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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SERVICE EMPLOYEES
INTERNATIONAL UNION,

Plaintiff,

v.

SAL ROSSELLI, JORGE RODRIGUEZ,
LORI WHYMAN, JOAN EMSLIE,
DAVID SHAPIRO, STANLEY LYLES,
NANCY EVANS, MARTHA
VASQUEZ, ROSIE BYERS, and ROY
CHAFFEE,

Defendants.

CASE NO. CV 08-02777 JFW (PLAx)
FIRST AMENDED COMPLAINT FOR
ACCOUNTING, PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF

CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

08 MAY -6 PM 2:47

FILED

1 **Introduction**

2

3 1. Plaintiff Service Employees International Union (“SEIU”) brings this
4 action on behalf of itself and the members of one of its local union affiliates, SEIU
5 United Healthcare Workers-West (“UHW-W”), to seek an accounting and the return
6 of at least \$3,000,000 that the ten defendant UHW-W officers wrongly caused to be
7 transferred to a sham organization under their exclusive control. The sham
8 organization purports to be a “workers and patients education fund” organized under
9 California nonprofit law and eligible for the charitable deduction under Internal
10 Revenue Code § 501(c)(3), but it is neither for workers, patients nor education, and it
11 is not charitable. The so-called “education” fund was set up by the UHW-W
12 president and a small handpicked subset of the union’s officers, not to educate
13 anyone, but to serve as a vehicle through which defendants could run a parallel off-
14 the-books labor organization operated outside the reach of the democratic
15 accountability and financial oversight controls provided for in the SEIU and UHW-
16 W Constitutions, as well as in the Labor-Management Reporting and Disclosure Act
17 of 1959 (LMRDA), 29 U.S.C. §§ 431 et seq.

18

19 2. In authorizing and making the transfers of UHW-W treasury monies to
20 the so-called “education” fund, the defendant officers breached their fiduciary duties
21 toward UHW-W members in multiple ways.

22

23 3. First, the defendants effectuated the transfers under false pretenses.
24 They did so under the cover of a resolution to the UHW-W Executive Board that, as
25 described in the Board’s minutes, authorized a gift to an apparently bona fide
26 education fund qualified to receive tax-deductible charitable contributions under
27 Internal Revenue Code § 501(c)(3). But the defendants knew that the recipient
28 would not be a true educational fund and would actually be nothing more than the

1 vehicle described above for allowing off-the-books financing of a shadow labor
2 organization under their exclusive control. The defendants thereby acted contrary to
3 the limited authority granted in the Executive Board's resolution. They also intended
4 to deceive UHW-W members, because the Executive Board's minutes constitute the
5 principal means by which rank-and-file members can learn the reasons behind union
6 leaders' decisions to spend their dues monies.

7
8 4. Furthermore, the defendants violated a provision of the UHW-W
9 Constitution which was adopted precisely to prevent the union's officers from
10 creating this type of shadow entity.

11
12 5. In addition, the defendants violated the SEIU Constitution by
13 circumventing provisions designed to ensure that local union officers engage in
14 sound financial management practices and that local unions are subject to auditing
15 and other forms of oversight to guarantee responsible safeguarding of members'
16 dues.

17
18 6. Although the defendants' scheme was uncovered when only \$3 million
19 had been transferred to the so-called "education" fund, they actually caused the
20 UHW-W Executive Board to authorize the transfer of "up to \$6 million" in UHW-W
21 dues monies — an amount that constituted nearly 40% of UHW-W's net assets.
22 Worse, the defendants planned to benefit personally from their actions. In particular,
23 in May 2007 the defendants began to fear (contrary to fact) that SEIU was planning
24 to appoint a temporary trustee to run the affairs of the local union and remove them
25 from office; they knew that, if a trusteeship were imposed, they could not use union
26 funds to pay the legal fees to challenge the trusteeship but would have to do so with
27 their own personal funds. Consequently, the defendants used the vehicle of
28 authorizing what appeared to be a gift to an education fund to hide from the members

1 the fact that the defendants were in effect making a gift to themselves to pay for
2 future personal legal fees.

3
4 **Jurisdiction and Venue**
5

6 7. This Court has subject matter jurisdiction over this matter pursuant to 28
7 U.S.C. §§ 1331 and 1367 and 29 U.S.C. § 185. Venue lies in this District, because
8 the defendants, in their official capacities, are officers of UHW-W, which represents
9 members in this District, has one of its two principal offices in the Western Division
10 of this District, and because defendants Rodriguez, Whyman, and Lyles, who (like all
11 the defendants) are being sued in their official and individual capacities, reside in
12 this District. Defendants Rodriguez and Lyles reside in the Western Division of this
13 District.

14
15 **Parties**
16

17 8. SEIU is an international labor organization representing employees in
18 industries affecting commerce. SEIU has approximately 160 local union affiliates,
19 including UHW-W. SEIU is headquartered in Washington, D.C., and represents
20 members in this judicial district. UHW-W is a local labor organization of the SEIU
21 that represents approximately 141,500 employees in industries affecting commerce in
22 southern and northern California. SEIU brings this action on its own behalf and in a
23 representative capacity on behalf of SEIU members within the jurisdiction of UHW-
24 W. The SEIU Constitution – which is a contract between and among SEIU, its
25 constituent local unions, and its members – authorizes the SEIU to sue in such a
26 representative capacity. In particular, the SEIU Constitution authorizes SEIU to
27 take “any and all lawful action” on behalf of itself, its members or its constituent
28 local unions, including “such legal action as it deems necessary to protect the

1 interests of [SEIU], [and] its members or constituent Local Unions.” SEIU files this
2 action to protect the interests of UHW-W and its SEIU members in the proper
3 handling of UHW-W funds, as well as to protect the interests of SEIU itself as an
4 institution in ensuring that its local unions do not circumvent or evade SEIU’s
5 auditing and other internal governance functions.
6

7 9. Defendant Sal Rosselli is the President of UHW-W, as well as President
8 and a member of the Board of Directors of the “United Healthcare Workers and
9 Patients Education Fund,” which is the so-called “education” fund described above
10 in the Introduction.
11

12 10. Defendant Jorge Rodriguez is Executive Vice-President and a member
13 of the Executive Board of UHW-W (the second ranking position in UHW-W), as
14 well as Vice President and a member of the Board of Directors of the so-called
15 “education” fund. Upon information and belief, defendant Jorge Rodriguez resides
16 within the Western Division of the District in the City of San Dimas, Los Angeles
17 County, California.
18

19 11. Defendant Lori Whyman is a Vice-President and a member of the
20 Executive Board of UHW-W, as well as a member of the Board of Directors of the
21 so-called “education” fund. Upon information and belief, defendant Lori Whyman
22 resides within this District in the City of Placentia, Orange County, California.
23

24 12. Defendant Joan Emslie is Secretary-Treasurer and a member of the
25 Executive Board of UHW-W (the third-ranking position in UHW-W), as well as
26 Secretary and Treasurer and a member of the Board of Directors of the so-called
27 “education” fund.
28

///

1 13. Defendant David Shapiro is a Vice-President and a member of the
2 Executive Board of UHW-W, as well as a member of the Board of Directors of the
3 so-called "education" fund.

4
5 14. Defendant Stanley Lyles is a Vice-President and a member of the
6 Executive Board of UHW-W, as well as a member of the Board of Directors of the
7 so-called "education" fund. Upon information and belief, defendant Stanley Lyles
8 resides within the Western Division of this District in the City of Simi Valley,
9 Ventura County, California.

10
11 15. Defendant Nancy Evans is a Vice-President and a member of the
12 Executive Board of UHW-W, as well as a member of the Board of Directors of the
13 so-called "education" fund.

14
15 16. Defendant Martha Vasquez is a Vice-President and a member of the
16 Executive Board of UHW-W, as well as a member of the Board of Directors of the
17 so-called "education" fund.

18
19 17. Defendant Rosie Byers is a Vice-President and a member of the
20 Executive Board of UHW-W, as well as a member of the Board of Directors of the
21 so-called "education" fund.

22
23 18. Defendant Roy Chaffee is a Vice-President and a member of the
24 Executive Board of UHW-W, as well as a member of the Board of Directors of the
25 so-called "education" fund.

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1 **Facts**

2
3 19. UHW-W was chartered by SEIU on December 6, 2004, as a result of the
4 merger of SEIU Locals 250 and 399. Article 4 of the UHW-W Constitution and
5 Bylaws (“UHW-W Constitution”) provides that the Local’s Constitution and Bylaws
6 “shall at all times be subordinate to the [SEIU] Constitution and Bylaws.” The SEIU
7 Constitution and Bylaws (“SEIU Constitution”) provide at Article XV that “the
8 Constitution and Bylaws of all Local Unions and affiliated bodies shall at all times
9 be subordinate to the Constitution and Bylaws of [SEIU].”

10
11 20. The SEIU Constitution contains several provisions designed to ensure
12 that all SEIU local union officers handle the dues moneys and other union funds with
13 which they are entrusted in accordance with accepted fiduciary and financial
14 management standards. For example, the SEIU Constitution requires all local
15 unions to secure and maintain surety bonds; to maintain financial records for at least
16 six years; and to make all of their books, records, and financial data available to
17 SEIU auditors whenever requested by a representative of the SEIU President.
18 [Article XIII, § 6; Article XV, §§ 1, 13]. The SEIU Constitution also prohibits local
19 union officers from taking or retaining any money or other property of a local union
20 or from destroying or altering local union financial records. [Article XIII, § 7].
21 Furthermore, the SEIU Constitution authorizes the SEIU President to correct
22 financial malpractice or breaches of democratic procedures committed at the local
23 union level by using a variety of enforcement tools. [Article XI, § 6; Article VIII,
24 § 7].

25
26 21. The UHW-W Constitution includes a provision, Article 21, designed to
27 ensure that all local union property, other than real property, is titled only in the
28 name of the UHW-W’s full Executive Board and is dedicated solely for the joint use

1 of the membership. This provision serves to protect UHW-W's members by making
2 it explicit that the local union's officers cannot create captive subsidiaries or other
3 entities controlled by a subset of the local's officers to shield certain assets and
4 transactions from the ordinary auditing and oversight controls applicable to local
5 unions. The provision does not bar UHW-W from making a bona fide gift to a third
6 party organization. It does, however, bar UHW-W from transferring funds to an
7 entity that is, in substance, merely an arm of the local union itself and controlled
8 exclusively by a subset of the local union's officers and operated as a way to evade
9 the proper oversight of the local union's governance safeguards consistent with
10 federal law. Article 21 provides in pertinent part:

11
12 The title to all property, funds, and other assets of this
13 Union except for real property, which may be held by a
14 corporation created pursuant to Internal Revenue Code
15 Section 501(c)(2), shall at all times be vested in the
16 Executive Board for the joint use of the membership of this
17 Union.

18
19 22. For reasons unknown to SEIU, in the spring of 2007 the defendants
20 evidently began to fear, contrary to fact, that SEIU was planning to impose a
21 trusteeship over UHW-W pursuant to Article VIII, § 7 (a) of the SEIU Constitution,
22 which permits SEIU's President to appoint a temporary trustee to run the affairs of a
23 local union in order to correct corruption or financial malpractice, assure the
24 performance of collective bargaining agreements, or restore democratic procedures.

25
26 23. On May 18, 2007, the UHW-W Executive Board met in executive
27 session and then reported, in its official minutes, that it had adopted a resolution "to
28 approve up to \$6 million [nearly 40% of UHW-W's net assets] to the newly-created

1 non-profit United Healthcare Workers and Patients Education Fund to provide
2 education to healthcare workers and patients concerning issues related to the
3 healthcare crisis, as well as to other issues of importance to healthcare workers and
4 their patients.” The UHW-W Executive Board at the time included about 91
5 members, including the ten defendants.

6
7 24. On May 21, 2007, the defendants filed articles of incorporation for the
8 “United Healthcare Workers and Patients Education Fund” (“fund” or “corporation”)
9 as a California Public Benefit Corporation with the California Secretary of State.
10 The articles of incorporation state at Article Two that, “The specific purposes for
11 which this corporation is organized are to educate the public, patients and Union
12 members with respect to health care issues.” Similarly, Article Four states in
13 pertinent part that, “This corporation is organized and operated exclusively for
14 educational purposes within the meaning of Section 501(c) (3) of the Internal
15 Revenue Service.” The defendants constitute the Board of Directors of the
16 corporation.

17
18 25. On May 25, 2007, UHW-W transferred \$1,000,000 from its general
19 treasury funds to the so-called “education” fund.

20
21 26. On August 7, 2007, the defendants held the first meeting of the Board of
22 Directors of the fund and elected Sal Rosselli, UHW-W’s President, as President of
23 the fund; Jorge Rodriguez, UHW-W’s Vice President as Vice President of the fund;
24 and Joan Emslie, UHW-W’s Secretary-Treasurer, as Secretary and Treasurer of the
25 fund. The Board of Directors adopted Bylaws which provide in Article 2, § 1 that,
26 “The primary objectives and purposes of this corporation shall be to educate union
27 members, patients and the public with respect to health care issues.”

28 ///

1 27. On September 5, 2007, the fund received an approval letter for a state
2 franchise and income tax exemption from the State of California Franchise Tax
3 Board, which letter recites that the approval is “based on information you submitted
4 and assumes that your present operations continue unchanged or conform to those
5 proposed in your application.”

6
7 28. On February 5, 2008, \$2,000,000 more was transferred from the treasury
8 of UHW-W to the so-called “education” fund.

9
10 29. On March 24, 2008, SEIU informed defendant Rosselli that it had
11 received an allegation that in the year 2007, “in clear violation of your fiduciary
12 duties, you executed a plan to transfer significant local union treasury funds to an
13 outside entity to evade the ongoing oversight and expenditure approvals of the
14 UHW-W local/executive board membership as well as to circumvent other internal
15 union governance requirements of the UHW-W and SEIU constitutions and bylaws.”
16 SEIU further alleged “that you conducted a vote of the local union executive board
17 . . . to transfer this money outside the local union to enable possibly you or a select
18 group of individuals to run a independent operation to subvert local union auditing
19 functions, membership oversight, leadership decision-making or future governance
20 actions, such as a purported threat of a trusteeship order, that might be taken under
21 the SEIU constitutional process to safeguard the members’ interests. Upon. It is
22 alleged that this arrangement was also designed to thwart U.S. Department of Labor
23 oversight and federal labor law restrictions on the nature, appropriateness and extent
24 of certain future expenditures.”

25
26 30. In response to that letter, UHW-W leaders have made statements and
27 provided information establishing that the so-called “education” fund has not been
28 operated in a manner consistent with either the authorization language set forth in the

1 minutes of the May 18, 2007 UHW-W Executive Board meeting, or with the
2 purposes set forth in the fund's May 21, 2007 articles of incorporation. In particular
3 the fund has not been run either for the purpose of "provid[ing] education to
4 healthcare workers and patients concerning issues relating to the healthcare crisis, as
5 well as other issues of importance to healthcare workers and patients," or "to educate
6 the public, patients, and Union members with respect to health care issues." Instead,
7 the fund has been operated as if it were a mere arm or alter ego of UHW-W, carrying
8 out activities that otherwise could be financed by UHW-W but doing so without the
9 democratic accountability and financial controls applicable to UHW-W's other
10 expenditures.

11
12 31. For example, in a resolution dated March 29, 2008 the fund approved
13 the expenditure of up to \$225,000 to conduct a straw poll among UHW-W long-
14 term care members that purported to put to those members the question of whether
15 they preferred to remain within UHW-W or instead be transferred to a union
16 representing only long-term care workers. (This February and March 2008 poll was
17 non-binding and was conducted in a deceptive manner.) UHW-W's leaders
18 repeatedly referred to the referendum as a UHW-W internal union matter, and have
19 even gone so far as to complain that when another SEIU local union expressed
20 concerns about whether the ballot was misleading, that other local was interfering in
21 the affairs of UHW-W, not the affairs of the (then undisclosed) "education" fund.
22 Because the straw poll was a UHW-W internal matter, the expenditure of fund
23 monies to subsidize the labor organization in conducting its internal union affairs
24 was flatly inconsistent with the fund's articles of incorporation and with its status as
25 an "educational" organization qualified under § 501 (c) (3) of the Internal Revenue
26 Code to receive deductible charitable contributions. By tapping into the "education"
27 fund to finance this union-conducted straw poll, the defendants would have been able
28 – had their actions not been brought to light as a result of SEIU's investigation – to

1 avoid scrutiny and accountability with regard to why they would expend so much
2 union money on a misleading straw vote of no binding effect or relevance under
3 SEIU's procedures.

4
5 32. The so-called "education" fund was used to pay thousands of dollars of
6 fees to various consultants who appear to have generated no tangible work product,
7 except for, apparently, a 2007 speech delivered in Wisconsin by UHW-W President
8 Sal Rosselli in his capacity as UHW-W President.

9
10 33. The fund has not been either structured or operated in a manner
11 resembling a true educational institution qualified to receive deductible charitable
12 contributions under § 501(c)(3). Furthermore, it was never the real intent of the
13 defendants in creating the fund, or in causing UHW-W to contribute \$3,000,000 to it,
14 to set up a real § 501(c)(3) educational organization for bona fide purposes.

15
16 34. The defendants' real purpose for creating and transferring UHW-W
17 assets to the so-called "education" fund operated by this small band of individuals
18 was to establish a well-financed entity with access to a ready source of funds beyond
19 the reach of SEIU's auditing, oversight, and trusteeship powers and that could be
20 operated by free of the constraints of democratic accountability under which labor
21 organization officers must operate. The defendants also intended to benefit
22 personally from the creation of the fund and the transfer of union assets to it. As
23 noted, the defendants harbored the (unfounded) fear that SEIU was planning to
24 impose a trusteeship over UHW-W. And the defendants were aware that when an
25 international union appoints a trustee to manage the affairs of a local union, any
26 displaced local union officers wishing to challenge the trusteeship will, by definition,
27 lack access to the union's funds and be required to finance their challenge with their
28 own personal funds. To avoid facing that personal financial expense, the defendants,

1 in substance, transferred UHW-W treasury monies to themselves but disguised that
2 act of self-dealing by creating the sham “education” fund and making it appear in the
3 minutes of the UHW-W Executive Board’s action that UHW-W’s monies were being
4 transferred to a legitimate independent nonprofit educational entity.

5
6 35. The defendants have revealed through multiple statements and through
7 multiple actions that the so-called “education” fund was set up for the purpose of
8 providing the defendants with a means of financing potential challenges to SEIU
9 actions without having to spend their own money. Those statements and actions
10 include but are not limited to those described at paragraphs 36-38 of this complaint.

11
12 36. Shortly after the March 24, 2008 letter from SEIU President Stern was
13 sent to UHW-W President Rosselli, Rosselli and other defendants caused a
14 “Factsheet” to be printed on UHW-W letterhead and posted on a UHW-W sponsored
15 website. The Factsheet describes the “education” fund as a vehicle that provides
16 “opponents” of SEIU President Stern with “access to significant resources to pursue
17 an agenda that he [Stern] can’t control.” That description of the fund is not
18 consistent with the authorization language in the minutes of the May 18, 2007 UHW-
19 W Executive Board meeting; that authorization language speaks of providing up to
20 six million dollars to a charitable organization established to educate the public and
21 union members on issues related to the health care crisis, not one established to
22 finance one side of an intra-union political dispute. But the Factsheet description is
23 consistent with the proposition that the defendants’ actual purpose in authorizing the
24 transfer of UHW-W moneys to the fund was to allow UHW-W’s officers to place
25 money outside the reach of SEIU’s oversight protections but still within the officers’
26 control so that they could finance a challenge to a potential trusteeship.

27 ///

28 ///

1 37. On or around the same day that the Factsheet was posted on the above-
2 referenced UHW-W sponsored website, that same website prominently featured a
3 link to, and an approving quotation from, a weblog, or "blog" post that sought to
4 justify the UHW-W decision to transfer substantial funds to the so-called "education"
5 fund. The blog post recites that the "fund established by UHW-W" was set up in
6 order to "give members resources to resist the imposition of [a] trusteeship" and to
7 "help members defend their rights while it remains in effect."

8
9 38. Another communication in which the defendants revealed that the true
10 purpose of the fund is different from the purpose set forth in the May 18, 2007
11 UHW-W Executive Board minutes is a letter by defendant Rosselli to SEIU
12 President Stern dated April 3, 2008. In that letter, Rosselli states that the fund was
13 established to educate workers and patients about "their democratic rights under the
14 LMRDA." The minutes of the May 18 Executive Board meeting, however, speak
15 only of education "concerning issues related to the healthcare crisis, as well as other
16 issues of importance to healthcare workers and their patients." Patients have no
17 LMRDA rights at all. And, by referring to issues of importance to "healthcare"
18 workers and education concerning "the healthcare crisis," the minutes plainly convey
19 that the authorization extends only to education with a healthcare component, not to
20 education on matters such as LMRDA rights that have no healthcare component and
21 as to which one's status as a healthcare or non-healthcare worker is wholly
22 irrelevant.

23
24 39. The purpose behind the transfer of UHW-W monies to the so-called
25 "education" fund is not only deceptively described in the UHW-W Executive Board
26 minutes, it is also deceptively described in the annual financial report, called the
27 "Form LM-2," that UHW-W filed in March 2008 with the United States Department
28 of Labor. The Form LM-2 describes the transfer of \$1,000,000 in May 2007 as an

1 “education contribution.” Further, the address listed for the Education Fund on
2 UHW-W’s LM-2 report is 560 S. Winchester Blvd., Suite 100, San Jose, California
3 95128, whereas on every filing and piece of correspondence that has issued from the
4 fund, including the fund’s July 2007 “Statement of Information” with the California
5 Secretary of State, the fund identifies as its address and principal office location the
6 home address of defendant Emslie. The use of the Winchester Boulevard address
7 was part of a plan to hide from UHW-W members and other interested parties the
8 fact that the fund was under the exclusive control of a subgroup of the UHW-W
9 Executive Board and was not a bona fide independent educational fund.

10

11 40. On April 28, 2008, defendant Rosselli sent an e-mail message to SEIU
12 informing it that the UHW-W Executive Board and the defendants who constitute the
13 Executive Board of the fund had both voted on April 24, 2008, to take steps to shut
14 down the corporation. Rosselli stated that the decision was made because a
15 healthcare ballot initiative that was to appear on the California ballot in Fall 2008
16 “never materialized.”

17

18 41. Upon information and belief, the California ballot initiative died in late
19 January 2008 before UHW-W transferred \$2,000,000 to the fund. Moreover, the
20 fund’s March 29, 2008 authorization of the \$225,000 expenditure described in
21 Paragraph 31 above and the transfer of \$52,500 on the same day to a lawyer in
22 Washington, D.C. who specializes in internal union disputes (in addition to a prior
23 payment to him on February 12, 2008 of \$22,500) are inconsistent with this latest
24 characterization of the purpose for which the fund was established and operated.
25 After the defendants were advised of the filing of this Complaint, defendant Rosselli
26 informed SEIU that approximately \$2,800,000 had just been returned to UHW-W.

27 / / /

28 / / /

1 42. On April 30, 2008, SEIU President Stern for the third time asked for a
2 copy of IRS Form 1023 that the fund submitted to the IRS for a tax exemption. On
3 May 1, 2008, defendant Rosselli provided that document. Part IV of the IRS
4 submission states that the purpose of the fund is “to educate the public, health care
5 patients and healthcare workers . . . concerning the on-going health care crisis in
6 America and how and why [sic] to provide high quality affordable healthcare for all
7 people regardless of their means.” Furthermore, the fund represents that none of its
8 activities would be “attempt[s] to influence legislation.” The letter from defendant
9 Rosselli also informed the SEIU that the \$52,500 sent on March 29, 2008 to a
10 Washington, D.C. “consultant,” a lawyer who specializes in internal union disputes,
11 would be returned. If that money is returned, UHW-W will still be owed about
12 \$192,000, consisting of approximately \$122,500 that was spent by the fund and
13 another \$69,000 that is being held in its checking account.

14

First Claim for Relief
Breach of Fiduciary Duty

15

16

17

18 43. The plaintiff incorporates by reference each of the preceding paragraphs.

19

20 44. This claim arises under the federal statutory and common law concerning
21 the governance of labor unions.

22

23 45. 29 U.S.C. § 501(a) establishes that union officers and representatives
24 occupy “positions of trust” in relation to the labor organization and its members.
25 Section 501(a) provides in pertinent part that:

26

27

28

It is therefore the duty of each such person, taking into
account the special problems and functions of a labor

1 organization, to hold its money and property solely for the
2 benefit of the organization and its members and to manage
3 invest, and expend the same in accordance with its
4 constitution and bylaws and any resolutions of the
5 governing bodies adopted thereunder, to refrain from
6 dealings with such organizations as an adverse party or in
7 behalf of an adverse party in any manner connected with his
8 duties and from holding or acquiring any pecuniary or
9 personal interest which conflicts with the interests of such
10 organization, and to account to the organization for any
11 profit received by him in whatever capacity in connection
12 with transactions conducted by him or under his direction on
13 behalf of the organization.

14
15 46. A body of federal statutory and common law has developed under
16 § 501(a) establishing the scope of fiduciary duties of union officers and
17 representatives, including the defendants, who are fiduciaries with respect to the
18 funds owned and held by UHW-W. The defendants have a fiduciary duty to hold
19 UHW-W's money "solely for the benefit of the organization and its members,"
20 consistent with its own and the SEIU's Constitution and Bylaws, and not for any
21 other purpose.

22
23 47. The transfer of \$3,000,000 to the so-called "education" fund was a
24 breach of fiduciary duty for multiple reasons, including but not limited to the
25 following.

26
27 48. The transfer was for a purpose inconsistent with the purpose authorized
28 in the May 18 UHW-W Executive Board resolution.

1 unions and their members and officers. The UHW-W Constitution is a contract
2 between labor organizations within the meaning of Section 301(a) of the Labor
3 Management Relations Act, 29 U.S.C. § 185(a), and is also a contract governed by
4 state law.

5
6 55. The defendants, as members of SEIU and UHW-W and as officers of
7 UHW-W, are subject to and bound by the SEIU Constitution and the UHW-W
8 Constitution. The SEIU Constitution and the UHW-W Constitution are enforceable
9 against the defendants under federal and California law.

10
11 56. The defendants, acting in their official capacities on behalf of UHW-W
12 and in their individual capacities, have violated and/or failed to comply with the SEIU
13 Constitution and the UHW-W Constitution, and have committed breaches of contract,
14 by the acts, omissions and course of conduct alleged in this Complaint. The
15 defendants' breaches of contract include, but are not limited to: taking actions
16 deliberately designed to circumvent and evade the SEIU Constitution's provisions
17 that give SEIU auditing and oversight rights in connection with its local unions; and
18 causing UHW-W assets to be transferred to an entity that is not truly independent of
19 UHW-W but that in fact is controlled by a subset of UHW-W officers and that is
20 being used to do UHW-W business off the books and outside the purview of the
21 financial controls and democratic accountability protections to which UHW-W
22 members are entitled under the law and under the UHW-W and SEIU Constitutions.

23
24 57. The plaintiff seeks relief available under federal and/or California law to
25 enforce the union Constitutions and to remedy defendants' breaches of contract,
26 including declaratory, equitable and other non-damages remedies against the
27 defendants.

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Third Claim for Relief
California Law Breach of Fiduciary Duty

58. The plaintiff incorporates by reference each of the preceding paragraphs.

59. The defendants have breached their fiduciary duties as officers of UHW-W in violation of California law, which has caused damage to the SEIU and the members of UHW-W.

Prayer for Relief

Wherefore, the plaintiff respectfully requests that the Court:

1. Impose a constructive trust over the United Healthcare Workers and Patients Education Fund under California law;
2. Order an accounting of the funds of UHW-W that were transferred to the fund;
3. Grant a preliminary and permanent injunction to prevent the defendants from disbursing and/or encumbering the monies held by the fund;
4. Order the defendants to return all monies to the treasury of UHW-W and make UHW-W whole for the amounts wrongfully transferred and/or expended by the fund;
5. Order the defendants to pay SEIU's reasonable attorneys' fees and costs incurred in bringing this action; and

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6. Grant such other and further relief as the Court deems just and proper.

Dated: May 6, 2008

ROBERT M. WEINBERG,
LEON DAYAN,
BREDHOFF & KAISER, P.L.L.C.

GLENN ROTHNER,
ROTHNER, SEGALL & GREENSTONE

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SERVICE EMPLOYEES
INTERNATIONAL UNION,

Plaintiffs,

v.

SAL ROSSELLI, JORGE RODRIGUEZ,
LORI WYMAN, JOAN EMSLIE, DAVID
SHAPIRO, STANLEY LYLES, NANCY
EVANS, MARTHA VASQUEZ, ROSIE
BYERS, and ROY CHAFFEE,

Defendants.

Case No. CV08-02777 (JFW)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
JOINT MOTION TO DISMISS
FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF
CAN BE GRANTED**
(F.R.C.P. 12(b)(6))

Date: July 14, 2008
Time: 1:30 p.m.

Judge: Hon. John F. Walter

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1 **I. INTRODUCTION**

2 The Service Employees International Union (SEIU), an international labor
3 organization, has brought this lawsuit against ten individual members of the
4 Executive Board of one of its local labor organization affiliates (the United
5 Healthcare Workers – West, or UHW-W). The SEIU’s lawsuit essentially alleges
6 that the ten officers breached their fiduciary duties and violated the union
7 constitution when the entire Executive Board authorized the creation of a separate
8 Fund and transferred union assets to that Fund. Here, the ten defendants jointly
9 seek dismissal of this lawsuit because each cause of action fails to state a claim
10 upon which relief may be granted, or alternatively seek the dismissal of each cause
11 of action which fails to state a claim.

12 The SEIU’s first cause of action for breach of fiduciary duty under federal
13 law must be dismissed because the Ninth Circuit has not recognized that unions
14 have a private right of action under 29 U.S.C. section 501(a) of the Labor
15 Management Reporting and Disclosure Act (LMRDA), and instead has held that
16 such claims must be brought by a union member plaintiff under the conditions
17 precedent stated in 29 U.S.C. section 501(b). The SEIU is thus not a proper
18 plaintiff, and further, has not met the conditions precedent necessary to file such a
19 claim. The SEIU’s second cause of action for breach of contract based on
20 violations of the international and local union constitutions, must be dismissed
21 because the Ninth Circuit has held that federal courts do not have subject matter
22 jurisdiction over breach of contract claims under section 301 of the Labor
23 Management Relations Act (LMRA) (29 U.S.C. section 185) that are brought
24 against union member defendants. The named individual member defendants are
25 thus immune from suit under 29 U.S.C. section 185. The SEIU’s second cause of
26 action for breach of contract under state law must be dismissed because this state
27 common law claim is preempted by 29 U.S.C. section 185, given that the
28 constitutional violations alleged by the SEIU are explicitly founded and wholly

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1 based on the union constitutions at issue, and cannot possibly be resolved without
2 interpreting those constitutional provisions. Finally, the SEIU's third cause of
3 action for breach of fiduciary duty under state law must be dismissed because
4 under California law, and as a matter of law, the ten named local union officers
5 owe no state law fiduciary duty to the international union itself, and also because
6 the international labor organization fails to allege sufficient facts regarding the
7 nature and source of the fiduciary duty it alleges was breached by the selectively
8 named ten individual officers of the local labor organization.

9 After extensive, substantive meet and confer efforts between counsel
10 pursuant to and in efforts to comply with Local Rule 7-3, the parties have failed to
11 resolve their dispute, and Plaintiff SEIU has refused to dismiss and/or further
12 amend its First Amended Complaint. See Declaration of Jonathan Siegel in
13 Support of Defendants' Motion to Dismiss for Failure to State a Claim Upon
14 Which Relief Can be Granted, and Declaration of Latika Malkani in Support of
15 Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief
16 Can be Granted, filed herewith. Thus, defendants jointly move this Court to
17 dismiss this case with prejudice because the First Amended Complaint as pled
18 fails to state a cause of action, and because further amendments cannot cure the
19 fatal defects in this case. Alternatively, the defendants request dismissal of each
20 and/ or every cause of action that this court determines fails to state a claim upon
21 which relief may be granted under the Federal Rules of Civil Procedure Rule
22 12(b)(6).

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23
24 **II. FACTUAL AND PROCEDURAL BACKGROUND**

25 The United Healthcare Workers - West (UHW-W) is a statewide (local)
26 labor organization and an affiliate of the international labor organization Service
27 Employees International Union (SEIU). See First Amended Complaint for
28

1 Accounting, Preliminary and Injunctive Relief (FAC), ¶ 8, 3:17-22. In this lawsuit,
2 the international union sues ten individual union members of the local union.
3 FAC, ¶¶ 9-18, 4:7 – 5:25. All ten individuals sued herein are members of the
4 Board of Directors of the Educational Fund at issue in this case. *Ibid.*

5 In 2007, the Executive Board of UHW-W met in executive session and
6 adopted a resolution to approve the transfer of UHW-W funds to establish the
7 United Healthcare Workers and Patients' Education Fund ("Fund"). FAC, ¶ 23,
8 7:26 – 8:5. Although the UHW-W Executive Board at the time included,
9 according to the SEIU, about ninety-one members, the SEIU has selectively sued
10 only the ten defendants who were members of the Board of Directors of the Fund.
11 FAC, ¶ 23, 7:26 – 8:5, ¶¶ 9-18, 4:7 -- 5:25.

12 The Fund was established as a corporation within the meaning of
13 section 501(c)(3) of the Internal Revenue Service (FAC, ¶ 24, 8:7-16) and with a
14 governing board of the ten defendants who are all members of the UHW-W
15 Executive Board. FAC, ¶¶ 9-18, 4:7 – 5:25. The Fund's stated purposes are listed
16 on the IRS Form 1023, a document that the Fund submitted to the IRS, a copy of
17 which was submitted to SEIU President Andrew Stern on or before May 1, 2008.
18 FAC, paragraph 42, 15:1-13. On April 28, 2008 the SEIU received notice from
19 defendant Sal Rosselli, President of UHW-W, that the UHW-W Executive Board
20 and the defendants who constitute the Executive Board of the Fund had determined
21 to dissolve the Fund. FAC, ¶ 40, 14:11-16. This FAC was filed on May 6, 2008.

22 In this litigation, the SEIU attempts to bring a derivative suit against the ten
23 individual union members "on its own behalf and in a representative capacity on
24 behalf of SEIU members within the jurisdiction of UHW-W." FAC, ¶ 8, 3:22-24.
25 In this capacity, the SEIU purports to bring claims for breach of fiduciary duty
26 under both federal and state law, as well as for breach of contract based on the ten
27 defendants' alleged violations of the international and local union constitutions.
28 FAC, ¶¶ 43-59, 15:18 -- 19:8. The claimed breaches of contract are alleged under

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1 both federal and state law. FAC, ¶¶ 52-57, 17:16 – 18:27. Those alleged breaches
2 of contract likewise stem from the UHW-W’s establishment of the Fund. *Ibid.*

3
4 **III. ARGUMENT**

5 Defendants maintain that even construing the Plaintiff’s FAC in the light
6 most favorable to the Plaintiff, and even accepting all well-pled allegations as true,
7 the SEIU has not established a valid claim for relief under Federal Rules of Civil
8 Procedure, Rule 12(b)(6). “Dismissal can be based on the lack of a cognizable
9 legal theory or the absence of sufficient facts alleged under a cognizable legal
10 theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990),
11 citing to *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th
12 Cir.1984). Here, defendants move this Court to dismiss each and/ or every cause
13 of action alleged by the SEIU for failure to state a claim upon which relief may be
14 granted. Fed. R. Civ. P. 12(b)(6).

15 **A. SEIU’S First Cause of Action For Breach Of Fiduciary Duty**
16 **Under 29 U.S.C. Section 501(a) Fails to State A Claim Because**
17 **The Ninth Circuit Has Unequivocally Held That Such Claims**
Must be Brought by A Union Member Plaintiff Under The
Conditions Precedent Stated in 29 U.S.C. section 501(b)

18 Contrary to controlling Ninth Circuit law, the SEIU’s first cause of action
19 alleges that 29 U.S.C. section 501(a) of the LMRDA creates a private right of
20 action for a union to sue its officer for a breach of fiduciary duty. FAC, 15:20 -
21 16:21, ¶¶ 44-46. See also, Exh. 2 to Siegel Declaration, May 6, 2008 Letter From
22 Rothner to Siegel (“... SEIU does not purport to bring an action under Section
23 501(b); rather, SEIU has alleged claims directly under the federal common law
24 embodied in LMRDA Section 501(a).”). As discussed below, the Ninth Circuit
25 has rejected this theory. *Building Material and Dump Truck Drivers, Local 420 v.*
26 *Traweek* (“*Traweek*”), 867 F.2d 500, 506-507 (9th Cir. 1989).

27 The LMRDA specifies the fiduciary duties of union officers, and further
28 establishes the conditions under which those officers may be sued for breach of

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1 their fiduciary duties :

2 501. Fiduciary responsibility of officers of labor
3 organizations

4 (a) Duties of Officers; Exculpatory Provisions and Resolutions
5 Void

6 The officers, agents, shop stewards, and other
7 representatives of a labor organization occupy positions
8 of trust in relation to such organization and its members
9 as a group. It is, therefore, the duty of each such person,
10 taking into account the special problems and functions of
11 a labor organization, to hold its money and property
12 solely for the benefit of the organization and its members
13 and to manage, invest, and expend the same in
14 accordance with its constitution and bylaws and any
15 resolutions of the governing bodies adopted thereunder,

16

17 (b) Violation of Duties; Action by Member after Refusal
18 or Failure by Labor Organization to Commence
19 Proceedings; Jurisdiction; Leave of Court; Counsel Fees
20 and Expenses

21 When any officer, agent, shop steward, or representative
22 of any labor organization is alleged to have violated the
23 duties declared in subsection (a) of this section and the
24 labor organization or its governing board or officers
25 refuse or fail to sue or recover damages or secure an
26 accounting or other appropriate relief within a reasonable
27 time after being requested to do so by any member of the
28 labor organization, such member may sue such officer,
agent, shop steward, or representative in any district
court of the United States or in any State court of
competent jurisdiction to recover damages or secure an
accounting or other appropriate relief for the benefit of
the labor organization. No such proceeding shall be
brought except upon leave of the court obtained upon
verified application and for good cause shown, which
application may be made ex parte. ...

29 U.S.C. § 501(a)-(b) (in relevant part). "Section 501(a) of the Landrum-Griffen
Act makes union officials fiduciaries in the management of union assets. Section
501(b) creates liability for breach of fiduciary duty." *Brock v. Mazzola*, 794 F.2d
427, 429 (9th Cir. 1986) (footnotes omitted).

Plaintiff SEIU asks this Court to adopt reasoning that has been explicitly
rejected by the Ninth Circuit. Drawing on the language in section 501(b) that

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1 requires that, in response to a union member's pre-lawsuit demand, the union must
2 "refuse or fail to sue or recover damages or secure an accounting or other
3 appropriate relief," a few courts in other Circuits have allowed a union to bring suit
4 under either section 501(a) or under section 501(b), reasoning that the statutory
5 language in section 501(b) implies that a union can sue its officials. 29 U.S.C. §
6 501(b); see, e.g., *Int'l Union of Elec. Workers v. Statham*, 97 F.3d 1416, 1419
7 (11th Cir. 1996), citing to *Weaver v. UMW*, 492 F.2d 580, 586 (D.C. Cir. 1973).

8 In *Statham*, *supra*, 97 F.3d at 1418, the Eleventh Circuit considered a
9 union's argument "that section 501(a) creates a cause of action that can be asserted
10 by a union as well as by union members," and held "that section 501(a) was
11 intended to create a federal cause of action that can be asserted by the union on its
12 own behalf." *Id.* at 1421. However, in so holding, the Eleventh Circuit expressly
13 recognized the Ninth Circuit's "opposite conclusion" (*Id.* at 1418): "The courts
14 that have concluded that section 501 does not create a cause of action that can be
15 asserted by a union are: *Building Material and Dump Truck Drivers, Local 420 v.*
16 *Traweek*, 867 F.2d 500, 506-07 (9th Cir. 1989)..." *Id.* at 1418, fn. 2.

17 Indeed, the Ninth Circuit has considered and explicitly rejected the SEIU's
18 assertion that the union itself may bring a cause of action under 29 U.S.C. section
19 501. In *Traweek*, *supra*, 867 F. 2d 500, a local union filed, against two of its
20 former officers, breach of fiduciary duty claims under 29 U.S.C. section 501(b),
21 alleging, *inter alia*, that the officers caused local union funds to be spent without
22 proper authorization. *Id.* at 503-505. After the United States Central District Court
23 found for the union on the 501(b) claim, and directed that the officers repay the
24 amount of the unauthorized checks (*Id.* at 505), the Ninth Circuit found that the
25 District Court had no subject matter jurisdiction to consider the local union's
26 501(b) claim. *Id.* at 505-507. In so doing, the Ninth Circuit expressly rejected the
27 notion that a union can sue its officials under 501:

28 Appellees first argue that § 501(b) only confers

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1 jurisdiction if an individual union member files the suit.
2 We agree. The literal language of the statute is clear-it
3 authorizes an individual union member to bring suit if a
4 union refuses or fails to sue. See *Filippini v. Austin*, 106
5 F.R.D. 425, 428 (C.D. Cal.1985). The condition
6 precedent to the filing of a § 501(b) suit requires proof
7 that the union refuses or fails to sue upon a demand made
8 by a union member. *Flaherty v. Warehousemen, Local*
9 *334*, 574 F.2d 484, 487 (9th Cir.1978); *Adams-Lundy*
10 *(II)*, 844 F.2d at 248. Here, by contrast, the union
11 maintains a right to sue to recover its own

12 funds; therefore it does not need the consent of the court
13 or the operation of § 501 to sue for recovery.
14

15 Thus, Congress included a requirement that the
16 individual member request leave of the court to bring suit
17 because any money lost through financial impropriety
18 does not belong to the union member personally. This
19 statutory requirement offers proof that Congress intended
20 that this remedy be available solely to individual union
21 members. See *Filippini*, 106 F.R.D. at 430 (§ 501(b) was
22 created by Congress to address abuse of position by
23 union officers in situations where members have no
24 effective remedy for such abuse except to petition the
25 federal courts for help.) (*Id.* at 506; citations in original.)

26 In holding that “the union could not initiate the suit as a sole party plaintiff” (*Id.* at
27 507), the Ninth Circuit also expressly rejected reasoning that Congress intended
28 for the union to act in the first instance, as expressed in *Weaver v. UMW*, 492 F.2d
580, 586 (D.C. Cir. 1973), and as relied upon here by Plaintiff SEIU. (See Exh. 2
to Siegel Declaration, May 6, 2008 letter from Rothner to Siegel, at page 3, citing
to *Weaver*.) In *Traweck, supra*, 867 F.2d 500, 506-507, the Ninth Circuit
considered and rejected *Weaver’s* reasoning that Congress intended to allow labor
organizations to sue under section 501:

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23 The issue posed by this case, whether a union standing
24 alone can bring a § 501 suit as an initial matter, was
25 never addressed in *Weaver*.

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26 We conclude that *Filippini* provides the better-reasoned
27 and more persuasive interpretation of § 501(b). The clear
28 language of the statute does not contemplate a suit
brought by a union, but only addresses the availability of
a suit when the union refuses to sue. Our construction of
the statute is consistent with the general principle,
repeatedly reaffirmed by this court, that the scope of

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federal jurisdictional statutes should be construed narrowly. We reverse the district court's judgment against Traweck and McFadden to the extent that it was predicated on a violation of § 501(b) because the union could not initiate the suit as a sole party plaintiff and therefore the district court lacked subject matter jurisdiction to consider the claim.

Plaintiff improperly asks this Court to defy controlling authority. Even the United States Supreme Court has recognized the split in the Circuits, and has declined to resolve the “[u]ncertainty as to the scope of § 501(b)”, in *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 375, 110 S.Ct. 680, 686 (1990):

Section 501(b), 29 U.S.C. § 501(b) (1982 ed.), by its terms, does not establish a private right of action for a union itself. Rather, it provides that a suit may be brought in district court by a union member when a union officer is alleged to have breached his duties “and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization.” That language certainly contemplates that a union may bring suit against its officers in some forum, but it does not expressly provide an independent basis for federal jurisdiction. Courts have reached inconsistent positions on the question whether a union may bring suit under § 501. *Compare Building Material and Dump Truck Drivers, Local 420 v. Traweck*, 867 F.2d 500, 506-507 (CA9 1989) (no right of action), with *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Orr*, 95 LRRM 2701, 2702, 1977 WL 1661 (ED Tenn.1977) (union has right of action to allege a violation of § 501). We need not resolve that question here.

Finally, the SEIU attempts to pigeon-hole its claim as arising only under section 501(a), not under 501(b), and asks this Court to ignore *Traweck* and extend the scope of federal jurisdiction recognized within the Ninth Circuit by recognizing a private right of action under 29 U.S.C. section 501(a) of the LMRDA. However, the Ninth Circuit has explicitly adopted a narrow construction of section 501, and has declined to expand federal jurisdiction. Adopting the SEIU’s expansive construction of section 501(a) would undermine the limited construction of federal

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1 jurisdiction under section 501(b) as stated in *Traweek, supra*, 867 F.2d at 506:
2 “[B]ecause of the federal policy of noninterference in the internal affairs of unions
3 and labor matters, and because 501(b) extends federal court jurisdiction, this court
4 narrowly construes the scope of subject matter jurisdiction under 501(b).”

5 Finally, to the extent the SEIU is alleging a violation of 501(b), in addition
6 to its lack of standing to bring suit, it has not met the statutory conditions precedent
7 to filing suit. 29 U.S.C. § 501(b) requires that no action can be filed unless the
8 court gives its approval "upon verified application and for good cause shown." As
9 the Ninth Circuit explained in *Horner v. Ferron*, 362 F.2d 224, 228 (9th Cir.
10 1966):

11 The requirement of § 501(b) that a plaintiff in such an
12 action show 'good cause' before being entitled to file the
13 complaint is intended as a safeguard to the affected union
14 against harassing and vexatious litigation brought
without merit or good faith. *Highway Truck Drivers and
Helpers Local 107 v. Cohen*, E.D.Pa., 182 F.Supp. 608,
622, fn. 10, *aff'd*, 3d Cir., 284 F.2d 162.

15 The SEIU's failure to comply with the requirements of § 501(b) of a verified
16 showing of good cause for this Complaint is an independent ground for dismissal
17 of the SEIU's first cause of action.

18 **B. SEIU's Second Cause of Action For Breach Of Contract Under 29**
19 **U.S.C. section 185 Fails to State A Claim Because The Ninth**
20 **Circuit Has Held That Such Claims May Not Be Brought Against**
Individual Union Members

21 The SEIU's Second Cause of Action purports to be brought under the
22 constitution and bylaws of the UHW-W against ten individual defendants. In one
23 cause of action, the SEIU appears to bring breach of contract claims under federal
24 statutory law, relying on 29 U.S.C. section 185(a), and also under California law.
25 See FAC, ¶¶ 53-57, 17:21-18:27. Both claims fail as a matter of law.

26 The SEIU's federal breach of contract cause of action claims a violation of
27 section 301(a) of the LMRA (29 U.S.C. section 185(a)), which confers federal
28 subject matter jurisdiction and states, in full:

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185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

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

The United States Supreme Court has recognized that a union constitution and bylaws is a contract between labor organizations, but in so doing, extended the right to sue in federal court for violations of this contract to union members as *beneficiaries* of the union constitution:

Congress expressly provided in § 301(a) for federal jurisdiction over contracts between an employer and a labor organization or between labor organizations. Collective-bargaining agreements are the principal form of contract between an employer and a labor organization. Individual union members, who are often the beneficiaries of provisions of collective-bargaining agreements, may bring suit on these contracts under § 301. Likewise, union constitutions are an important form of contract between labor organizations. Members of a collective-bargaining unit are often the beneficiaries of such interunion contracts, and when they are, they likewise may bring suit on these contracts under § 301.

Wooddell v. International Broth. of Elec. Workers, Local 71, 502 U.S. 93, 101, 112 S.Ct. 494, 500 (1991) (emphasis in original). *Wooddell's* reasoning, that union members are third party *beneficiaries* of a union constitution and bylaws, does not automatically extend to imposing individual liability on union officers. Under controlling law, 29 U.S.C. section 185(a) confers federal subject matter jurisdiction for violations of a union constitution where such claims are brought by either a union or a union member against a union. *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry v. Local 344*, 452 U.S. 615, 621, 101 S.Ct. 2546, 2553 (1980); *Kinney v. International Bhd. Of Electrical Workers*, 669 F.2d 1222, 1229 (9th Cir. 1981).

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1 Prior to *Wooddell*, the United States Supreme Court held that individual
2 defendants are not liable under 29 U.S.C. section 185(a) for monetary damages.
3 *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 417, 101 S.Ct. 1836, 1845-46
4 (1981). To the extent that the SEIU seeks any monetary judgment from the ten
5 defendants for their alleged violations of the union constitutions, this claim is
6 legally defective. See, FAC, Prayer For Relief, ¶¶ 4-6, 19:23-20:1.

7 The United States Supreme Court has not decided whether injunctive relief
8 claims may be brought against individual officers under 29 U.S.C. section 185(a).
9 However, the SEIU's claim for equitable relief against the ten individual union
10 members (FAC, ¶ 57, 18:24-27) also fails because the Ninth Circuit has held that
11 individual union officers are not proper defendants for a breach of contract claim
12 under 29 U.S.C. section 185. *Traweck, supra*, 867 F.2d at 508. Plaintiff SEIU
13 argues that *Traweck* only forecloses claims against individual defendants for
14 monetary damages, but still allows section 185(a) claims for equitable relief to be
15 brought against individual officers. See Exh. 2 to Siegel Declaration, May 6, 2008
16 Letter from Rothner to Siegel. However, the language in *Traweck* is broader than
17 the SEIU suggests. In *Traweck*, the Ninth Circuit broadly considered and
18 determined whether union officers were immune from liability under 29 U.S.C.
19 section 185, unconditionally saying "we must decide whether § 185 contemplates a
20 suit brought by a union against an individual union member for breach of internal
21 union rules." *Traweck, supra*, 867 F.2d at 508. And *Traweck, supra*, 867 F.2d at
22 508, expansively held that individual officers were immunized from liability under
23 29 U.S.C. section 185:

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24 The Court in *Complete Auto Transit, Inc. v. Reis*, 451
25 U.S. 401, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981),
indicated that Congress intended individual employees to
26 be shielded from suits brought under § 185. *Reis*
concerned the ability of an employer to bring a damages
27 action against union members for participating in a
wildcat strike. As *Reis* details, the term "any person" was
28 removed from the draft legislation and was replaced with
the term "labor organization." See *id.* at 412-13, 101

1 S.Ct. at 1843. After analyzing the legislative history, the
2 Court concluded that the "Senate passed [the revised]
3 version of the bill, foreclosing individual damages
4 liability in both § 301 and § 303 lawsuits." *Id.* at 414, 101
5 S.Ct. at 1844.

6 In deciding this issue we are influenced by the fact that
7 appellants can point to no case where an individual union
8 member has been held to be a proper defendant under §
9 185. Appellants would have us interpret *Journeyman's*
10 jurisdictional analysis to require an exclusive focus on
11 whether a contract exists under the terms of § 185.
12 Rather, we conclude that the primary focus in *Reis* was
13 on Congress' intent to immunize individual members
14 from a § 185 suit. See *Evangelista v. Inlandboatmen's*
15 *Union*, 777 F.2d 1390, 1400 (9th Cir.1985).

16 If the Ninth Circuit had desired to restrict its holding only to immunize
17 union members from liability for monetary damages, it could have so stated. But
18 the language in *Traweck* is broad and unconditional, conferring "immunity" from
19 section 185 suits and thus finding no subject matter jurisdiction. See also, *Breda v.*
20 *Scott*, 1 F.3d 908, 309 (9th Cir. 1993) ["In *Building Materials & Dump Truck*
21 *Drivers, Local No. 420 v. Traweck*, 867 F.2d 500, 508 (9th Cir.1989), we held that
22 the Union could not sue one of its members under section 301."]

23 Here, the SEIU's breach of contract cause of action is based on its
24 allegation that the individual union members it sues are contractually bound by the
25 SEIU and UHW-W constitutions. "The defendants, as members of SEIU and
26 UHW-W and as officers of UHW-W, are subject to and bound by the SEIU
27 constitution and the UHW-W constitution. The SEIU constitution and the
28 UHW-W constitution are enforceable against the defendants under federal and
California law." FAC, ¶ 55, 18:6-9. However, this focus on the binding nature of
a contract does not address the central question regarding whether or not Congress
intended to immunize individual members from liability under section 185. And
the Ninth Circuit has concluded that Congress did intend to confer such immunity:
"Congressional intent to shield individual members from liability precludes an
exclusive focus on the existence of a contract in this case." *Traweck, supra*, 867

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1 F.2d at 508.

2 Finally, the cases relied upon by the SEIU do not support a narrower reading
3 of *Traweck* within the Ninth Circuit, but rather only offer that *other Circuits* have
4 attempted to distinguish *Traweck* and/or have adopted a different view of
5 Congressional intent (*Statham, supra*, 97 F.3d 1416, 1421-1422) and a more
6 expansive view of federal jurisdiction. See, e.g., *Statham, supra*, 97 F.3d 1416,
7 1419-1420, *Shea v. McCarthy*, 953 F.2d 29, 31-32 (2nd Cir. 1992), as cited in Exh.
8 2 to Siegel Declaration, May 6, 2008 Letter from Rothner to Siegel. But the Ninth
9 Circuit's more restrictive view of federal jurisdiction, as stated in *Traweck, supra*,
10 867 F.2d at 508, controls here, and is contrary to this Court adopting the rulings of
11 other Circuits. The SEIU's federal law breach of contract action should be
12 dismissed against these ten individual union members.

13 **C. SEIU's Second Cause of Action for Breach of Contract Under**
14 **State Law Fails To State A Claim Because It Is Preempted By**
Federal Labor Law

15 The SEIU's second cause of action also alleges that the union members
16 "have violated and/or failed to comply with the SEIU Constitution and the
17 UHW-W Constitution" (FAC, ¶ 56, 18:12-13) and thus are liable for breach of
18 contract under the common law of the State of California. FAC, ¶¶ 52-57, 17:16-
19 18:27. Specifically, the SEIU alleges that the defendants breached contractual
20 obligations in causing UHW-W assets to be transferred to the educational fund,
21 which the SEIU alleges circumvented "financial controls and democratic
22 accountability protections" provided for in the Constitutions. FAC, ¶ 56, 18:11-22.

23 As noted, 29 U.S.C. section 185 provides federal jurisdiction over "[s]uits
24 for violation of contractsbetween any such labor organizations...." 29 U.S.C.
25 § 185(a). A union constitution and bylaws is a contract between labor
26 organizations within the meaning of 29 U.S.C. section 185(a). *Wooddell, supra*,
27 502 U.S. at 101, 112 S.Ct., at 500 (1991). In addition to establishing federal
28 jurisdiction for violations of a union constitution, 29 U.S.C. section 185,

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1 “authorizes federal courts to fashion a body of federal law” to govern the
2 enforcement and interpretation of labor contracts. *Textile Workers Union v.*
3 *Lincoln Mills*, 353 U.S. 448, 451, 77 S.Ct. 912, 915 (1957); *Local 174, Teamsters*
4 *of America v. Lucas Flour Co.*, 369 U.S. 95, 103-104, 82 S.Ct. 571, 576 (1962).
5 “[W]hen resolution of a state-law claim is substantially dependent upon analysis of
6 the terms of an agreement made between the parties in a labor contract, that claim
7 must either be treated as a § 301 claim, ...or dismissed as pre-empted by federal
8 labor-contract law.” *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct.
9 1904, 1916 (1985) (internal citations omitted), referring to LMRA section 301, 29
10 U.S.C. section 185. See also, *Rissetto v. Plumbers and Steamfitters Local 343*, 94
11 F.3d 597, 599 (9th Cir.1996) (State claim preempted by section 301, 29 U.S.C.
12 section 185, can only be brought as federal claim under the LMRA.). Federal law
13 preempts state law when the court must interpret the labor contract at issue to
14 resolve the state law claim. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S.
15 399, 413, 108 S.Ct. 1877, 1885 (1988).

16 Here, the plaintiff SEIU alleges that the defendants breached contractual
17 obligations in causing UHW-W assets to be transferred to the educational fund,
18 which the SEIU alleges circumvented “financial controls and democratic
19 accountability protections” provided for in the constitutions. FAC, ¶ 56, 18:11-22.
20 In support of this breach of contract claim, the FAC references numerous
21 provisions in both the SEIU and the UHW-W constitutions that it claims the
22 defendants have violated. FAC, ¶¶ 4, 5 (2:8-16), 8 (3:17-4:5), 19-22 (6:3-7:24),
23 52-57 (17:19-18:57). Here, the SEIU’s breach of contract claim is wholly founded
24 and entirely based on the constitutional provisions at issue. The very breach of
25 which SEIU complains is the constitutional provisions it cites. And the acts which
26 the SEIU claims violate the constitutional provisions at issue is conduct which
27 cannot be adjudicated as violative of the respective constitutions without complete
28 reliance on, and interpretation of, the constitutional provisions at issue. There is

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1 simply no way to litigate the SEIU’s breach of contract claim without relying on,
2 and interpreting, the many provisions in the SEIU and UHW-W constitutions. For
3 example, the SEIU contends that the defendants violated Article 21 of the UHW-W
4 constitution. FAC, ¶ 21, 6:26-7:17. In so contending, the SEIU itself attempts to
5 interpret Article 21, and argues that under the SEIU’s interpretation, the
6 defendants’ conduct violated the provision. *Ibid.* By its own pleading, the SEIU’s
7 state law claim for breach of contract cannot be resolved without interpreting the
8 constitutional provisions it claims were violated by the defendants’ conduct.
9 Because this state law breach of contract claim is wholly founded and based on the
10 constitutions, the state law claim is plainly preempted by federal labor law.
11 *Allis-Chalmers Corp.*, *supra*, 471 U.S. at 220; *Lingle*, *supra*, 486 U.S. 399, 413.
12 This state law contract claim should be dismissed with prejudice to refiling since
13 amendments cannot cure this fatal defect. Fed. R. Civ. P. 12(b)(6).

14 **D. SEIU’s Third Cause of Action for Breach of Fiduciary Duty**
15 **Against the Ten Union Officers Fails to State a Claim Because**
16 **Under California Law, the Officers Owe No State Law Fiduciary**
Duty to SEIU International

17 Under California law, “[t]o state a claim for breach of fiduciary duty, a
18 complaint must allege the existence of a fiduciary duty, its breach, and damages
19 resulting thereto.” *Nielson v. Union Bank of California*, 290 F.Supp.2d 1101, 1137
20 (2003), citing to *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith,*
21 *Inc.*, 68 Cal.App.4th 445, 483 (1998). The existence of a duty is a question of law.
22 *Wilson v. All Service Ins. Corp.*, 91 Cal.App.3d 793, 796 (1979). As such, unlike
23 the First Amended Complaint’s factual allegations, the Court does not accept as
24 true the allegation that a duty exists, but instead determines that issue as a matter of
25 law. “[A] plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to
26 relief” requires more than labels and conclusions, and a formulaic recitation of the
27 elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286,
28 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts “are not

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1 bound to accept as true a legal conclusion couched as a factual allegation”).” *Bell*
2 *Atlantic Corp. v. Twombly*, 127 S.Ct.1955, 1965 (2007). “We do not, however,
3 necessarily assume the truth of legal conclusions merely because they are cast in
4 the form of factual allegations.” *Western Mining Council v. Watt*, 643 F.2d 618,
5 624 (C.D. Cal. 1981) (internal citations omitted).

6 In its First Amended Complaint, SEIU alleges that the defendants’ fiduciary
7 duties spring from their status as an officer of the local union: “The defendants
8 have breached their fiduciary duties as officers of UHW-W in violation of
9 California law, which has caused damage to the SEIU and the members of UHW-
10 W.” FAC, ¶ 59, 19:6-8.

11 As a matter of law, the ten defendants owe no *state law* fiduciary duty either
12 to UHW-W or to the SEIU. An extensive body of federal law governs the duties of
13 a union officer to its membership, and the labor organization itself. For example,
14 the federal duty of fair representation protects a union’s membership from arbitrary
15 treatment. “The duty of fair representation exists because it is the policy of the
16 National Labor Relations Act to allow a single labor organization to represent
17 collectively the interests of all employees within a unit...” *DelCostello v.*
18 *International Broth. of Teamsters*, 462 U.S. 151, 164, fn. 14, 103 S.Ct. 2281
19 (1983). “The duty stands ‘as a bulwark to prevent arbitrary union conduct against
20 individuals stripped of traditional forms of redress by the provisions of federal
21 labor law.’” *Ibid.*, citing to *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903 (1967).
22 And, of course, Title V of the Landrum-Griffen Act protects the labor
23 organization’s members from misconduct by its officers or officials. See LMRDA,
24 29 U.S.C. § 501, regarding the fiduciary duties owed by union officers.

25 In deference to this well-developed federal regulatory scheme, California
26 courts have consistently disallowed state law claims that seek redress for union
27 and/or union officer misconduct that are addressed by these federal causes of
28 action. For example, it is well-settled that a union owes no state law fiduciary duty

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1 to its members independent of the federal duty of fair representation. *Hussey v.*
2 *Operating Engineers Local Union No. 3*, 35 Cal.App.4th 1213, 1221 (1995). In
3 *Hussey*, a union member filed a lawsuit in state court against his Union *and its*
4 *business agent*, including allegations of state common law negligence and a state
5 law claim for breach of fiduciary duty. *Id.* at 1215. Plaintiff Hussey had alleged
6 that the union's representation of him at a *Skelly* hearing and at all stages of his
7 disciplinary proceedings, by failing to provide legal representation, call sufficient
8 witnesses, and other such conduct, violated a duty of due care. *Id.* at 1216. The
9 California Court of Appeal affirmed summary judgment for the defendants,
10 finding, *inter alia*, that the union and the business agent owed no state law
11 fiduciary duty to its members independent of the federally-based duty of fair
12 representation owed by a union to its members:

13
14 Hussey has cited no authority and we have discovered
15 none for the theory that a union owes a fiduciary duty to
16 its members, independent of the duty of fair
17 representation. In fact, the decisions relied upon by
18 Hussey, *Brady v. Trans World Airlines, Inc.* (3d
19 Cir. 1968) 401 F.2d 87, 94, and *Williams v. Pacific*
20 *Maritime Ass'n* (9th Cir. 1980) 617 F.2d 1321, 1331,
21 demonstrate that a union's duty to represent its members
22 which may be akin to a fiduciary duty is simply part of
23 the duty of fair representation. (*Id.* at 1221.)

19 There is likewise no authority that recognizes a state law fiduciary duty
20 owed from a union officer to the union, nor is one necessary in light of the officer's
21 federal obligations. In *Oakland Raiders v. National Football League* (2005) 131
22 Cal.App.4th 621, the Sixth District canvassed extensively the scenarios in which
23 fiduciary duties have been recognized and rejected. The Court recognized
24 necessity as the key criteria for the duty, and identified, the union/union member
25 relationship as one in which no duty was necessary in light of the federal duty of
26 fair representation:

27 In numerous cases, however, California courts have
28 rejected attempts to extend fiduciary obligations to
relationships where the imposition of such an affirmative

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1 duty is unwarranted. For instance, no fiduciary
2 relationship was found to exist as between the following:
3 . . . (6) a trade union and a union member (apart from the
4 union's duty of fair representation. (*Hussey v. Operating
Engineers Local Union No. 3* (1995) 35 Cal.App.4th
1213, 1221, 42 Cal.Rptr.2d 389 (*Hussey*)); . . . *Id.* at
633.

5 The *Raiders* Court also distinguished a trade union from a corporation, citing to
6 *Hussey*:

7 The Raiders has cited no cases-and we are aware of
8 none-in which it has been held as a blanket proposition
9 that a voluntary unincorporated association **and/or its**
10 **leadership** owes fiduciary duties to its members. A
11 voluntary association, although it has some attributes of a
12 legal entity, is not the equivalent of a corporation. (See 3
13 Ballantine & Sterling, Cal. Corporation Laws (4th
14 ed.1992) § 424.01, p. 19-566 (rel.81-5/02); see also 9
15 Witkin, Summary of Cal. Law (9th ed. 1989)
16 Corporations, § 45, pp. 553-554.) Neither *Hittle* nor
17 *Masters* rests on the principle that an unincorporated
18 association **and/or its leaders** stand in a fiduciary
19 relationship with respect to its members under all
20 circumstances. We decline to reach that conclusion here.
21 (See *Hussey, supra*, 35 Cal.App.4th 1213, 1221, 42
22 Cal.Rptr.2d 389 [holding trade union association was not
23 fiduciary of union members].) *Id.* at 637. (Emphasis
24 added.)

25 Although *Hussey* and *Raiders* discussed the duties owed by a union to its
26 membership, rather than the duties owed by union officers to the union, their
27 controlling principle is that California courts reject a state law duty where federal
28 law regulates the relationship. "As a general rule, courts finding no fiduciary duty
have done so "where other legal relationships clearly existed between the parties
which 'covered' the transaction in suit and which were inconsistent with the
existence of fiduciary duty." (Chodos, *The Law of Fiduciary Duties, supra*, p. 61.)"

Raiders, supra, 131 Cal.App.4th at 634. Since 29 U.S.C. section 501 of the
LMRDA "covers the transaction in suit here," no state law duty exists.

This conclusion also follows from cases holding that federal law preempts
state law claims alleging negligence or other fiduciary-like (duty based) violations
of conduct by union officials. In one such case, an employee alleged various rights

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1 had been violated by his union, and by the Union's President and Business
2 Representative. *Carter v. Smith Food King*, 765 F.2d 916, 918 (9th Cir. 1985),
3 fn.1. The Central District construed the complaint as alleging, *inter alia*, a federal
4 claim against the union for breach of the duty of fair representation, and four
5 pendant state claims against the union: breach of the covenant of good faith and
6 fair dealing, wrongful interference with a business relationship, intentional
7 infliction of emotional distress, and constructive discharge. *Ibid.*¹ The Ninth
8 Circuit upheld the district court's dismissal of the employees pendant state tort
9 claims:

10 We agree with the district court's conclusion that the
11 pendant tort claims are nothing more than
12 recharacterizations of Carter's federal claims. The tort
13 claims each arose out of the same acts and conduct which
14 formed the basis of Carter's section 301/breach of duty
15 claims and are thus preempted by federal labor law.
16 *Farmer v. United Brotherhood of Carpenters & Joiners*
17 *of America, Local 25*, 430 U.S. 290, 305, 97 S.Ct. 1056,
18 1066, 51 L.Ed.2d 338 (1977); *Olguin v. Inspiration*
19 *Consolidated Copper Co.*, 740 F.2d 1468, 1474-75 (9th
20 Cir.1984); *Fristoe v. Reynolds Metals Co.*, 615 F.2d
21 1209, 1212 (9th Cir.1980) (*per curiam*).

22 See also, *Williams v. Pacific Maritime Ass'n* (9th Cir. 1970) 421 F.2d 1287, 1289,
23 holding that individual union officials cannot be sued under California state law for
24 a civil conspiracy seeking monetary damages:

25 It is likewise our view that, under federal labor law,
26 individual union members are not liable in damages by
27 reason of conduct such as plaintiffs charge against the
28 personal defendants. 29 U.S.C. § 185(b); *Atkinson v.*
Sinclair Refining Co. (1962) 370 U.S. 238, 245, 82 S.Ct.
1318, 8 L.Ed.2d 462.

29 We conclude that the Congressional policy on these

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¹ The Court affirmed summary judgment in favor of the union's President and its Business representative. "It is well settled that section 301 provides the basis for an action for breach of the duty of fair representation only against a union as an entity, and not against individuals who happen to hold positions in that union. *See, e.g., Atkinson v. Sinclair Refining Co.* (1962) 370 U.S. 238, 247-48, 82 S.Ct. 1318, 1324-25, 8 L.Ed.2d 462; *Williams v. Pacific Maritime Association* (9th Cir. 1970) 421 F.2d 1287, 1289. The individually named defendants were thus entitled to judgment as a matter of law." *Carter, supra*. 765 F.2d at 920-921.

1 matters, as manifested by the federal labor laws, is such
2 that it was intended to be controlling and therefore
3 preempts state law to the contrary. We are persuaded as
4 to this by the rationale of such cases as *Vaca v. Sipes*,
5 386 U.S. 171, 195, 87 S.Ct. 903 (1967), *Atkinson v.*
Sinclair Refining Co., 370 U.S. 238, 245-246, 82 S.Ct.
1318, 8 L.Ed.2d 462 (1962), and *San Diego Building*
Trades Council v. Garmon, 359 U.S. 236, 243, 79 S.Ct.
773, 3 L.Ed.2d 775 (1959).

6 Finally, as discussed, the Landrum-Griffen Act spells out the scope of a
7 union officer's duties and the circumstances and procedures under federal labor
8 law for asserting a claim for breach of duty. 29 U.S.C. § 501. As discussed, *supra*,
9 Congress and our federal courts have stated several conditions precedent to
10 bringing such a legal claim, including a finding of good cause, a prior request to
11 act made upon the union, and obtaining leave of court. *Id.* at § 501(b). Of note,
12 "the 'good cause' provision 'was a condition precedent to Section 501 suits, a
13 condition which was designed to protect unions and their officers from harassing,
14 vexatious litigation.'" *Phillips v. Osborne* 403 F.2d 826, 830 (9th Cir. 1968), citing
15 to *Horner v. Ferron*, 362 F.2d 224, 228 (9th Cir. 1966). Recognition of the SEIU's
16 unprecedented state law claim here would effectively allow the SEIU to
17 circumvent these federal requirements and would undermine this federal policy.

18 Further, even if there were a fiduciary obligation, the SEIU's FAC fails to
19 factually assert how any such duty extends from the defendants herein to the
20 international union under the facts of this case. The California Supreme Court
21 recently clarified the situations in which a fiduciary obligation will be held to exist.
22 In *City of Hope National Medical Center v. Genentech, Inc.*, 43 Cal.4th 375, 386
23 (2008), the California Supreme Court clarified and reaffirmed that there can be no
24 fiduciary obligation between parties unless the party charged with the fiduciary
25 obligation "either knowingly undertake[s] to act on behalf and for the benefit of
26 another, or . . . enter[s] . . . a relationship which imposes that undertaking as a
27 matter of law."

28 Here, the SEIU summarily alleges, "The defendants have breached their

1 fiduciary duties as officers of UHW-W in violation of California law, which has
 2 caused damage to the SEIU and the members of UHW-W.” FAC, ¶ 59 (19:6-8). It
 3 is difficult from the Complaint to understand what fiduciary relationship the SEIU
 4 alleges, and in what capacity the SEIU alleges these individuals acted. For
 5 example, it is unclear whether the SEIU is suggesting that in establishing the
 6 Education Fund, the ten members of the local union’s Executive Board that the
 7 SEIU has selectively chosen to sue, knowingly undertook a fiduciary duty to the
 8 international union. If so, it remains unclear what the SEIU alleges is the source of
 9 such a duty. Assuming *arguendo* that a state law fiduciary claim exists, the SEIU’s
 10 Complaint fails to state adequate facts to attest the nature and source of that duty.
 11 *Bell Atlantic Corp., supra*, 127 S.Ct. at 1965.

12 Because the SEIU cannot, as a matter of law, state a valid state law claim for
 13 breach of fiduciary duty, and because further amendments could not cure this legal
 14 defect, the SEIU’s third cause of action should be dismissed with prejudice to
 15 refiling.

16
 17 **IV. CONCLUSION**

18 For the above-stated reasons, the ten named defendants, union members and
 19 officers of the local labor organization UHW-W, jointly and respectfully request
 20 that this Court dismiss each and every cause of action as claimed by the Plaintiff
 21 SEIU, and dismiss this litigation in its entirety. Alternatively, the defendants
 22 request dismissal of each cause of action that this court determines fails to state a
 23

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1 claim upon which relief may be granted under the Federal Rules of Civil Procedure
2 Rule 12(b)(6).

3

4

Respectfully submitted,

5

DATED: June 20, 2008

SIEGEL & LEWITTER

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By: /s/ Jonathan H. Siegel
Jonathan H. Siegel
Latika Malkani
Sarah Beard

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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION
12

13 SERVICE EMPLOYEES
INTERNATIONAL UNION,

14
15 Plaintiffs,

16 v.

17 SAL ROSSELLI, JORGE RODRIGUEZ,
LORI WYMAN, JOAN EMSLIE, DAVID
18 SHAPIRO, STANLEY LYLES, NANCY
EVANS, MARTHA VASQUEZ, ROSIE
19 BYERS, and ROY CHAFFEE,

20 Defendants.
21

) Case No. CV08-02777 (JFW)

) **REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS**

) Date: July 21, 2008
Time: 1:30 p.m.

) Judge: Hon. John F. Walter

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1 **I. INTRODUCTION**

2 Grasping at the law of other circuits, off-point dicta, and other half-straws,
3 Plaintiff SEIU's Opposition to this motion attempts to skittle past precedent and
4 make arguments that have been rejected by controlling authority.

5 First, as the United States Supreme Court and other Circuit courts have
6 recognized, the Ninth Circuit has considered and declined to imply a private right of
7 action for a labor organization to sue its officers under section 501 of the Labor
8 Management Reporting and Disclosure Act (LMRDA). 29 U.S.C. § 501; *Building*
9 *Material and Dump Truck Drivers, Local 420 v. Traweek* ("Traweek"), 867 F.2d
10 500, 506-507 (9th Cir. 1989). In reaching different conclusions on this issue,
11 Courts from different Circuits have considered section 501 in its entirety, and either
12 implied or not implied a private right of action for unions to sue under that section,
13 based on and consistent with each Circuit's view of federal jurisdiction as being
14 expansive or restrictive. Here, the SEIU's argument asks this Court to adopt an
15 interpretation of section 501 that is overly myopic and (in this Circuit) wrong.

16 Second, the SEIU's argument that there exist independent state law breach of
17 Constitution claims that the SEIU may bring on behalf of UHW-W members, to
18 enforce alleged UHW-W Constitutional violations, by UHW-W officers, is fully
19 founded on, and requires the interpretation of, provisions in the SEIU International
20 Constitution that discuss the obligations that run from a parent union to its affiliate
21 local – obligations which the SEIU concedes are governed by federal law under
22 section 301 of the LMRA. 29 U.S.C. § 185. Any state law breach of contract
23 claims are thus preempted. And SEIU's federal breach of Constitution claim for
24 non-monetary relief still fails in the Ninth Circuit as a matter of law, under
25 *Traweek, supra*, 867 F.2d at 508. This claim additionally fails because the non-
26 monetary remedies are sought from the Fund, not the UHW-W, and cannot be
27 obtained from the defendants in their official capacities as UHW-W officers.

28 Third, although Congress has stated its intent not to preempt such a claim *if it*

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1 *existed*, California courts have declined to impose a separate, independent state law
2 claim for breach of fiduciary duty that runs from the officers of a labor organization
3 to its members. The SEIU's Opposition failed to address numerous controlling
4 decisions that, in deference (by choice rather than by obligation) to the duties
5 imposed by federal law, have declined to impose a state law fiduciary duty.

6 **II. ARGUMENT**

7 **A. Adopting A Narrow Construction Of Federal Subject Matter**
8 **Jurisdiction, the Ninth Circuit Has Considered The Same**
9 **Arguments Advanced Here By the SEIU And Has Declined To**
10 **Imply A Private Right of Action For A Labor Organization To Sue**
11 **Its Officers Under Section 501**

12 Insisting on a statutory construction argument that was rejected in *Traweck*
13 and ignoring Ninth Circuit findings of Congressional intent, the SEIU slices apart
14 section 501 in a shortsighted attempt to distinguish the trees but not the forest. The
15 SEIU does not and cannot explain that in disallowing a labor organization itself to
16 sue its officers under section 501, the Ninth Circuit carefully reached that
17 conclusion after considering section 501 in its entirety, its statutory construction,
18 and the restrictive scope of federal jurisdiction. The Ninth Circuit found in
19 *Traweck*, as consistent with its prior rulings, that in section 501 Congress intended
20 to empower members, not unions, with a federal cause of action to remedy fiduciary
21 violations by union officers. *Traweck, supra*, 867 F.2d at 506-507; *Phillips v.*
22 *Osborne*, 403 F.2d 826, 828-829 (9th Cir. 1968).

23 **1. Congress Did Not Expressly Grant Unions a Federal Cause**
24 **of Action under 501(a)**

25 First, the SEIU boldly puts aside *Traweck* and other Ninth Circuit decisions
26 interpreting Congressional intent, and asks this Court to find, based on irrational
27 statutory construction, that in section 501(a) Congress *expressly* granted labor
28 organizations a private right of action. The SEIU argues that the final sentence in
section 501(a), as follows, expressly creates liability running from union officers to
the labor organization itself: "A general exculpatory provision in the constitution
and bylaws of such a labor organization or a general exculpatory resolution of a

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1 governing body purporting to relieve any such person of liability for breach of the
2 duties declared by this section shall be void as against public policy.” 29 U.S.C.
3 § 501(a). The SEIU next cites to out-of-context dicta in a dissent from *Key Tronic*
4 *Corporation v. United States*, 511 U.S. 809, 822, 114 S.Ct. 1960, 1967, 1968
5 (1994) (Scalia, J., dissenting): “Surely to say that A should be liable to B is the
6 *express* creation of a right of action.” Based on these statements and the fiduciary
7 duties outlined in section 501(a), the SEIU argues that Congress expressly
8 conferred upon unions a federal cause of action for fiduciary violations, arguing that
9 Congress contemplated “liability for breach of the duties” expressed in section
10 501(a). 29 U.S.C. § 501(a); Opposition at 8:8 – 9:4.

11 This argument is incredulous. The final sentence in section 501(a) simply
12 voids any union’s attempt to pass internal rules (for example, in its Constitution or
13 Bylaws) that would immunize its officers from liability under section 501. 29
14 U.S.C. § 501(a). Of course Congress contemplated that section 501, in its entirety,
15 would create some liability for breach of fiduciary duties: Congress expressly
16 conferred a federal cause of action, and federal jurisdiction, to members who
17 remedy such breaches. 29 U.S.C. § 501(b). But section 501(a) simply articulates
18 duties, it most certainly does not explicitly specify *to whom* the union officers shall
19 be liable. And the SEIU’s Opposition selectively omitted the next sentence *cited by*
20 *the majority* in *Key Tronic* stating that where a statute simply says “A shall be
21 liable” *without identifying to whom A shall be liable*, the statute does not create an
22 express cause of action. *Key Tronic Corporation, supra*, 511 U.S. at 818, 14 S.Ct.
23 at 1967, n.11. Unquestionably, Congress did not expressly confer upon unions the
24 right to sue under any part of section 501. 29 U.S.C. § 501(a), (b).

25 **2. Congress Did Not by Implication Confer upon Unions a**
26 **Federal Cause of Action under 501(a)**

27 Some courts *in other circuits* have concluded that by giving labor
28 organizations a “right of first refusal” before a member can sue under 501(b),
Congress implied that the union itself may also directly sue its officers for fiduciary

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1 duty violations. See *International Union of Electronic, Electrical, Salaried,*
 2 *Machine & Furniture Workers, AFL-CIO v. Statham* (“*Statham*”), 97 F.3d 1416
 3 (11th Cir. 1996), 1419-1421, and at 1418, n. 2, and cases cited therein. However,
 4 “[s]ection 501(b), 29 U.S.C. § 501(b) (1982 ed.), by its terms, does not establish a
 5 private right of action for a union itself.” *Guidry v. Sheet Metal Workers National*
 6 *Pension Fund*, 493 U.S. 365, 374, fn.16, 100 S.Ct. 680, 686, n. 16 (1990). Since
 7 Congress did not confer upon unions the right to sue under section 501(b), some
 8 courts *in other circuits* have looked to 501(a) for the source of an implied private
 9 right of action for a union to sue under 501. See e.g., *Statham, supra*, 97 F.3d at
 10 1421, and cases cited therein. However, these courts *in other circuits* have so
 11 concluded by considering 501 in its entirety, reasoning that by including the right of
 12 first refusal in section 501(b), Congress intended for a labor union to be able to
 13 directly sue its officers in the first instance for fiduciary duty breaches. See, e.g.,
 14 *Statham, supra*, 97 F.3d at 1419 (“By giving the union the right of first refusal to
 15 the cause of action, section 501(b) shows Congress preferred that the union, rather
 16 than individual members, sue on its own behalf...”) This is also the same reasoning
 17 advanced by the SEIU. See Opposition at 9:12 – 10:3, 11:16 – 12:5 and 9:18-21
 18 (“Requiring the member to take that step would be unnecessary – indeed capricious
 19 – unless Congress understood that labor organizations could *act* on a member
 20 request and bring a lawsuit against faithless officers under § 501(a)...”

21 The problem with the SEIU’s argument is that the Ninth Circuit has
 22 considered and rejected it in *Traweek*, and that the SEIU’s argument is inconsistent
 23 with the Ninth Circuit’s consistent findings of Congressional intent in *Traweek* and
 24 in prior cases. First, in *Traweek*, the Ninth Circuit explained the “right of first
 25 refusal” language in section 501(b) as being included in the statute for another
 26 purpose, as being necessary because the union member is bringing a derivative
 27 claim:

28 Congress included a requirement that the individual
 member request leave of the court to bring suit because

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1 any money lost through financial impropriety does not
2 belong to the union member personally. This statutory
3 requirement offers proof that Congress intended that this
remedy be available solely to individual union
members.....

4 The clear language of the statute does not contemplate a
5 suit brought by a union, but only addresses the availability
6 of a suit when the union refuses to sue. Our construction
7 of the statute is consistent with the general principle,
repeatedly reaffirmed by this court, that the scope of
federal jurisdictional statutes should be construed
narrowly.

8 *Traweek, supra*, 867 F.2d at 506-507. *Traweek's* reasoning is based on a finding
9 that Congress enacted section 501 to empower union members, and union members
10 alone, to sue to remedy fiduciary violations by union officers. *Ibid.* And this
11 construction is indeed consistent with the Ninth Circuit's longstanding view that
12 federal jurisdiction must be narrowly construed and reflective of a Congressional
13 intent that 501 was enacted to empower union members, but not unions themselves,
14 with a remedy to address union officer misconduct, as expressed in *Phillips v.*
15 *Osborne*, 403 F.2d 826, 828-829 (9th Cir. 1968):

16 The congressional history of the Landrum-Griffin Act
17 makes it abundantly clear that Congress sought to
18 implement the recommendations of the Committee and
intended to deal solely with the activities of union leaders
as they affected their members.

19 On a related thread, the SEIU's Opposition dramatically foreshadows a
20 doomsday scenario "juridical (sic) no-man's land where no court, federal or state,
21 can provide their union with a remedy for the misconduct." Opposition at 5:14-15.¹
22 As the Ninth Circuit and other Courts have recognized, the labor organization itself
23 is not without a remedy to curb union officer misconduct. First, and perhaps most
24 importantly, there are many internal procedures that exist to remedy union
25 misconduct, and requiring a member to approach the union before resorting to
26 federal court serves the important purposes of protecting the union from "harassing

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27 _____
28 ¹ The SEIU improperly admonishes defendants for properly restricting its
argument to allegations in the Complaint and/or issues of law. Opp. at 5:16-17.

1 and vexatious litigation brought without merit or good faith,” *Horner v. Ferron*, 362
2 F.2d 224, 228 (9th Cir. 1966), and also prevents the federal courts from being
3 clogged with disputes that can best be resolved internally. *Phillips, supra*, 403 F.2d
4 at 826. Second, the union itself may bring other state law claims, such as fraud,
5 conversion, or other such claims, if and when conditions are sufficiently egregious
6 to warrant such claims, and where a state’s legislative or judicial body have
7 recognized such claims under state law. Additionally, a union member may bring
8 suit under 29 U.S.C. section 501(b) against union officials who have breached their
9 trust if the union fails to act within a reasonable time and if the union member
10 complies with the conditions precedent as stated in 29 U.S.C. section 501(b). On a
11 practical note, here the SEIU’s counsel has at least thus far initially succeeded in
12 concurrently litigating a union member’s derivative claim under section 501(b) in a
13 related case in this Court that is based upon the same transaction or occurrence as
14 this case, and which in fact seeks the remedy (for the UHW-W) that the SEIU
15 claims here (also on behalf of the UHW-W). *Collins v. Rosselli, et al.*, United
16 States District Court, Central District California, Case No. 2:08-cv-03330-JFW
17 (PLAx). The SEIU knows well that in this case, it’s claim of a judicial no-man’s
18 land is purely theoretical.

19 Also, despite the SEIU’s attempts to further muddle the issue, basing federal
20 jurisdiction on section 1331 and section 501(a), rather than solely on section 501(b),
21 does not greatly alter this analysis. Here, section 1331 only provides federal
22 jurisdiction if and when a federal cause of action exists. 28 U.S.C. § 1331;
23 *Statham, supra*, 97 F.3d at 1421. However, where the Ninth Circuit has not implied
24 or otherwise recognized a federal cause of action for unions to sue under section
25 501 (*Traweck, supra*, 867 F.2d at 506-507), section 1331 cannot independently
26 confer federal jurisdiction. And with neither a federal cause of action warranting
27 federal jurisdiction under 28 U.S.C. section 1331, nor an independent basis for
28 federal subject matter jurisdiction under 501(b), this Court has no jurisdiction over

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1 the SEIU's claim under 29 U.S.C. section 501.

2
3 **3. This Court May Dismiss the SEIU's Claims Either By This**
4 **Motion, Under Rule 12(b)(6) For Failure to State A Claim**
5 **Upon Which Relief May Be Granted, Or In The Alternative,**
6 **Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction**

7 The SEIU grossly overstates the impact of the ruling sought in this motion,
8 arguing that because defendants invoked Rule 12(b)(6), "[t]he implication of that
9 position is that a union cannot enforce the rights it has against officers who breach
10 their § 501(a) duties in *any* court, state or federal." Opposition at 15:12-14.

11 To be clear, defendants' Rule 12(b)(6) motion is precise and narrow.
12 Defendants simply ask this federal Court to dismiss this claim – the SEIU's claim
13 against these ten defendants for breach of fiduciary duty under section 501(a) of the
14 LMRDA. Defendants believe Rule 12(b)(6) provides adequate grounds for
15 dismissal of this claim in this Court because the Ninth Circuit has rejected allowing
16 a labor organization to sue its officers for fiduciary breaches under section 501, and
17 because to recognize such a federal cause of action under 501(a) would defy
18 otherwise consistent Ninth Circuit findings that Congress intended to confer this
19 cause of action on members, not on unions. To that extent, the SEIU's first cause of
20 action fails to state a legally cognizable claim upon which this Court, sitting in the
21 Ninth Circuit, may grant the SEIU the relief it seeks. Whether this claim may be
22 brought in other courts, state or federal, is purely academic.

23 Notwithstanding, defendants respectfully ask that this Court treat this entire
24 motion as one brought under Rule 12(b)(6), for reasons stated above, and,
25 alternatively, under Rule 12(b)(1), for lack of subject matter jurisdiction. Thus,
26 defendants ask this Court to consider, either on this motion or *sua sponte*, the lack
27 of subject matter jurisdiction over each of the SEIU's claims, including the pendent
28 state law claims over which supplemental jurisdiction will not exist under 28 U.S.C.
section 1367 unless there is an independent surviving federal claim. "If the court
determines at any time that it lacks subject-matter jurisdiction, the court must

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1 dismiss the action.” F.R.C.P. Rule 12(h)(3); *Traweck, supra*, 867 F.2d at 505.

2 **B. This Court Should Dismiss The SEIU’s Breach of Constitution**
3 **Claim Because The Ninth Circuit Found That Congress Broadly**
4 **Intended to Immunize Union Members, And Because the SEIU**
5 **Seeks Non-Monetary Relief That Cannot Be Had From The**
6 **Defendants In Their Official Capacities**

7 The Supreme Court held that individual union members or officers are not
8 liable for damages for breach of contract under section 301 of the LMRA. 29
9 U.S.C. § 185; *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 417, 101 S.Ct.
10 1836, 1845 (1981). In so holding, the Supreme Court explicitly did not rule on
11 whether Congress intended that individual union members could be sued under
12 section 301 for purely non-monetary relief. *Id.* at 415, 1844, n. 17; *Id.* at 416, 1845,
13 n.18. Consequently, the SEIU alleges that its second claim, for breach of
14 Constitution under section 301 of the LMRA, 29 U.S.C. section 185 (and for breach
15 of contract under California law as discussed, *infra*), against the ten individual
16 defendants, seeks only non-monetary relief, and is now brought “solely” against the
17 ten defendants in their official capacities. Opposition at 4:3-5.

18 As argued, the Ninth Circuit in *Traweck* held that Congress intended “to
19 immunize individual members from a § 185 suit.” *Traweck, supra*, 867 F.2d at 508,
20 referencing 29 U.S.C. § 185, § 301 of the LMRA. Defendants maintain that
21 *Traweck*’s broad, unconditional language precludes section 301 suits against
22 individual union members, even if those suits seek only non-monetary relief,
23 because *Traweck*, consistent with Ninth Circuit law, found Congress intended to
24 restrict federal court jurisdiction, rather than for the federal courts to “provide a
25 forum in which to demand payment or settle internal union squabbles.” *Id.* at 508.

26 Notwithstanding, even if 301 claims were allowed against the defendants in
27 their official capacities, the SEIU still could not in this lawsuit obtain the non-
28 monetary relief it seeks here. FAC, ¶¶ 53-57, 17:21 - 18:27, see also, FAC, Prayer
For Relief, 19:10 – 20:1. In it’s Opposition, the SEIU introduced that it sues the
individual defendants only in their “official” capacities. Opposition at 4:3-5.

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1 However, the non-monetary relief that the SEIU now seeks either has occurred (and
2 thus is moot, as understood from the FAC’s allegations) or cannot be obtained by
3 suing these ten officers in their official capacities as UHW-W officers.

4 The lawsuit prays for three non-monetary remedies. First, the lawsuit seeks
5 to impose a constructive trust over the Fund. However, the Fund is not named in
6 this action and is not before this Court. Also, this is a California law state remedy,
7 and thus cannot be awarded under section 301. Furthermore, as the lawsuit admits,
8 on April 28, 2008, the day before this suit was filed, UHW’s President Sal Rosselli
9 (the lead named defendant) notified the SEIU in writing that both the UHW-W and
10 the Fund had voted to shut it down. ¶ 40, 14:11-16. (The SEIU has not alleged,
11 and cannot allege, that there exists any Fund remaining over which to name in this
12 suit and impose a constructive trust.) Second, the lawsuit seeks an accounting of
13 the UHW money transferred to the Fund, and third, the SEIU asks this court to
14 enjoin the defendants from “disbursing and/or encumbering the monies held by the
15 fund” (FAC, 19:10 - 20:1). The requested relief cannot be obtained in this lawsuit
16 because if the defendants are now sued only in their official capacities as UHW
17 officers, then they have no power or ability – in that role – to either disburse or
18 encumber any monies held by the Fund, or to take action to bind the Fund (even if
19 the Fund still existed, which the SEIU will not be able to allege in good faith). And
20 as just a fraction of the Executive Board, the ten SEIU defendants likewise lack
21 power to take action on behalf of the UHW-W Executive Board. Even assuming a
22 valid claim, the non-monetary relief sought by the SEIU could not be obtained from
23 these defendants in this lawsuit.

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24 **C. The SEIU’s Second Cause of Action For Breach of Contract under
25 California Law Is Wholly Dependant on the SEIU Constitution
26 Which the SEIU Concedes Is Governed By Federal Labor Law,
27 And It Is Otherwise Preempted**

28 The SEIU’s Opposition clarifies that it argues in the alternative. First, the
SEIU claims to sue on the SEIU International Constitution, which it alleges is a
contract between the international and local labor organizations, or a “contract

