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**CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

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Plaintiffs,

v.

ACTORS' EQUITY ASSOCIATION, a labor organization,

Defendant.

Case No.: 2:15-cv-08169-TJH-JPR

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

Complaint Filed: October 17, 2015

Date: September 19, 2016
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## I. INTRODUCTION

Forty-eight years ago Los Angeles actors began to form small, "99-seat" theaters where they performed on a volunteer basis. The city is now sprinkled with "99-seat" intimate theaters. You can't drive down a major (or even minor) street without seeing them. The Odyssey on Sepulveda. The Robey on Spring. Casa 0101 on East First. The Fountain (on Fountain, of course).

Many productions are experimental. The intimate theater world is both a laboratory and a proving ground. A place for volunteer actors to test untried material. Many if not most of these shows will never be seen again.

Though there are exceptions. *Spring Awakening*, a Tony Award winner, started in a 99-seat theater. *Louis and Keely: 'Live' at the Sahara*, started in a 99-seat theater and recently finished its second run at the Geffen Playhouse in Westwood.

In 2015, AEA adopted a new rule that, if implemented, will destroy this vibrant 99-Seat Theater system. The rule will prohibit actors from volunteering, and permit them to work in intimate theater only if they are paid minimum wage. The theaters, which work on shoestring budgets, will be forced to close, downsize, or rely on non-AEA actors who are not subject to the union's new rule. (Comp., ¶¶ 3, 48.)

The Complaint alleges that, in implementing this prohibition, AEA breached a 1989 Settlement Agreement that originated in this Court. The Settlement Agreement created an "Equity Waiver" system under a "99-Seat Theater Plan" that effectively governed the small theatre community these last 25 years. The Settlement allowed AEA to change the 99-Seat Theater Plan, but prevented it from acting on a change proposal until it first complied with a series of important procedural steps, including participation in a multi-dimensional consultative process in order to gather the input and opinions of stakeholders, and conducting an advisory referendum of members.

AEA deliberately breached the Settlement Agreement by making its decision to endorse a proposal to change, indeed eliminate, the 99-Seat Plan ***before*** going through this important consultative process. On February 6, 2015, AEA endorsed a proposal it

developed, and immediately started promoting and advertising it to members by undertaking a public relations campaign and pressuring members to support the proposal.

Only after it endorsed the proposal did it go through the consultative process, but with its mind already made up. Among other things, it refused to engage in active discussion with Review Committee established by the Settlement Agreement. In the run-up to the referendum it set up a telephone bank to urge members to vote "yes," and even pressured some members. It ignored the results of the referendum, in which members rejected the proposed change by a 2-1 margin in the largest voter turnout in AEA's history.

AEA's actions are the subject of Plaintiffs' claims for breach of contract, breach of the covenant of good faith and fair dealing, and breach of the union's duty of fair representation. In addition, Plaintiffs allege that AEA violated the equal voting rights provision of § 101(a)(1) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(1), because it failed to include position statements in the on-line referendum material for the first three days of voting, thereby depriving some members of valuable information that it furnished to others.

AEA's motion to dismiss should be denied for several reasons. Most importantly, it does not as a matter of law overcome Plaintiffs' factual showing that AEA breached the agreement by acting on the proposal before participating in the mandatory consultative process. Having properly established a breach of contract, AEA's lone argument that the implied covenant claim rises and falls with the breach of contract claim necessarily fails. In any event, Plaintiffs have properly pleaded this claim as well.

AEA raises a variety of non-meritorious legal defenses to Plaintiffs' federal law claims, but does not undermine Plaintiffs' showing that the Union acted arbitrarily and in bad faith and did not provide members with an equal vote.

For these reasons, AEA's motion should be denied in its entirety.

## II. FACTS

Plaintiff's Complaint lays out an extremely detailed chronology of the events underlying this lawsuit. That chronology began with the history of Equity Waiver in Los Angeles [¶14], detailed the structure of small theatres as 501(c)(3) organizations and the manner in which they raise funds [¶15], and stressed the artistic, cultural, and economic value of the Equity Waiver system for both the small theatre community and the city of Los Angeles [¶¶ 16(a)-(c)]. Next, the Complaint lays out the facts that led to the original lawsuit between these parties [¶¶ 17-20], the 1989 Settlement Agreement [¶¶ 21-23(a)-(b)], the parties' subsequent course of conduct under it for over 25 years [¶¶ 24(a)-(i)], AEA's initial actions beginning in 2012 to eliminate Equity Waiver theatres [¶¶ 25-29], and its unilateral course throughout 2014 in pursuit of its goal to destroy the Equity Waiver system [¶¶ 30-34].

Those actions in 2012-2014 led to the events at the heart of this lawsuit: the series of steps AEA took in 2015 in violation of the procedural protections created by the Settlement Agreement [¶¶ 35-45], that ultimately culminated in AEA's successful destruction of the Equity Waiver system by: eliminating the Settlement Agreement and the permanent Review Committee created under it and promulgating an entirely new plan for 99-seat theatres [¶¶ 46-47[1]]. As the Complaint alleges, these actions were accomplished by breaching the requirements of the Settlement Agreement and in

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[1] The substantial changes promulgated by Equity fall generally into three categories. First, AEA imposed minimum wage requirements for volunteers in the County's small theatre community. Second, AEA carved out a small segment of the community ("Membership Companies") for continued Waiver treatment, but for those Companies removed all health, safety and other protections that existed under the 99-Seat Theatre Plan. Finally, AEA preserved a version of the Equity Waiver system for theatres with 50 or fewer seats. The "minimum wage" requirement is the most onerous of these changes. It threatens to destroy the exciting and essential small theatre culture in Los Angeles by imposing burdensome compensation costs that will make it impossible for many small theatres to survive. Many will close altogether. All will have greater difficulty producing original works. Some have already decided to present fewer productions with smaller casts beginning in 2016, and many will turn to the world of non-union actors. Thousands of actors and other creative artists will likely lose access to important theatrical volunteer acting opportunities which contribute to their creative development, enhance their professional careers, and often lead to recognition by others in the theatrical, television and film industries and then to remunerative acting employment. [Comp., ¶ 3.]

contravention of federal labor law. Finally, the Complaint alleges the damages actors and these small theatres will suffer as a result of AEA's actions: the loss of valuable and irreplaceable volunteer opportunities for actors to develop their artistic and creative talents and lost opportunities for their exposure to potential employers hiring for remunerative work; and, for the theatres, likely closure or steep reductions in productions [¶¶ 48(a)-(b)].

For purposes of this opposition to AEA's motion, the critical allegations of the Complaint are found in Paragraph 23 (setting forth the specific and detailed requirements that must be followed in the event a proposal for substantial change to the Equity Waiver system); Paragraph 35 (setting forth the specific allegations of AEA's breach of the requirements of the Settlement Agreement); Paragraph 57 (alleging the acts by AEA constituting its interference with Plaintiffs rights to receive the benefits of the Settlement Agreement); Paragraphs 25-45 (alleging acts constituting AEA's bad faith); and Paragraphs 42 and 68-78 (alleging deprivation of members' equal rights). These allegations are discussed in detail in the pertinent legal arguments below.

## III. THE COURT SHOULD DENY THE MOTION AS TO THE CLAIMS FOR BREACH OF CONTRACT AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

### A. The Settlement Agreement Expressly Prohibited AEA from Acting on a Proposal Until it Had Followed Preliminary Procedural Steps.

#### 1. The Complaint Properly Alleges AEA's Breach of those Requirements of the Settlement Agreement.

In order to withstand a motion to dismiss under 12(b)(6), a plaintiff need only plead the underlying facts to support a claim upon which relief may be granted. *Dream Marriage Grp. Inc. v. Anastasia Int'l, Inc*., No. CV 10-5034 RSWL FFMX, 2010 WL 4346111, at *2 (C.D. Cal. 2010). When ruling on a motion to dismiss, the Court must accept all factual allegations pleaded in the complaint as true, and construe

them and draw all reasonable inferences from them in favor of the nonmoving party. *Manzarek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025, 1030–31 (9th Cir. 2008); *Gerritsen v. Warner Bros. Entm't Inc.*, 116 F.Supp.3d 1104, 1122 (C.D. Cal. 2015).

In California, a plaintiff alleging an action for breach of contract must plead and prove the existence of a contract, plaintiff's performance or excuse for nonperformance, defendant's breach, and damage to the plaintiff. *Conder v. Home Sav. of Am.*, 680 F.Supp.2d 1168, 1174 (C.D. Cal. 2010); *Dream Marriage Grp. Inc.*, 2010 WL 4346111, at *2; *First Commercial Mortgage Co. v. Reece*, 89 Cal.App.4th 731, 745 (2001). Plaintiffs plead all of these elements, including that AEA breached the Settlement Agreement when it "acted" on the February 6, 2015 proposal to eliminate the 99-Seat Plan without first complying with the procedural steps required under that contract. [*Id*., ¶ 53.]

Requirements of the Agreement. Paragraph 3 of the Settlement Agreement provides that the Review Committee, WAB, a member or executive may make a proposal to substantially change the 99-Seat Plan. The Complaint alleges that the National Council itself, collaborating with staff, developed and approved a proposal to change the Plan. [Comp., ¶¶ 35, 37, Exh. E.][2]

Under Paragraph 4, when a proposal for a substantial change is made, the National Council is to remain above the fray and is authorized to "act on the proposal" *only after* certain procedural steps are completed. [Comp., ¶ 23.] The Settlement Agreement requires the Council to provide the Review Committee and AEA membership with the details of the proposal 45 days before the Council can take any action. [*Id*., ¶ 23(b)(i).] The National Council must also arrange for meetings between

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[2] AEA argues that the Western Regional Board (formerly WAB) made the proposal, and attaches Council minutes to that effect. [Motion, p. 6:5-6, Exh. 5.] But AEA President Wyman announced at the time that elected leaders and "staff" worked up the proposal together. [Comp., ¶¶ 35, 37, Exh. E.] This is a factual dispute that cannot be resolved at the pleading stage.

AEA representatives and members of the Review Committee for the purpose of hearing the opinions and recommendations of the Review Committee about the proposed changes prior to acting on the proposal. [*Id*., ¶ 23(b)(ii).] Additionally, if requested, the National Council must hold an advisory referendum and include opposing position statements. [*Id*., ¶ 23(b)(iii)-(iv).] In light of the facts and circumstances that gave rise to the *Jens* lawsuit, this process was designed to ensure that AEA not adopt a formal position on the proposal until it had the benefit of the multi-dimensional consultative process mandated by the Settlement Agreement. [Comp., ¶¶ 17, 21-23.]

The Breach. Plaintiffs allege that AEA breached the Settlement Agreement when it acted on the proposal – by endorsing and promoting it – *before* it provided the membership with details of the proposal, before it met with the Review Committee, before it held a membership meeting and before it conducted a referendum. [Complaint, ¶ 35, Exh. A, ¶ 4.] As alleged in the Complaint, the actions taken prematurely by AEA included: (i) AEA Executive Director McColl's announcement that the National Council had developed and approved a proposal to eliminate the 99-Seat Theatre Plan [*id*.]; (ii) President Wyman's announcement endorsing the proposal [Comp., ¶ 37]; (iii) expenditure of AEA funds to advertise and promote the proposal, including a telephone bank [Comp., ¶ 38]; and (iv) directing certain members of AEA's 99-Seat Committee to vote for the proposal [Comp., ¶ 39]. These facts properly allege conduct constituting a serious and material breach of the Settlement Agreement.

**2. AEA's Arguments Fail for Procedural and Substantive Reasons.**

AEA argues that the First Claim for Breach of Contract should be dismissed because it did not "act on the proposal" until it was formally adopted in April 2016. AEA denies that its early endorsement and promotion of the proposal constitutes "acting," pointing in particular to its self-serving minutes which declare that it will "adhere to the procedures of Paragraph 4" of the Settlement Agreement. [Motion, 6:5-

8, 13:3-5, Exh. 5.]

This argument fails for several reasons. First, the Settlement Agreement expressly prohibits AEA from acting on a proposal until after the steps set forth in Paragraph 4 are followed. AEA's argument that it fully complied with these provisions ignores – in violation of the standards governing motions under Rule 12(b)(6) – Plaintiffs' allegations that AEA "acted on the proposal" on February 6, 2015 by taking the many measures described in Section III.A.1 above, long before it formally voted to implement its plan. These alleged facts establish that Plaintiffs have properly and sufficiently alleged that AEA's actions breached the Settlement Agreement. [Complaint, ¶ 35.]

Next, AEA improperly attached the purported minutes of the February 6, 2015 Council meeting. Under Rule 12(b)(6), a party may attach to its motion any document referenced in but not attached to the complaint. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). This exception to the general rule prohibiting consideration of external evidence on a Rule 12(b)(6) motion does not, however, give a defendant license to attach any and all documents related to the parties' dispute to its motion. *See Spy Optic, Inc. v. Alibaba.Com, Inc.*, 2015 WL 7303763, at *4 (C.D. Cal. Sept. 28, 2015) (denying defendant's Request for Judicial Notice of exhibit because plaintiff did not rely on the exhibit in the complaint); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (district court may not consider material beyond the pleadings on a Rule 12(b)(6) motion without converting it to a motion for summary judgment and giving the non-moving party an opportunity to respond); *Hodges v. Holiday Inn Select*, 2008 WL 149139, at *3 (E.D. Cal.2008), aff'd, 357 F. App'x 887 (9th Cir. 2009) (same).[3] The Complaint does not cite nor reference meeting minutes, and its

[3] All of the authorities AEA cites for its assertion that this Court may consider documents outside the Complaint are inapposite and distinguishable for the following reasons. *See* Motion, p. 9:19-25 citing *Colony Cove Properties, LLC v. City Of Carson*, 640 F.3d 948, 955 (9th Cir. 2011) (standing for the general proposition that when ruling on a motion to dismiss, a court may generally only consider ***exhibits attached to the complaint***); *Knievel v.*

mention of February 6 in the Complaint is *not* the type of reference giving rise to the permissible attachment of documents. Thus, on procedural grounds the Court should reject AEA's argument that the purported February 6 minutes prove that it did not – as Plaintiffs allege – breach the Settlement Agreement at that meeting.

Finally, even if the Court considers those minutes, AEA's argument fails for substantive reasons. Whatever the minutes say (and they contradict the published statement of President Wyman about who was responsible for the proposal), they do not negate Plaintiffs' other allegations that AEA acted on the proposal by endorsing it, promoting it, and pressuring members to vote for it long before the formal adoption in April. In view of this, the Court may not at the pleading stage take these minutes as evidentiary proof that AEA did not breach the Settlement Agreement. *See Manzarek*, *supra* 519 F. 3d at 1030–31; *Gerritsen*, *supra* 116 F.Supp.3d at 1122.

Accordingly, Plaintiffs have sufficiently plead their breach of contract claim and AEA's Motion to Dismiss this claim must be denied.

### 3. AEA Is Not Entitled to Deference When Interpreting a Contract with a Third Party.

AEA claims the Court should construe the contract in a way that favors the union because federal policy discourages judicial interference with internal union affairs. [Motion, pp. 10:10-11:3.] AEA is not entitled to such special deference.

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*ESPN*, 393 F.3d 1068, 1083 (9th Cir. 2005) (where a plaintiff only attached part of a webpage as an exhibit, the court admitted the rest of the webpage because it necessarily must have been clicked on in order to get to ***the webpage that plaintiff attached to the complaint***); *Inland Boatmen's Union of Pac. v. Dutra Grp*., 279 F.3d 1075, 1083 (9th Cir. 2002) (court considered two documents because the plaintiff ***specifically cited to the documents*** in the complaint and ***because jurisdictional issues required review*** of evidence to resolve factual disputes as to whether the court had jurisdiction); *Lee*, *supra*, 250 F.3d at 688 (reversing district court's dismissal of plaintiff's claims finding that the court assumed the existence of facts that favored defendants ***based on evidence outside plaintiffs' pleadings***); *Parrino v. FHP, Inc.*, 146 F.3d 699 (9th Cir. 1998) (because plaintiff's claims rested upon the membership and certain terms of a Group Plan, the court considered the documents of the Group Plan). Here, Plaintiffs neither referenced the meeting minutes nor do its claims rest upon them. AEA's attachment of the meeting minutes to its motion is therefore improper.

Courts may defer to a labor union's interpretation of its own constitution, and permit unions to enact internal operational rules "properly adopted,"[4] but they do not defer to a union's interpretation of a contract with a third party, as in this case. AEA does not and cannot cite a single case in which courts defer to a union's interpretation of a negotiated contract with a third party simply because it is a union.[5]

Whether under other circumstances AEA could adopt a plan preventing members from volunteering for 99-seat theaters is not in question here. The issue presented in Plaintiffs' First Claim for Relief is whether AEA violated the Settlement Agreement with the *Jens* plaintiffs when it decided to end volunteer intimate theater. And that question is governed by California contract law, as AEA seems reluctantly to concede in its footnote 5. *ASARCO, LLC v. Celanese Chemical Co.*, 792 F.3d 1203, 1212, n.4 (9th Cir. 2015), *citing Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990) ("construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally.").

**B. Alternatively, If the Language of the Settlement Agreement Is Ambiguous, the Court Must Deny the Motion to Dismiss Because Contractual Ambiguities Can't Be Resolved on a Motion to Dismiss.**

To the extent the Settlement Agreement is not clear with respect to the meaning of the term "act on a proposal," such an ambiguity cannot be resolved on a motion to dismiss. While Plaintiffs contend that AEA's actions endorsing and promoting the contract qualify as "acting on the proposal," at the very least the meaning of the phrase is ambiguous, in which case its interpretation is properly the subject of

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[4] That is the thrust of the eight cases cited by AEA in § I.B of its Memorandum. *E.g.*, *Motion Picture & Videotape Editors Guild v. Int'l Sound Technicians,* 800 F.2nd 973, 975 (9th Cir. 1986) (policy of non-interference with internal union affairs absent specific limitation).

[5] Unlike many labor union constitutions, there is no federal jurisdiction over AEA's, because it is not a "contract . . . between labor organizations." Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185(a); *Wooddell v. IBEW, Local 71*, 502 U.S. 93, 100-102 (1991). Rather AEA is a unitary organization with local affiliates. *See*, *Korzen v. Local Union 75, Int'l Bhd. of Teamsters*, 75 F.3d 285, 288-89 (7th Cir. 1996).

litigation rather than a Rule 12(b)(6) motion.

Where language in a contract is ambiguous, such that it is capable of two or more reasonable interpretations, a motion to dismiss is improper and must be denied. *See Quigley v. Pennsylvania Higher Education Assistance Agency*, 2000 WL 1721069, *5 (N.D. Cal. 2000) (denying motion to dismiss where court found that there were two reasonable interpretations of the phrase "cease reporting"); *Reyes v. Nationstar Mortgage LLC,* 2015 WL 4554377, *4 (N.D. Cal. 2015) ("[w]here the terms of a contract are ambiguous, resolution of contractual claims on a motion to dismiss is improper"); *Maloney v. Indymac Mortgage Services*, 2014 WL 6453777, *6 (C.D. Cal. 2014) (denying motion to dismiss where contract ambiguous with regard to terms "reasonable" and "appropriate"); *Hayter Trucking, Inc. v. Shell Western E&P, Inc.*, 18 Cal.App.4th 1, 18 (1993) (overruling demurrer where court determined that consideration of parol evidence of trade custom and usage was necessary; noting that "[u]nless the interpretation proffered in the complaint is conclusively negated by a provision in the contract, a demurrer is improper"); *JMR, Inc. v. R. E. Hedderly, etc., et al.*, 261 Cal.App.2d 144, 147 (1968) (same).

The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties. *Maloney, supra* 2014 WL 6453777, at *6 (C.D. Cal. 2014) (*citing to Bank of the West v. Superior Court*, 2 Cal.4th 1254 (1992)). Parol evidence may be admitted to explain the meaning of a writing when the meaning used is one to which the written contract term is reasonably susceptible or when the contract language is ambiguous. *Quigley, supra*, 2000 WL 1721069, at *5 (N.D. Cal. 2000) (*citing to Powers v. Dickson*, 54 Cal.App.4th 1102, 1111 (1997)); *In re Matrix Development Corp.*, 2009 WL 2163462, *4 (D. Or., July 17, 2009) (district court correctly looked to extrinsic evidence to determine the parties' intent rather than relying on mechanical rules of contract interpretation).

Where a plaintiff alleges in the complaint his interpretation of an ambiguous contract, a motion to dismiss must therefore be denied. *See Beck v. American Health*

*Group International*, 211 Cal.App.3d 1555 (1989) (indicating that, where a plaintiff alleges in the complaint the meaning which he ascribes to an ambiguous contract, it is error for the trial court to construe the contract upon demurrer because the parties should be given the opportunity to present extrinsic evidence regarding intent).[6]

Here, Plaintiffs allege in the Complaint the meaning that they ascribe to "acting on a proposal" under the Settlement Agreement. As alleged in the Complaint, AEA "acted" on the proposal beginning February 6, 2016, by developing, endorsing and promoting it, and pressuring members to vote for it. [Complaint, ¶ 35, full discussion in § III.A.1 above.] Because Plaintiffs sufficiently alleged the meaning that they ascribe to the phrase "acting on a proposal" under the contract, extrinsic evidence is necessary to determine intent and the motion to dismiss is therefore improper. For this additional reason, the Court should deny AEA's motion to dismiss.

### C. The Court Should Also Deny the Motion to Dismiss as to the Claim for Breach of the Covenant of Good Faith and Fair Dealing.

The covenant of good faith and fair dealing governs the manner in which contractual obligations must be discharged. *See Carma Developers, Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342, 371-372 (1992). What that duty embraces is dependent upon "the nature of the bargain struck between the [parties] and the legitimate expectations of the parties which arise from the contract." *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 26 Cal.3d 912, 918 (1980). In order to withstand a motion to dismiss for breach of the covenant of good faith and fair dealing, a plaintiff must plead facts to support the underlying claim. *Dream Marriage Grp.* Inc., 2010 WL 4346111, at *2. Under California law, to allege a claim for breach of the covenant of good faith and fair dealing, a plaintiff must allege the following elements: (1) the plaintiff and the

[6] It is also possible that, during discovery, Plaintiffs will uncover extrinsic evidence of ambiguity that does not appear on the face of the Agreement. *Trident Center v. Connecticut Gen'l Life Ins. Co.*, 847 F.2d 546 (9th Cir. 1988).

defendant entered into a contract; (2) the plaintiff did all or substantively all of the things that the contract required him to do or that he was excused from having to do so; (3) all conditions required for the defendant's performance had occurred; (4) the defendant unfairly interfered with the plaintiff's right to receive the benefits of the contract; and (5) the defendant's conduct harmed the plaintiff. *Hanich v. CitiMortgage, Inc.*, 2015 WL 3889617, at *2 (C.D. Cal. 2015); *Merced Irr. Dist. v. County of Mariposa*, 941 F.Supp.2d 1237, 1280 (E.D. Cal. 2013).

The allegations here properly allege such a claim. As established above, Plaintiffs sufficiently allege the first through third and fifth elements of this claim. [*See* Section III.A, above.] Additionally, Plaintiffs sufficiently allege the fourth element, that AEA unfairly interfered with their right to receive the benefit of the contract by: (1) repeatedly refusing in bad faith to convene joint Review Committee meetings both before the proposal in contravention of Section 2 of the Settlement Agreement and after; (2) adopting a proposal to eliminate the Equity Waiver system and by taking action on the proposal before following the procedures outlined in Section 4 of the Settlement Agreement; (3) attempting to sway the Union membership by conducting biased surveys and focus groups; (4) pressuring the 99-Seat Committee members to vote in favor of the resolution; (5) organizing and paying for telephone banks intended to prevail on Union members to vote for the referendum; (6) refusing to confer with the Plaintiff-side members of the Review Committee to consider the advice of the 2-1 majority of Union members who voted to reject the proposal; and (7) resolving to implement the proposal before the section 4 process was followed. [Complaint, ¶¶ 57 and 25-26, 28, 29, 31-33, 40 discussed at Section IV.A, *infra*.] These allegations properly allege conduct that unfairly interferes with Plaintiffs' right to receive the benefits of the Settlement Agreement and dismissal is improper. *See Graham v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 66844 (N.D. Cal. May 20, 2016) (denying motion to dismiss on implied covenant claim finding plaintiff had adequately alleged that she carried out her duties under the parties' Settlement

Agreement but that the defendant bank did not do the same; *Basic Research, LLC v. Rath*, 2009 U.S. Dist. LEXIS 87731 (N.D. Cal. Sept. 24, 2009) (denying motion to dismiss finding plaintiffs had sufficiently alleged that the defendants had frustrated plaintiffs' right to realize the benefits of the settlement agreement it entered into with the defendant).

AEA's only argument with respect to the implied covenant claims is that it rises and falls with the breach of contract claim and thus, if the Court dismisses the breach of contract claim it must necessarily dismiss the covenant claim. [Motion, 16:3-5.] AEA's citation to *Canas v. Ocwen Loan Servicing LLC*, 2015 WL 5601838, at *5 (C.D. Cal. 2015) for this argument is inapposite. The plaintiff there failed to even allege that a valid contract existed between the plaintiff and defendants and thereby failed to allege the essential elements. The court there also assumed *arguendo* a contract existed but still found the plaintiff's claim was not based on any rights or obligations thereunder. *Id.* In stark contrast here, Plaintiffs here allege both a valid contract and AEA's breach of the implied covenant based on obligations explicitly contained in the Settlement Agreement. Thus, the lone basis for AEA's motion to dismiss this claim fails.

Moreover, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is proper and viable on its own. Contrary to AEA's argument that the gravamen of the two claims are virtually identical, Plaintiffs' covenant claim alleges more: not only did AEA breach the Settlement Agreement by failing to comply with the express provisions of Section 4, its actions dating back to more than a year before the events of 2015 were designed to (and did) undermine the fair system and process bargained for in the Settlement Agreement, thereby injuring and unfairly frustrating Plaintiffs' right to receive the benefits of the agreement. These are precisely the types of factual allegations that are sufficient to allege a claim for breach of the implied covenant. *See Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal.App.3d 1371, 1395 (1990) (allegations of breach of the implied covenant of good faith and fair

dealing "must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities"). The Court should deny AEA's motion to dismiss this claim as well.

## IV. AEA BREACHED ITS DUTY OF FAIR REPRESENTATION BY ACTING ARBITRARILY AND IN BAD FAITH TOWARD ACTORS.

The duty of fair representation requires a union like AEA to serve the interests of all members "without hostility." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203-204 (1944). A tripartite test is applied to the duty of fair representation. The duty is violated if a union's actions are "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171 (1967). A determination of bad faith involves assessment of the subjective motivation of union officials, while arbitrariness looks to the objective adequacy of the union's conduct. *Crider v. Spectrulite*, 130 F.3d 1238, 1243 (7th Cir. 1997).

For decades, thousands of Los Angeles stage actors relied on the volunteer 99-Seat Theater system to hone their acting skills, test new material, give voice to emerging playwrights, and gain exposure to the professional theatrical world for potential remunerative employment. By unilaterally destroying this creative and vibrant theatrical ecosystem, AEA acted in bad faith and without reason, thereby violating the duty of fair representation owed to its members.

### A. Plaintiffs' Allege Sufficient Evidence of Bad Faith.

Plaintiffs allege that AEA's prohibition against volunteer theater was adopted in bad faith. Where plaintiffs allege bad faith, they need not also allege discrimination or arbitrariness, because bad faith "can never be reasonable." *Black v. Ryder*, 15 F.3d 573, 584-85 (6th Cir. 1994); *see also*, *Beck v. UFCW, Local 89*, 506 F.3d 874, 879 (9th Cir. 2007); *Alvey v. G.E.*, 662 F.2d 1279, 1289-90 (7th Cir. 1980); *N.L.R.B. v. Teamsters Local 315*, 545 F.2d 1173, 1175-76 (9th Cir. 1976); *Kirchhof v. Hawaii Ass'n of Union Agents*, __ F.Supp.3d __, 2016 WL 2977240, *18-19 (D.Haw., May

20, 2016).

At the evidentiary stage of a fair representation case, "some degree of inference [from "circumstantial evidence"] almost always will be necessary to make assessments concerning an individual's motives." *N.L.R.B. v. Teamsters Gen'l Local No. 200*, 723 F.3d 778 (7th Cir. 2013). At this earlier pleading stage, the Complaint need only allege sufficient factual content from which a reasonable inference of bad faith can be drawn, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Among other things, deceptive actions evidence bad faith. *Humphrey v. Moore*, 375 U.S. 335, 348 (1964) ("fraud, deceitful action or dishonest conduct" can be evidence of bad faith); *Carballo v. Comcast, Inc.*, 2015 WL 4365289 (N.D.Cal., July 16, 2015).

The Complaint alleges abundant specific facts from which an inference of bad faith can fairly be drawn. In 2012, AEA started its course of conduct by rebuffing nine months of requests for Review Committee meetings [Comp., ¶ 25], even though the Settlement Agreement contemplated that the Review Committee would be the primary venue for discussions about the operation and future of the 99-seat plan. [Comp., Exh. A, ¶ 2.] In 2013, AEA sent a staff member to meet with the Plaintiff-side members of the Review Committee, but refused to allow the AEA members to participate. [Comp., Exh. A, ¶ 26.] AEA again refused requests for Review Committee meetings from November 2013 until February 2015 (over 15 months). And when they finally met, AEA Executive Director Mary McColl would not permit AEA members of the Committee to speak at the meeting. [Comp., Exh. A, ¶¶ 28, 29, 31, 40.]

Bad faith is also found in the methodologically flawed, result-oriented survey and focus group meetings conducted in 2014. [Comp., ¶¶ 32, 33.] For example, AEA used the imprecise survey results that 60% of members were satisfied or somewhat satisfied with the existing plan [Comp., ¶ 32] to conclude, unreasonably, that a majority of members wanted to scrap the plan altogether. [Motion, Exh. 6.]

AEA originally told Plaintiff-side Review Committee members that it did not want to terminate the intimate theater program, but merely wanted to streamline it for

more efficient monitoring purposes. [Comp., ¶ 26.] AEA never offered any explanation for why it changed its mind from wanting to "streamline" administration to wanting to destroy the entire small theater system. *See,* Carballo, *supra*, 2015 WL 4365289 at *4 (changing mind without sufficient explanation is evidence of bad faith); *Kirchhof, supra*, 2016 WL 2977240 at *15-16 (same).

Plaintiffs also plead that WAB and AEA National Council member Larry Cahn stated in a public posting: "We came up with a plan that does what AEA needed, which was to get rid of the Settlement Agreement," and there "is no need for the Review Committee since there no longer a 99-seat plan." [Comp., ¶ 46, Exh. F.] Executive Director McColl echoed that the "Settlement Agreement was a mistake and AEA would not make that same mistake again." [Comp., ¶ 40.] A reasonable inference of bad faith can be drawn from these admissions that AEA's goal was to kill the Settlement Agreement, particular given the Settlement Agreement has no end date and requires the Review Committee to be "permanent." [Comp., Exh. A, ¶ 2.]

Some of the same facts that support the breach of contract action also give rise to a reasonable inference of bad faith. AEA circumvented the Settlement procedures – designed to keep the Union neutral until after opposing voices had an opportunity to weigh in on the proposal – by endorsing the proposal from its inception, actively lobbying for its success in the referendum, setting up a phone bank to advance the lobbying effort, and trying to taint the election by directing members of its 99-Seat Committee to vote for the proposal. [Comp., ¶¶ 35, 37, 38, 39.]

And bad faith can be inferred from AEA's unexplained disregard for its members' 2-1 rejection of the proposal in the largest voter turnout in the organization's history. Bad faith also flows from refusal to discuss these lopsided referendum results with the Plaintiff-side Review Committee members, or otherwise taking any "advice" from its advisory referendum. [Comp., ¶¶ 43-45.]

Finally, bad faith is evidenced by the absence of any rational basis for AEA's actions. To satisfy the duty of fair representation, "a union must conduct some

minimal investigation." *Tenorio v. N.L.R.B.*, 680 F.2d 598, 601 (9th Cir. 1982) (minimal investigation required to drop grievance); *Nosie v. Association of Flight Attendants--CWA, AFL-CIO*, 722 F.Supp.2d 1181, 1199–200 (D. Haw. 2010). Here, AEA refused requests from the Review Committee to conduct a study of the economics of intimate theater in order to ascertain whether there was any feasible chance tiny 99-seat theaters could survive if required to pay minimum wages for rehearsals and performances.[7] AEA's promise of minimum wages for 1000s of actors is illusory. The only predictable result of its action will be its prohibition against actors working on a volunteer basis and the likely closure of scores of theaters or reliance by those theaters on non-union actors. [Comp., ¶ 3, 48.]

**B. AEA Acted Arbitrarily.**

Courts "decline to give a union the deference owed to an exercise of judgment" when its action is "'so far outside a wide range of reasonableness'" as to be "irrational or arbitrary." *Beck, supra*, 506 F.3d at (internal citation omitted). Union action made without regard to objective criteria may be considered arbitrary. *E.g., N.L.R.B. v. General Truck Drivers, Warehousemen and Helpers*, 778 F.2d 207, 213 (5th Cir. 1985) (operation of exclusive hiring hall without objective criteria or standards); *Diaz v. International Longshore and Warehouse Union Local 13*, 474 F.3d 1202, 1207 (9th Cir. 2007) (abandoning member's grievance without minimal investigation may be deemed arbitrary).

Many of the same allegations that support the bad faith claim also qualify as predicate facts for arbitrariness. As explained in the preceding section, AEA's promise of minimum wages is illusory, and AEA acted without any tangible or statistical basis before it imposed its new plan on the small theater world.

**C. The Union's Actions Harm Employee Rights as Employees.**

AEA claims that the duty of fair representation does not apply to internal union

[7] This allegation is not in the Complaint, but Plaintiffs are prepared to amend the Complaint to add it if necessary to satisfy pleading requirements.

rules, as contrasted with union actions regarding a collective bargaining agreement. This is incorrect. Although most duty of fair representation cases involve a union's failure to pursue a grievance under a collective bargaining agreement, "federal jurisdiction exists over a fair representation claim ***regardless of whether it is accompanied by a breach-of-contract claim*** . . . under [Labor Management Relations Act] § 301 [29 U.S.C. § 185]." *Breininger v. Sheet Metal Workers Int'l Ass'n, Local No. 6*, 493 U.S. 67, 83 (1989) (operation of hiring hall subject to duty of fair representation) (emphasis added).

AEA's contention that the duty of fair representation does not attach to changes in internal union rules is inaccurate, for when union rules adversely impact an employee's employment, as here, the fair representation obligation is implicated. The rule in the Ninth Circuit is that internal union rules are subject to the duty of fair representation when they have a "substantial impact" on relations of members to covered employment. *Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14*, 453 F.2d 1018, 1024 (9th Cir. 1972); *Carpenters Local 25 v. N.L.R.B.*, 769 F.2d 574, 581 (9th Cir. 1985) (union may not be able to enforce its internal regulation in a manner that affects member's employment status).

AEA's new rule, if implemented, will negatively impact actors' lives as employees. Volunteer theatrical work accomplishes for actors what training and practice accomplish for other artists. The Complaint alleges that volunteer work in 99-seat theater enables actors to practice and hone their skills for larger remunerative productions [Comp., ¶¶ 3, 16(a)], allegations the Court must accept for purposes of a 12(b)(6) motion. The new prohibition on volunteer theater will have no less an impact on many actors than would a musician's union prohibition on practicing at home without payment by employers. It would make them less employable.

Also, many 99-seat theater productions developed into commercially successful stage productions that operated under union contract and provided these actors with union-scale wages. [Comp., ¶ 16(b).] For example, Deaf West Theater's *Spring*

*Awakening* started in the small Inner-City Arts theater as a 99-seat production, and eventually made it to Broadway. (*Id.*, see also http://www.latimes.com/entertainment/arts/la-et-cm-tony-spring-awakening-20160503-snap-story.html.) AEA's suggestion that its intended destruction of intimate theater will have no impact on its members' employment is frivolous.

## V. THE UNION VIOLATED ITS MEMBERS' RIGHT TO AN EQUAL VOTE UNDER THE LMRDA.

### A. Plaintiffs Are Entitled to Equal Voting Rights.

Title I of the Labor Management Reporting and Disclosure Act ("LMRDA") is the union members' "bill of rights." 29 U.S.C. § 411(a)(1). It assures union members "equal rights and privileges . . . to vote in elections or referendums of the labor organization . . ." *Furniture & Moving Drivers v. Crowley*, 467 U.S. 526, 536-537 (1984). The Fifth Claim for Relief alleges that AEA deprived members of their equal right to vote by omitting position statements from on-line voting material for the first three days of the referendum. [Comp., ¶¶ 42, 68-78.] Members who voted during the first three days were deprived of information furnished to other members who voted later. This is discrimination, "pure and simple." *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1473 (9th Cir. 1992).[8]

The same goes for the Union's directive that members of the 99-seat committee vote in favor of the referendum. Pressuring some members to vote for the proposal deprived all members of the right to have a discrimination-free election.

### B. The Complaint States a Viable Claim for Violation of Members' Equal Rights.

In *Ackley*, *supra*, 958 F.2d at 1473-74, the Court held that § 101(a)(1) prohibits discrimination in voting rights and privileges (including rules having a disparate impact). *Ackley* cautioned, however, that the LMRDA confers no additional

[8] The Complaint alleges that AEA violated the LMRDA by failing to remain neutral during the referendum process. [Comp., ¶¶ 71, 73.] We recognize that this failure, while it violated the Settlement Agreement, is not an independent violation of § 101(a)(1).

substantive rights of "fairness" to a referendum process, such as a statutory right to union disclosure of relevant information. As long as all members are treated the same, no matter how badly, § 101(a)(1) is not violated.[9]

AEA gloms onto *Ackley's* caveat about fairness to attack Plaintiffs for seeking nothing more than a "fair" election. This seriously distorts the Complaint. Plaintiffs complain that AEA failed to treat all members equally by furnishing less information to members who voted on-line during the first three days and more information to the remaining voting members. This is the clearest possible form of discrimination. Even if was accidental, it does not insulate AEA from liability under § 101(a)(1), as *Ackley* contains no "improper motive" requirement. *Id*., 958 F.2d at 1473.

AEA claims that *Ackley* is a talisman that protects it from § 101(a)(1) liability so long as no member was denied the bare right to vote. [Motion, pp. 2:4, 23:16-19.] This also is incorrect. *Ackley* states that a plaintiff must allege denial of rights accorded to other members. *Ackley*, 958 F.2d at 1473. *See also, Marcoux v. American Airlines, Inc*., 2006 WL 842888, at *7–8 (E.D.N.Y., Mar. 28, 2006) (only some members permitted to change their votes). In *Ackley*, the Court found that union leaders "furnished the same type and amount of information to all [members] and accorded them identical rights . . ." *Id.* at 1473. Here, in sharp contrast, members who voted on-line during the first three days of the election were not furnished with the "same type and amount of information" given others. This is precisely the type of denial of equal "rights and privileges" *Ackley* suggests would constitute a § 101(a)(1) violation.

AEA also pressured AEA-side Review Committee members to vote for the proposal. This deprived all other members of the equal rights and privileges of voting,

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[9] In so holding, the Court rejected a more fulsome and capacious approach adopted by the Fifth and D.C. Circuits, which held that § 101(a)(1) confers more general rights to fairness during a union election process. *E.g., Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 470 (5th Cir.1981); *Alexander v. International Union of Operating Engineers,* 624 F.2d 1235, 1240 (5th Cir.1980); *Bunz v. Moving Picture Machine Operators' Protective Union,* 567 F.2d 1117, 1121 (D.C.Cir.1977).

because it sought to skew the outcome. While this may not be as blatant as stuffing the ballot box, *cf.*, *Rodriguez v. SEIU*, 755 F.Supp.2d 1033, 1049 (N.D.Cal. 2010), putting direct pressure on some voters to taint election results by definition constitutes an equal rights violation. *Cf.*, *McGinnis v. Local Union 710, International Brotherhood of Teamsters*, 774 F.2d 196 (7th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986) (requirement that votes be cast in Chicago despite disbursed membership, thereby tainting outcome) (approved by *Ackley* at 1474, n.8).[10]

### C. Section 101(a)(1) Applies to the Referendum Guaranteed Under the Settlement Agreement.

AEA argues that § 101(a)(1) does not apply to advisory referendums. This unfounded contention rests on a distortion of *Kahn v. Hotel & Rest. Employees & Bartenders Int'l Union*, 469 F.Supp. 14, 18 (N.D. Cal. 1977), *aff'd* 597 F.2d 1317 (9th Cir. 1979), and *Acker v. BLE*, 1977 WL 15551 (D. Minn. April 22, 1977).

Although § 101(a)(1) does not require a union referendum for any particular matter, where members are entitled to participate in an election as a matter of right, then the equal rights and privileges protection of § 101(a)(1) attaches. *Sergeant v. Inlandboatmen's Union of the Pac.*, 346 F.3d 1196, 1201 (9th Cir. 2003) ("[§ 101(a)(1)] requires that rights given to some members must be given to all . . ." ); *Thomas v. UMW*, 422 F.Supp. 1111, 1117 (D.D.C. 1976) (same).

There is no dispute that the advisory referendum is guaranteed to members under the Settlement Agreement. [Comp., Exh. A [¶ 4(iii), (iv)].] Because the advisory referendum is mandatory, § 101(a)(1) applies to protect members' interest in an equal voting process.

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[10] AEA argues that Plaintiffs do not have standing to assert a § 101(a)(1) claim on behalf of members who were pressured into voting in favor of the proposal. [Motion, pp. 24:24 – 25:2.] This mere "rule of practice" is subject to exceptions. *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). Plaintiffs have standing to "assert the claim of intimidation affecting the integrity of the voting process as to all," *Members for a Better Union v. Bevona* , 972 F.Supp. 240, 246 (S.D.N.Y. 1997), *vacated on other grounds* (2nd Cir. 1998) 152 F.3d 58; *Members for a Better Union v. Bevona*, 988 F.Supp. 307, 318–19 (S.D.N.Y. 1997), *vacated on other grounds* (2nd Cir. 1998) 152 F.3d 58.

*Kahn* and *Acker* are inapposite because neither involved an election procedure guaranteed by any union constitution, contract or rule. In both cases, elected officials made unilateral and gratuitous decisions to conduct advisory voting before exercising their discretion to merge locals (*Kahn*) or consolidate seniority lists (*Acker*). The quote *Kahn*, plaintiffs were not denied "an equal vote in the merger decision" because "plaintiffs had no right to vote on that issue at all." *Kahn*, 469 F.Supp. at 18; *see also*, *Acker*, 1977 WL 1551 at *6.

The referendum here was not conducted at the whim of elected leaders, as in *Kahn* and *Acker*, but because it was contractually mandated by the Settlement Agreement. It was therefore covered by Title I's Bill of Rights.

There is a second reason § 101(a)(1) applies to this referendum: It plays a substantive role in AEA's deliberative process. *Thomas*, *supra*, 422 F.Supp. at 1114-1116. In *Thomas*, a group of union members alleged their union violated § 101(a)(1) because they were excluded from advisory "bargaining conferences" that other members attended. *Id.* at 1114-1115. Under the Union's constitution, advisory bargaining conferences were intended to obtain suggestions and recommendations from the members to help the leadership establish priorities, but played no formal role in the decision-making. *Id*. at 1116.

The Court held that, while only advisory, the "suggestions, views and recommendations" were designed to "insure at least the rudiments of democracy in union deliberations on matters of some importance." Section 101(a)(1) therefore applied to ensure that members received an equal right to participate in those processes. *Id.* at 1116.

The Settlement Agreement's mandatory advisory referendum plays precisely the same role. As in *Thomas*, its purpose is to enable the leadership to take into account the sentiment of the members, and thereby help it formulate its ultimate position. The referendum was supposed to be an integral part of a reticulated

contractual deliberative process. That it was advisory made it no less covered by § 101(a)(1) than any other contractually mandated election procedure.

**D. The Pleadings Do Not Establish That This Case Is Financed By Interested Employers.**

AEA argues that Plaintiffs' LMRDA claim should be dismissed because it is financed by interested employers. [Motion, pp. 22:1-22:2.] AEA's contention should be rejected for two reasons.

First, the "Go Fund Me" website is not subject to judicial notice under Federal Rule of Evidence 201(b)(2). The purported self-reporting of third parties on a website that Plaintiffs do not control is not the kind of information that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224–25 (10th Cir. 2007), and other cases on which AEA relies [Motion, p. 22, n.9], say a court may take judicial notice of a *party's own website* when no objection is made to the request. Neither condition is present here.

Second, the pleadings do not establish that the funders are "interested employers." Section 101(a)(4) prohibits an employer from financing a § 101(a)(1) suit only when it has a "concrete interest in the litigation due to its relationship with the union." *Adamszewski v. Local Lodge 1487, IAM*, 496 F.2d 777 (7th Cir. 1974). Those elements are not established by the pleadings.

No Interest. In *Farowitz v. Assoc. Musicians of Greater New York*, 241 F.Supp. 895 (S.D.N.Y. 1965), on which *Adamszewski* relied, the Court narrowly construed the word "interested" and held that an employer is not "interested" if it supports a dispute that is clearly one involving a member's political rights in the union (the member had been punished for opposing union policy) and the employer gains only "incidental propaganda benefit" from the member's litigation. *Id.* at 908. Here, as in *Farowitz*, the §101(a)(1) dispute is about members' political rights: whether there was an equal vote in the referendum. Purported "employer funders" will not gain a thing from a re-run

of the referendum.[11] Employer support that equates with an "assertion of a 'moral responsibility'" does not require dismissal. *See*, *Adamszewski*, 499 F.2d at 782, n. 4.

No Employers. There is no allegation in the pleadings that Odyssey Theatre or Blank Theatre, the two funders alleged by AEA to be employers, are in fact employers. By definition one does not "employ" volunteers, and AEA acknowledges that actors working in 99-Seat Theater are volunteers. (*E.g.*, AEA Los Angeles 99-seat Theatre Plan, Comp., Exh. B, p.1 "all members rendering services under the all spices of the plan are volunteers…").

No Concrete Relationship. *Adamszewski* emphasized that, to be an interested employer, the § 101(a) litigation must impact the employer's concrete "relationship" with the union. *Id.*, 496 F.2d at 784. There, the employer had a "concrete interest" because the member's LMRDA lawsuit challenging internal union discipline about crossing a picket line had a direct impact on the interpretation of a strike settlement agreement between the employer and union that prohibited discipline of members who had crossed the picket line. There is nothing in the pleadings here to establish that Plaintiffs' § 101(a)(1) claim implicates any "concrete relationship" between Odyssey or Blank and AEA. The theaters have no collective bargaining relationship with AEA. And there is no logical connection between a re-run of the referendum – the purpose of the LMRDA claim – and any relationship between the theaters and the AEA.

[11] Odyssey and Blank Theaters might have a direct interest in the outcome of the First Claim for Relief for breach of the Settlement Agreement, but § 101(a)(1) does not bar an interested entity (whether or not an employer) from funding a breach of contract action.

## VI. CONCLUSION

For all the foregoing reasons, Plaintiffs request that Defendant AEA's Motion to Dismiss be denied in its entirety. Plaintiffs request leave to amend if the Court, in considering the arguments made by counsel throughout this brief and the specific offer to amend in footnote 7, considers that such amendment will avoid any dismissal that the Court may otherwise be considering.

Dated: August 17, 2016

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Dated: August 17, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 17, 2016, I electronically filed the PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS COMPLAINT with the Clerk of the Court for the United States District Court, Central District by using the Central District CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the Central District CM/ECF system.

/s/

By: _____

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