUF 75)

Mr. Viramontes first testified that he had no involvement with Port Medical, then recanted and admitted that he loaned $130,000 in cash to Port Medical. (SUF 77)

The arbitration decision for the 2012 complaint was based on the fact that Viramontes denied any connection to Port Medical and that while the "*greater part of the flyer's content related to political inter-union satire,*" the arbitrator believed that Eric's comments were based on "rumor" and intended to "vilify" Viramontes. Eric was sentenced to 180 days off work. (SUF 78) PMA opposed the decision in a lengthy legal opinion (SUF 79, 80) and wrote a letter to Eric, refusing to implement the decision and advising Eric that the matter was referred to the Coast. (SUF 56) There was a subsequent order by the Arbitrator in which the arbitrator makes a finding that in the event PMA fails to implement the event, the arbitrator will consider the grievance machinery "stalled," making reference to § 17.282. "If the grievance machinery stalls…the matter can be referred by either the Union or the Association to the Joint Coast Labor Relations Committee for disposition." (SUF 81) This never happened. Eric wrote letters to the JPLRC and ILWU International President pleading for assistance. (SUF 82) McEllrath, ILWU President and Chairman of the Joint Coast Labor Relations Committee, testified that he had no idea as to the outcome of Eric's and PMA's pleas but told others to "handle it." (SUF 83) When Eric appealed, the arbitrator inexplicably added an additional six months of time off. (SUF 84) Neither arbitrator ever found any form of discrimination. (SUF 85)

In 2013, Eric was found guilty of "retaliation" as a result of a fight between Eric and Viramontes and sentenced to one year off work. (SUF 86) Eric does not deny the altercation but states Viramontes invited him to step into an alley, away from the union offices where the fight ensued. (SUF 87) Assault charges are properly heard by the JPLRC pursuant to §17.82. (SUF 88) The arbitrator refused to acknowledge a previous opinion related to an assault. "…you can't take your

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grievance to the dispatch hall…You know what you can do at the Memorial Hall? You can kill each other, literally, and not come up for a 13.2." (SUF 89)

Connecting the dots to events in 2012 and 2013 to those in 2017, complaint SPSC-0006-2017 found Eric guilty of retaliation against Viramontes, complaining that Eric posted a PMA complaint against Viramontes on a website. PMA's complaint against Viramontes alleged his involvement in the 2012-2013 Medical Fraud scheme and was given to Eric by the then Labor Relations Representative, Luke Hollingsworth. (SUF 90) Eric sent it to labor consultant Jim Tessier to include in a request to reopen SP-0032-2012 as a means of vindication. (SUF 91, 74) 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 based on a theory of retaliation.[5] (SUF 93)

**C. Arbitrator Mascola was Biased and Incompetent.**

ILWU and PMA jointly selected Mark Mascola as an arbitrator in September 2015.[6] PMA and ILWU jointly employ him through the Joint Coast Labor Relations Committee (JCLRC), which has the responsibility to "investigate and adjudicate" grievances. (SUF 94) Members of the JCLRC include the President, Vice President, and other officers of ILWU. (SUF 95) 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 96) Mascola was given a "Code of Conduct" by his employers when he became an arbitrator. (SUF 97)

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[5] Eric was found guilty in 2016 in an arbitration pursuant to grievance SPSC-0032-2016. (See p. 22:17-23:1.)

[6] From 2008 to 2015, Mascola was a Labor Relations Representative, on the E-Board and Grievance Committee. This was a paid position by Local 13.

Mascola had two altercations with Eric before 2015. In 2012, Mascola *physically* attacked Eric and threatened to kill him. Mascola does not deny this occurred. Mascola was an elected official at the time.[7] (SUF 99) A few weeks later, frustrated by what he considered Eric's disruptive behavior during an LRC hearing, he called Eric a "fucking monkey." (SUF 100) Mascola, while an LRC representative, repeatedly contacted David Miller, an arbitrator hearing § 13.2 complaints, including those against Eric. (SUF 101) 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 102)

**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 April 1, 2016, alleging Mascola was biased and exceeded his authority. (SUF 103) The JPLRC has no deadline by which to respond to 13.3 complaints. (SUF 104) Eric never received notice of the outcome of the bias complaint. (SUF 105) During discovery, 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 106)

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

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[7] Eric filed a 13.2 complaint against Mascola. Fearful of retaliation and facing multiple 13.2 charges, he withdrew the complaint. (SUF 98)

LRC representative. (SUF 107) 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 108) 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 109) While Defendants had a contractual mandate to investigate and to meet and confer with the grievant, they failed to do so. (SUF 110)

All parties knew of Mascola's bias 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. (SUF 111) 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 112) All Defendants were aware of the alleged bias as early as March 2016. (SUF 113)

## III. Argument

### A. Defendants are not Entitled to Summary Judgment.

Disputes as to material facts preclude a granting of Local 13's Motion for 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.[8] The lower court held that the longshoreman was required to pursue arbitration under the terms of the collective bargaining agreement. *Id.*, at 75. However, the Supreme Court held that the lack of a clear and unmistakable waiver of union-represented employees' rights deemed the arbitration clause unenforceable. *Id.*, at 82.

Defendants would have this 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 115)

We ask this Court to consider Plaintiff, the analogue to the grievant in the § 13.2 process, as no less trapped, even more so by a system empowered to punish him by taking away his livelihood in fewer than ninety days in a kangaroo court, overseen by an unqualified (and biased) arbitrator under the guise of civil rights protections by angry union officials. Eric was hounded for years by the 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 116)

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, "By making and enforcing, albeit tacitly, a collective bargaining agreement…however neutral on their face, are unlawful if they tend to perpetuate the effects of past discrimination." Here, ILWU bargained for the PCLCD, recently ratified its unenforceable provisions,

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[8] *Wright* involved a disability claim. *Id.*, at 70. Such claims are no longer covered by 13.2 but are covered by separate provisions in the SGH. (SUF 114)

and Local 13 perpetuates its unlawful enforcement by consistently and intentionally applying a distorted version to Eric. (SUF 117)

The Ninth Circuit has held that CBA provisions illegal under state law are prohibited. *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 an unlawful provision of the CBA against Plaintiff and some 21,000 longshore workers.

**C. 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). A finding of equitable estoppel rests on the consideration of four elements: (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," it repeatedly provides contract language stating otherwise. (SUF 58, 60, 116) 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 118) Any "voluntary" aspect of § 13.2 was purposefully concealed by the inclusion of mandatory language in the PCLCD and SGH. (SUF 58, 60, 120) "The grievance procedure of this Agreement shall be the exclusive remedy…" (SUF 121) Plaintiff reasonably relied upon the mandatory nature of § 13.2, an important issue in seeking a legal remedy and as a practical matter. (SUF 119) Eric reasonably believed that §13.2 was the sole avenue by which they could prosecute discrimination claims. Local 13 actively negotiated each contract, retained its own lawyers, and repeatedly affirmed and condoned § 13.2. Moreover, Defendants concealed the "decision" regarding the § 13.3 complaint against Mascola, never providing notice to Eric. To hold Plaintiff to a six month limitations period, in spite of Defendant's intent to mislead, allows Local 13 to "take advantage of its own wrong." At a minimum, the Court should allow and contemplate the evidence considered by the Arbitrator in reaching the decision to deregister Eric and matters related to the 13.3 complaint against arbitrator Mascola.

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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). Historical events should be considered for current violations of the DFR but also, to evaluate whether Local 13 should be equitably estopped from asserting the statute of limitations period.

**D. Defendant Local 13 Breached the Duty of Fair Representation.**

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 "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *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. 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).

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**1. Local 13 is Liable Under an Agency Theory.**

It is unclear why Defendant Local 13 cites (almost exclusively) to District Court opinions and in some instances misquotes the opinion. "If the alleged union officer's actions 'fall outside the scope of their duties, they must bear the consequences alone.' *Imsande-Sexton v. Local 9509, Commc'ns Workers of Am., AFL-CIO*, No. 05CV272 J (LSP), 2007WL 9718966, at *23 (S.D. Cal. Apr. 9, 2007) (quoting *Urichuck v. Clark*, 689 F.2d 40, 43 (3d Cir. 1982))." Docket # 107, p. 14:16-20. This reference is incomplete. The court stated: "a union and its officers may be held jointly and severally liable in an action brought under Title I of the LMRDA." *Imsande-Sexton v. Local 9509, Commc'ns Workers of Am., AFL-CIO*, No. 05CV272 J (LSP), 2007 WL 9718966, at *23 (S.D. Cal. Apr. 9, 2007), aff'd sub nom. *Imsande-Sexton v. Commc'ns Workers of Am., AFL-CIO*, 333 F. App'x 220 (9th Cir. 2009), citing *Urichuck v. Clark*, 689 F.2d 40, 43 (3d Cir. 1982); *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980). Immediately after establishing the fact of principal liability, the court opined: "…as result, a union is liable for the acts of its agents within the general scope of their authority. A union can also be held liable for the acts of its agents if it ratifies their conduct with knowledge of the possibility of illegality. However, if the agents' *illegal* actions fall outside the scope of their authority, "they must bear the consequences alone." *Id.*, (emphasis added) (citations omitted). Because the agents in *Imsande-Sexton* did not allegedly commit illegal acts, and because the union offered no facts to support that its agents acted outside the scope of their authority when taking adverse actions against Plaintiff, the court denied the defendant's motion for summary judgment on that claim. These facts are inapposite to Plaintiff's claims and facts.

Like Bart Simpson's famous "I didn't do it. You can't prove it. Nobody saw me," defense, each Defendant absolves itself by alternative theories. Uniquely, Local 13 avers that the entire grievance procedure is controlled by the

workers. (Local 13's MSJ, p. 3:28–4:8.) Local 13 assisted in the implementation of the § 13.2 grievance process against Plaintiff on fifteen separate occasions. In all but one of the six "guilty verdicts" against Eric, each was filed by a Local 13 elected official and, in many instances, paid employees of the Union, not rank and file union members. Chris Viramontes was the prior President (2013-2014), Secretary/Treasurer (2007-2010, 2010-2011), on the Executive Board and a relief business agent at the time he filed complaint # SPSC-0006-2017, the basis of Eric's deregistration. (SUF 122) It was the job of Labor Relations Representatives from Local 13 to ensure that the process was fair and equitable. Grievance # SPSC-0032-2016 in 2016 included a nineteen-page appeal by PMA in which they sought to correct the misapplication of §13.2 to Plaintiff, and an Opposition by ILWU. (SUF 55, 123) This dispute, which could have been resolved before the CLRC, was never elevated. (SUF 124)

Local 13 ratified and condoned the malicious acts of arbitrator Mascola. The animosity Mascola harbored against Eric was well known to Local 13. Eric filed a §13.3 complaint against Mascola in 2016, alleging Mascola's bias and that he exceeded his authority. (SUF 103) Eric was never given notice of the outcome of the bias complaint. (SUF 105) 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, the other an LRC Representative from Local 13, Mike Dimon.[9] (SUF 107) Defendants had an opportunity, even a contractual mandate to investigate; they failed to do so. (SUF 110) Importantly, the issue of Mascola's bias was known to the parties in advance of the deregistration arbitration. (SUF 98, 100, 103) Eric filed a § 13.3 Complaint against CLRC Appeal Arbitrator Schwerin on April 1, 2016, which was denied.

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[9] Mr. Dimon, a declarant for Local 13's motion, is accused of engaging in the very conduct which underlies Plaintiff's complaint.

(SUF 125) Local 13 failed to prevent or to rectify the use of biased arbitrators against Eric.

Local 13 intentionally refused to act to correct the abuse of § 13.2 with full knowledge of all the facts. Specifically: (1) that Eric was exercising his right to free speech by the circulation of flyers and political cartoons. Whatever the embarrassment to union officers, he has a right to political commentary. (2) Local 13 had knowledge of the misapplication of 13.2 but failed to take any action. (3) Local 13 allowed Mascola to continue hearing § 13.2 grievances, despite his obvious and known bias. And, (4) Local 13 dismissed a 13.3 Complaint against Mascola by virtue of the actions of the LRC Representative. An LRC position is a paid position by the union.[10]

Alternatively, Local 13 is vicariously liable under a *respondeat superior* theory of liability for the actions of Dimon who arbitrarily and discriminatorily dismissed the 13.3 complaint against Mascola, colluded with PMA in resolution of the of the 13.3 complaint and in failing to investigate. Many of the individuals who filed complaints against Eric held paid positions at the time they filed the complaints. (SUF 30)

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

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[10] As an employer, Local 13 spends approximately $20,000,000 in salaries. (SUF 126)

contrary to instructions." *Id.* § 165. Local 13 is responsible for the "bad acts" of its officers.

**2. 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. Union officials filed fifteen § 13.2 grievances against him. (SUF 30) The gravamen of the grievances arose out of opposition to political flyers and/or cartoons satirizing management or elected union members. (SUF 127) Section 13.2 was used against Eric like no other longshore worker. (SUF 128) Local 13 never defended Eric nor corrected the unlawful application and misapplication of § 13.2 to Eric. (SUF 129) Local 13 elected officials were effectively invited to file § 13.2 complaints against Eric by the impunity of Defendants in the mishandling of such complaints. Defendant avers that the § 13.2 procedures were "adequately performed" which begs the question of the inherent unlawfulness of the procedures. Assuming arguendo that the "procedures" were lawful, they were (in every instance) misapplied to the Plaintiff. (SUF 55, 79, 80) Moreover, Arbitrator Miller noted the lack of representation by the Local. There is nothing "rational" about the repeated misapplication of a procedure which punishes Eric (in this case) with approximately two years and nine months off work and his wrongful termination with full knowledge that the procedure is being misapplied.

Equally irrational is an arbitration decision with a finding of "retaliation" four years after certain events. Retaliation claims that rely on temporal proximity between an employer's knowledge of protected activity and an adverse employment action hold that the temporal proximity must be "very close." (citations omitted) (3–month period insufficient); *Hughes v. Derwinski,* 967 F.2d 1168, 1174–1175 (C.A.7 1992) *274 (4–month period insufficient). "Action taken (as here) twenty months later suggests, by itself, no causality at all". *Clark County School Dist. v. Breeden* 532 U.S. 268, 273–274 (2001).

The nexus between the unlawful decision by Mascola rests squarely on the ratification and condonation by Local 13 in allowing him (Mascola) to proceed with arbitrations against the Plaintiff and in dismissing the § 13.3 Complaint alleging bias by Mascola which would have prevented Mascola's termination of Eric's career. "Not one provision [of § 13.2] was violated…" (Local 13's MSJ, p. 15:23.) In fact, every provision was deconstructed by Local 13 officials in a manner intended to harm and retaliate against the Plaintiff for the exercise of his right to free speech.

"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 55, 57, 79, 80, 123) 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.

**E. 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.*

**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 estoppel argument,[11] 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. 14:1-9.)

**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

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[11] See: Section III.C. Equitable Estoppel i.e.; Local 13 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.

activities and the proximity in time between the protected activity and the retaliatory conduct. *See id.* at 1059.

Conspicuously absent from Local 13's MSJ, all but one grievance was filed by Local 13 officials or union members running for office and relate to political flyers and cartoons and other lawful communication. (SUF 30, 127) Plaintiff also exercised his rights under the LMRDA by filing § 13.3 charges of bias against the arbitrators. See: Section II.C. Plaintiff has established the first element of a § 101(a)(2) claim.

Eric was subject to retaliatory actions by Local 13 as detailed below. The temporal proximity to flyers, political cartoons or other lawful activity by Eric inevitably triggered the filing of a grievance alleging that the flyer, or cartoon or conduct was offensive; such conduct included Eric's efforts to find work at a non-PMA site. Union officers were essentially "invited" to file repeated retaliatory grievances by the impunity with which Local 13 and other Defendants responded or failed to respond.

Seven §13.2 complaints were filed against Eric within the two-year statute, January 24, 2016 to July 31, 2017. (SUF 30) Five of the arbitrations were heard by Mascola which all conveniently occurred within his "rotation." Mascola was biased against Eric and had a known hatred of him. The grievances were arbitrated out of order as it relates to the filing date of the complaints. (SUF 30) Long-time ILWU lawyer, Coast Appeals Officer, Larry Schwerin, heard the appeals. (SUF 30) The § 13.3 grievances against Mascola and Schwerin alleged bias and discriminatory application of § 13.2, and Eric repeatedly objected to Mascola hearing § 13.2 grievances. Such objections were dismissed by the CLRC, overruled by Mascola, and confirmed by Schwerin. (SUF 111, 112)

All of the grievances filed within the two-year limitations period were related to political speech or were retaliatory:

/ / /

(1) Grievance SPSC-0005-2016, 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 cartoon depicted several ILWU officials as "rats," including Mr. Toledo. "Eric Aldape handed out flyers at the dispatch hall" and Toledo alleged discrimination on the basis of his (Toledo's) "race" as a Native American. (SUF 130) Toledo failed to appear and the matter was dismissed. (SUF 131) Schwerin reversed the dismissal (without notice to Eric) and the matter was set for another hearing. (SUF 132) The case was dismissed by Mascola. Mascola found Eric not guilty in two arbitrations before deregistering him. The two "guilty" verdicts are irreconcilable with the stated intent of § 13.2.

(2) Grievance SPSC-0008-2016, filed by John Seixas, a member of the grievance committee, stemmed from the same cartoon with drawings of rats. Mascola found Eric not guilty. (SUF 133)

(3) Grievance SPSC-0032-2016, also filed by Seixas, was in response to a flyer that portrayed a circus-like atmosphere in which union officials were presented in an unattractive manner. Seixas alleged that homosexual activity was portrayed. (SUF 134) Ron Merical initially denied a hearing, which Seixas appealed. Larry Schwerin, the appeals arbitrator overturned the decision with a lengthy opinion which informed Seixas' *new* complaint filed long after the expiration of 14 days, on the same issues. Eric was found guilty and sentenced to a year off work. (SUF 135) PMA wrote an appeal, arguing that Eric was engaged in protected speech. "*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 55) ILWU opposed the appeal. (SUF 123) The grievance was upheld.

(4) Grievance SPSC-0001-2017, filed by Seixas grieved that Eric's attempts to work in a Tacoma non-PMA facility and posting on the internet was a form of retaliation. (SUF 136) Arbitrator Merical denied it. (SUF 137)

(5) Grievance SPSC-0006-2017, filed by Viramontes is detailed above and resulted in Eric's deregistration. "*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 138) Mascola also took into consideration sixty-seven flyers, published over a nine-year period. (SUF 139)

(6), (7): Following his termination, there were two subsequent arbitrations which Plaintiff did not attend. Grievance SPSC-0011-2017, filed by Lawrence Toledo, in which Toledo argued that texts and comments on a website were retaliatory. The grievance was denied by Mascola. (SUF 140) Grievance SPSC-0013-0017 filed by John Seixas, argued that he was negatively impacted by Mr. Aldape passing out flyers in the Local 13 Dispatch Hall as part of his effort to get elected as a business agent. One flyer is ironically entitled, "Free Speech, We Must Preach" (used as an exhibit in a previous hearing) and another flyer entitled, "Two B.A.'s for the Price of One." (SUF 141) At the hearing on May 2, 2019, PMA made a verbal statement arguing the particulars of 13.2. Plaintiff was found not guilty. (SUF 142)

Within the statutory time frame (two years), seven grievances were filed against Eric. Four of them were filed by John Seixas, an elected official. A determination by the arbitrator of whether a complaint falls under the § 13.2 standard is required *before* the grievant is required to suffer through an arbitration. (SUF 40) Yet, this is precisely what Mascola failed to do and allowed the arbitrations to proceed against Eric. In any other venue, Mr. Seixas would have been deemed a vexatious litigant. Sexius a union official, was never curbed and simply continued apace with the support, ratification and condonation of

Local 13. The repeated opportunity to present his "case" against Eric was an invitation to do so.

Plaintiff has asserted material facts which satisfy all three elements of the test elucidated in *Casumpang, supra*. Eric exercised his right to oppose union policies, he suffered retaliatory actions as a result of political speech regarding union matters, and this retaliatory action was a direct result of his decision to express disagreement with union leadership. Elected officials targeted Eric by filing repeated, unfounded § 13.2 grievances against him which were arbitrated in most instances by Mascola, an admittedly biased arbitrator. (SUF 30, 127) See Section II.C.

**F. PMA Breached the Collective Bargaining Agreement.**

Defendant PMA violated the contract and admitted the likelihood of § 13.2's unlawful application to Plaintiff. (SUF 55, 79, 80, 113) 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

assented to this conduct. (SUF 143) PMA violated the contract by failing to submit its dispute with ILWU regarding misapplication of § 13. (SUF 144) "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 55, 79, 80) "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 145) PMA's agent/employee, Mascola, breached the SGH by applying events spanning more than nine years in SCGM-0009-2017. (SUF 146) (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 106, 107, 109)

## IV. CONCLUSION

Defendant LOCAL 13's Motion for Summary Judgment should be denied.

Dated: August 9, 2019

ANDREA COOK & ASSOCIATES

By: _____/s/_____
Andrea L. Cook
Attorneys for Plaintiff,
ERIC ALDAPE