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In Re Hearing on Whether a Trustee
Should Be Appointed at SEIU United
Healthcare Workers-West Under Article
VIII, Section 7 of the SEIU Constitution

**POST-HEARING REPLY BRIEF
OF INTERNATIONAL PRESIDENT
ANDREW L. STERN**

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY1

II. THE FACTS ALLEGED IN THE AMENDED NOTICE OF TRUSTEESHIP WERE PROVED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE8

 A. UHW-W’s Attempt to Rebut the PEF-Related Charges is Unsuccessful8

 B. The Transfer Of \$500,000 To The Siegel & LeWitter Trust Account Served No Legitimate Purpose And Was Hidden From the International Union.....23

 C. UHW-W Admits that It Has Retained SEIU’s Stolen Proprietary Database.....27

III. UHW-W’s “BAD FAITH/RETALIATION” DEFENSE FAILS.....29

 A. This Proceeding Was Initiated Solely to Remedy UHW-W’s *Conduct*; No Action Has Ever Been Taken Against UHW-W or its Leaders Based on their Speech, and the International Union Has In Fact Taken Affirmative Steps to Accommodate UHW-W’s Right to Speak and Participate in SEIU Forums30

 B. UHW-W’s “Retaliation” Defense is Incoherent and Built Upon Wildly Unreliable Evidence.....31

 1. UHW-W’s Effort to Reverse Engineer a Retaliation Theory from an Email Reflecting the Musings of a Mid-Level International Staff Employee Who Was Not in the Decision-making Loop Fails Utterly31

 2. UHW-W’s Most Incendiary “Retaliation” Allegations are Based on Unreliable Tales Told by Absent Witnesses Whose Stories Were Not Tested Through Cross Examination39

 3. UHW-W Has Not Merely Injected Unreliable Evidence into the Record, it Has Gone Further and Grossly Misrepresented that Evidence42

 4. Contrary to the Premise of UHW-W’s Submission, the International Union is Not Retaliating Against UHW-W for its Speech When the International Merely Responds to UHW-W’s Speech with Speech of Its Own.....44

C.	Even if, Contrary to Fact, UHW-W Had Proven with Reliable Evidence that Some International Officers or Staff Employees Engaged in Some Unfair Conduct toward UHW-W, that Would Not Shelter UHW-W's Serious Acts of Financial Malpractice, Subversion of Democratic Procedures, and Interference with the Legitimate Objects of the International Union from Forming the Basis for a Proper Trusteeship	45
IV.	THE INTERNATIONAL PRESIDENT HAS "REASON TO BELIEVE" THAT ESTABLISHMENT OF A TRUSTEESHIP IS NECESSARY TO PROTECT THE INTEREST OF THE MEMBERSHIP OF UHW-W AND OF SEIU	46
	CONCLUSION.....	57

I. INTRODUCTION AND SUMMARY

We showed exhaustively in our Opening Brief that the allegations set forth in the Amended Notice of Trusteeship—that UHW-W’s leaders improperly shifted millions of dollars of its members’ dues monies off the books; covered up their actions through a series of acts of dishonesty; and wrongfully retained stolen International Union property—were proven by the overwhelming weight of the evidence. *See* Opening Br. at 10-66.

Given the seriousness of those allegations, one would expect that, if they were untrue, UHW-W would respond to them primarily, if not exclusively, on the merits. But throughout this proceeding, UHW-W has tried to shift the focus away from the merits of those allegations and toward its effort to impugn the character and motives of those who have made the allegations. Only a relatively small part of UHW-W’s presentation at the hearing was devoted to its response on the merits of the charges, and only a relatively small part of UHW-W’s Post-Hearing Brief is devoted to that matter.

UHW-W has sought to shift the focus for an obvious reason. The International President has amply proven each of the charges; indeed, he has proven those charges based on highly reliable evidence that meets the rigorous standards of admissibility that apply to federal judicial proceedings. In particular, the International President has proven all the essential points in his case by putting under oath and subjecting to cross-examination witnesses who had personal knowledge of the matters about which they testified, and by relying on statements made by (and documents produced by) UHW-W itself.

Insofar as UHW-W has made some effort to respond to the merits of the charges, that effort is, as we will show in Part II. A of this Reply, wholly unsuccessful. With respect to the first two charges—those involving the diversion of UHW-W assets to the United

Healthcare Workers and Patients Education Fund (“PEF”) under false pretenses—UHW-W has ignored much of the most probative evidence against it, and, where it has addressed the evidence, it has offered only unconvincing *post hoc* rationalizations for the numerous actions taken by UHW-W and PEF that were inconsistent with the proposition that PEF was a genuine “education” fund. With respect to the other charges, UHW-W’s responses are equally deficient. *See* Part II.B and II.C *infra*.

In tacit recognition of the fact that it lacks a convincing defense on the merits, UHW-W has devoted most of its brief to the contention that, even if it is *guilty* of the charged conduct, the Hearing Officer should nevertheless recommend against establishment of a trusteeship on the basis of UHW-W’s two “affirmative defenses.”

The first of those two defenses is UHW-W’s “bad faith” defense—*i.e.*, its contention that the International Union has initiated this action in order to retaliate against UHW-W for its leaders’ exercise of their free speech rights. UHW-W builds this defense upon a foundation of wild and incendiary allegations directed at the International Union’s officers and staff employees, accusing them of doing everything from forming a “skunk team” for the purpose of digging up negative personal information about UHW-W’s leaders, to attempting to suborn false statements from witnesses, to deliberately promoting the decertification of a unit of UHW-W employees, to enlisting other SEIU local unions to carry out opposition research against UHW-W.

In stark contrast to the International President’s case on the merits—which, as noted, was fully supported by evidence meeting the high standards of admissibility applicable in federal court, including testimony under oath by witnesses with personal knowledge and subject to cross-examination—UHW-W’s “bad faith” case depends heavily on second- and

third-hand accounts of events that fail to meet even the most minimal standards of reliability. Indeed, UHW-W's most incendiary allegations in its Brief come from five persons (Thomas Dewar, Teresita Collado, and allegedly Tyrone Freeman, Matthew Maldonado, and an unnamed former employee of SEIU Local 1199 New York) whom UHW-W did *not* put on the witness stand to testify under oath and subject to cross-examination. All but the last of those five absent witnesses were presumably *co-operating* with UHW-W in the presentation of its defense, and hence UHW-W could have, and undoubtedly would have, placed them under oath and subjected them to cross-examination if it had faith that their tales would survive scrutiny.

Worse still, UHW-W has not been content merely to inject into the hearing record a plethora of unreliable statements from absent witnesses—as well as other unreliable evidence—UHW-W has, in multiple places in its Brief, made assertions of fact that are unsupported even by the *unreliable* evidence that it introduced.

Further, it is not just the unreliable nature of UHW-W's evidence—and the lack of candor that UHW-W follows in characterizing that evidence in its brief—that makes UHW-W's retaliation defense unworthy of credence. The defense is incoherent even on its own terms, for it is predicated on the notion that the International Union treated jurisdictional reorganization and trusteeship as mutually exclusive alternatives, when in fact SEIU's conduct refutes the notion.

UHW-W's other affirmative defense asserts that—again—even if UHW-W engaged in the misconduct alleged in the Amended Notice of Trusteeship, a trusteeship should not be imposed, because the International President does not have the requisite “reason to believe,” under Article VIII, §7(a) of the SEIU Constitution that a trusteeship is “necessary to protect

the membership . . . for the purpose of [*inter alia*] . . . correcting financial malpractice, . . . restoring democratic procedures or otherwise carrying out the legitimate objects of this International Union.” That defense is wrong at the most basic level.

If, as we submit, UHW-W’s leadership is guilty of the serious misconduct alleged in this proceeding, then not only would appointing a trustee plainly “protect the interests of the membership” of SEIU—both the interest of the membership of UHW-W and the interest of the membership of the SEIU as a whole—but *failing* to appoint a trustee would seriously *harm* the interests of the membership.

In this regard it must be emphasized that the International President has gone beyond showing that UHW-W committed the underlying wrongs alleged in the Amended Notice of Trusteeship, he has shown further that the wrongs that UHW-W committed through its officers were not mere accidents or isolated lapses in judgment but were acts that flowed from a deliberate decision made by UHW-W’s leadership in the first half of 2007 to embark on a course of conduct calculated to evade the lawful and democratically adopted rules and policies of the International Union.

What ties the wrongs together is that they betray an unwillingness on the part of UHW-W’s leaders to accept the reality that UHW-W is not a fiefdom unto itself but is instead an organization that is bound by the SEIU Constitution, and by its own Constitution, to be an integral part of a larger democratic institution—an institution that the members of *all* of SEIU’s local unions can, through the delegates they send to SEIU conventions and the International Officers they elect at conventions, shape, structure and direct in ways that may not be to each individual local union’s liking.

The continued pattern of wrong-doing proven in this case manifests a fundamental distortion that has become embedded in the culture of UHW-W's leadership of the role of a local union in the context of the larger polity that constitutes the SEIU. UHW-W's leaders came to believe that when the convention delegates and International Union officers adopt a policy, through the SEIU's democratic processes, that in the eyes of UHW-W's leaders is unwise or unfair to UHW-W, UHW-W is entitled to violate and evade that policy by whatever means necessary—including by transferring assets off the union's books to circumvent the controls placed on local unions by the SEIU Constitution and by engaging in active deception of UHW-W's members, the SEIU, government agencies, and the Hearing Officer—even while that policy is in effect and legally binding on UHW-W. UHW-W's leaders, in other words, have evinced through their conduct a sense of their own exceptionalism.

Accordingly, the International President has overwhelming "reason to believe" that a trusteeship of UHW-W is necessary both to "protect the interests of the membership" of UHW-W and to "protect the interests of the membership" of SEIU as a whole. Standing on its own, a continuing course of moving massive sums of money off the local's books – and therefore out of range of the positions of the constitutions of SEIU and UHW-W and the provisions of the LMRDA that make union leaders accountable to their members for all financial transactions – and a continuing course of covering up those actions by creating false union records and making false statements to the SEIU and to various government agencies manifests a style of union leadership that cannot be tolerated in any local, big or small, powerful or weak. That brand of leadership reflects a fundamental breakdown of democratic procedures, and in the case of UHW-W, that misguided leadership distorts and permeates the

overall governance of the local. It is an understatement to say that the International President has “reason to believe” that in these circumstances a trusteeship is necessary to “protect the interests of the membership” of UHW-W.

But the International President’s duty and authority to protect the interests of the membership runs beyond the interests of the members of a single local; it runs to the membership of the SEIU as a whole. Here, the interests of that broad membership clearly require a trusteeship. The leadership of UHW-W has adopted an ‘end justifies the means’ mode of governance. Here, the end is preserving UHW-W’s jurisdiction at all costs. As we have shown, the continuing pattern of misconduct by UHW-W is in service of that end. UHW-W pursues that end at the cost of threatening to destroy the long-standing jurisdictional policy first adopted by the delegates at the 2000 Convention and implemented at dozens of locals over the next eight years and then reaffirmed at the 2008 Convention specifically as to the representation of long-term care workers. One can debate the wisdom of that policy. What is beyond debate is that this jurisdictional policy was adopted through the democratic processes established under the SEIU Constitution. UHW-W cannot set itself above that policy. To allow UHW-W to do so would be to allow UHW-W to prevent SEIU from “carrying out the legitimate objects of this International Union.” Art. VIII, §7(a). The International President’s power to impose trusteeship is expressly designed to prevent such a result.

Given all this, a decision that, on the one hand, finds UHW-W’s officers responsible for the serious misconduct alleged in this case, but that, on the other hand, concludes that a trusteeship is not in order, would tear at the fabric that binds all of SEIU’s local into a single international union. Such a decision would send an unmistakable message across the entire

International Union: that a local union that is sufficiently large, politically connected, and powerful to mobilize against the International Union, after having been caught in serious transgressions of the SEIU Constitution and of the most basic norms of union conduct, can escape the constitutional mechanism that is in place precisely to redress and deter such transgressions—the trusteeship authority of the International Union. Indeed, when, as in this case, misconduct and dishonesty within a local is not confined to one or two officers acting on their own and in isolation from the executive board, but is being carried out with the support or acquiescence of the local’s Executive Board, use of the trusteeship authority is particularly necessary, because, by definition, the local union’s own system of checks and balances has broken down.

Precisely because the SEIU has many local unions that are sufficiently large, politically connected, and powerful to fit that criterion, a ruling that would find the leadership of UHW-W to have committed the charged conduct, yet be left to continue to govern the local, would threaten to upset the conscious and deliberate choices that the democratically elected delegates from SEIU locals of all sizes made at SEIU conventions over the past decade to unify the power of workers for organizing, bargaining and political action across local unions. These decisions are informed by the delegates’ considered judgment that, in the past, SEIU’s effectiveness as a labor organization had been hobbled by a governance system that allowed local unions to insist on their own way of doing things even though this lack of unity diluted the effectiveness of national programs and initiatives.

If SEIU, a national union comprised of large, small, and medium-sized locals, is to be able to function as a *truly* international union—and to carry out its mission as determined, not by a single local union, but by the union as a whole—then a finding that the UHW-W

leadership has engaged in the serious misconduct charged in this case compels the conclusion that establishment of a trusteeship over UHW-W is necessary to protect the membership of SEIU, including those who belong to UHW-W and those who belong to other local unions within SEIU. Put simply, if the International President cannot impose a trusteeship in these circumstances, the SEIU will lose control of its ability to carry out its mission as determined by its authorized democratic processes.

II. THE FACTS ALLEGED IN THE AMENDED NOTICE OF TRUSTEESHIP WERE PROVED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE

A. UHW-W's Attempt to Rebut the PEF-Related Charges is Unsuccessful

1. In our Opening Brief, we showed in great detail that the evidence in the hearing record overwhelmingly supports the allegation that PEF was created and funded for reasons different from the “educational” purposes set forth in UHW-W’s Executive Board Minutes. The section headings within Part II.A.1.b capture the essence of our submission on this point:

- “Three witnesses testified that at the UHW-W board meeting authorizing PEF, UHW-W board members were told in a closed executive session that PEF was being set up to finance potential battles against the International Union,” Opening Br., Part II.A.1.b § (i) (pp. 14-18);
- “The circumstances surrounding the May 2007 UHW-W Executive Board meeting and the conduct of UHW-W’s officers thereafter corroborate the testimony of the International President’s three credible witnesses,” *id.* § (ii) (pp.18-26); and
- “Statements made or adopted by UHW-W’s own representatives corroborate the testimony of the International President’s three credible witnesses,” *id.* § (iii) (pp. 26-41).

In its Brief, UHW-W tries to rebut the PEF charges by devoting virtually all of its energy to a lengthy multi-pronged attempt to impugn the character and motives of former

UHW-W Administrative Vice President and Executive Board member Amado David. *See* UHW-W Br. at 34-37. David was one of three witnesses who came forward to testify that UHW-W President Sal Rosselli, in a closed executive session at the May 2007 UHW-W Executive Board meeting, gave an account of PEF's intended purposes that differed from the purposes described in the meeting minutes. The other two witnesses were former UHW-W Executive Board member Pam Burton and current UHW-W staff employee Theresa Fernandez. As explained in more detail in our Opening Brief, David testified that Rosselli explained during the executive session that the proposed "education" fund would be available in case a trusteeship occurred, and would allow UHW-W's displaced officers, post-trusteeship, to have access to a source of funds to finance a challenge to the trusteeship. Opening Br. at 14-15.

2. We will show below that UHW-W's attack on David fails on its own terms. But the more fundamental point is that UHW-W, in its narrow fixation on Amado David, has missed the forest for the trees. The forest is that a full eleven months of *conduct* by UHW-W's own officers, agents and allies—which, unlike testimony, cannot be manufactured or tailored after the fact to fit a desired narrative—*corroborates* the account of PEF's true purposes that was related by David and the two other witnesses who testified for the International President on this point, and, concomitantly, *believes* the account given by UHW-W's witnesses about those purposes.

Specifically, in the period between PEF's May 18, 2007 creation and UHW-W President Rosselli's official April 3, 2008 response to the International President Stern's March 24 inquiry letter regarding PEF, UHW-W and its allies took a series of actions that only make sense if, as David and the International President's two other witnesses testified,

PEF was created in order to serve as a contingency fund to fight internal union battles including a potential trusteeship battle, and that, conversely, make *no* sense if, as UHW-W's witnesses claimed, PEF was set up and operated to be a genuine education fund.

Those actions include but are not limited to:

- The fact that, when UHW-W President Sal Rosselli asked the UHW-W Executive Board to authorize a transfer up to \$6,000,000 of UHW-W's money (nearly 40% of its net assets) to a newly-created entity with no track record, Rosselli presented the Board with no business plan, budget, or document of any kind—an absence of documentation that, given the size of the authorization, makes sense only if what is being proposed is something that is meant to be kept secret, Opening Br. at 11-13, 18;
- The fact that UHW-W, despite its well-developed member communications program, did absolutely nothing to publicize PEF to UHW-W's membership—an absence of publicity that is inconsistent with the testimony of UHW-W's witnesses that PEF was set up to do noble and laudable things such as hold seminars about the need for healthcare reform and support UHW-W's contract campaign, Opening Br. at 19;
- The fact that, on each of the two occasions in which Rosselli decided, on his own, to wire seven-figure sums of money to PEF (\$1 million on May 25, 2007 and \$2 million on February 5, 2008), he neither documented nor reported the rationale for the amount or timing of his decision, Opening Br. at 12-13, 19-20;
- The fact that the second transfer—the \$2 million transfer—was made at a time when PEF had spent very little of its original \$1 million grant and did not appear to need more money, Opening Br. at 13;
- The fact that *following* the second transfer on February 5, 2008, PEF took no action to finance or otherwise promote activities pertinent either to healthcare reform or to UHW-W's contract campaign—the activities that UHW-W's witnesses *claimed* were PEF's *raison d'être*—even though, on UHW-W's own version of events, there was a flurry of activity surrounding healthcare reform and the contract campaign in the period between February 5 and the April 24 PEF dissolution resolution, Opening Br. at 13-14;
- The fact that a disbursement that PEF *did* make following the second transfer on February 5—indeed PEF's single largest disbursement—was unrelated to healthcare reform or the contract campaign but was fully consistent with the proposition that PEF was created and operated as a contingency fund in the event of a trusteeship or other internal union battle. The disbursement in question was a \$75,000 payment to retain, for six months, Washington, D.C.

attorney Arthur Fox, who is well known as an expert in intra-union litigation, including trusteeship litigation, and who has no demonstrated expertise on the subject of healthcare reform, Opening Br. at 21-23;

- The fact that Fox’s services could not, as UHW-W has recently suggested, have been in the nature of serving as a “consultant” to communicate a “union democracy” component of PEF’s mission, given that PEF asserted the attorney-client privilege as a basis for withholding correspondence between PEF and Fox, IP Exh. 36 at 2;
- The fact that *both* the \$1 million initial transfer *and* the \$2 million subsequent transfer were executed shortly *after* the occurrence of UHW-W Executive Board meetings at which UHW-W’s Board authorized efforts to confront the International Union and shortly *before* UHW-W carried out those efforts, Opening Br. at 20-21; and
- The fact that PEF’s second largest authorization to expend monies was to finance an internal union UHW-W referendum, or straw poll, on a matter of controversy between UHW-W and SEIU—the matter of long-term care jurisdiction, Opening Br. at 23-24, 84 n.24.

Not only do all of these *actions* corroborate the testimony of Amado David, but an important statement by UHW-W’s own President, Sal Rosselli, corroborates David’s testimony as well. As we explained in our Opening Brief, on March 24, 2008, International President Stern sent a letter of inquiry to Rosselli, asking Rosselli to respond to seven allegations, including the allegation that UHW-W had set up and transferred millions of dollars to an outside fund (later revealed to be PEF) for the purpose of evading, *inter alia*, the International’s trusteeship authority. On April 3, 2008, Rosselli sent Stern his formal nine-page response, with copies to the entire UHW-W Executive Board, the entire International Executive Board, and the SEIU Council of Presidents.

In that response, Rosselli—rather than *denying* that UHW-W had transferred monies to an outside fund that would allow opponents of a trusteeship to finance their challenge even after the trustee assumed control of UHW-W’s assets—included a passage aimed at *justifying* such a transfer. *See* IP Exh. 27 at 8 (“if a trusteeship were to be imposed, the underlying

purpose would be to retaliate against UHW for our public criticisms of SEIU’s policies and would, accordingly, be unlawful,” and “[a]s a consequence, we would have every right to retain legal counsel...—a right that a trustee might attempt to quash *by denying access to the funds needed to exercise that right*”) (emphasis added).¹

The appearance of that passage is so difficult to understand if Amado David were not telling the truth about the real purpose of PEF that Rosselli was literally reduced to testifying at the trusteeship hearing that *he did not understand his own letter*. See Rosselli 11/14 Tr. at 973-74 (Q. “What did you mean by that statement in the letter? A. I don’t know.”); see also 11/15 Tr. at 1033. As explained in more detail in our Opening Brief, Rosselli’s assertion defies credibility, given that the letter was vitally important from Rosselli’s point of view, inasmuch as it was his union’s official response to what Rosselli considered a trusteeship threat letter. 11/15 Tr. at 1032.

Also corroborating David is the fact that UHW-W’s own website, *Seiuvoice*, featured and linked to a web article that, in discussing PEF, reported that “the local executive board voted to put money into a separate tax-exempt fund protected from seizure by Stern ... [that] would give members resources to resist the imposition of the trusteeship and, if it is imposed, would help defend their rights while it remains in effect.” Opening Br. at 26-27. The article was written by Herman Benson, a union democracy advocate who sits on the Board of Directors of the Association for Union Democracy with PEF attorney Arthur Fox. The UHW-W officer who made the decision to feature and link to the article was John Borsos, who attended the board meeting in question. As explained in our opening brief, the proposition that Borsos would draw attention to the article, without including a disclaimer, if

¹ The passage is quoted in full in our Opening Brief. See Opening Br. at 31-32.

he believed that Benson gave a false account of the facts concerning what happened at the meeting that was absolutely central to the allegation against UHW-W in the March 24, 2008 inquiry letter from the International, is wholly unworthy of belief. *Id.*

As if that were not sufficient, David's account is also corroborated by the fact that, on the night of Monday March 17, 2008 Pacific time (just after midnight March 18 Eastern time), a UHW-W insider writing under the name of "Rob Hettrjr" sent an email to International Long-term Care Director Jim Philliou reporting that there had been a recent mandatory staff meeting at UHW-W, during which the staff were told that "uhw claims it is ready in case the international tries to trustee, they have a *fund* set up for expenses, *information technology, and office space,*" IP Exh. 123 (emphasis added)—a report that, in light of the fact that PEF had recently procured information technology and had earlier received donated office space, provides powerful evidence that PEF was indeed a contingency fund set up to make UHW-W's officers "ready in case the international tries to trustee." *See* Opening Br. at 34-38; Declaration of Jim Philliou, ¶¶ 7-20 (submitted November 28, 2008).

All of these statements—as well as the numerous instances of conduct set forth in the series of bullet-pointed paragraphs above—make UHW-W's effort to impugn David's character and motives beside the point. For although UHW-W casts David (falsely as we will show) in the role of a wily manipulator, it cannot cast David in the role of a sorcerer so powerful as to be able to telepathically coax Herman Benson into writing the words in his blog post that corroborate David; induce John Borsos to feature that post on *Seiuoice* without any disclaimer; impel Rosselli to send his April 3 letter containing the damning words quoted above that he was forced to distance himself from at the hearing; and cause the

UHW-W insider known as “Rob Hetrjr” to send an email to Jim Philliou reporting that “uhw claims it is ready in case the international tries to trustee, they have a fund set up for expenses, information technology, and office space.”

3. UHW-W’s attack on David not only fails to account for the fact that David’s testimony was corroborated from multiple sources, it fails even on its own terms.

As its “first” ground for discrediting David, UHW-W simply discredits itself, for it makes this unsupported—and false—assertion: “Mr. David came forward with this account of the May 2007 Executive Board meeting for the first time at the September 26, 2008 trusteeship hearing—five months after the International had made its allegation about the ‘secret purpose’ of the Education Fund in a federal lawsuit.” UHW-W Br. at 34-35.

Notably, UHW-W includes no citation to the record for that assertion, because the record contradicts the assertion. Indeed, counsel for UHW-W tried and failed on more than one occasion to elicit an admission from David to the effect that he had never spoken about the discussion at the May 2007 Board meeting before the allegation about PEF became public knowledge in the wake of International President Stern’s March 24, 2008 letter. For example, counsel asked: “And in March of 2008, you never came forward and told your story; did you?” 9/26 Tr. at 151. Far from saying, “no,” David replied “to who?” *Id.* Then, after counsel said, “To anyone,” David said that he *had* told the stories about the discussion and the transfer of funds. *Id.* (“I told – I told stories about – yeah, there was that – the discussion. And, yes, there’s a transfer of fund.”).²

² While the transcript is somewhat garbled, it is clear that David’s answer was that he *had* told his story in March 2008, and that David was *not* accepting UHW-W’s counsel’s insinuation that David had been silent in and before March 2008. David, moreover, has submitted to the Hearing Officer a short declaration clarifying the transcript on this point and specifying that he

UHW-W's second line of attack on David's credibility is unwittingly—but richly—ironic. UHW-W contends that, because David strongly disagreed with the direction in which Rosselli and UHW-W's other top officers were taking UHW-W in early 2008 and decided to resign from UHW-W, become a dissenter, and freely express his views to UHW-W's members about his opposition to the direction in which Rosselli was leading the union, David's testimony should not be credited: “Mr. David is motivated by a desire to retaliate against UHW and its leaders *because he opposes the direction for the labor movement advocated by UHW.*” UHW-W Br. at 35 (emphasis added). That attack on David's credibility reveals more about UHW-W's ideological blindness than it does about David's credibility. For UHW-W plainly does not believe that the testimony of Sal Rosselli, John Borsos, Dan Martin, and all of UHW-W's other witnesses should be discredited because *they* oppose “the direction for the labor movement” advocated by *SEIU*. Thus, UHW-W apparently is of the view that disagreement with UHW-W's direction is a character flaw that renders the dissenter unworthy of belief, but that disagreement with *SEIU*'s direction is a self-evident virtue.

UHW-W's third line of attack on David is circular. UHW-W argues that because its own witnesses gave testimony inconsistent with David's, *see* UHW-W Br. at 37, the only conclusion must be that David is the one who is not telling the truth. Given that each of the witnesses for whom UHW-W is implicitly vouching repeated a story about PEF that is contradicted by the raft of evidence marshaled above, that is a dubious conclusion to say the least.

indeed had spoken to others about PEF prior to March 24, 2008. *See* Declaration of Amado David (submitted December 18, 2008).

UHW-W's final attack on David, like UHW-W's first attack, only damages UHW-W's credibility. Indeed it has the stench of desperation. This attack comes from an *unsworn* letter to the Hearing Officer submitted, *ex parte*, on November 26 by a *current UHW-W Executive Board member*, Teresita Collado—an officer of UHW-W whom UHW-W could have made available to testify under oath and certainly could have asked to vouch for her story in a declaration sworn under penalty of perjury.³ The first notice that UHW-W gave the International President of this letter came on December 12 (the day that the Opening Briefs were due), when the letter was included at the end of a very long compilation of “member letters” that UHW-W submitted to the Hearing Officer and served on counsel. *See* UHW-W Exh. 246. The unsworn letter makes the scurrilous allegation that “[o]ver many months,” David has called Collado about the May 2007 Board meeting at which PEF was authorized and “pressured her to say things [she] knew were not true” about what was said at that meeting. UHW-W Br. at 39; UHW-W Exh. 246. After accusing David of suborning false statements, the letter also lashes out at Theresa Fernandez—a current UHW-W staff employee who had nothing to gain and everything to lose by coming forward to testify in this proceeding against UHW-W—and at retired UHW-W board member Pam Burton. Collado calls Fernandez and Burton “angry and bitter,” a description diametrically at odds with the demeanor of those two UHW-W members on the witness stand. UHW-W Exh. 246.

³ In a previous filing, UHW-W made the erroneous assertion that a person serving on a union's executive board is not an “officer” if the person holds no other union position. *See* UHW-W letter of December 4, 2008 (responding to International President's objection to York-Jones Declaration). That is directly contradicted by the plain language of the LMRDA. *See* 29 U.S.C. § 402 (n) (defining an “officer” to include “any member of [the] executive board or other similar governing body” of a labor organization).

The letter should be discredited and disregarded. To begin with, Collado was physically present during the first phase of the trusteeship hearing in San Mateo. 9/27 Tr. at 212-13. She spoke from the floor during the member forum portion of the proceeding. In her speech, she did not even *mention* Amado David, who had by that point completed his testimony—much less did she say that David had given a false account of the May 2007 Board meeting that they both had attended, or that that David had ever tried to pressure her into giving a false account of that meeting.

Furthermore, if as Collado claims, David had been pressuring her “over many months” to speak about the PEF meeting, it is more than remarkable that UHW-W never called her as a witness to impeach David, given that Collado’s story—if believed—would provide far more powerful impeachment evidence than the thin impeachment gruel that UHW-W served up at the hearing regarding David and that we have just reviewed.⁴

The sum of the matter is that Collado’s unsworn letter should not even be treated as *evidence*; and it should certainly not be credited over the sworn testimony presented by the International President’s witnesses and tested through cross-examination.

4. One of the many aspects of UHW-W’s conduct that is difficult to explain if, as UHW-W has insisted, PEF was truly set up to finance education concerning an

⁴ Collado’s letter also shows that she is not careful with her facts. Theresa Fernandez testified at the hearing that, shortly after the May 2007 meeting, she had a lunch meeting with Collado in which Collado told her that, during the executive session regarding PEF, the use of PEF for a trusteeship was discussed and that Collado was disturbed, not by the use of the fund for that purpose, but by the large amount of money that had been authorized. 11/15 Tr. at 1149. In a separate part of her testimony, Fernandez testified that another Board member, Pam Burton, had told Fernandez shortly after the meeting that UHW-W had authorized a “war chest.” In her unsworn letter, Collado writes as if Fernandez had attributed the phrase “war chest” to *her*, rather than to Burton. UHW-W Exh. 246 (“Even the words she used to describe the conversation (that never took place) are not the words I would use like ‘war chest’”).

expected healthcare reform ballot measure is why UHW-W, through Rosselli, wired \$2 million to PEF on February 5, which was after the pre-eminent healthcare reform initiative, ABX-1, died in committee on January 28. Expert witness Walter Zelman, who testified on behalf of the International President, explained that when that bill died in committee, it had ceased being viable for all practical purposes. 9/27 Tr. at 23-24. The \$2 million transfer becomes particularly mysterious when considered together with the following language from the resolution passed by the UHW-W Board on April 24 and explaining why the UHW-W Board was calling for the dissolution of PEF: “WHEREAS, *the political landscape has now changed markedly, the anticipated ballot initiative that was to have been placed on the ballot in California never materialized*, and the establishment of the Fund has become a source of unnecessary conflict between UHW-W and the SEIU International.” UHW-W Exh. 95 (emphasis added).

In its Post-Hearing Brief, UHW-W labors mightily to explain how the \$2 million transfer that Rosselli made to PEF on February 5, 2008 can be reconciled with the fact that “the anticipated healthcare initiative” referenced in the April 24 resolution had died before that date. UHW-W Br. at 43-45. To that end, UHW-W argues at great length that Zelman’s testimony was not credible; that the proponents of ABX-1 continued to attempt to revive it well after it died in committee; that multiple healthcare reform initiatives continued apace after February 5; and that education concerning healthcare reform remained important in California after February 5 and indeed never ceased being important. *Id.*

The problem with UHW-W’s argument on this point is that even if, as its witness Paul Kumar testified, the prospects for important work on healthcare initiatives continued after February 5 and never died, then it remains the case that the \$2 million transfer, when

considered together with PEF's post-transfer expenditures, *still* cannot be squared with the italicized language in UHW-W's April 24 resolution seeking the dissolution of PEF. That is because, as we showed in our Opening Brief, PEF did *nothing* to promote or finance healthcare reform in the days—or even the weeks—following the \$2 million transfer.

The only way that UHW-W could possibly have made sense out of the April 24 resolution would have been for it to demonstrate that, *between* February 5 and April 24—or at least between February 5 and the March 24 date of the PEF inquiry letter—there had been some important “turning point” date that materially dampened the prospects for a healthcare reform initiative. If, for example, March 12 had been such a “turning point” date, then perhaps both the February 5 transfer and the April 24 resolution's first rationale would have made sense. Kumar, however, testified at length and he never identified *any* such turning point date between February 5 and March 24 or April 24. Kumar's direct testimony quite simply destroyed UHW-W's only hope of a sensible and plausible narrative that could simultaneously explain (i) the \$2 million transfer on February 5; (ii) the failure of PEF to do anything remotely related to healthcare after February 5; and (iii) the italicized language in the UHW-W Board resolution of April 24 citing the demise of a healthcare reform initiative as a reason for dissolving PEF.

Perhaps realizing this, UHW-W has suggested that the pertinent language in the April 24 resolution citing the demise of a healthcare reform initiative was really just makeweight or filler language, and that the only true reason for the dissolution of PEF was to avoid conflict with the International. But that puts UHW-W in the uncomfortable position of defending itself by conceding that its April 24 resolution contains prominent language that is entirely pretextual. And that concession is significant, because the “demise of healthcare

reform” rationale in the April 24 resolution provided the pertinent UHW-W and PEF officers with a seemingly legitimate reason for acting to dissolve the fund. Absent that rationale, it would have appeared to all the world in late April—accurately—that the only reason why the officers of UHW-W and PEF were suddenly scrambling to dissolve the fund was because the International had caught those officers red-handed in an illegitimate diversion of union assets for a purpose different from PEF’s stated purpose, and that they were hastily trying to return the diverted assets solely for reasons of self-preservation.⁵

5. UHW-W’s final stratagem in defending itself against the PEF charges is to contend that the transfer of UHW-W assets to PEF was harmless, because those assets were *not* outside the control of UHW-W and its Executive Board and hence *were* subject to the accountability, oversight, and trusteeship provisions of the SEIU Constitution and the protections of federal law. UHW-W Br. at 47-50. That argument is fatally flawed.

To begin with, UHW-W’s support for the proposition that PEF was under the control of UHW-W is the testimony of two accountants, both of whom testified that, in making their

⁵ UHW-W repeatedly makes the assertion that when PEF was dissolved on April 24 and its Board of Directors voted to return PEF’s unspent monies to UHW-W, PEF was acting “at the request and demand” of the International Union. *See, e.g.*, UHW-W Br. at 19. That statement is manifestly false. The only pre-April 24 communication UHW-W cites in support of that contention is an April 7 letter from Andy Stern to Sal Rosselli, in which Stern recommends to Rosselli, not that PEF be dissolved or that it return its funds to UHW-W, but simply that UHW-W cease making new transfers to PEF pending Stern’s investigation. IP Exh. 28. That letter made no “demand” of any kind with respect to PEF-related expenditures. Furthermore, on April 30, 2008 Stern wrote a letter to Rosselli in which, far from “requesting and demanding” that PEF return its monies to UHW-W, Stern suggested that the advice of counsel be sought before PEF returned any of its funds. IP Exh. 38. That suggestion was made precisely to avoid any implication that if PEF’s directors chose to breach their fiduciary duties to PEF in order to make UHW-W whole (rather than by, for example, relying on their fidelity bonds or personal assets to do so), the International could be viewed as a participant in, or inducer of, such a breach of duty.

determination on the “control” issue, they (a) looked *outside* PEF’s governing documents and (b) considered, as part of their analysis, events that occurred *after* the International Union raised questions about PEF, including, most significantly, the fact that PEF dissolved and transferred its assets to UHW-W at UHW-W’s request. Hernandez 11/13 Tr. at 497-98; Kupperberg 11/13 Tr. at 513.

It is entirely circular for UHW-W to argue that PEF was under the control of UHW-W based on what UHW-W did *after* questions about the propriety of PEF were raised and UHW-W’s officers had decided, out of their interest in self-preservation, to take steps to shut down PEF. The only behavior that is relevant to the issue of whether UHW-W viewed PEF as an entity whose assets were outside the control of UHW-W—and hence outside the International Union’s audit and trusteeship authority—is the behavior that UHW-W’s officers engaged in *before* UHW-W’s officers, realizing that the PEF transaction could not be justified, took steps to cause PEF to dissolve and transfer its assets to UHW-W.

And the evidence concerning all of the *relevant* behavior points entirely in one direction: that UHW-W did treat PEF as legally separate and outside the financial oversight and trusteeship authority of the International Union.

To begin with, the articles of incorporation and bylaws of PEF—filed, of course, before PEF came under scrutiny—were structured in such a way that PEF was a separate legal entity, whose board members were chosen only by other board members and not by an outside entity such as UHW-W. Ross 9/26 Tr. at 229-30, 248; Trister 11/14 Tr. at 630-32.⁶

⁶ In one of many misstatements in its brief, UHW-W claims that Michael Trister, who testified as an expert on behalf of the International President, failed to disclose that “he has worked for the International in the past.” UHW-W Br. at 51 n. 11. That is simply wrong. In response to the question, “Can you identify some of the significant labor organizations that have

Moreover, UHW-W's behavior after setting up PEF shows that UHW-W treated PEF as an entity whose financial transactions were not part of UHW-W's own financial transactions. Thus, UHW-W reported the \$1 million transfer to PEF on its 2007 Form LM-2 as a "contribution," meaning a payment to a separate entity. IP Exh. 23 at 144. Furthermore, in response to a question on that same Form LM-2 that asks the filer to identify related entities in which the union is interested, UHW-W did not identify PEF, but only UHW-W's building corporation. IP Exh. 23 at 174. What is more, PEF made two disbursements in 2007 that were in excess of \$5,000 (all to consultant Ed Garvey)—disbursements that if they had come from the union would have to be reported on the LM-2, Opening Br. at 48, 50—and yet those disbursements were *not* reported on UHW-W's LM-2. *Id.*

Even more damning is how UHW-W President Sal Rosselli and UHW-W's officers behaved in the period immediately after the PEF investigation began, but before they realized that their wrongdoing in connection with PEF was so blatant that they had to dissolve PEF and cause PEF to return its assets to UHW-W. Most notably, on April 7, 2008, International President demanded that UHW-W produce documents, including certain documents that, it turned out, were in the possession of PEF. IP Exh. 28; IP Exh. 29 at 1. In response to that April 7 letter, Rosselli wrote back on April 8 and said in unmistakable language:

the vast majority of the documents you are demanding do not belong to, and are not in the possession of, UHW; rather, as you recognize, they are records that belong to the United Healthcare Workers and Patients Education Fund ("Fund") which is a separate and independent § 501(c)(3) legal entity. And your authority under Article XIII § 6(a) of the SEIU Constitution to audit local union financial records does not give you the right to audit, much less require

asked you for your advice in the last 10 years in connection with nonprofit organization issues as opposed to election issues," Trister identified "the SEIU International[.]" See Trister 9/26 Tr. at 173

the production of, its records, and to insist on compliance within just three days.

IP Exh. 29 at 1.

Furthermore, on April 10, PEF adopted a resolution which recited: “the information and extensive documents sought do not belong to UHW-W, but rather are the property of this Fund.” IP Exh. 30.⁷

In addition, UHW-W admitted that PEF’s officers did not have fidelity bonds of the kind required for labor organization officers, but UHW-W defended that practice on the ground that PEF was a separate 501(c)(3) entity, not a part of UHW-W. Opening Br. at 49.

The essential question, of course, in determining whether UHW-W’s officers committed financial malpractice and attempted to evade the oversight and accountability controls of the SEIU Constitution and the financial disclosure regulations applicable to labor organizations is how UHW-W’s officers behaved at the time they set up and operated PEF, but before they realized they were under scrutiny. And *all* of that evidence supports the proposition that PEF was set up and operated to be a separate entity outside the reach of the International Union’s oversight authority and outside the strictures of federal regulations governing labor organizations.

B. The Transfer Of \$500,000 To The Siegel & LeWitter Trust Account Served No Legitimate Purpose And Was Hidden From The International Union

It is undisputed that UHW-W transferred \$475,000 to the trust account of Siegel & LeWitter, the third largest single transfer in its history, seven days after International

⁷ Rosselli’s description in his nine-page April 3 letter of how PEF would operate in the event of a trusteeship—that it would provide access to funds that a trustee might deny—is also flatly inconsistent with the notion that UHW-W and its officers viewed PEF as an entity that would be under the control of a trustee in the event of trusteeship.

President Stern sent the March 24, 2008 inquiry letter that UHW-W's witness viewed as a trusteeship threat . IP Exh. 101, control number 289; IP Exh. 105. The retainer only provided for a \$25,000 transfer, and Mr. Siegel was "surprised" by the amount that was transferred. Siegel 11/14 Tr. at 803-804.

As we showed in our Opening Brief, UHW-W's conduct in connection with the transfer constituted financial malpractice and dishonesty, because a transfer in that amount was inconsistent with and unsupported by the retainer agreement, and because UHW-W officials deliberately hid the retainer from the International Union by sending a false and misleading email communication to the International President on March 31, 2008, the day of the wire transfer. Opening Br. at 56-59. UHW-W makes only the most cursory attempt to explain the amount of the retainer.

And UHW-W has put forth an implausible story for its failure to disclose the meeting minutes that would have allowed the International Union to discover the transfer in a timely manner. SEIU had requested "copies of all minutes of meetings of the UHW-W local union executive board" between September 1, 2007 and March 24, 2008. IP Exh. 18. On March 31, 2008, UHW-W's counsel sent an e-mail with executive board minutes to SEIU: "Here are ALL the Minutes of ALL UHW Executive Board meetings from September 1, 2007, through the date of President Stern's letter , March 24, 2008." IP Exh. 24 (emphasis in original). The minutes of a subsequently discovered March 7-8, 2008 executive board meeting at which the \$500,000 retainer had been approved were not provided. Hauptman 11/12 Tr. at 30-31.

At the hearing, UHW-W's justification for the failure to produce the March minutes was as follows: "minutes" are not "minutes" until officially approved at the next executive

board meeting; President Stern's letter of March 24 only asked for "minutes," not "draft minutes"; and because the "draft minutes" were not approved until after March 24, UHW-W's response on March 31 was fully responsive. UHW-W at 19-23, 53 n. 11.⁸

The principal difficulty with UHW-W's argument is that this rationale for not providing the minutes, when read together with other significant evidence in the record, serves only to *strengthen* the case that UHW-W was engaged on March 31 in a willful and deliberate attempt to hide from the International Union the knowledge that the International would have gleaned from seeing the March 7-8 minutes, *i.e.*, the knowledge that another massive transfer of UHW-W assets was afoot.

That other significant evidence to which we refer comes from documents that UHW-W produced in response to an August 27 request by International Union monitor Stephen Lerner for "Executive Board Meeting minutes from 2006 to date." IP Exh. 60. In response to that request, UHW-W made no distinction between "draft" and "final" minutes and produced some minutes that were in draft form and some that were in final. IP Exh. 61 (producing draft and final minutes, IP Exh. Vol. I, UHW-W Minutes at 250, 918). That response is telling, for it shows that UHW-W does not itself, in the ordinary course, make the distinction between "draft" and "actual" minutes that UHW-W pretended at the hearing was fundamental to UHW-W's way of doing business. And the fact that UHW-W itself does not

⁸ Not one of UHW-W's witnesses knew who worked on the response to SEIU's request for the minutes, *e.g.*, Martinez 11/13 Tr. at 353-353, Rogers 11/13 Tr. at 373-376. The UHW-W brief suggests that IP witness Robert Hauptman agrees with the distinction between "draft minutes" and "actual minutes." UHW-W at 53 n. 11. Hauptman answered a question about whether he would provide draft minutes if he were asked for "*approved and final minutes*": "If that was the explicit understanding, that someone requested *approved minutes*, no, I would not send unapproved minutes." 11/12 Tr. at 83 (emphasis added).

ordinarily hold to the “draft/final” distinction, in turn, can mean only one of two things, neither of which aids UHW-W’s cause.

The first possibility is that, back in March 2008, UHW-W was consciously attempting to exploit a contrived distinction between “draft” and “final” minutes that UHW-W itself did not respect in the ordinary course of business, and was doing so for the deliberate purpose of hiding the March 7-8 minutes from the International Union while creating a ready-made cover story to defend itself if caught. The second possibility is that, back in March 2008, all that UHW-W cared about was ensuring, at all costs, that the International Union not be given a copy of the March 7-8, 2008 minutes, and that the “draft”/“final” distinction was not developed as an excuse to explain the manifestly misleading March 31, 2008 email until this trusteeship litigation began. We happen to think the latter scenario is more likely, but, under either scenario, UHW-W is guilty of deliberate deception. And, given that UHW-W undisputedly *did* produce “draft” minutes under circumstances where it was not trying to hide a recent transaction, there is no third possibility here; there is, in other words, no innocent explanation for UHW-W’s decision on March 31 to send an email designed to hide the evidence that would have allowed the International to discover promptly the unsolicited \$475,000 wire transfer that was taking place that very same day.⁹

⁹ UHW-W’s argument that the International President should have known to make a follow-up request for the March 7-8 meeting minutes because UHW-W had sent all of the International board members its annual promotional calendar in late 2007 is, with all respect, silly. We can put to one side the fact that the appendix of minutes in the International President’s exhibit book shows that UHW-W sometimes cancels or moves its scheduled meetings. The more fundamental response is that UHW-W’s expectation that everyone who receives its promotional calendar will hold on to it for a year and keep it accessible in a file in case the need to consult it arises, is manifestly absurd. Anyone who is flooded with year-end promotional calendars from one’s alma mater, insurance agents, or a child’s school would

Quite apart from all of this, the overarching point here—and one that UHW-W does not and cannot rebut—is that wire transferring \$475,000 to Siegel & LeWitter’s trust account on March 31 made absolutely no business sense, *unless* the purpose was to get the money off the books of UHW-W and hence outside the immediate control of a trustee. By wiring that money, UHW-W effectively put another obstacle in the way of a potential trustee by creating a class of asset that the trustee would not be able to identify immediately and would need a third party’s cooperation to access.

C. UHW-W Admits that It Has Retained SEIU’s Stolen Proprietary Database

In our Opening Brief, we set forth in full detail the overwhelming evidence that UHW-W wrongfully retained stolen International Union property, in the form of the International’s Convention database, even after being put on notice that it was stolen and even in the face of repeated requests for its return.

Tellingly, in its Post-Hearing Brief, UHW-W makes no attempt to deny the allegation that it has the convention database. Nor does it provide any explanation for the misrepresentation by UHW-W Secretary Treasurer Joan Emslie that “UHW is *not* in possession of any property belonging to SEIU.” IP Exh. 58 (emphasis in original); UHW-W Br. at 23-25, 56-57. John Borsos, who received and merged the database into UHW-W’s master database, certainly knew what UHW-W had obtained. Borsos 11/12 Tr. at 206-207 (“It looked like people who might have attended the convention.”) UHW-W’s response can only be characterized as part of a pattern of deception and misrepresentations to the International Union.

understand that it is not practical to save every single one of these calendars on the off chance that it might later need to be consulted. The same is true with local union calendars.

UHW-W puts forth one, and only one, justification for its retention and use of the stolen database. It claims that its behavior constituted a form of speech that International President Stern blessed as protected in a letter that he wrote on April 17, 2008 in response to a letter from UHW-W on April 16, 2008 in which UHW-W complained of mailings into its membership from another local union. UHW-W Exhs. 89, 86.

A review of the two letters, however, reveals that Stern in no way suggested that those who use stolen property to communicate with members are engaging in protected free speech.

The first letter—UHW-W’s letter of April 16—asks Stern to intercede to prevent another local union from mailing information to UHW-W’s members’ homes, but that letter pointedly does *not* allege that the other local was using a stolen membership list. UHW-W Exh. 86. The letter from UHW-W constituted a request that Stern order another local to cease communicating with UHW-W’s members *through any means*. *Id.* Thus, Stern was not being called upon even to *address* the issue of whether the theft or proprietary lists can be justified if the theft is for the purpose of speech activities. And, not surprisingly, when Stern responded to the April 16 letter with his letter of April 17, he did not make any assertion that even dealt with the matter of stolen lists, let alone did he condone the use of stolen lists to communicate with members. UHW-W Exh. 89.

What Stern did say in his letter is entirely consistent with the International Union’s position in this proceeding. In that letter, Stern explained that were he to accede to UHW-W’s request, he would be put in the position of a censor, protecting UHW-W’s members from communications that UHW-W’s leaders were asserting they did not wish to hear. According to Stern, “I could not lawfully order one local union to cease communicating with

members of the public, including members of other local unions. . . . [Complying with your request] would suppress free speech rights and prevent UHW members from hearing ideas that differ from those of UHW's leadership on matters of importance to UHW's members." UHW-W Exh. 89.

Stern, then, plainly was not encouraging or condoning the use of stolen lists for purposes of member communication. He simply was applying SEIU's free speech policy and noting that UHW-W's leaders were expressing a profoundly paternalistic and anti-democratic conception of union free speech.¹⁰

Thus, UHW-W's only justification for its theft is no justification at all. The fourth charge in the Amended Notice of Trusteeship—that UHW-W wrongfully retained stolen International property in violation of the SEIU Constitution—has therefore been proven based on the undisputed evidence.

III. UHW-W's "BAD FAITH/RETALIATION" DEFENSE FAILS

UHW-W devotes the bulk of its brief to its contention that this proceeding was initiated in bad faith and for the purpose of retaliating against UHW-W for its speech. That contention should be rejected on multiple grounds.

¹⁰ UHW-W says that, in response to a delegate's question about whether one local can mail information to the members of another local, Stern gave a response from the podium at the SEIU Convention similar to the response in his letter. Thus, what we have said in text applies to the Convention remark. UHW-W has no evidence that the delegate inquired about the use of stolen lists.

A. This Proceeding Was Initiated Solely to Remedy UHW-W's *Conduct*; No Action Has Ever Been Taken Against UHW-W or its Leaders Based on their Speech, and the International Union Has In Fact Taken Affirmative Steps to Accommodate UHW-W's Right to Speak and Participate in SEIU Forums

To begin with a very basic point, all of the allegations of wrongdoing set forth in the Amended Notice of Trusteeship charge UHW-W based on its leaders' *conduct* and not on their speech. UHW-W and its leaders have been engaged in open, robust and full-throated speech—including speech on public websites and in other public forums—for a long time, *see, e.g.*, IP Exh. 12 at 77 (Spring *Unity* Magazine; including timeline showing that UHW-W launched its *SeiuVoice* website on February 15, 2008); and UHW-W has not cited a single instance in which the International Union or its leaders have ever taken any action or threatened to take any action against any UHW-W leader or member based on anything that leader or member has said.

More to the point, as we showed in great detail in our Opening Brief, the notion that the International Union has been trying to prevent UHW-W and its leaders from expressing their opinions or advocating for their proposals to change the SEIU Constitution is refuted by the fact that the International Union went out of its way to ensure that UHW-W would be able to attend and participate in the most important forum for speech and debate that exists within SEIU—the June 2008 SEIU Convention. *See* Opening Br. at 106. While UHW-W and its allies were raising the specter that the International Union would attempt to establish an emergency trusteeship in the wake of the March 24, 2008 inquiry letter and thereby bar UHW-W from sending a delegation, the International took steps to avoid that prospect. Most significantly, after receiving UHW-W's April 3 response to the March 24 inquiry letter, International President Stern wrote to UHW-W on April 7 and stated that, while he was

troubled by the initial information he was provided by UHW-W concerning PEF and believed that the allegation regarding PEF merited further investigation, he was recommending to UHW-W that it make no further transfers to PEF while the investigation continued. IP Exh. 28. That recommendation provided UHW-W with an opportunity to abate what would have easily met the standards for an “emergency” situation under the case law—the prospect of an additional transfer of \$3 million in union assets to an outside entity—and thereby to avoid the necessity for an emergency pre-Convention trusteeship. *See* Opening Br. at 106-08. Furthermore, the SEIU alerted UHW-W of a problem with its delegate election while there was time for UHW-W to cure the problem—a step the International leadership did not have to take and that it would not have taken if its goal was to harm UHW-W’s ability to participate at the Convention with its maximum delegate strength. *Id.* at 109. None of these actions are consistent with the portrait UHW-W attempts to paint of an institution that attempts to suppress dissenting voices or to prevent union members or members of the public from hearing competing ideas as to the direction of SEIU or of the labor movement.

B. UHW-W’s “Retaliation” Defense is Incoherent and Built Upon Wildly Unreliable Evidence

1. UHW-W’s Effort to Reverse Engineer a Retaliation Theory from an Email Reflecting the Musings of a Mid-Level International Staff Employee Who Was Not in the Decision-making Loop Fails Utterly

UHW-W has placed virtually the entire weight of its retaliation defense on a single email—which it refers to as the June 5, 2008 “implosion” email—and on the defective premise that the motives of International President Andy Stern in initiating this trusteeship proceeding can be deduced from that email, even though the email was neither written by

Stern nor sent to Stern. UHW-W Exh. 115. The email, rather, was written by Bill Ragen, a mid-level International Union staff employee who was out of the decision-making loop with respect to the two matters that are pertinent to UHW-W's retaliation defense: trusteeship and long-term-care jurisdictional reorganization in California. 11/15 Tr. 1354. Indeed, as Tom DeBruin testified, the June 5 email had so little impact when written that as far as he could recall, none of the recipients even replied to it; and on the very day Ragen wrote the email, he was assigned to transition to SEIU's "private equity" project, which had nothing at all to do with UHW-W. *Id.* at 1354-55.

While these points about the June 5 email were established without contradiction on the final day of the hearing, UHW-W has nevertheless persisted in its attempt to transform the musings of a single staffer who did not participate in *any* of the decisions relevant to this proceeding—and whose email did not generate even the faintest ripple within SEIU—into the Rosetta Stone for discerning the motives of Stern and of the entire SEIU. That attempt fails utterly.

The email begins by saying "A few thoughts," and immediately below, Ragen offers his opinion that "Trusteeship would be difficult – it's like Iraq, easy to get in and then a slog." UHW-W Exh. 115.¹¹

The email next uses the word "Implosion" to characterize the proposal to transfer the California long-term-care members who now are dispersed among three locals (with approximately 65,000 of them belonging to UHW-W) into a single statewide long-term-care-

¹¹ At the time Ragen was writing this, the International Union had already uncovered the existence of PEF, and Ragen's opinion that it would be "easy to get in" seems to reflect that he believed there were more than sufficient grounds for a trusteeship, but that the physical administration of a trusteeship would be "the slog."

only local. Then—in the sentence to which UHW-W attaches talismanic significance—Ragen opines that “Implosion would be a better outcome.” *Id.* UHW-W infers from this sentence that Ragen conceived of trusteeship of UHW-W and jurisdictional transfer of UHW-W’s long-term-care members as mutually exclusive *alternatives*, and not as issues to be decided independently on their own merits and through different decision-making processes. Then, in a major leap, UHW-W makes the further inference that the International Union’s *actual decision-makers*—including Andy Stern—conceived of trusteeship and jurisdictional transfer as mutually exclusive alternatives.

Based on the same email, UHW-W next makes two further assumptions: (i) that Andy Stern had decided against trusteeship as an option by June 5;¹² and (ii) that because Stern, like Ragen, supposedly viewed trusteeship and jurisdictional change as mutually exclusive, Stern, like Ragen, was necessarily in favor of the jurisdictional transfer “alternative” as of June 5, 2008.

Moving away from the June 5, 2008 email, UHW-W develops its “retaliation” defense by making still another assumption, which is that the proposal to transfer UHW-W’s long-term-care workers into a statewide long-term-care-only local depended, not on any deeper structural considerations, but solely on the identity of the particular long-term-care local union leaders in California, and that the jurisdictional transfer proposal ceased to be viable on August 9, 2008, the date on which the *Los Angeles Times* published a front-page story reporting evidence of serious instances of self-dealing and breaches of fiduciary duty

¹² Why Bill Ragen would be weighing the relative merits and demerits of trusteeship on June 5, if word had spread throughout the International by that time that trusteeship had been taken off the table, is one of the many things UHW-W cannot explain.

by Tyrone Freeman, who was then the president of California's largest long-term-care local, Local 6434.¹³

Finally, building on this whole edifice of assumptions originally derived from UHW-W's premise that Ragen's musings reflected the thinking of SEIU's decisionmakers, UHW-W adds its final assumption, which it calls its proof of retaliation: namely, that this trusteeship proceeding was initiated on August 25, 2008 because the supposed alternative to trusteeship—the transfer of UHW-W's long-term care workers into a statewide long-term-care-only local—was dealt a fatal blow by the downfall of Tyrone Freeman.

UHW-W's retaliation defense suffers from a glaring defect: it is contradicted by actual events. As explained in our Opening Brief, the long-term-care jurisdictional reorganization process in California had begun well before the *Los Angeles Times* published its August 9, 2008 Freeman article. Opening Br. at 71-87 And—of particular importance—that process continued *without pause*, not only after the *Los Angeles Times* article was published, but after SEIU placed Freeman's local into trusteeship, and after SEIU's investigation of Freeman established that Freeman engaged in self-dealing and other breaches of his fiduciary duties to Local 6434.

There is accordingly not only a complete dearth of evidence to support UHW-W's two key retaliation premises—that Andy Stern shared Bill Ragen's apparent view that trusteeship and jurisdictional transfer were mutually exclusive alternatives to one another, and that Stern lost interest in jurisdictional transfer when Tyrone Freeman fell from grace—

¹³ SEIU promptly initiated its own investigation of Freeman and Local 6434, and that investigation led to the prompt establishment of a trusteeship over Local 6434; the removal from office of Freeman and all of the Local's other officers; the bringing of disciplinary charges against Freeman; the finding that he was guilty as charged; and the decision to bar him from membership in SEIU for life. *See* UHW-W Exh. 138.

all of the evidence concerning the International Union's conduct after Ragen sent his email on June 5 is to the contrary. The International's post-June 5 conduct thus corroborates the testimony of Thomas DeBruin that Ragen was not a decision-maker regarding either jurisdiction or trusteeship, and that he was not even in the decision-making loop.

Furthermore, the broader proposition advanced by UHW-W based on the Ragen email—that the proposal to transfer UHW-W's long-term care members into a single statewide long-term-care local was formulated, not because of its merits, but because it was seen as a way to punish or “implode[e]” UHW-W to retaliate against its leaders for their free-speech activities—is refuted by two full years of history that preceded that email. We detailed that history exhaustively in our Opening Brief (*see* pp. 116 -20) and will not repeat it here.

The essential point is that the proposal to create a single statewide long-term-care local was developed in early 2006—well *before* UHW-W engaged in any of the exercises of free speech that UHW-W claimed in its proffer and in its Opening Statement caused the International Union to attempt to retaliate against it. Opening Br. at 74-81, 116-20. That proposal, moreover, never had been abandoned. In fact, in an important jurisdictional report issued by a two-member panel in June 2006 and adopted by the International Executive Board shortly thereafter, the International took the position that a rigorous application of the jurisdictional principles underpinning SEIU's 2000 Decide Report would dictate transfer of the long-term care members of UHW-W—as well as those in other California locals—into a single state-wide long-term-care local, but that pragmatic considerations led them to recommend a temporary exception. Opening Br. at 77. Furthermore, when International President Stern sent a memorandum summarizing the 2006 International Executive Board

report he noted that aspect of it and called for there to be a study of the issue in the future—a study that came in January 2008 when International Executive Vice-President Gerald Hudson issued a report on the matter. Opening Br. at 117; IP Exh. 87. That report, in turn, triggered jurisdictional hearings that took place later in 2008 and a report on jurisdiction by former National Labor Relations Board General Counsel Leonard Page that issued on August 27, 2008. IP Exh. 102

It thus makes no sense at all to infer from Ragen's June 5, 2008 email that the idea of transferring California's long-term care members into a long-term-care-only local was being cooked up in the late spring of 2008 as a means to retaliate against UHW-W for its speech. The record is entirely to the contrary.

Instead, as we explained in our Opening Brief, the only sound inference to draw from the history of jurisdictional realignment in California is that the International Union's proposal in 2006 to reduce UHW-W's jurisdiction was an important *cause*—and was not, in any way, an *effect*—of UHW-W's decision to begin speaking out against the International Union in public forums. Opening Br. at 117-20. And that point became crystal clear during the 2008 facilitated discussion, when UHW-W put forth as a non-negotiable demand that it be excepted from the ordinary policies and procedures for determining jurisdiction developed by the International Executive Board—an elected and broadly representative body—and that its membership be given a guarantee of veto power over any proposal that would reduce UHW-W's jurisdiction. Opening Br. at 85-89.

What is more, the record not only refutes UHW-W's theory that jurisdictional transfer was devised in the late spring of 2008 to be a form of punishment of UHW-W, it also refutes the notion put forward by UHW-W that the International Union's interest in investigating

misconduct at UHW-W evaporated during that same period and revived only after Tyrone Freeman's misdeeds were brought to light in the wake of the August 9, 2008 *Los Angeles Times* story.

One undisputed record fact of particular significance in this regard (and repeatedly ignored by UHW-W) is that International President Stern issued a letter to UHW-W on August 4, 2008—five days *before* the *Los Angeles Times* published its article—in which Stern directed International staff employee Bob Hauptman to conduct an on-site audit of UHW-W's books and records to verify UHW-W's previous statements about the status of the PEF monies and to determine whether any other large and suspicious asset transfers had occurred. IP Exh. 56. That on-site audit, of course, led the International Union to discover *both* that, on March 31, 2008, UHW-W made the unsolicited \$475,000 wire transfer to the Siegel client trust account referenced above, *and* that the March 31 email that UHW-W had sent to the International deceptively hid the existence of certain board minutes which, if they had been produced as requested in response to the International's March 24 inquiry letter, would have allowed the International to learn of the \$475,000 transfer months earlier.

Furthermore, in the month preceding the August 4 audit letter, the International was actively pursuing the allegation that UHW-W had either stolen the International Union's proprietary convention database or had wrongfully retained the database knowing it to have been stolen. *See* IP Exh. 52 (July 10 letter); IP Exh. 53 (July 22 letter); *see also* IP Exh. 57 (August 8 letter concerning database). And—contrary to UHW-W's repeated and unsupported assertions that the International had lost interest in PEF and had viewed the conduct involving PEF as ancient history—the reality is that the International was actively pursuing the PEF charges by pursuing its own lawsuit against PEF, *see* IP Exh. Litigation

Section (control nos. 450-520); and, because of a technical standing issue presented in the lawsuit brought in SEIU's name, by financing a lawsuit brought by two UHW-W members, Michelle Collins and Yvette Hurston, that also challenged the PEF transactions. *See* IP Exh., Vol. 2, "Litigation" (control nos. 521-623).¹⁴

Indeed, with respect to the latter lawsuit, UHW-W counsel, Jonathan Siegel, pointed out in an August 6 pleading on behalf of the defendants, that one of the two members, Hurston, had, on July 24, 2008, filed an internal charge against UHW-W based on the PEF allegation; and that the International President had, on July 31, 2008, exercised his authority under the SEIU Constitution to transfer jurisdiction over the Hurston charge from UHW-W's trial committee to the International Union. IP Exh., Vol. 2, "Litigation" (control nos. 583-85). That history—and, in particular, the fact that the International President took the affirmative step on July 31 of placing jurisdiction over the Hurston internal charge with the International Union—further puts the lie to the contention by UHW-W that the International had somehow lost interest in the PEF matter in the period preceding the publication of the *Los Angeles Times* article.

¹⁴ The case brought in SEIU's own name was dismissed based on the district court's determination of a technical issue going to the matter of standing. *See* IP Exh. Vol. 2, "Litigation," Order Granting Motion to Dismiss in *SEIU v. Rosselli*, CV-08-2777-JFW (C.D. Cal. July 22, 2008) at 515-520. UHW-W, however, suggests in its brief that the court reviewed the "same alleged conduct" as the conduct relating to PEF at issue here, and insinuates that the court's dismissal reflected on the merits of the fiduciary breach claims. UHW-W Br. at 2. That insinuation is completely false. In fact, the very same district court judge who dismissed the suit brought in SEIU's name on standing grounds, held shortly thereafter that there was "good cause" for the *Collins* case—based on the same PEF allegations—to go forward, *see* IP Exh. "Litigation," Order Granting *Ex Parte* Application for Leave to File Verified Complaint in *Collins v. Rosselli*, CV-08-3330-JFW (C.D. Cal. August 8, 2008) at 594-95, and that case indeed has gone forward.

2. UHW-W's Most Incendiary "Retaliation" Allegations are Based on Unreliable Tales Told by Absent Witnesses Whose Stories Were Not Tested Through Cross-Examination

A substantial portion of UHW-W's submission on the retaliation issue is devoted to the recitation of a laundry list of sensational allegations directed at the International Union's officers and staff employees. This part of UHW-W's submission does not appear to be aimed at establishing any particular theory; rather, the point seems to be to create the impression that the Service Employees International Union is staffed with a lot of bad actors who, because they are capable of doing nefarious and underhanded things, might have decided to initiate a trusteeship proceeding against UHW-W out of spite.

The fundamental defect in this part of UHW-W's case is that all of the most incendiary allegations leveled by UHW-W are based on second- and third-hand accounts of events that fail to meet even the most minimal standards of reliability. Indeed, UHW-W's most sensational allegations in its Brief come from individuals whom UHW-W did *not* put on the witness stand to testify under oath and subject to cross-examination. Further, all but one of them were *co-operating* with UHW-W in the presentation of its defense, and thus UHW-W could have, and undoubtedly would have, placed them under oath and subjected them to cross-examination if it had faith that their tales would survive scrutiny.

The first of UHW-W's absent witnesses is Thomas Dewar, who despite being on UHW-W's witness list, was never put on the stand by UHW-W. Instead, UHW-W submitted a declaration by Dewar after the hearing in which Dewar claims that he was asked to be part of a "skunk team." The team would advocate the International Union's platform at the 2008 Convention in letters to the editor, criticize UHW-W's leadership, and, in the part stressed by UHW-W, try to uncover negative personal information about UHW-W leaders. Dewar

claims that he discussed that last aspect of the supposed assignment at a restaurant meeting that included SEIU staff member Josie Mooney, International Executive Board member Thomas DeBruin, and two communications consultants, Mark Mosher and John Whitehurst. *See* Declaration of Thomas Dewar (submitted 11/21/2008).

DeBruin, of course, testified under oath in front of the Hearing Officer and was an eminently credible witness.¹⁵ He explained that he and Mooney had been tasked with the job of advocating the International Union's convention program, responding to criticisms from UHW-W on the merits, and pointing out inconsistencies or instances where UHW-W did not practice what it preached, but *not* with making personal attacks against UHW-W's leaders or digging up negative personal information about them. 11/15 Tr. at 1242. He also testified about the restaurant meeting involving Thomas Dewar. He explained that Dewar's tale was a fiction; that Dewar joined the restaurant meeting late; that he came on very aggressively and immediately took over the conversation, talking non-stop; and that Dewar was the person who brought up the issue of the existence of a file about Sal Rosselli that one of the consultants had access to. 11/15 Tr. at 1238-1241. DeBruin testified that he felt suspicious about Dewar shortly after he joined the meeting. *Id.*

There is no reason to credit Dewar's Declaration over DeBruin's live testimony, and two very good reasons to *discredit* Dewar's Declaration. First, UHW-W had Dewar on its witness list but instead of putting him on the stand and subjecting him to cross-examination, UHW-W chose to tell Dewar's story by having a person who was not at the restaurant

¹⁵ UHW-W spends six pages of its opening brief attempting to undermine Thomas DeBruin's credibility as a witness. *See* UHW-W Br. at 99-105. We believe that attempt is futile because it was apparent to all present that DeBruin was a candid, thoughtful, and responsive witness.

meeting take the stand, read from a *San Francisco Bay Guardian* newspaper article, and tell Dewar's story for him. Borsos 11/12 Tr. at 249-51. Second, it was revealed after the hearing that UHW-W offered—and Dewar accepted—a lucrative \$8830 per month consulting contract, which Dewar signed shortly after he gave his Declaration. *See* Declaration of Bob Hauptman (submitted 12/10/08); 12/10/08 letter from Dayan to Marshall. Dewar thus had an obvious bias in favor of UHW-W—a bias that he did not disclose in his Declaration.¹⁶

Two other witnesses on whom UHW-W heavily relies in making its most sensational allegations are Tyrone Freeman, the disgraced former President of Local 6434, and Matthew Maldonado, Freeman's former chief of staff, who was removed from office when Local 6434 was placed under trusteeship for corruption and financial malpractice. Freeman and Maldonado, according to UHW-W, were willing to meet with UHW-W representatives and co-operate with them in preparing for the trusteeship hearing, but UHW-W did not, of course, place either of those gentlemen under oath where they could be subject to cross-examination and confronted with their acts of dishonesty. The weight given to the out-of-court statements that UHW-W claims they made to UHW-W representatives should be nil.

A fourth absent witness on whom UHW-W relies is an unnamed person who UHW-W witness John Borsos asserted was a person who claimed to be formerly employed by another SEIU Local—Local 1199NY. 11/12 Tr. at 252-55. The unnamed person, according to Borsos, said that a woman by the name of Amy Gladstein directed Local 1199NY staff employees to conduct opposition research on UHW-W. *Id.* Borsos, however, revealed his

¹⁶ The only argument UHW-W can muster to suggest that DeBruin's testimony should not be credited is that DeBruin did not write a letter to the newspaper to complain about inaccuracies in the story. That argument is misleading because UHW-W neglects to mention that DeBruin testified that he *personally* met with representatives from the newspaper. 11/15 Tr. at 1345-46.

own lack of credibility when he testified that Gladstein was an *International* staff employee, 11/12 Tr. at 254—a false assertion that UHW-W tacitly recognizes was false by not repeating that assertion in its brief. Gladstein rebutted the allegation made by the unnamed absent witness by testifying under oath by telephone and subject to cross-examination. 11/15 Tr. at 1162-82.

Again, there is no conceivable basis on which a second-hand report of a statement made by an unnamed person of unknown credibility should be credited over the account of a witness who testified under oath and subject to cross-examination. But beyond that, because Gladstein is indisputably *not* an employee of the International Union, there could be no possible justification for finding the *International Union* responsible for her misconduct even if, contrary to fact, UHW-W had been able to prove any misconduct on her part.

3. UHW-W Has Not Merely Injected Unreliable Evidence into the Record, it Has Gone Further and Grossly Misrepresented that Evidence

One of UHW-W’s most scurrilous allegations—one which it has elevated to the status of an argument heading—is that “The International Promoted a Decertification Campaign Against UHW at Good Samaritan Hospital.” UHW-W Br. at 95. As support for that claim, UHW-W cites an email chain in which SEIU staffer Bill Ragen noted that an effort was underway to attempt to decertify UHW-W’s bargaining unit at Good Samaritan Hospital and asked International Union officers Stephen Lerner and Mary Kay Henry whether another SEIU staffer, Keisha Stewart, should be sent in “to help on the Good Sam decert.” *Id.* (citing UHW-W Exh. 230). In its effort to portray Mary Kay Henry—and by extension, the International—as so

callous as to refuse UHW-W help on a decertification campaign, UHW-W writes as if Henry's *complete* response to Ragen and Lerner was two words: "Why do?"

But the reality is that the balance of Henry's response email makes it clear that Henry was not in any way opposed to the concept of helping UHW-W avoid a decertification; Henry's concern was solely over whether Keisha Stewart was an appropriate staff employee to send into UHW-W, given that UHW-W had *complained about Stewart* at the then-recent "facilitated discussion" session (sometimes referred to in this case as the "mediation") between UHW-W and the International Union's Healthcare Steering Committee. Henry's email says to Lerner and Ragen—immediately after the "why do?" line plucked out of context by UHW-W—that they all should "talk by phone" about the appropriateness of assigning Keisha Stewart, because "she was issue in facilitated discussion." UHW-W Exh. 30. *See also* Second Declaration of Mary Kay Henry at ¶ 6. Henry therefore was trying to *accommodate* UHW-W, not harm it, when she raised her concern.

The only lesson to be drawn from the "Why do?" email is that UHW-W is willing to level even the most serious allegations without subscribing to even the most minimal standards of candor.

4. Contrary to the Premise of UHW-W's Submission, the International Union is Not Retaliating Against UHW-W for its Speech When the International Merely Responds to UHW-W's Speech with Speech of Its Own

A substantial part of UHW-W's list of acts of alleged "retaliation" against UHW-W for its speech consists of incidents in which all that the International Union has done is engage in vigorous counter-speech of its own. Those incidents should not be considered evidence of anything other than the fact that there has been a robust public debate between UHW-W and the International ever since UHW-W made its decision, at its January 25-26 Executive Board

meeting to launch a “massive public campaign” of criticism against the International Union.
9/26 Tr. at 143.

By suggesting that when UHW-W engages in the criticism of the International Union, it is exercising its right to free speech but that when the International Union engages in speech critical of UHW-W, it should be deemed to be engaging in unlawful “retaliation,” UHW-W is tacitly advocating for a legal regime that, in the First Amendment context, the Supreme Court has condemned as impermissible: “[The Government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

C. Even if, Contrary to Fact, UHW-W Had Proven with Reliable Evidence that Some International Officers or Staff Employees Engaged in Some Unfair Conduct toward UHW-W, that Would Not Shelter UHW-W’s Serious Acts of Financial Malpractice, Subversion of Democratic Procedures, and Interference with the Legitimate Objects of the International Union from Forming the Basis for a Proper Trusteeship

While UHW-W’s retaliation defense fails for all the reasons just stated, it suffers from a defect that is perhaps more fundamental. Even if UHW-W had been able to prove, with reliable evidence, that one or more of the alleged instances of unfair or inconsiderate conduct toward UHW-W had occurred as alleged, and that International officers or staff employees had, on occasion, treated UHW-W or its officers in a less-than-ideal manner, that would *not* shield UHW-W from trusteeship if, as we have shown, UHW-W’s officers engaged in significant acts financial malpractice, subversion of democratic procedures, or interference with the legitimate objects of SEIU. The question as to whether a trusteeship is appropriate focuses on whether the local union in question has transgressed the appropriate standards of conduct, and not on whether the international union has on occasion acted in a less than ideal manner.

The law is well-established that, because a parent labor organization may establish a trusteeship over a local union whenever the parent has *one* proper purpose for taking that action,

evidence that a combination of permissible and impermissible purposes may have motivated a trusteeship decision is insufficient to defeat a trusteeship. *See, e.g., Morris v. Hoffa*, 361 F.3d 177, 189 (3d Cir. 2004) (because “the existence of a single proper purpose for the imposition of a trusteeship establishes the validity of the trusteeship even where improper motives may exist,” the district court’s conclusion that the hearing panel found proper justifications for imposing the trusteeship would be affirmed “even if we assume *arguendo* that a 2004 Hoffa-Morris vendetta motivated Hoffa's effort to oust [Morris and other plaintiff officers] from Local 115”); *National Ass'n of Letter Carriers v. Sombrotto*, 449 F.2d 915, 923 (2d Cir. 1971) (“one proper purpose for imposing a trusteeship would suffice” to sustain its validity); *SEIU Local 87 v. SEIU*, 230 F.Supp.2d 1099, 1107 (N.D. Cal. 2002) (“As long as the trusteeship is supported by at least one proper purpose, it is immaterial in light of a single proper purpose”); *Johnson v. Holway*, 2005 U.S. Dist. LEXIS 34787, at *49-50 (D.D.C. Dec. 6, 2005) (same); *Satink v. Hoffa*, 2005 U.S. Dist. LEXIS 17556, *70-72 (N.D. Ohio Aug. 22, 2005) (“An international union's decision to impose a trusteeship must be upheld, moreover, if just a single reason for that action was valid - even if some other, improper motive also may have existed”).

In other words, the courts have rejected the notion that a local union's officers can defend against a trusteeship by showing a mix of proper and retaliatory motives may have influenced the decision to establish the trusteeship. Only if the local officers can show that the parent organization did not subjectively believe that the local’s misconduct was sufficiently serious to constitute grounds for trusteeship at all—and hence that the only purpose for establishing the trusteeship was an improper one—can a motive-based defense, rather than an innocence-based defense, possibly succeed.

Were the law otherwise, a local union's officers could engage in the most extreme acts of impropriety imaginable—including diversion of local union funds to family members and friends or rigging elections—and yet still raise a defense against trusteeship by showing that the parent organization officers who recommended the trusteeship were unhappy with the local officers and wished to see them go for reasons independent of the financial improprieties. In rejecting that kind of a “mixed motive” defense, the courts have recognized that if a local union's officers have engaged in financial malpractice or other misconduct sufficiently serious to satisfy the statutory criteria for a trusteeship, then the parent union officers’ judgment that a trusteeship is warranted to protect the union as an institution should not be overridden simply because there is evidence of other motives or grounds for establishing the trusteeship.

Here, because the acts alleged in the Amended Notice of Trusteeship constitute serious wrongs—including financial malpractice, attempted self-dealing, falsification of meeting minutes, and dishonesty—and because the evidence in support of those claims is so powerful, there can be no conceivable basis on which it can be inferred from the nature of the charges or the quality of the evidence that the International President has initiated this proceeding without having a good faith belief in the existence of grounds for trusteeship.

IV. THE INTERNATIONAL PRESIDENT HAS “REASON TO BELIEVE” THAT ESTABLISHMENT OF A TRUSTEESHIP IS NECESSARY TO PROTECT THE INTEREST OF THE MEMBERSHIP OF UHW-W AND OF THE SEIU

As its second affirmative defense, UHW-W invokes the preamble to the provision in the SEIU Constitution governing trusteeships—which provides that a trustee may be appointed “[w]henver *the International President has reason to believe that, in order to protect the interests of the membership*, it is necessary to appoint a Trustee for the purpose of correcting ... financial malpractice ... restoring democratic procedures, or otherwise carrying

out the legitimate objects of this International Union”—and argues that, even if it is found to have engaged in the misconduct at issue here, a trusteeship would not protect the interests of the membership. That argument must be rejected.

The nature of the wrongs that UHW-W’s officers have committed gives the International President more than ample “reason to believe” that the appointment of a trustee would “protect the membership” of the UHW-W and of the SEIU. Indeed, if UHW-W has engaged in the serious misconduct alleged in this proceeding, then not only would appointing a trustee plainly “protect the interest of the membership” of SEIU—both the interest of the membership of UHW-W and the interest of the membership of the SEIU as a whole—but *failing* to appoint a trustee would seriously *harm* the interests of the membership.

Consider just the first charge in the Amended Notice. It alleges that UHW-W’s leaders proposed and then executed a scheme that involved authorizing the transfer of up to \$6 million of UHW-W monies to a sham 501(c)(3) set up for a purpose different from its nominal “educational” mission. The (c)(3) entity was to function as a war chest that would be available to finance internal union battles that UHW-W’s leaders would be unable or unwilling to finance with union funds, including a potential trusteeship battle. Unfettered discretion to determine the timing and amount of the seven-figure transfers would be granted to a single officer of UHW-W, who would be subject to no financial controls—not even a minimal requirement that the officer document the reasons for the timing and amount of his seven-figure asset-transfer decisions. What is more, for the scheme to remain hidden and thus for it to work as planned, UHW-W had to commit a fraud on its own members, *inter alia*, by issuing false meeting minutes. Beyond that, the operations of the fund, while related to union business, would be run and overseen outside of the democratic processes of UHW-

W by unelected directors instead of the full elected executive board of UHW-W, and its expenditures would be outside the financial reporting requirements of the LMRDA and also would not provide UHW-W members with the transparency to which they are entitled under the SEIU and UHW-W Constitutions.

The willingness of UHW-W's leaders to cast aside basic democratic accountability and financial oversight protections to which members are entitled *itself* provides a good and sufficient reason to appoint a trustee to protect the interests of the membership of UHW-W.

But when all of the different wrongs that UHW-W's leadership committed are considered together, the necessity of establishing a trusteeship becomes even more clear. As explained more fully in our Opening Brief (pp. 88-94), what ties the wrongs together is that they betray an unwillingness on the part of UHW-W's leaders to accept the principle that UHW-W is not a fiefdom unto itself but is instead an organization that is bound by the SEIU Constitution, and by its own Constitution, to be an integral part of a larger democratic institution—an institution that the members of *all* of SEIU's local unions can, through the delegates they send to SEIU conventions and the International Officers they elect at conventions, shape, structure and direct in ways that may not be to each individual local union's liking.

The wrongs manifest a fundamental misconception by UHW-W's leadership as to the role of a local union in the context of the larger polity that constitutes the SEIU. UHW-W's leaders came to believe that when the convention delegates and International Union officers adopt a policy through the SEIU's democratic processes which, in the view of UHW-W's leaders is unwise or unfair to UHW-W, UHW-W is entitled to violate or evade that policy by whatever means necessary—including by transferring assets off the union's books to

circumvent the controls placed on local unions by the SEIU Constitution and by engaging in active deception of UHW-W's members, the SEIU, government agencies, and the Hearing Officer—even while that policy is in effect and legally binding on UHW-W. UHW-W, in other words, began to evince through its conduct a sense of its own exceptionalism.

That sense of UHW-W exceptionalism revealed itself most clearly on the matter of the policies and voting procedures that should apply to mergers, transfers and other jurisdictional changes. In particular, UHW-W's leaders believed that it would be unjust for the International Union to transfer members of several locals into one local according to a “pooled voting” system (where each member's vote would have equal weight and the majority prevails) instead of according to a local-by-local voting system (where one local could veto a proposal if the majority of its membership opposed it). Opening Br. at 85.

Indeed, UHW-W's leaders considered only UHW-W's preferred system, whereby a minority of those affected could block jurisdictional change, to be “true democracy” and characterized the former voting system, where the majority would rule, as “false democracy.” UHW-W's leaders had every right to hold and express that belief and every right to propose at the quadrennial SEIU Convention amendments to the SEIU Constitution governing jurisdiction—a right they ultimately exercised freely and without retaliation.

But UHW-W's leaders went further. Most dramatically, UHW-W's President Sal Rosselli took to the floor of the June 2008 SEIU Convention in Puerto Rico; stated that “I am speaking for our executive board, not Sal”; and announced that if there were to be a vote on the transfer of long-term-care workers in California to a new local union and the method of voting was pooled, rather than local-by-local, UHW-W would not abide by the

determination: “*We cannot and will not accept that kind of vote.*” IP Exh. 109 (emphasis added).

That speech had been foreshadowed by a non-negotiable demand that UHW-W had put forward in April 2008 at a facilitated discussion between UHW-W and the International Union’s Health Care Division Steering Committee. UHW-W stated that it could only reach an accord with SEIU and suspend its public campaign of criticism of the International if SEIU granted UHW-W’s membership the special, extra-constitutional privilege of being able to veto any jurisdictional change affecting UHW-W. Opening Br. at 85, 89. That demand was rejected, because as International Executive Board member Dennis Rivera put it in his letter of September 8, 2008: “[T]he leaders of UHW-W were motivated by just one issue. They demanded that the democratic decision making process within our union about how best to structure and unite the voices of health care workers [i.e., the process governing mergers and other jurisdictional determinations] never have an impact on their local.... UHW-W’s refusal to accept the will of the majority continues to undermine our efforts to win Justice for All.” UHW-W Exh. 152. *See also* 11/15 Tr. at 13, 16..

The mindset of UHW-W’s leaders that was openly displayed at the 2008 Convention and in the facilitated discussion was also reflected in the conduct that forms the basis for the charges in the instant proceeding. Most notably, on May 18, 2007, UHW-W held an Executive Board meeting that was marked by statements by board members that they “wouldn’t go” if UHW-W’s long-term-care workers were to be transferred. It was, of course, at that meeting where UHW-W President Sal Rosselli proposed during a closed session, and the Executive Board adopted, the scheme to transfer up to \$6,000,000 in union funds to PEF and to falsely describe the transaction to UHW-W members in the Board’s

official minutes as a tax-exempt non-profit “education” fund even though in truth the fund would be something very different. The fund would, among other things, allow certain UHW-W officers, in the event they were displaced by a trustee, to draw upon the transferred union monies to finance litigation and other opposition activities under circumstances where both the SEIU Constitution and federal law contemplate that such activities are to be financed with the displaced officers’ own personal assets.

In this regard, it is worth recalling that, when initially confronted with this charge on March 24, 2008, UHW-W President Rosselli responded on April 3 with a nine-page letter that included a revealing passage about PEF. In that passage, Rosselli notably did *not* deny that a fund had been set up that would finance anti-trusteeship litigation; Rosselli instead sought to justify a fund set up for that purpose. In particular, Rosselli claimed that UHW-W could, in effect, see into the future and determine for itself that “if a trusteehip were to be imposed, the underlying purpose would be to retaliate against UHW for our public criticisms of SEIU’s policies and would, accordingly, be unlawful,” and that “[a]s a consequence, we would have every right to retain legal counsel...—a right that a trustee might attempt to quash by denying access to the funds needed to exercise that right.” IP Exh. 27 at 8.

Rosselli, in other words, was asserting UHW-W’s prerogative to be the judge in its own case even before any case had been initiated—a prerogative similar in kind to the one that he had later asserted on behalf of UHW-W’s executive board with respect to jurisdiction in his speech at the 2008 SEIU Convention.

Accordingly, the International President has overwhelming “reason to believe” that a trusteehip of UHW-W is necessary both to “protect the interests of the membership” of UHW-W and to “protect the interests of the membership” of SEIU as a whole. Standing on

its own, a continuing course of moving massive sums of money off the local's books—and therefore out of range of the protections of the constitutions of SEIU and UHW-W and the provisions of the LMRDA that make union leaders accountable to their members for all financial transactions—and a continuing course of covering up those actions, manifests a style of union leadership that cannot be tolerated in any local, big or small, powerful or weak.

That style of leadership reflects a fundamental breakdown of democratic procedures, and in the case of UHW-W, that style is embedded in a culture of governance that permeates all governing bodies of the local. It is an understatement to say that the International President has “reason to believe” that in these circumstances a trusteeship is necessary to “protect the interests of the membership” of UHW-W.

But the International President's duty and authority to protect the interests of the membership runs beyond the interests of the members of a single local; it runs to the membership of the SEIU as a whole. Here, the interests of that broad membership clearly require a trusteeship. The leadership of UHW-W has adopted an ‘end justifies the means’ mode of governance. Here, the end is preserving UHW-W's jurisdiction at all costs. As we have shown, all of the continuing pattern of misconduct by UHW-W is in service of that end. UHW-W pursues that end at the cost of threatening to destroy the long-standing jurisdictional policy first adopted by the delegates at the 2000 Convention and reaffirmed at the 2008 Convention specifically as to appropriate jurisdictional structure for representing long-term care workers. One can debate the wisdom of that policy. What is beyond debate is that that policy was adopted through the democratic processes established by the SEIU Constitution. UHW-W cannot set itself above that policy. To allow UHW-W to do so would

be to allow UHW-W to prevent SEIU from “carrying out the legitimate objects of this International Union.” Art. VIII, §7(a). The International President’s power to impose trusteeship is expressly designed to prevent such a result.

Given all this, a decision that, on the one hand, finds that UHW-W’s officers engaged in the serious misconduct alleged in this case, but that, on the other hand, finds that a trusteeship is not in order, would not only harm the interests of the membership of UHW-W; it would tear at the fabric that binds all of SEIU’s locals into a single international union. Such a decision would send an unmistakable message across the entire International Union: that a local union that is sufficiently large, politically connected, and powerful to mobilize against the International Union after having been caught in serious transgressions of the democratically adopted provisions of the SEIU Constitution and of the most basic norms of union conduct, can escape the precise constitutional mechanism that is in place precisely to redress and deter such transgressions—the trusteeship authority of the International Union. Indeed, when, as in this case, misconduct and dishonesty within a local is not confined to one or two officers acting on their own and isolation from the executive board, but is being carried out with the support or acquiescence of the board, use of the trusteeship authority is particularly necessary, because, by definition, the local union’s own system of checks and balances has broken down.

Precisely because the SEIU has many local unions that are sufficiently large, politically connected, and powerful to fit that criterion, a ruling that would find the leadership of UHW-W to have committed the charged conduct, yet be left in place to continue to govern the local, would threaten to upset the conscious and deliberate choices that the democratically elected delegates from SEIU locals of all sizes have made at SEIU

conventions over the past decade to strengthen the relative power of the International Union vis a vis its local unions. These decisions are informed by the delegates' considered judgment that, in the past, SEIU's effectiveness as a labor organization had been hobbled by a governance system that allowed local unions to enjoy an excessive level of autonomy that diluted the effectiveness of national programs and initiatives.

If SEIU, a national union comprised of large, small, and medium-sized locals, is to be able to function as a *truly* national union—and to carry out its mission as determined, not by a single local union, but by the union as a whole—then a finding that the leadership of UHW-W has engaged in the serious misconduct alleged in this case compels the conclusion that establishment of a trusteeship over UHW-W is necessary to protect the membership of SEIU, including those who belong to UHW-W and those who belong to other local unions within SEIU.

Put simply, if the International President cannot impose a trusteeship in these circumstances, the SEIU will lose control of its ability to carry out its mission as determined by its authorized democratic processes.

Against all this, UHW-W has suggested that no trusteeship should be established because its regular triennial officer elections will be held in February, and it argues that the propriety of the conduct that its leadership has engaged in should be settled at that election and not through this trusteeship proceeding. UHW-W claims that its members are informed of the allegations against its officers because UHW-W has posted transcripts of these proceedings on the *Seiuvoice* website.

This argument rests on a false factual premise, a false legal premise, and a fundamental misconception of the nature of the trusteeship provision in the SEIU Constitution.

The false factual premise is that a vote by UHW-W's members to re-elect the officers whose conduct is at issue in this case would be tantamount to an expression of approval of the officers' actual conduct. That premise is false precisely because UHW-W's leaders have not come forward and *admitted* that they set up PEF for purposes different from its purported purpose as an "education" fund, and that they then falsified the official meeting minutes to make it appear that they were creating and financing a genuine education fund. Nor have UHW-W's leaders admitted to or accepted responsibility for any of the other misconduct alleged in this proceeding. Rather, they have continued to misrepresent the nature and purpose of their actions. Thus, it would be impossible to discern whether a vote by the membership in favor of the current officers meant that they were intending to ratifying the officers' *actual* conduct or instead meant only that the members were continuing to be deceived by the very misrepresentations at issue in this case—misrepresentations that we have shown thwart democratic accountability by denying members the accurate information they need in order to cast an informed vote.

The false legal premise of UHW-W's argument lies in its assumption that misconduct severe enough to provide grounds for a trusteeship can somehow be redressed or remedied through a vote by union members to re-elect the leadership that engaged in the misconduct.

That argument would nullify the International President's trusteeship power as stated in Art. VIII, §7(a) of the SEIU Constitution.¹⁷

A vote to re-elect malfeasant officers by a majority of a local union's members can not substitute for that constitutional trusteeship power to protect the interests of the membership when the leadership has engaged in conduct that constitutes financial malpractice, subversion of democratic procedures, or other grounds for trusteeship. Even if a majority of the members of UHW-W would prefer to be governed by corrupt and undemocratic leaders, the constitutional power of the International President to provide that the local be properly governed is not obviated or diminished. Moreover, the provision governing trusteeships makes it plain that the President's trusteeship authority is designed to protect the *entire* membership of SEIU, and not only the membership of the particular local union in question. Article VIII § 7(a) of the International Constitution provides: "Whenever the International President has reason to believe that, in order to protect the interests of the membership, it is necessary to appoint a Trustee for the purpose of correcting corruption or financial malpractice ..., restoring democratic procedures, or otherwise carrying out the

¹⁷ Furthermore, that argument would ignore the fact that protections against corruption, financial malpractice, and subversion of democratic procedures exist to protect the *entire* membership of a local union, not just the majority. Hence, in a similar context, the 9th Circuit held that an after-the-fact referendum was ineffective to ratify fiduciary breaches committed by a union's officers:

Even if the referendum had included [each] issue and [the Board's] actions had been retroactively 'approved' by a majority of those voting, it would be of no avail to defendants here. To permit such validations of officers' breaches of fiduciary obligations would be inconsistent with the purposes of the Labor-Management Reporting and Disclosure Act, one of which is to protect union members, including a minority, from the improper practices of union management or an unscrupulous majority of the membership.

Kerr v. Shenks, 466 F.2d 1271, 1276, n 3.

legitimate objects of *this International Union*, he or she may appoint such Trustee to take full charge and control of the affairs of a Local Union or of an affiliated body.” (Emphasis added).

A local union in which the majority of members are willing to overlook the acts of corruption, financial malpractice, or antidemocratic practices of its leadership is not outside the trusteeship authority, as that authority exists to protect “the legitimate objects of this International Union.”

* * * *

CONCLUSION

It is appropriate to close this Brief in the same way we closed our case at the hearing. Thomas DeBruin testified that, in 1992, SEIU was an outstanding union—so outstanding that he had only recently led the effort within his formally independent healthcare union to affiliate with SEIU. 11/15 Tr. At 1187. But SEIU also was hampered in its efforts to act effectively on a national level by the presence of powerful local leaders who were referred to as the “warlords,” because, in the face of a rapidly declining labor movement, they were content to operate separate fiefdoms and were difficult to enlist into ambitious national programs. 11/15 Tr. At 1230. It took years of effort by delegates from locals across the SEIU, and many major initiatives at SEIU’s quadrennial conventions, to change that “warlord” culture. And, as DeBruin testified in connection with UHW-W’s self-described “strike” against the International to gain special dispensation from the SEIU Constitution’s democratically adopted jurisdictional processes (11/15 Tr. At 1228), there is a real danger that, if the International were to succumb to the temptation to buy peace with one large local,

other large locals would soon mobilize their members and their political allies and there would be a gradual return to the warlord culture.

The same would be true here, if it were to be held that UHW-W committed the serious acts of financial malpractice, dishonesty, and evasion of democratic controls alleged in this case, but that, because of its size and its stature, it should be accorded special dispensation from the trusteeship standards that have been applied to smaller or less prominent local unions. Such an outcome would send an unmistakable signal to the larger and more powerful local unions throughout SEIU that, if there are provisions in the SEIU Constitution that they find unsatisfactory, they need not go the trouble of embarking on a campaign to *amend* those provisions, they can instead simply circumvent them and count on the fact that the International President will be powerless to use his trusteeship authority to stop them. The tyranny of the warlords would soon re-emerge within SEIU, contrary to the wishes of the democratically elected delegates at the conventions that have been held over the last decade.

In short, trusteeship is the only, and the necessary, remedy in this case if the will of the democratically established governing authorities of the SEIU is not to be nullified.

Respectfully submitted,

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